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The Flag, the First Amendment, and the Military

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Introduction

Few issues invoke the heightened emotional response that defaming the American flag generates. Old Glory holds a special status in the United States. Our national anthem, the *Star-Spangled Banner*, was inspired by the sight of the American flag flying over Fort McHenry the morning after the 1814 British bombardment.[1] We pledge allegiance to the flag as the symbol of our Republic,[2] and when prominent citizens die, the flag is flown at half-staff.[3]

The national flag is equally, if not more, revered in the armed forces. The military drapes the American flag over the caskets of its honored dead[4] and presents the flag to family members as a token of appreciation from a grateful nation.[5] Soldiers going into harm's way have worn, and continue to wear, the American flag on their uniforms.[6] Some of the most celebrated moments in American military history involved the flag.[7] Unquestionably, the best-known moment was the Marines raising the American flag over Mount Surabachi on the Pacific island of Iwo Jima during World War II.[8]

The nation is locked in an ongoing and longstanding debate about whether the flag may be the object of physical desecration as a vehicle for protest or whether the government should use the criminal system, or perhaps even amend the Constitution, to protect it. Societal efforts to protect the American flag from physical desecration through the civilian criminal justice system[9] were severely hampered by two Supreme Court rulings issued a decade ago.[10] Legislative initiatives to provide constitutional protection against desecration followed in the wake of these rulings. Constitutional amendments designed to outlaw desecration of the American flag have passed the House three times, but have failed to pass the Senate.[11]

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1. ANN ARMBRUSTER, THE AMERICAN FLAG 41 (1991). The Star-Spangled Banner was not officially adopted as the U.S. national anthem until 1931. *Id.*

2. The pledge is as follows: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands: one nation under God, indivisible, with liberty and justice for all." *Id.* at 47.

3. U.S. DEP'T OF ARMY, REG. 600-25, SALUTES, HONORS, AND VISITS OF COURTESY app. B (1 Sept. 1983) [hereinafter AR 600-25] (listing occasions when the National Flag is at half staff); U.S. DEP'T OF ARMY, REG. 840-10, FLAGS, GUIDONS, STREAMERS, TABARDS, AND AUTOMOBILE AND AIRCRAFT PLATES, para. 2-4(g) (1 Nov. 1998) [hereinafter AR 840-10]; THE OFFICER'S GUIDE 194 (23d ed. 1958) ("The national flag is displayed at half-staff . . . as a salute to the honored dead . . . .").

4. AR 840-10, *supra* note 3, para. 2-4(j) (discussing use and display of internment flag on the casket of authorized military personnel); *cf.* ESTER WIER, ARMY SOCIAL CUSTOMS 93 (1958); THE OFFICER'S GUIDE, *supra* note 3, at 195-96 ("The national flag is used to cover the casket at the military funeral of present or former members of the military service.").

5. *See* AR 600-25, *supra* note 3, para. 6-17(b) (burial honors include "present[ing] the flag to the designated recipient.").

6. *See, e.g.*, R. Jeffrey Smith, *Rebels Demand Rights*, WASH. POST, Mar. 17. 2001, at A1, A17 (showing photo inset of American soldier on patrol in Kosovo wearing American flag patch on uniform); Lieutenant General Tommy R. Franks, *Third U.S. Army/U.S. Army Forces Central Command: Full Spectrum-Fully Engaged*, ARMY (Oct. 2000), at 181, 185 (showing photo inserts of U.S. soldiers in Kuwait wearing American flag on uniform); MARK BOWDEN, BLACK HAWK DOWN 349 (2000) (showing photo of U.S. Army Rangers before a 1993 mission in Mogadishu, Somalia, wearing the American flag on Desert Camouflage Uniform).

7. During the Revolutionary War, the British ship *Serapis* signaled the American ship *Bonhomme Richard*, which was sinking after sustaining battle damage, to strike its colors. The American captain, John Paul Jones, replied "I have not yet begun to fight," and instead captured the British warship. After the battle, Jones is reputed to have written, "The very last vestige mortal eyes ever saw of the *Bonhomme Richard* was the defiant waving of her unconquered and unstriken Flag as she went down." ARMBRUSTER, *supra* note 1, at 30.

8. The photograph was taken by Associated Press cameraman Joe Rosenthal during the February 1945 assault on Iwo Jima by the U.S. Marines. ROBERT H. SPECTOR, EAGLE AGAINST THE SUN 501 (1985). "Rosenthal was unaware that he had just taken the most famous photograph of the Pacific war and one of the best known war photos of all time." *Id.*

9. The first federal statute designed to protect the American flag from "improper use" was enacted in 1917, but applied only to the District of Columbia. State v. Janssen, 580 N.W.2d 260, 269 (Wis. 1998). A nationwide act came into being in 1968. *Id.* In comparison, state desecration laws have existed since 1897 and almost every state (except Alaska) has enacted similar legislation since then. *Id.* at 269 n.14.

10. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). *See infra* notes 61-84 and accompanying text (discussing these cases).

Proponents of such an amendment posit that the national flag is unique and deserving of special protection.[12] Senator Orrin Hatch, who sponsored the latest effort to prohibit the physical desecration of the flag, stated it is "not just a piece of cloth or a symbol . . . [i]t is the embodiment of our heritage, our liberties and indeed our sovereignty as a nation."[13] Some opponents of such an amendment argue that the flag's unparalleled symbolism makes its desecration the ultimate act of political protest.[14] Former Senator Charles Robb, a Marine combat veteran who opposes a constitutional amendment, believes "that the best way to honor the values embodied by the flag is to preserve the freedom of protesters to desecrate or destroy it—acts Robb considers political speech protected by the Bill of Rights."[15]

Despite the Supreme Court rulings, the military justice system retains the ability to punish certain flag-related misconduct, even when the challenged conduct might otherwise be protected expressive conduct in the civilian sector. This article reviews relevant Supreme Court decisions, the history of flag-related court-martial cases, and the limited application of the First Amendment in the military context. Finally, this article attempts to define the permissible parameters of court-martial jurisdiction in this area.

Supreme Court Cases

During the last half century, the Supreme Court has issued a number of decisions addressing governmental attempts to regulate conduct involving the American flag. Because the Supreme Court opinions may affect prosecutorial efforts for flag-related misconduct within the military justice system, they warrant review.

Forced Salutes

In *West Virginia State Board of Education v. Barnette*,[16] the Supreme Court addressed the constitutionality of a state requirement that all public school teachers and students salute the American flag while reciting the pledge of allegiance. The state viewed failure to salute as an insubordinate act that constituted grounds for expulsion.[17] A district court injunction restraining enforcement of the state law to Jehovah's Witnesses was appealed to the Supreme Court.[18] The Jehovah's Witnesses considered the flag to be akin to a "graven image" and refused to salute it.[19]

The Court held the pledge and salute requirements to be constitutionally infirm and in violation of the First and Fourteenth Amendments.[20] In coming to its conclusion, the Court fully recognized the special place the national flag holds within American society:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that the freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organiza-

11. Jim Abrams, *Senate Defeats Flag Amendments By 4 Votes*, ATLANTA J.-CONST., Mar. 30, 2000, at A10. Most recently, the Flag Protection Constitutional Amendment was reintroduced in the Senate on 13 March 2001. *Amendment Shielding Flag Hits Congress*, BIRMINGHAM NEWS (Birmingham, Ala.), Mar. 13, 2001, at 4A.

12. *See, e.g.*, Adrian Cronauer, *Protect Flag, Respect Rights*, ARMY TIMES, Dec. 1, 1997, at 54 ("The flag is qualitatively different than any other symbol we have in this country.").

13. Abrams, *supra* note 11, at A10; *see also Red, White & Dodger Blue*, WASH. POST, July 8, 1998, at D3 (noting that Los Angeles Dodgers' Manager Tommy Lasorda testified before a Senate Judiciary Committee hearing in favor of the constitutional amendment that the 1989 Supreme Court ruling "treats the flag as 'just another piece of cloth that can be burned and soiled with impunity.'").

14. Pherabe Kolb, *Flag Burning Amendment Yet Waves*, CQ WEEKLY, May 29, 1999, at 1266 ("Opponents say that the amendment would curtail one of the bedrock liberties—freedom of political speech—that the flag embodies."); Tom Teepen, *Burning Issue Keeps Coming* Back, ATLANTA J. CONST., May 16, 1999, at B2 ("Flag-burning is a noxious act, but it is precisely because the act is so heinous to most that it also carries such big political magic.").

15. Craig Timber, *Robb's True Colors on Defense Showing, Allen Says*, WASH. POST, Oct. 9, 2000, at B7; *see Flag Burning Amendment*, ATLANTA J. CONST., Mar. 28, 1999, at B4 (stating that Representative John Lewis "and other opponents argued that the amendment . . . would weaken First Amendment rights.").

16. 319 U.S. 624 (1943).

17. *Id.* at 624, 626, 628. Expelled students were considered "unlawfully absent," subject to being treated as delinquent, and their parents or guardians were subject to criminal prosecution. *Id.* at 629.

18. *Id.* at 630.

19. The Jehovah's Witnesses followed a literal interpretation of the Bible, which commanded: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them." *Id.* at 629 (citing *Exodus* 20:4-5).

20. *Id.* at 642 ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

> tion. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.
>
> . . . .
>
> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[21]

Significantly, however, the Court's opinion recognized limitations to the First Amendment's broad reach that affect the legitimacy of the military's requirement to display respect to the national colors. When discussing the role and function of symbols of the state, the Court opined that some gestures of respect were "appropriate," specifically citing the salute as an example.[22] Further, in concluding that no circumstances were present justifying an exception to the protections of the First Amendment in *Barnette*, the Court recognized that such an exception may exist in the military context. As the Court noted, "The Nation may raise armies and compel citizens to give military service . . . . [I]t follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."[23]

Contemptuous Speech

The Supreme Court addressed the constitutionality of criminalizing contemptuous speech against the American flag in *Street v. New York*.[24] The Court reversed a state court malicious mischief conviction, holding that the defendant could not constitutionally be "punished merely for speaking defiant or contemptuous words about the American flag."[25] In response to the murder of civil rights activist James Meredith, the defendant burned the American flag on a public street corner. When subsequently confronted about the burning by a police officer, the defendant stated, "We don't need no damn flag" and "Yes, that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag."[26]

The Court examined four governmental interests that could potentially justify the New York law and found all four wanting. First, the Court determined that Street's statement about the flag was not enough to incite onlookers to break the law. Even if the combined flag burning and language amounted to incitement, the statute was not narrowly tailored to address such conduct.[27] Second, albeit conceding that some listeners might be motivated to take action against Street upon hearing his remarks, his "comments were [not] so inherently inflammatory as to come within that small class of 'fighting words' which are "'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"[28] Third, even if Street's comments did rise to the level of fighting words, the statute was "not narrowly drawn to punish only words of that character . . . ."[29] Finally, Street's conviction could not be sustained because his comment was "likely to shock passers-by."[30] Where, as here, the shocking aspect of Street's comments were "attributed to the content of the ideas expressed," the Constitution protected the free expression of such ideas even if the ideas may be considered offensive by others.[31]

Finally, the Court considered whether Street's conviction could be justified because the defendant's remarks "failed to show the respect for our national symbol which may properly be demanded of every citizen."[32] Relying heavily on the reasoning of *Barnette*, the Court characterized Street's conduct as

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21. *Id.* at 641-42.

22. *Id.* at 632 ("Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee.").

23. *Id.* at 642 n.19.

24. 394 U.S. 576 (1969).

25. *Id.* at 581. The state statute "made it a crime not only publicly to mutilate a flag but also 'publicly [to] defy . . . or cast contempt upon [any American flag] by words.'" *Id.* at 583. The defendant had also burned the flag. *Id.*

26. *Id.* at 577.

27. *Id.* at 584.

28. *Id.* at 585.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

deplorable and distasteful, but nevertheless posited that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[33]

In *Street*, the Court also had the opportunity to decide whether the deliberate burning of an American flag as an act of protest was constitutionally protected, but declined to do so.[34] The Court would not decide that particular issue for another two decades.[35]

Symbolic Speech Analysis

Although not specifically addressing flag-related misconduct, in 1968 the Supreme Court decided an important First Amendment case that would impact on its constitutional analysis of subsequent flag cases. In *United States v. O'Brien*, a Vietnam anti-war protester, who had burned his Selective Service registration certificate, challenged his conviction for violating the Universal Military Training and Service Act (UMTSA) as an abridgment of his freedom of speech.[36] O'Brien's misconduct was designed to encourage others to oppose the war. The Court determined that the Act did not curtail free speech on its face, but then examined O'Brien's argument that burning his certificate constituted "symbolic speech" that enjoyed First Amendment protection.[37] O'Brien took the position that "freedom of expression . . . includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'"[38]

The Court rejected O'Brien's expansive view of what conduct constituted protected symbolic speech.[39] Assuming that O'Brien's misconduct implicated the First Amendment, the Court determined that the UMTSA survived constitutional muster so long as "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[40] The Court then formulated a four-part test to determine when the government may regulate (non-speech) conduct that causes a concomitant limitation on First Amendment freedoms. Such regulation is justified

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[41]

Sustaining O'Brien's conviction, the Court determined that the USMTA met all four parts of the test. The USMTA and its implementing system of registration were a legitimate and reasonable exercise of Congress's power "to raise and support armies and to make all laws necessary and proper to that end . . . ."[42] The registration certificate was merely "a legitimate and substantial administrative aid in the functioning of this system,"[43] and legislation designed to preserve the certificates served "a legitimate and substantial purpose in the system's administration."[44] Finally, the Court found "no alternative means" to ensure the availability of these documents and that the "governmental interest and the operation [of the statute were] limited to the noncommunicative aspects of O'Brien's conduct."[45]

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33. *Id.* at 586.

34. *Id.* at 578, 586-87 (Warren, C.J., dissenting).

35. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

36. 391 U.S. 367, 369-72 (1968).

37. *Id.* at 375-76.

38. *Id.* at 376.

39. *Id.* ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

40. *Id.* at 376.

41. *Id.* at 377.

42. *Id.*

43. *Id.*

44. *Id.* at 378. The Court reviewed several purposes for the certificates and concluded, "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them." *Id.* at 380.

Improper Flag Use and the Vagueness Doctrine

In 1973, another flag-related case, *Smith v. Goguen*,[46] came before the Supreme Court. In *Goguen*, a Massachusetts police office filed a criminal complaint against the defendant under a state flag-misuse statute for wearing a small, cloth American flag on the seat of his trousers.[47] The statute provided a criminal penalty for anyone who mutilated, trampled, defaced, or treated "contemptuously the flag of the United States . . . , whether such flag is public or private property . . . ."[48] Goguen was charged with "publicly treat[ing] contemptuously the flag of the United States."[49] Upholding the federal appeals court ruling that the statute was unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment and overbroad under the First Amendment, the Supreme Court resolved the case solely on vagueness grounds.[50]

The Court reviewed the due process doctrine of vagueness, which requires "fair notice or warning," "reasonably clear guidelines" for enforcement, and "that all 'be informed as to what the State commands or forbids' [so that] . . . 'men of common intelligence' not be forced to guess at the meaning of the criminal law."[51] Additionally, the Court noted that when a literal reading of a statute, "unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."[52]

With respect to the defendant, the Court found that the statutory language under which he was charged was impermissibly vague, failing to draw a distinction "between the kinds of nonceremonial treatment [of the flag] that are criminal and those that are not," in light of the widespread, casual treatment of the flag as a clothing item.[53] As written, the statute did not permit "any public deviation from formal flag etiquette."[54] The standard for defining what constituted contemptuous treatment was "so indefinite that police, a court, and jury were free to react to nothing more than their own preferences [sic] for treatment of the flag."[55] Additionally, no narrowing, state-court interpretation of the phrase "treats contemptuously" was available to save the statute from constitutional infirmity.[56]

In *Spence v. Washington*,[57] the Supreme Court easily reversed a state conviction for improper use of the flag where a protestor hung a flag, with a peace symbol on it, upside down from his window. Protesting the United States invasion of Cambodia and the Kent State shootings, the defendant had displayed his privately-owned flag, on his property, with the peace symbol made of removable tape, without inciting violence or risking a breach of the peace, and the display was observed only by the arresting officers.[58] In its opinion, the Court formulated a test to determine if the challenged conduct triggered application of the First Amendment. The test of the conduct examined "the factual content and environment in which it was undertaken," and asked whether "[a]n intent to convey a particularized message . . . [was] present" and how great was the likelihood "that the message would be understood by those who viewed it."[59]

45. *Id.* at 381-82.

46. 415 U.S. 566 (1973).

47. *Id.* at 568.

48. *Id.* at 568-69.

49. *Id.* at 570.

50. *Id.* at 571-72, 582. In a concurring opinion, however, Justice White opined that the statute was not vague and that defendant should have known his conduct was contemptuous. *Id.* at 584-88 (White, J., concurring). However, Justice White upheld the lower court's decision on First Amendment grounds because Goguen's conviction, in essence, punished him for communicating an unpopular idea about the flag. *Id.* at 588. If, however, the defendant had mutilated, trampled or defaced the flag, then Justice White would have upheld the conviction on the theory that the "flag is a national property" and the government could permissibly regulate "those who would make, imitate, sell, possess, or use it." *Id.* at 587.

51. *Id.* at 573-74.

52. *Id.* at 573.

53. *Id.* at 574.

54. *Id.* at 575.

55. *Id.* at 578.

56. *Id.* at 575.

57. 418 U.S. 405 (1974).

58. *Id.* at 408-09.

Flag Desecration

The Supreme Court recently had the opportunity to comment on the constitutionality of the laws designed to protect the flag from desecration.[60] First, in *Texas v. Johnson*,[61] the Court reviewed a state conviction for flag desecration of a defendant who burned a stolen American flag as part of a political protest during the 1984 Republican National Convention. Protesters chanted "America, red, white, and blue, we spit on you" as the flag burned.[62]

Holding that Johnson's conviction was inconsistent with the protections of the First Amendment,[63] the Court determined first that the defendant's challenged actions constituted expressive conduct,[64] which justified his First Amendment challenge. Next, the Court examined the Texas statute to determine if it was related to the suppression of free speech. If it was related, then the standard of review would be "demanding." If not connected to expression, however, the Court would scrutinize the Texas law under the less stringent *O'Brien* standard for restrictions on "noncommunicative conduct."[65] Ultimately, the Court determined that the state's interest in protecting the flag—"preserving the flag as a symbol of nationhood and national unity"—was related to the suppression of free speech,[66] and after subjecting that interest to "the most exacting scrutiny,"[67] found the state's interest in protecting the flag insufficient to support Johnson's conviction.[68]

The Court reasoned that the state's articulated interest in protecting the flag as a national symbol necessarily "assume[d] that there is only one proper view of the flag."[69] The Court opined that such a position was constitutionally infirm and unsupported by legal precedent.[70] Indeed, the Court stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[71] Further, the state's flag desecration law did not survive judicial scrutiny merely because it targeted physical desecration of the flag rather than prohibited verbal attacks upon it. Such a distinction "is of no moment where the nonverbal conduct is expressive . . . and where the regulation of that conduct is related to expression . . . ."[72] Lastly, the Court rejected any suggestion that the flag's uniqueness served as an exception to its constitutional analysis.[73] While recognizing the "cherished place" the American flag holds in our society, the "special place reserved for the flag in this Nation . . . ," and "the special role played by our flag [and] the feelings it inspires" the Supreme Court, nevertheless, determined that no "separate judicial category exists for the American flag alone."[74]

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59. *Id.* at 410-11; *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989).

60. One researcher found that less than forty-five reported flag burnings occurred between 1777, when the U.S. flag was officially adopted, and the Supreme Court's 1989 decision in *Texas v. Johnson*. Professor Robert Justin Goldstein, *Two Centuries of Flag Burnings In The United States*, FLAG BULL. 65 (Mar.-Apr. 1995). Approximately one half of the recorded flag burnings occurred between 1966-70 as part of protests against the Vietnam War. *Id.*

61. 491 U.S. 397 (1989).

62. *Id.* at 399.

63. *Id.*

64. *Id.* at 404-45. The State of Texas conceded this point during oral argument. *Id.* at 405. Notwithstanding this concession, the Court noted that it had "little difficulty in identifying an expressive element in conduct relating to flags" and characterized the American flag as "[p]regnant with expressive content." *Id.*

65. *Id.* at 403, 406.

66. *Id.* at 406-07. The Court rejected a second state interest, preventing a breach of the peace, as "not implicated on this record." *Id.* at 407.

67. *Id.* at 412. If the state's interest were unrelated to the suppression of free speech, then "*O'Brien*'s relatively lenient standard" would have applied. *Id.* at 407.

68. *Id.* at 420.

69. *Id.* at 413 n.9.

70. "In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it." *Id.* at 415.

71. *Id.* at 414.

72. *Id.* at 416. The Court elaborated further: "Texas's focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea." *Id.*

73. "We decline to create for the flag an exception to the joust of principles protected by the First Amendment." *Id.* at 418.

74. *Id.* at 417-19. Justice Kennedy's concurring opinion emphasized the difficulty the majority had in reaching such a personally unpopular decision. *Id.* at 420-21 (Kennedy, J., concurring).

Significantly, the Court distinguished its opinion from other forms of flag-related misconduct. The Court pointed out that "[t]here was no evidence that Johnson himself stole the flag he burned," and admonished that "nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea."[75] The Court "also emphasize[d] that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson,"[76] clearly suggesting that the government would be free to prosecute Johnson under those theories even when such misconduct occurred during the defendant's exercise of his First Amendment rights.

In the second flag desecration case, *United States v. Eichman*,[77] the Supreme Court heard a First Amendment challenge to a federal statute, the Flag Protection Act of 1989 (FPA), following several convictions of protestors under the FPA for burning the American flag.[78] The government conceded that the act of flag burning constituted expressive conduct and unsuccessfully attempted to persuade the Court to reconsider its prior rejection of the argument that flag burning should be treated like obscenity and fighting words—modes of expression not entitled to complete First Amendment protection.[79]

The United States then attempted to distinguish the federal FPA from the state statute rejected in *Johnson* by arguing that the federal statute did "not target expressive conduct on the basis of the *content* of the message;" rather, it merely focused on protecting the flag's physical integrity, "without regard to the actor's motive, his intended message, or the likely effect of his conduct on onlookers."[80] In comparison, the Texas statute had criminalized "only those acts of physical flag desecration 'that the actor knows will seriously offend' onlookers . . . ."[81]

Rejecting the government's attempt to distinguish the two statutes, the Court determined that, although the language of the FPA did not contain an "explicit content-based limitation," it was clear that the underlying governmental interest in enacting the FPA was related to, and concerned with placing limitations on content.[82] Although rejecting the government's attempt to protect "the 'physical integrity' of a *privately* owned flag," the Court was quick to point out that its decision did "not affect the extent to which the Government's interest in protecting *publicly* owned flags might justify special measures on their behalf.[83] Further, in another footnote, the Court noted that its decision did not affect the constitutionality of a related charge for "causing willful injury to federal property," which was still pending.[84]

Flag-Related Courts-Martial

Only a handful of reported military cases have addressed flag-related misconduct, and of those cases only one has addressed such misconduct in the context of a First Amendment challenge.

The Early Cases

The earliest cases arose during the Civil War. In 1862, Union occupation forces in Louisiana hanged William B. Mumford after a military tribunal convicted him of treason for "pulling down, dragging in the mud, and shredding an American flag . . . ."[85] During the same year, Colonel John McClusky, commander of the 15th Maine, was court-martialed for conduct unbecoming an officer and gentleman after he threw the regimental flag into the ocean while intoxicated.[86] Some members of the regiment had objected to fighting under "an Irish flag," one containing images of a harp and a shamrock. McClusky testified that he threw the regimental colors into the sea so that

75. *Id.* at 412-13 n.8.

76. *Id.* The Court's holding also appeared to leave open the possibility that the state's interest in preventing a breach of the peace could legitimately prevent flag-desecration, even in the context of a political protest, if the desecration were to occur under different circumstances. *Id.* at 420.

77. 496 U.S. 310 (1990).

78. Ironically, the enactment of the FPA "sparked a wave of flag burnings unprecedented in the country with approximately three dozen such incidents reported between June 1989 and May 1990. That figure approached the total of all previously reported flag burning incidents in American history." Goldstein, *supra* note 49, at 66.

79. *Eichmann*, 496 U.S. at 315.

80. *Id.*

81. *Id.*

82. *Id.* *See also id.* at 317 ("[T]he precise language of the Act's prohibitions confirms Congress's interest in the communicative impact of flag destruction.") ("[T]he Act still suffers from the same fundamental flaw [as in *Johnson*]: It suppresses expression out of concern for its communicative impact.").

83. *Id.* at 315-16 (emphasis added), n.5 (emphasis added).

84. *Id.* at 313 n.1.

85. Desecrating The American Flag 1 (Robert J. Goldstein ed., 1996).

it would not be "dishonored, nor will it be a subject for dissension or dispute . . . ."[87] The court acquitted McClusky on the rationale that the flag "was not an *official* regimental flag, 'as defined by the Army regulations and that since the accused acted under the impression that its possession by the regiment was productive of discord,' such actions may have been 'injudicious,' but no criminality could be attributed to the act itself."[88]

The earliest reported court-martial, *United States v. Martin*, is more illustrative of a terrible sense of timing than any salient legal point. In *Martin*, a Navy sailor who used obscene language against the U.S. flag was convicted of conduct prejudicial to good order and discipline.[89] Martin made the particularly poor decision to verbally defame the national flag in November 1941—only weeks before the Japanese attack on Pearl Harbor—and found himself standing trial in the wake of that attack[90] when feelings of patriotism were at a fevered pitch.

Courts-Martial Arising Under the UCMJ

In *United States v. Cramer*, a Marine private first class (PFC) was convicted of wrongfully and dishonorably defiling the United States flag.[91] Rather than addressing any First Amendment issues, the analysis by the U.S. Court of Military Appeals (COMA) was limited to determining the maximum permissible punishment for PFC Cramer's misconduct, which it ultimately determined to be a fine of $100, thirty days confinement, or both. Of note, the court elected not to provide a description of the specific act of defilement or Cramer's motivation, opining that "recitation of the evidence [would be] neither necessary or desirable."[92]

In *United States v. Lewis*,[93] a Marine Corps PFC fell out of a morning physical training run and was found by his platoon leader walking along the road and reading a comic book while morning colors played, which accompanied the raising of the American flag.[94] In response to the lieutenant's order to "stop and stand at attention," Lewis stopped but failed to stand at attention, and turned his back to the flag.[95] Following the ceremony, the Marine platoon leader questioned the accused's failure to stand at attention, to which Lewis replied, "I don't have to stand at attention and I don't care what you say."[96] The Marine Corps subsequently charged Lewis with disrespect to his platoon leader, willful disobedience of an order to stand at attention and honor the flag, and dereliction of duty by failing to come to attention and face the direction of the flag during the raising ceremony. Lewis was convicted of all but the disobedience charge.[97]

On appeal, the U.S. Navy Court of Military Review set aside the findings of guilty for the disrespect and dereliction charges because the platoon leader did not first advise Lewis of his Article 31 rights before questioning him about his failure to display proper respect to the flag.[98] The COMA partially reversed, permitting Lewis's statement to be used for purposes of the disrespect charge, but not for the dereliction charge.[99] Neither appellate court was required to address any First Amendment challenges.

Not until 1989 did the military justice system face a First Amendment inquiry involving a court-martial conviction for flag-related misconduct. In *United States v. Hadlick*,[100] a soldier who had committed a number of crimes while intoxicated was taken to a civilian police station where he spat on the American flag.[101] The police officer escorting Hadlick

86. THOMAS P. LOWRY, TARNISHED EAGLES: THE COURTS-MARTIAL OF FIFTY UNION COLONELS AND LIEUTENANT COLONELS 98-99 (1997). McClusky also faced charges for threatening language and gestures, neglect (dereliction) of duty, and conduct unbecoming after threatening to slap two junior officers. *Id.* at 99.

87. *Id.* at 101-02.

88. *Id.* at 103.

89. No. 411226, C.M.O.1, 274 (1942).

90. *Id.* at 274-75.

91. 24 C.M.R. 31 (C.M.A. 1957).

92. *Id.* at 32.

93. 9 M.J. 936 (N.M.C.M.R. 1980).

94. *Id.* at 937.

95. *Id.* The accused "appeared to continue reading his comic book." United States v. Lewis, 12 M.J. 205, 206 (C.M.A. 1982).

96. *Lewis*, 9 M.J. at 937.

97. *Id.* at 937. Lewis was also convicted of unrelated charged involving unauthorized absences and disrespect to a noncommissioned officer.

98. *Id.* at 938-39.

99. *Lewis*, 12 M.J. at 209.

described "a big glob of mucus on the flag."[102] The soldier's misconduct was meant as an expression of his displeasure with his treatment and with life in general.[103] In addition to other crimes, a court-martial subsequently convicted Hadlick of a violation of Article 134, Uniform Code of Military Justice (UCMJ), in that his desecration of the flag was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Hadlick pleaded guilty to the Article 134 offense.[104]

On appeal to the COMA, the court granted *Hadlick*'s petition for review, returning the case to the Army Court of Military Review (ACMR) to determine whether the conviction could stand in light of *Texas v. Johnson*.[105] In an unpublished decision, the Army appellate court avoided the First Amendment issue by finding that the soldier had "spit on the flag for 'no particular reason,'" was not exercising his First Amendment right to free speech at the time and, accordingly, *Texas v. Johnson* was inapplicable.[106] The Army appellate court still overturned the conviction, finding that the providence inquiry failed to establish that the misconduct was "observed by anyone in the armed forces, was in fact a deliberate act of desecration, or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting."[107]

Only one reported military case has directly confronted the issue of flag-related expressive conduct in a military criminal scenario. In *United States v. Wilson*,[108] an Army military policeman (MP) preparing for a flag-raising ceremony remarked to a fellow soldier that the Army "sucked," prompting his companion to suggest that Wilson move to a communist country.[109] Wilson responded by stating, "This is what I think" and blew his nose on the American flag.[110] As a consequence, Wilson was tried and convicted of dereliction of duty pursuant to Article 92 of the UCMJ, "in that he 'willfully failed to ensure that the United States flag was treated with proper respect by blowing his nose on the flag when it was his duty as a military policeman on flag call to safeguard and protect the flag.'"[111]

On appeal, Wilson argued that the act of blowing his nose on the flag was expressive conduct protected by the First Amendment. The ACMR rejected Wilson's constitutional challenge. The court acknowledged that, like their civilian contemporaries, members of the armed forces enjoyed the protections of the First Amendment protection, including freedom of speech and expressive conduct, and that expressive conduct such as flag desecration cannot be prohibited merely because it may be viewed as "offensive or disagreeable."[112] The unique needs of the military may justify certain restraints on its members that would not be permissible in civilian society, however, and the government enjoys greater latitude in limiting expressive conduct than when restricting freedom of speech.[113] After determining that Wilson's conduct was expressive in nature and that the applicable law was "only incidentally related to the suppression of free speech,"[114] the Army appellate court applied the four-part test dictated in *United States v. O'Brien* to Article 92(3) and determined that the government had satisfied its burden.[115]

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100. No. 8900080 (A.C.M.R. 30 Nov. 1989).

101. Captain Gregory A. Gross, *Flag Desecration in the Army,* ARMY LAW., Apr. 1990, at 25; Captain Jonathan F. Potter, *Flag Burning: An Offense Under The Uniform Code of Military Justice?*, ARMY LAW., Nov. 1990, at 21, 24.

102. Potter, *supra* note 101, at 24.

103. Gross, *supra* note 101, at 25 ("His actions were meant to express his displeasure with the way he had been treated and with the way his life had been for the past year.").

104. Potter, *supra* note 101, at 24.

105. 29 M.J. 280 (C.M.A. 1989).

106. Potter, *supra* note 101, at 24 (citing United States v. Hadlick, No. 8900080, slip op. 3, 4 (A.C.M.R. Nov. 30, 1989)).

107. *Id.* (citing *Hadlick*, No. 8900080, slip op. at 4).

108. 33 M.J. 797 (A.C.M.R. 1991).

109. *Id.* at 798.

110. *Id.*

111. *Id.*

112. *Id.* at 799.

113. *Id.*

114. The court viewed these two questions as the initial inquiry required under the analysis of *Texas v. Johnson*. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 397 (1989)).

More specifically, the ACMR first determined that Article 92 was within Congress's power to regulate a soldier's conduct and agreed with the military judge that "the government may regulate a soldier's conduct while on duty and in uniform."[116] Second, the court determined that Article 92 promoted the effectiveness of the force, "an important and substantial governmental interest."[117] Third, the court found the punitive provision's purpose—to "prescrib[e] failures to perform military duty"—was facially unrelated to the suppression of free expression.[118] Fourth, parroting the language of *O'Brien*'s fourth prong, the ACMR concluded that "the incidental restriction of alleged First Amendment freedoms is no greater than is essential to further the government interest in promoting the disciplined performance of military duties."[119] Finally, the ACMR commended the military judge for balancing the military's need for a disciplined force against the accused's First Amendment rights, and for considering several factors supporting the military prosecution, including the fact that the flag was publicly owned.[120]

Application of the First Amendment to Flag-Related Misconduct in the Military

The courts have traditionally afforded the armed forces a large measure of deference when reviewing military requirements in the light of First Amendment challenges.[121] The Vietnam-era case of *Parker v. Levy*,[122] in which the Supreme Court specifically addressed the application of the First Amendment to the military, and its seminal military predecessor, *United States v. Howe*,[123] provide an excellent framework to address the parameters of potential UCMJ action in response to flag-related misconduct.

Levy *and* Howe*: A Restrictive Analytical Framework*

In *Parker v. Levy*, an Army officer-doctor made public statements contemptuous of the Special Forces. He made the statements to enlisted soldiers, and he discouraged African-American soldiers from serving in Vietnam. Levy challenged his court-martial convictions for conduct unbecoming an officer and for conduct prejudicial to good order and discipline based, in part, on the First Amendment.[124] The Supreme Court began its analysis by pointing out that, although First Amendment protections existed in the armed forces, they were subject to a different application. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[125] Specifically, the Court noted that speech tending to "undermine the effectiveness of response to command" was not constitutionally protected in the military even if the same speech would have enjoyed First Amendment protection in the civilian sector.[126]

Captain Levy also argued that Article 133, conduct unbecoming an officer and gentleman, and Article 134, conduct prejudicial to good order and discipline, were overbroad and facially invalid. Rejecting this argument, the Court reiterated its earlier position that, even if the challenged law could be applied in some marginal or fringe instances such that it would be violative of the First Amendment, the Court would let the statute stand if "there were a substantial number of situations to which it might be validly applied."[127] Because the two punitive articles could be legitimately applied to "a wide range of conduct" and because Levy's comments were "unprotected under the most expansive notions of the First Amendment," the Court rejected the defendant's overbreadth challenge.[128]

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115. *Id.* at 800.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* ("Whether the flag is publicly or privately owned is a factor to consider.")

121. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1985) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); Gen. Media Comm. Inc. v. Cohen, 131 F.3d 273, 283 (2d Cir. 1997) ("[T]his deference arises from the long-recognized distinctive conditions of military life.").

122. 417 U.S. 733 (1974).

123. 37 C.M.R. 429 (1967).

124. *Levy*, 417 U.S. at 736-38.

125. *Id.* at 758.

126. *Id.* at 759 (citing United States v. Priest, 45 C.M.R. 338, 344 (1972)).

127. *Id.* at 760 (citation omitted).

Relying in large part on *Levy*, the COMA rejected a First Amendment challenge to convictions for a contemptuous speech against the President and conduct unbecoming an officer and gentleman. In *United States v. Howe*, an Army officer, who had participated in an anti-war demonstration, was convicted of violating Articles 88 and 133 after carrying a sign that read "Let's Have More Than a Choice Between Petty Ignorant Fascists in 1968" and "End Johnson's Fascist Aggression in Viet Nam."[129] The Army lieutenant had not organized the demonstration; he participated in it while off-post, off-duty and in civilian clothes; and no one at the demonstration was even aware that Howe was in the military.[130]

Relying on a "contemporary construction of the Constitution" and Article 88's predecessor, the COMA rejected Howe's argument that the punitive provision violated the First Amendment.[131] The court pointed out that an earlier version of Article 88 predated the First Amendment; it was adopted by the nation's first Congress and readopted on several occasions since then.[132] Turning to Article 133, the COMA held that it too survived First Amendment scrutiny; indeed, the court characterized that punitive article as "a constitutionally permissible exercise of statutory restraint" on an officer's abuse of the right to free expression.[133] Further, the COMA declined to accept Howe's position that Article 133 was limited to conduct committed by an officer in his official capacity: "an officer on active duty is not a civilian and his off-duty activities do not fall outside the orbit of Article 133 . . . insofar as an abuse of the right of free expression is concerned."[134]

Collectively, *Levy* and *Howe* establish a reduced application of the First Amendment to the armed forces. Hence, the military justice system enjoys a greater reach over flag-related misconduct than does the civilian criminal system. And while the area remains somewhat unsettled, courts-martial convictions for flag-related misconduct should survive judicial scrutiny in many instances where the same misconduct would not sustain a conviction in civilian courts.

The Spectrum of Potentially Permissible Prosecutions

On the spectrum of potential prosecutions based on flag-related misconduct, the government stands on its most solid ground when the accused commits misconduct against an American flag that is publicly owned.[135] Under such circumstances the courts will view the flag as simply another item of government property, even it is used as part of a political protest or other act of free expression.[136] Accordingly, the military justice system can legitimately punish a publicly-owned flag's theft or destruction, as well as any related offenses, such as trespass.[137] Further, as established in *Wilson*, military law reaches a service member's failure to safeguard the flag if the accused has a duty to do so.[138]

The law is largely unsettled once the circumstances progress beyond behavior targeting publicly owned flags. Here, the legitimacy of any military court-martial will depend on the particular circumstances in which the challenged conduct occurs. The greater the military nexus to the challenged conduct, the greater the likelihood of the prosecution passing constitutional muster, and conversely, the fewer links between the accused and his military status and duties, the less likely the court-martial charges will survive.[139]

For example, may a member of the armed forces be prosecuted for failure to salute the American flag? The Supreme Court has clearly held that, as a general rule, the government

128. *Id.* at 760-61.

129. 37 C.M.R. 429, 432 (1967).

130. *Id.* at 433; Robert Sherrill, Military Justice Is to Justice as Military Music Is to Music 178-79 (1970).

131. *Howe*, 37 C.M.R. at 438.

132. *Id.* at 438-39. Further, reflecting the nation's historic concerns with a standing army, Article 88, UCMJ, ensured civilian control over the military. *Id.* at 439.

133. *Id.* at 440-41.

134. *Id.* at 442.

135. Spence v. Washington, 418 U.S. 405, 409 (1973) ("We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property.").

136. *See* United States v. Wilson, 33 M.J. 797, 800 n.5 (A.C.M.R. 1991).

137. *See* United States v. Eichman, 496 U.S. 310, 313 n.1 (1990) ("[N]othing in today's decision affects the constitutionality of this prosecution" for "causing willful injury to federal property."); Texas v. Johnson, 491 U.S. 397, 413 n.8 (1989) ("nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson."); *cf.* State v. Janssen, 580 N.W.2d 260 (Wisc. 1998) (holding a state flag desecration law overbroad but theft of flag charges not challenged.); William B. Ketter, *Flag-Protection Amendment Will Infringe on Protests of All Stripes*, Ariz. Republic, Oct. 10, 1995, at B4 (stating that of the four reported cases of flag burning in 1994, all were prosecuted under "laws prohibiting theft, vandalism or inciting riot.").

138. *Wilson*, 33 M.J. at 798-99.

may not "compel conduct that would evince respect for the flag."[140] In *Barnette*, however, the Court recognized the appropriateness of gestures of respect, like a salute, rendered to symbols of the state, such as a flag, and recognized that there may exist occasions within the military context that justify involuntary displays of obedience.[141] If the display of respect is linked to the requirements of military discipline, such as a salute rendered during a unit formation or parade,[142] the prosecution has a greater likelihood of surviving judicial scrutiny.[143]

Further, a dereliction of duty charge may be brought against a member of the armed forces who fails to render proper respect to the flag when that person has a duty to do so.[144] In *Wilson*, the duty of "a military policeman on flag call to safeguard and protect the flag" and ensure that it was "treated with proper respect,"[145] was based on a custom of the service.[146] The charge was proven by reference to a drill and ceremonies field manual and an Army regulation;[147] however, long-standing service customs have required displays of respect from service members in circumstances much broader than those presented in *Wilson.*[148]

After *Texas v. Johnson*, the Supreme Court appeared to leave open the possibility that, under the proper set of circumstances, a flag desecration law could be used to make a protestor, who burned the flag, subject to prosecution for breach of the peace;[149] however, the mere potential for a breach of the peace as a result of a flag burning was insufficient, the Court believed,

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139. *Cf. Spence*, 418 U.S. at 408-09 (discussing various factors to consider); *Wilson*, 33 M.J. at 798 ("If the accused was a soldier but off duty, out of uniform, procured a [privately owned] flag, decided to burn it or blow his nose on it or perhaps spit on it . . . arguably then that expression of a position might be protected, that issue has yet to be decided.").

140. *Johnson*, 491 U.S. at 414.

141. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 642 n.19 (1943); *cf.* McCord v. Page, 124 F.2d 68, 70 (5th Cir. 1941) ("Military regulations requiring a soldier to salute his superior officers and his flag are not intended to interfere with religious liberties, and the enforcement of the regulations by a proper military tribunal does not violate the Constitution of the United States.").

142. THE ARMED FORCES OFFICER 50 (1950) ("Saluting is an expression of courtesy, alertness, and discipline."); Lieutenant Commander Leland P. Lovette, NAVAL CUSTOMS, TRADITIONS, AND USAGE 8 (1939) ("Ceremonies . . . are accepted today in military organizations as regulations of dignified respect to the symbols of the state . . . . [and] are a function of discipline . . . ."), 24 ("Salutes: Nothing gives a better indication of the state of discipline than the observance of the forms of military courtesy.").

143. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1985) ("[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life."); Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) ("The need for obedience and discipline within the military necessitates an application of the First Amendment different from that in civilian society."); *Wilson*, 33 M.J. at 799 ("Military necessity, including the fundamental necessity for discipline, can be a compelling government interest, warranting the limitation of the right of freedom of speech."); *cf.* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian."). When the challenged conviction is rooted in a governmental interest in maintaining good order and discipline "courts will 'not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct." United States v. Brown, 45 M.J. 389, 396 (1996) (citing Avrech v. Sec'y of the Navy, 520 F.2d 100, 103 (D.C. Cir. 1975)).

144. *Wilson*, 33 M.J. at 798-99; United States v. Lewis, 12 M.J. 205, 207 (C.M.A. 1982) (characterizing, in dicta, the failure "to show respect to the colors" during a morning flag raising ceremony by a Marine who had fallen out of a physical training session, while in his platoon area, as a "possible violation of the Uniform Code").

145. *Wilson*, 33 M.J. at 798.

146. Military customs have long served as a basis of military law. A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW 6 (1901) ("The *unwritten source* [on military law] is the 'custom of war,' consisting of the customs of the service both in peace and in war."); *see Parker*, 417 U.S. at 744 ("And to maintain the discipline essential to perform its mission effectively, the military has developed what 'might not unfitly be called the customary military law' or 'general usage of the military service.'") (citing Martin v. Mott, 12 Wheat 19, 35, 6 L. Ed. 537 (1827)).

147. *Wilson*, 33 M.J. at 798 n.1.

148. *See, e.g.*, THE OFFICER'S GUIDE, *supra* note 3, at 194 ("Members of the military service are meticulous in observing the courtesies which are required to be rendered on prescribed occasions or circumstances with respect to the National flag . . . .") ("During reveille and retreat, military personnel not in formation will face the flag and salute it and maintain the salute until the music ends."); THE ARMED FORCES OFFICER, *supra* note 140, at 52 ("The hand salute is required . . . in honoring the National Anthem, or color . . . ."), 55 (Salute colors during retreat and during a parade or review); COLONEL JAMES A. MOSS, OFFICER'S MANUAL 70 (1943) ("Whenever or wherever 'The Star Spangled Banner' is played or 'To the Color' (Standard) is sounded, at the first note all officers and enlisted men present in uniform, but not in formation, stand at attention, facing the music, and render the prescribed salute, except that at 'Escort of the Color' or at 'retreat' they face toward the Color or Flag."); Lovette, *supra* note 140, at 178 ("During the ceremony of hoisting or lowering the Flag, or when the Flag is passing in parade or in a review, all persons present should face the Flag, stand at attention, and salute."); *id.* at 332 (similar Army custom). *See also* AR 600-25, *supra* note 3, app. A (listing various saluting requirements); U.S. DEP'T OF ARMY, FIELD MANUAL 22-5, DRILL AND CEREMONIES apps. A, E (8 Dec. 1986) (listing flag saluting requirements) [hereinafter FM 22-5].

149. Texas v. Johnson, 491 U.S. 397, 408 n.4 (1989) ("Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area."); *see* Spence v. Washington, 418 U.S. 405, 409 (1973) (noting the absence of "disorderly conduct" and any "proof of any risk of breach of the peace" as factors to consider in its First Amendment analysis).

to sustain a conviction. The Court in *Johnson* indicated that, under the circumstances, the challenged expressive conduct must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[150]

In *United States v. Cary*,[151] the U.S. Court of Appeals for the Eighth Circuit upheld a conviction,[152] under the federal FPA, of a person who burned the American flag during a protest opposing United States forces being sent to Honduras. The defendant, while "wearing a slit American flag as a poncho," burned a second flag after the demonstration became violent.[153] Distinguishing *Texas v. Johnson*, the appellate court found that "the government's interest in preventing breaches of the peace [was] implicated by the facts in this case" because the defendant's conduct posed "an immediate threat that the burning would encourage the violence to continue."[154] The court held that the government's interest in precluding breaches of the peace was unrelated to the suppression of free expression and also satisfied *O'Brien*'s lenient standard of review.[155]

In a cryptic memorandum opinion, the Supreme Court vacated the *Johnson* judgment and remanded the case to the Eighth Circuit for further consideration in light of *United States v. Eichman*.[156] The Eighth Circuit court then remanded the case to the district court.[157] In *Eichman*, however, the Court never specifically addressed the government's interest in preventing a breach of the peace,[158] but it did make clear that legislation not specifically content-based may be found infirm when the government's interest is concerned with content and "related" to its suppression,[159] which appeared to be the case in *Carey.*

In the wake of *O'Brien*, *Eichman*, and *Wilson*, the law in this area remains a fertile field for litigation, but it clearly appears that members of the armed forces do not enjoy the same level of First Amendment protection as their civilian contemporaries and that flag-related misconduct will not be insulated from the reach of the military justice system in many instances. The rationale for these conclusions are two-fold as noted below.

First, depending upon the circumstances, flag burning as a form of expressive conduct might not be constitutionally protected in the armed forces. The Supreme Court has held that the First Amendment does not protect "dangerous speech."[160] However, the military employs a "lower standard not requiring 'an intent to incite' or an 'imminent' danger."[161] Rather, the military's test "is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops."[162]

Constitutionally unprotected "speech is measured by 'its tendency,' not its actual effect."[163] Given the proper circumstances, desecrating the American flag may satisfy this test and fall outside the First Amendment's protective umbrella. For example, a uniformed member of the military who burns the flag in the presence of his unit to protest an imminent deployment into a hostile area overseas should be viewed as inhibiting the orderly accomplishment of the deployment and presenting a clear danger to the morale of the viewing soldiers who are about to be sent into harm's way. The higher the rank of the protesting soldier, the greater the danger.

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150. *Johnson*, 491 U.S. at 409. *But cf.* United States v. Brown, 45 M.J. 389, 395 (1996) (holding that a lower standard applied in the military); United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972) (adopting a "clear and present danger" standard).

151. 897 F.2d 917 (8th Cir. 1990).

152. Cary was convicted of "knowingly casting contempt upon a flag of the United States by publicly burning it in violation of 18 U.S.C. § 700 (1988)." *Id.* at 918.

153. *Id.* at 920.

154. *Id.* at 922.

155. *Id.* at 922-26.

156. Cary v. United States, 498 U.S. 288 (1990).

157. United States v. Carey, 920 F.2d 1422 (8th Cir. 1990) (judgment vacated and remanded to district court).

158. The Court refused to reconsider its position that "flag burning as a mode of expression" was not "like obscenity or 'fighting words,'" in that it would "not enjoy the full protection of the First Amendment." *Id.* at 315.

159. United States v. Eichman, 496 U.S. 310, 315 (1990).

160. United States v. Brown, 45 M.J. 389, 395 (1996) (citing Chaplinsky v. New Hampshire, 314 U.S. 568 (1942)).

161. *Id.* at 395.

162. *Id.* (citations omitted).

163. United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994).

Second, assuming *arguendo* that the First Amendment is triggered, prosecution of various forms of disorderly conduct involving the desecration of the American flag should survive judicial scrutiny under the appropriate circumstances. A punitive provision such as Article 116, riot or breach of peace, may fairly be characterized as only incidentally related to the regulation of such expressive conduct and subject to only the more lenient standard of review articulated in *O'Brien*. Article 116 is not directed at communicative content, but it is primarily concerned with preventing "violent or turbulent" conduct. The government's interest would be the same with or without the occurrence of flag desecration. Congress's power to regulate a soldier's conduct extends to Article 116. It promotes order and discourages violent behavior, which is an important government interest. The purpose of Article 116 is facially unrelated to the suppression of flag-related free expression. Therefore, the Article's restrictive effect on such expression is no greater than is necessary to further that governmental interest.

An unsettled issue is how far Articles 133 and 134 reach to punish flag-related misconduct. Article 133 punishes conduct unbecoming an officer and gentleman. In *Howe*, if another officer in civilian clothing had burned an American flag during the protest—as opposed to carrying a contemptuous placard—it seems unlikely that the COMA would have had difficulty in finding the second officer guilty of violating Article 133. Existing case law arguably supports a similar result today. First, Article 133 reaches off-duty conduct.[164] Second, there is no requirement that such "conduct of the officer, itself, otherwise be a crime."[165] Indeed, the impermissible conduct may simply violate a custom of the service.[166]

To sustain an Article 133 conviction under the scenario above, the government would first need to prove the existence and violation of an actionable custom prohibiting burning the flag.[167] The accused officer must have "notice from custom, regulation or otherwise . . . that his conduct is unbecoming."[168] Notice is measured by an objective standard; actual notice is not an element of proof.[169] Further, Article 133 requires that the act of burning the American flag dishonor or disgrace the officer personally, to such an extent that the conduct "seriously compromises the person's standing as an officer."[170] This requirement distinguishes the officer who violates a lesser custom or tradition that does not trigger the UCMJ.[171] One factor to consider in this legal calculus is the effect the conduct has, or could have, on others who become aware of the behavior.[172]

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164. United States v. Howe, 37 C.M.R. 429, 442 (1967) ("[A]n officer on active duty is not a civilian and his off-duty activities do not fall outside the orbit of Article 133 . . . ."); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 59c(2) (2000) [hereinafter MCM] ("[A]ction or behavior in an unofficial or private capacity . . . ."); *see Hartwig*, 39 M.J. at 128 (sexually suggestive letter to fourteen year old student); United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) (""The conduct of an officer may be unbecoming even when it is in private . . . .").

165. United States v. Bilby, 39 M.J. 467, 470 (C.M.A. 1994); *see* United States v. Norvell, 26 M.J. 477, 481 (C.M.A. 1988); *Howe*, 37 C.M.R. at 441; Colonel William Winthrop, MILITARY LAW AND PRECEDENTS 711 (2d ed. 1920 reprint) ("it need not amount to a crime . . . .").

166. MCM, *supra* note 162, para. 59c(2) ("[T]here is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer . . . cannot fall without seriously compromising the person's standing as an officer . . . . This article prohibits conduct . . . which, taking all the circumstances into consideration, is thus compromising."); *see also* United States v. Lewis, 28 M.J. 179 (C.M.A. 1989) (charging tuition to teach leadership skills to fellow officer).

167. MCM, *supra* note 162, para. 59c(2).

168. United States v. Guaglione, 27 M.J. 268, 272 (C.M.A. 1988).

169. United States v. Frazier, 34 M.J. 194, 198 (C.M.A. 1992) ("[A] reasonable military officer would have no doubt that the activities charged in this case constituted conduct unbecoming an officer."); *see Hartwig*, 39 M.J. at 130 ("reasonable officer would know . . . ."); United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) ("reasonable military officer"); United States v. Miller, 37 M.J. 133, 138 (C.M.A. 1993) (reasonable officer standard).

170. MCM, *supra* note 162, para. 59c(2) (conduct in "an unofficial or private capacity"). Conduct that "undermines [the officer's] leadership position is equally punishable" under Article 133, UCMJ. *Frazier*, 34 M.J. at 198.

171. *See* THE OFFICER'S GUIDE, *supra* note 3, at 206 ("The breach of some Army customs merely brands the offender as ignorant, or careless, or ill-bred; but there are others the violation of which would bring official censure or disciplinary action."). To illustrate, a service member who jogs on post while wearing shorts patterned on the U.S. flag probably has violated a custom or tradition concerning treating the national flag with respect. *Cf.* Command Sergeant Major (Retired) Robert S. Rush, NCO GUIDE 320 (6th ed. 1999) ("The flag should never be used as part of a costume or dress . . . ."); WIER, *supra* note 4, at 93 ("The national flag is always accorded courtesy and reverence. It should never . . . be used as part of a costume."); THE OFFICER'S GUIDE, *supra* note 3, at 195 (The national flag "should not be used as a portion of . . . a man's athletic clothing."). However, such conduct is unlikely to be viewed as so egregious as to seriously compromise that person's status as an officer.

172. United States v. Lewis, 28 M.J. 179, 180 (1989) (stating that under the circumstances, charging a fellow officer tuition for leadership skills training "undermined not only the commander's trust in him, but that of a fellow officer as well"); *see Miller*, 37 M.J. at 138 ("The repugnancy of this type of conduct was demonstrated by Mrs. Russ's (a civilian apartment complex manager) reaction . . . ."); *cf. Hartwig*, 39 M.J. at 130 (noting the effect on the victim of sexually suggestive letter); United States v. Adames, 21 M.J. 465 (C.M.A. 1986) (holding that fraternization by officers at training installation with female trainees "diminishes the respect with which they are viewed by the trainees—a respect essential for inculcating discipline" and the accused's "tactics he employed in seeking their companionship would-and did-directly tend to lower him in the esteem of the various female trainees"); Winthrop, *supra* note 163, at 716 n.44 ("[P]usillanimously submitting to public insult or chastisement by inferiors or others, without taking any measure to vindicate themselves.").

To be actionable under Article 133, the custom must attain "the force of law."[173] An actionable custom is typically one that is longstanding and commonly observed.[174] It is insufficient to serve as the basis of a charge if the custom is merely "a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence."[175] Many customs are memorialized in service regulations.[176] For example, long-established military custom requires officers to respect the national colors.[177] Indeed, one military author characterized the act of "honoring the nation's flag" as an old custom, one "originating in antiquity [and] observed in our Army."[178] Further, as a matter of longstanding custom, members of the armed forces have defended the flag from capture or harm.[179]

An active duty officer that publicly burns the national flag as an act of protest or other form of expression should be seen as both personally and professionally discredited within the military. The conduct violates longstanding military customs requiring military personnel to safeguard and render respect to the national colors. Indeed, such conduct by an officer would be completely alien to established military culture and expected standards of behavior and decorum. Further, given the unique role the flag plays within the military,[180] and the accentuated emotional attachment to it by current and former members of the armed forces,[181] such conduct invariably will have a profound impact on other members of the armed forces who witness or become aware of the behavior.

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173. *See* MCM, *supra* note 162, para. 60c(2)(b) (Art. 134); United States v. Smart, 12 C.M.R. 826 (A.B.R 1953) (discussing Article 134). There appears to be no substantive difference between the customs referenced in Articles 133 and 134. *Cf.* Parker v. Levy, 417 U.S. 733, 746-47 (1974) ("Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134."), 754 ("But even though sizable areas of uncertainty as to the coverage of [Articles 133 and 134] may remain . . . further content may be supplied even in these areas by less formalized custom and usage.").

174. *See* MCM, *supra* note 162, para. 60c(2)(b).

> Before a usage, combining numerous repetitions of acts extending over a considerable length of time may be denominated a custom, it is essential that it be certain, continuous, uniform and notorious . . . . [I]t must be generally known and must be proven by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature or character.

Smart, 12 C.M.R. at 828. *See also* Lovette, *supra* note 140, at 334 ("To render [an Army] custom valid and to qualify it for incorporation in this unwritten law, the following qualities are considered requisite: (1) Habitual or long-established custom; (2) Continuance without interruption; (3) Acceptance without dispute; (4) Reasonableness; (5) Exactitude; (6) Compulsory compliance; (7) Consistency with other customs."); Winthrop, *supra* note 163, at 423 ("As to what constitutes a usage or custom in law . . . it must consist of a uniform known practice of long standing, which is also certain and reasonable and is not in conflict with existing statute or constitutional provisions."); *cf.* Lieutenant Colonel (Retired) Lawrence P. Crocker, ARMY OFFICER'S GUIDE 92 (45th ed. 1990) ("A custom is an established usage.").

175. *See* MCM, *supra* note 162, para. 60c(2)(b).

176. *See id.*; *see, e.g.*, AR 600-25, *supra* note 3 (saluting requirements); FM 22-5, *supra* note 146 (same).

177. *See supra* note 146; *cf.* WIER, *supra* note 4, at 93 ("The national flag is always accorded courtesy and reverence.").

178. Crocker, *supra* note 172, at 93.

179. Texas v. Wilson, 33 M.J. 797, 798 (A.C.M.R. 1991) (including an MP on flag detail who had duty to "safeguard and protect" the flag); Lovette, *supra* note 140, at 172 ("[T]he Service has been educated and trained 'under the flag,' . . . and as in the past, so in the future, the service will consider it the highest and most solemn duty to defend the flag against all enemies."); *id.* at 177 ("Do not permit disrespect to be shown to the Flag of the United States of America."); *see Clinton Honors Ex-President, Ex-Slave*, WASH. POST, Jan. 17, 2000, at 10 (Posthumous Medal of Honor awarded to Civil War soldier who "saved his units's colors after the flag-bearer was killed in a bloody charge.").

180. For example, the flag flies over all military installations, is worn on the uniforms of military personnel and flown on Navy vessels going into harm's way, is the subject of numerous ceremonial displays of respect, has historically served as a motivational symbol to rally troops in battle (for example, Iwo Jima) and drapes the coffins of our honored dead. *See supra* notes 3-4, 6, 8, 146 and accompanying text; *see also* TOM BROKAW, THE GREATEST GENERATION 336 (1998) (stating that Mark Hatfield, a Naval officer at Iwo Jima and later a Senator from Oregan, recalled the raising of the American flag on Iwo Jima: "One of the guys said, Hey Look! At the top of the rock—Suribachi—we saw the American flag being raised. It was a thrilling moment. When we saw that flag go up it really did give us a sense of victory, even though we still fought on for some time.").

181. *See, e.g.*, Bill Gertel & Rowan Scarborough, *Inside The Ring: USS Cole*, WASH TIMES, Oct. 20, 2000, at A9 (noting that a Navy pilot flying relief mission to damaged warship has emotional reaction to seeing U.S. Flag: "[T]he first thing that jumped out at me [was] the Stars and Stripes flying. I can't tell you how that made me feel . . . even in this God-forsaken hell hole our flag was more beautiful than words can describe."); Specialist Joseph L. Campbell, *Flag Burning: Political Disagreement—Or Crime?*, ARMY TIMES, Sept. 21, 1998, at 3 ("Burning the flag is extremely offensive to those of us in uniform . . ." but posits that "[t]rampling on freedom while protecting the symbol of that freedom is hollow patriotism."); *cf* Petula Dvorak, *Salute Offered to Unknown Rescuer of Flags*, WASH. POST, Jan. 23, 2001, at B3 (Unknown "20-year veteran of the Coast Guard" rescued two U.S. flags from protestors during President Bush's inaugural parade, telling police "he was 'outraged' that the flags were taken down . . . ."); Martin Van Der Werf, *Freedom Rings Loudly in New Protest on Flag Show*, ARIZ. REPUBLIC, Apr. 29, 1996, at B1 (quoting Senator Dole: "As one who fought for our flag, I feel personally offended when I see it denigrated."); *No Charges for Using Flag as Rag*, ARIZ. REPUBLIC, Sept. 24, 1995, at A15 (stating that an Army veteran angry over the failure of local authorities to prosecute a teenager who used an American flag to clean his car's dipstick pointed out: "You go into battle behind the American flag . . . ."); Thomas Begay, *Protecting the Flag of All Americans*, ARIZ. REPUBLIC, May 28, 1995, at E3 (noting that former Navajo Code Talkers from World War II supported a constitutional amendment and stated, "too many good men and women, over too many years, have returned to this country in flag draped coffins, having given their all in its defense, to be ignored).

The particularly offensive nature of such conduct would not, by itself, sustain a conviction against a First Amendment challenge in either the civilian or military sector.[182] The same cannot be said with certainty in the military context when the circumstances under which the conduct occurs violates long-standing military customs and seriously undermines the officer's ability to function as a military leader. An Article 133 charge should withstand First Amendment scrutiny where the accused officer's conduct discredits him within the officer corps and in relationships with enlisted personnel, thereby undermining his position within both groups.[183]

Additionally, flag-related misconduct may be the subject of prosecution under Article 134, the general article. This punitive provision punishes, in part, "disorders and neglects to the prejudice of good order and discipline in the armed forces" (Clause 1) and "conduct of a nature to bring discredit upon the armed forces" (Clause 2).[184] As with Article 133, before a member of the military may be prosecuted under this article, "the servicemember must be on 'fair notice' that his conduct was punishable under the Uniform Code."[185] To some extent such notice is provided by *Army Regulation 600-20, Army Command Policy*, which states: "[I]ntentional disrespect to the National Colors or National Anthem is conduct prejudicial to good order and discipline and discredits the military service."[186] Violations of a custom of the service may also serve as the basis for an Article 134 charge, under Clause 1's "prejudicial to good order and discipline" provision.[187]

One legal commentator has opined that a soldier, in civilian garb, who publicly burns the American flag at the entrance to a military installation violates Article 134 because such conduct "strikes at the very heart of good order and discipline."[188] The commentator opined that an Article 134 charge should survive because of the traditional deference afforded "the military's professional judgment concerning the need for regulation," and the likely disruption of such conduct within the ranks. Moreover, the charge should survive on the same rationale as Article 134 convictions for similar types of misconduct. "[I]f the military may suppress dissent and disloyal statements communicated by the written or spoken word, as it did in *Levy*, *Priest*, and other cases, then it obviously may suppress dissent and disloyal activity communicated through expressive conduct such as burning the flag."[189]

Within a year of that Article being published, however, the ACMR in *Wilson* failed to embrace the commentator's position. Instead, the court opined that, with respect to a flag burning under a similar factual scenario, the issue remained unresolved and that such challenged conduct "might be protected."[190] Significantly, the court's opinion in *Wilson* seemed to suggest that the same soldier's conduct could be the subject of punitive action if committed "while on duty and in uniform."[191] Further,

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182. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Spence v. Washington, 418 U.S. 405, 412 (1973); *Wilson*, 33 M.J. at 799 ("Such conduct (desecration of the flag) cannot be prohibited simply because society may find the idea embodied in the symbolic act offensive or disagreeable.").

183. *Cf.* Parker v. Levy, 417 U.S. 733, 759 (1974) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does it is constitutionally unprotected.") (citing United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972)); Potter, *supra* note 101, at 26 (Art. 134 context).

184. MCM, *supra* note 162, para. 60c(1).

185. United States v. Bivens, 49 M.J. 328, 330 (1998) (citing *Parker*, 417 U.S. at 756 (1974)).

186. U.S. Dep't of Army, Reg. 600-20, Army Command Policy, para. 4.3(b) (15 July 1999).

187. MCM, *supra* note 162, para. 60(c)(2)(b).

188. Potter, *supra* note 101, at 26. However, the Judge Advocate General commentator also noted the Army appellate court's hesitancy in letting an Article 134 conviction for flag desecration stand in *Hadlick*. Although the court found the First Amendment was not implicated and despite the accused's admission that his conduct was service discrediting and of a nature to be prejudicial to good order and discipline, the ACMR determined that the providence inquiry was infirm "because the inquiry failed to indicate that Hadlick's conduct was 'observed by anyone in the armed forces, was in fact a deliberate act of desecration or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting.'" *Id.* at 24 n.27. Presumably, based on the limited discussion of the issue available in *Hadlick*, the ACMR would have agreed with Captain Potter, under his scenario, that flag desecration was actionable under Article 134 because the accused was observed by others in the armed forces or the act of desecration was deliberate. *But cf.* United States v. Wilson, 33 M.J. 797, 798 (A.C.M.R. 1991) (unresolved issue); Potter, *supra* note 101, at 24 ("question still left unanswered").

189. Potter, *supra* note 101, at 26.

190. *Wilson*, 33 M.J. at 798. Even if the courts ultimately determine that such conduct by enlisted personnel does not violate Article 134, the same conduct by officers may still be actionable given that officers have traditionally been held to a higher standard of conduct. United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1993) ("It has long been recognized that a 'higher code termed honor' holds military officers 'to stricter accountability.'"); *cf.* United States v. Court, 24 M.J. 11, 17 n.2 (C.M.A. 1987) (Cox, J, concurring in part and dissenting in part) ("[T]he citizens of this great Nation have a right to expect that persons who serve as commissioned officers within the armed forces will conduct themselves in accordance with the very highest standards of behavior and honor."). Further, the effect on the military may be more profound when committed by an officer. Congress's decision to limit Article 88 to officers arguably reflects this notion. *See* Major Michael A. Brown, *Must the Soldier Be a Silent Member of Our Society?*, 43 Mil. L. Rev. 71, 101 (1969) ("[I]t is probable that the drafters of the Code realized that the detrimental effect upon morale and discipline because of an enlisted man's contemptuous reference to high-level government officials would be much less than that of an officer, whom the enlisted men and subordinate officers have been taught to respect and obey.").

the court did not directly contradict—nor even mention—the *Levy/Priest/Brown* line of cases.

The ACMR left undisturbed the legal proposition that conduct remains punishable under the UCMJ if it progresses beyond mere protest to a call for active opposition to U.S. policies or to an action that "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops."[192] Accordingly, an act of flag desecration by a service member as an expression of disagreement with, or protest of, some particular U.S. policy may still be constitutionally protected, so long as the protester invokes minimal connections with the military, and the activity does not rise to a higher level of misconduct, such as an intentional effort to promote disloyalty among the force or an active call for civil disobedience.[193]

Clearly, the parameters for a permissible prosecution of flag-related misconduct under Article 134, Clause 1, remain unsettled. The weakest grounds for prosecution are when the accused's only connection with the armed forces is his military status; that is, when he is off duty, off post, out of uniform, desecrating a privately owned flag, and unobserved by others in the military or unknown by observers to be a member of the armed forces.[194] A prosecution under such circumstances seems unlikely to survive a First Amendment challenge. Conversely, as the number of factual links with the military increases, so does the likelihood that the Article 134, Clause 1 charge will survive judicial scrutiny.

Normally, a prosecution under Article 134, Clause 2's service-discrediting provision will not sustain a First Amendment challenge. This portion of Article 134 is concerned primarily with the effect the accused's conduct has on the military's reputation within the civilian sector.[195] The Supreme Court, however, made it clear that government regulation of flag-related misconduct that triggers First Amendment protections cannot be sustained merely because others find the conduct offensive or disagreeable.[196] This is the fundamental underpinning to a charge under Clause 2. Similarly, this legal proposition should extend to, and defeat the argument that prosecution under Clause 2 is appropriate when the reputation of the service is lowered in the public's eye because flag-related misconduct casts doubt on the loyalty and subservience to civilian control of the military. This argument merely recasts the subjective reaction of the public from "offensive or disagreeable" to "disloyal or nonsubservient."

Conclusion

Flag-related misconduct will remain an emotional and divisive issue in this country and any efforts to control such conduct will come under First Amendment scrutiny. Conduct that is acceptable within the civilian sector may, however, still be the legitimate object of prosecution within the military, and this principle applies with no less vigor to flag-related misconduct. The unique needs and mission of the armed forces, coupled with the courts' traditional deference to professional military judgment in this area, greatly expands the parameters of permissible governmental regulation of this form of expressive conduct. While the military justice system enjoys greater latitude than the civilian criminal systems, the exact parameters of UCMJ action are unknown, and the area remains a fertile ground for litigation. This article has endeavored to review the applicable case law, to identify issues that may arise in a flag-misconduct court-martial, and to provide some definition to the uncertain limitations of the law.

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191. *Id.* at 800.

192. United States v. Brown, 45 M.J. 389, 395 (1996); *see* United States v. Priest, 45 C.M.R. 338, 344 (1972); *see also* Parker v. Levy, 417 U.S. 733, 753 (1974); United States v. Harvey, 42 C.M.R. 141, 145 (1970).

193. *See Parker*, 417 U.S. at 753 (Article 134 "applies only to calls for active opposition to the military policy of the United States . . . and does not reach all '[d]isagreement with, or objection to, a policy of the Government."). The *MCM* includes an Article 134 offense for "disloyal statements," which contains a *mens rea* element distinguishing a disloyal statement from one merely designed to object to a U.S. policy: "That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces . . . ." MCM, *supra* note 162, para. 72(b)(4).

194. *See* Gross, *supra* note 101, at 26 ("Given the facts in *Hadlick* . . . . [i]t is difficult to imagine how spitting on the flag in a civilian latrine facility would undermine discipline in the Army.").

195. MCM, *supra* note 162, para. 60(c)(3) ("This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 78, § 2-6(B) (3rd ed. 1992 and 1995 Supp.) ("Key here, is the fact that certain acts may lower the civilian community's esteem or may bring the armed forces into disrepute.").

196. *See supra* note 180; *see also* Sons of the Confederate Veterans v. Glendening, 954 F. Supp. 1099, 1104 (D. Md. 1997) (Confederate flag).

Soldiers' and Sailors' Civil Relief Act (SSCRA) Note

Georgia Courts Apply SSCRA Against Soldiers

Military practitioners typically regard the Soldiers' and Sailors' Civil Relief Act (SSCRA) as a means to protect those in military service, and why not? The stated purpose of the Act is to enable military personnel "to devote their entire energy to the defense needs of the Nation."[1] However, one provision of the SSCRA can diminish, instead of enhance, a service member's rights—the law tolling the statutes of limitations under 50 U.S.C. App. § 525 (the so-called "tolling provision").[2]

In *Vincent v. Longwater*,[3] the Georgia Court of Appeals held that a civilian plaintiff could sue a soldier well past the normal statute of limitations because of the SSCRA tolling provision. Longwater sued Sergeant (SGT) Vincent as the result of a 1995 traffic accident. Sergeant Vincent was a soldier on active duty in the Army at the time, and subsequently reported for duty in Korea. The sheriff returned service to the plaintiff and indicated that he was unable to serve it.[4] In 1998, Vincent received service. He asserted Georgia's two-year statute of limitations on personal injury suits[5] precluded the action. Longwater—the civilian plaintiff—countered by asserting that the SSCRA tolled the statute of limitations for the time Vincent served on active duty.[6]

The Georgia court rejected SGT Vincent's argument that the tolling provision does not apply to career military personnel. The court also pointed out that, unlike SSCRA stays,[7] the tolling provision is not discretionary—courts must apply it. Significantly, the opinion implicitly accepts, at face value, the tolling provision's language applying it to actions by *or* against persons in military service.[8]

Perhaps, the court felt no need to address the issue of whether the SSCRA tolling provision deprives service members of some of the protections that statutes of limitation give other potential civil defendants. As early as 1944, state courts applied the tolling provision against service members.[9] A steady line of cases over the years reinforced this analysis.[10]

Certainly, the tolling provision can help a service member who might otherwise lose the opportunity to sue under a statute of limitation. However, legal assistance attorneys need to keep the "down side" in mind when assessing the potential impact of statutes of limitation against military clients. Lieutenant Colonel Culver.

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1. 50 U.S.C. app. § 510 (2000).

2. *Id.* § 525 reads as follows:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

3. 538 S.E.2d 164 (2000).

4. Georgia's law on service of process allows a court to order a necessary or proper party residing outside the state or departed from the state to be served by publication. GA. CODE ANN. § 9-11-4 (2000). The court's opinion in *Vincent v. Longwater* never reaches the question of why the plaintiff in the case never took such action.

5. *See id.* § 9-3-33.

6. *Vincent*, 538 S.E.2d at 165-66.

7. *See generally* 50 U.S.C. app. § 521 (2000).

8. *Vincent*, 538 S.E.2d at 166.

9. *See* Blazejowski v. Stadnicki, 317 Mass. 352, 58 N.E.2d 164 (1944).

10. *See, e.g.*, Kenney v. Churchill Truck Lines, Inc., 286 N.E.2d 619 (1972); Zitomer v. Holdsworth, 178 F. Supp. 504 (D. Pa. 1959); Landis v. Hodgson, 706 P.2d 1363 (Idaho Ct. App. 1985).

Contract and Fiscal Law Note

Open Sesame! FedBizOpps.gov Named Sole Procurement Entry Point

Effective 1 October 2001, all federal agencies must use www.FedBizOpps.gov to publicize procurements greater than $25,000.[11] This note addresses which procurement actions must be publicized on the website, exceptions to this requirement, and the website's interaction with the Commerce Business Daily (CBD).

On 16 May 2001, the Federal Acquisition Regulatory Council published an interim rule[12] amending the Federal Acquisition Regulation (FAR).[13] The rule requires all federal agencies to transition from publicizing procurements greater than $25,000 in the CBD[14] to publicizing those same actions on the Internet. The Web site, www.FedBizOpps.gov, is known as the "Governmentwide point of entry (GPE)."[15] The GPE is "the single point where Government business opportunities greater than $25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public."[16] The idea behind electronic notification is to simplify and streamline the procurement process and "enhance customer service and promote cost effectiveness."[17]

Agencies must post all solicitations greater than $25,000 on the GPE beginning 1 October 2001.[18] From 1 October 2001 until 1 January 2002, agencies must also direct the GPE to post the solicitations in the CBD.[19] Beginning 1 January 2002, agencies no longer need to post solicitations in the CBD and may rely solely on publication in the GPE.[20] In addition to posting solicitations greater than $25,000, the new rule also requires agencies to use the GPE to post other information, including pre-solicitation notices, award notices involving subcontracting opportunities, and amendments to solicitations.[21] To determine publication dates for calculating response times,[22] use the CBD publication date for notices published before 1 January 2002,[23] and the date the notice appears on the GPE for notices published after 1 January 2002.[24]

As with any good rule, this one has its exceptions. Contracting officers do not need to publish solicitations on the GPE when "disclosure would compromise the national security," when "the nature of the file ([for example], size, format) does not make it cost–effective or practicable . . . to provide access through the GPE," and when "the agency's senior procurement executive makes a written determination that access through the GPE is not in the Government's interest."[25]

Hopefully, the use of www.FedBizOpps.gov will push the federal procurement process even further into the electronic age. The long term goal is for agencies to "realize the efficiencies in electronic processes that justify agency investments in these processes."[26] Over 90,000 vendors are already registered to receive notice of contracting opportunities through the GPE.[27] Because of the low-cost access to the Internet, use of

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11. Electronic Commerce in Federal Procurement, 66 Fed Reg. 27,407 (May 16, 2001) (to be codified at 48 C.F.R. pts. 2, 4-7, 9, 12-14, 19, 22, 34-36).

12. *Id*.

13. General Servs. Admin. et al., Federal Acquisition Regulation (June 1997) [hereinafter FAR].

14. *Id*. at 5.101.

15. 66 Fed Reg. 27,409 (to be codified at 48 C.F.R. pt. 2.101).

16. *Id*.

17. Deidre Lee, Director of Defense Procurement, *quoted in FedBizOpps Website Tapped as Sole Government E-Procurement Venue*, The Gov't Contractor, May 23, 2001, at ¶ 214.

18. 66 Fed Reg. at 27,408.

19. *Id*.

20. *Id*.

21. *Id*.

22. When the government posts a solicitation, it must give potential offerors a "reasonable opportunity" to respond to that solicitation. For commercial item solicitations and other solicitations less than $100,000, the government chooses the "reasonable opportunity" that it provides to the offerors. For non-commercial item acquisitions greater than $100,000, the government must provide at least a thirty-day response time. FAR, *supra* note 11, at 5.203(a)-(c).

23. 66 Fed Reg. at 27,410 (to be codified at 48 C.F.R pt. 5.203).

24. *Id*.

25. *Id*. (to be codified at 48 C.F.R pt. 5.102(a)(4)). Unfortunately, the rule provides almost no guidance for interpreting these terms.

the GPE should help small businesses seeking to do business with the government. Although the government may eventually relinquish control of the GPE to private industry, the government wishes to initially manage the start-up of this "technological architecture."[28]

Beginning 1 October 2001, all agencies must use www.FedBizOpps.gov to publicize solicitations greater than $25,000. After 1 January 2002, agencies may use the GPE exclusively and no longer publicize their solicitations in the CBD. Though there are a few exceptions to this new rule, procurement officials must be prepared to bring significant portions of the acquisition process on-line. Major Siemietkowski.

26. *Id.* at 27,409.

27. *FedBizOpps Website Tapped as Sole Government E-Procurement Venue*, *supra* note 15.

28. 66 Fed Reg. at 27,408.

Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT)

This is the third in a series of CLAMO Notes discussing tactics, techniques, and procedures (TTP) for a Brigade Operational Law Team preparing to deploy to the Joint Readiness Training Center (JRTC). These TTPs are based on the observations and experiences of Operational Law (OPLAW) Observer/Controllers (O/Cs) at the JRTC. The JRTC OPLAW O/C Team suggests a four-stage "battle-focused training" approach to BOLT preparation for a JRTC rotation. This training first prepares the individual BOLT member, transitions to prepare the BOLT as a whole, then prepares the brigade staff, and finally focuses on the entire brigade task force. These training steps should prove useful to BOLTs in achieving success at the JRTC.

Preparing the Brigade Staff

The brigade staff makes the organization, analysis, and presentation of vast amounts of information manageable for the commander.[1] As today's military operations are legally complex, judge advocates (JAs) and legal specialists enjoy an increasingly critical role in the staff function. The OPLAW team must balance its garrison responsibilities to the division or installation Office of the Staff Judge Advocate (OSJA) with its duties as a brigade staff element—duties emphasized under recent doctrine.[2]

Traditionally, the chief of the brigade OPLAW team is the brigade trial counsel. Primarily responsible for military justice in garrison, the brigade trial counsel knows his commanders and perhaps the brigade executive officer (XO) and adjutant (S-1), but often has no real interaction with the rest of the staff.[3] Moreover, the officers and NCOs on the brigade staff are often unaccustomed to working with a JA.[4] The brigade staff may not understand the JA's role in targeting meetings and mission analysis, or why the JA needs to know when a Red Cross official is asking to inspect the Enemy Prisoner of War facility. In short, the staff does not know what information the JA needs, why he needs it, or how his analysis and advice impacts operations.

As a result, the first several days of a JA's deployment to the JRTC are characterized by improving staff integration by reducing the friction between the JA's attempts to manage legally relevant information and the staff's limited understanding of the JA's role. While not a "magic bullet," this article offers some TTPs to help JAs improve integration with the brigade staff in garrison and set the conditions for success before JRTC deployment.

Staff Integration in Garrison

Trial counsel are generally busy by nature, and often don't find the time to leave their computers, telephones, and witness lists to go down to the brigade to interact with the staff. As a staff member co-located with the brigade, however, the trial counsel should make every attempt to join the staff whenever possible[5]—attending command and staff meetings, the commander's professional development classes, staff physical training, and social events. Due to the trial counsel's special duties and sometime-separate location, he may not be able to make every meeting or event, but frequent attendance (and input when appropriate) distinguishes the useful staff officer from the "oxygen thief" who shows up only during the actual deployment.

Even for the JA convinced he has no time for anything other than military justice in garrison, good staff relationships can prove valuable. Access to the brigade's training calendar lets the JA know when his potential witnesses will be available for trial. When the JA really needs a battalion commander's endorsement on the court-martial packet, a copy of the brigade's Operations Order (OPORD) and training area map will help the JA find the commander in the "battalion CP at the NE corner of Sukchon DZ." If that's too far to drive, the Tactical Standing Operating Procedure (TACSOP) and OPORD will tell the JA how to raise the commander, "Bulldog 6," on the radio to get a *voco* endorsement. All of these products are readily

1. U.S. Dep't of Army, Field Manual 101-5, Staff Organization and Operations 1-3 (31 May 1997) [hereinafter FM 101-5].

2. *Id.* at 4-29, 4-32; U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations 5-22 to 5-24 (1 Mar. 2000) [hereinafter FM 27-100]; Joint Chiefs of Staff, Joint Pub. 5-00.2, Joint Task Force Planning Guidance and Procedures II-16 (13 Jan. 1999).

3. In matters of military justice, the JA serves the commander in a personal capacity and "[c]ommunicates directly with the commander concerning the administration of military justice." FM 101-5, *supra* note 1, at 4-32. With respect to other legal services, the JA is a special staff officer advising the command and staff on legal issues affecting all staff sections and Battlefield Operating Systems. *Id.*

4. Typically, the brigade is usually the lowest unit echelon with a dedicated JA. FM 27-100, *supra* note 2, at 5-22.

5. *See* FM 27-100, *supra* note 2, at 3-2 ("OPLAW JAs must proactively develop staff skills and relationships at all times, not merely before deployment.").

available through the brigade S-3 shop. On the other hand, the JA could just burn twelve days of processing time until the commander returns from the field.

Of course, staff participation in garrison pays greater long-term dividends. As a regular member of the brigade staff, the BOLT earns its credibility and the confidence of the commander on a daily basis. Routine participation in garrison staff meetings is an opportunity to educate the staff about the BOLT's role as a full-service legal advisor beyond the military justice realm. Command and staff meetings raise all kinds of administrative law issues: reports of survey completion, family readiness group activities, and private-organization membership drives, to name a few. While the JA and senior legal noncommissioned officer (SLNCO) should not usurp the role of the installation Administrative Law Office, BOLT team involvement can resolve minor issues and speed resolution of routine administrative law matters. In turn, the staff learns to rely on the JA and gets in the habit of forwarding items to the BOLT for review and comment.

Finally, regular participation in garrison staff activities gives the JA the opportunity to influence the brigade's home-station training. The operations section (S-3) manages the training calendar for the brigade, arranging everything from briefings to Situational Training Exercise (STX) lane training to brigade deployments. By participating in training meetings, the JA can ensure that subordinate battalions receive required Rules of Engagement (ROE) briefings and Law of War classes. Additionally, the JA confirms that legal training is integrated into STX lanes or Field Training Exercise (FTX) events.

Staff Integration in the Field

Brigade staffs engage in a significant amount of field training before deploying to the JRTC. The BOLT should be no exception. Regular participation in FTXs and command-post exercises (CPXs) with the brigade staff is an essential component of staff integration.

Throughout the year before the JRTC rotation, the brigade conducts a series of FTXs and CPXs to refine their Standing Operating Procedures (SOPs) and battle drills. These exercises focus the brigade's efforts on maneuver and the integration of combat arms and combat support Battlefield Operating Systems (BOS). These exercises often lack civilians on the battlefield for realism, and they lack traditional scripted legal events such as claims or fiscal law issues. Nevertheless, deployment of, and input from, the BOLT during these exercises reinforces to the staff that the JA and his staff are involved in brigade planning and decision-making above and beyond sustainment (such as contracting) and service-support (such as wills and powers-of-attorney) functions. On a more basic level, BOLT participation in FTXs facilitates establishment of a location and presence in the Tactical Operations Center (TOC). This participation also provides BOLT members with a chance to learn more about the other BOS. A brigade staff will generally accept and appreciate the JA and NCO who deploy with the brigade on training exercises and work in the TOC. They will not be as tolerant of the team that breezes in solely for a JRTC rotation, expecting others to surrender precious space during the year's most important training event.

Periodically, a BOLT will have the opportunity to participate in Battle Command Training Program (BCTP) division or corps warfighter exercises, or in other large-scale exercises run by Department of Defense (DOD) organizations with JAs on the exercise staff. For the brigade, these exercises are functionally similar to CPXs, except they integrate higher headquarters, sister brigades, and other services into the exercise. As Department of the Army or DOD-level training organizations direct these exercises, they often contain scripted events requiring the brigade to perform legal analysis. These exercises and any associated preparatory events provide an even greater opportunity for the BOLT team to contribute to the staff's success during pre-rotation exercises.

Approximately ninety days before the JRTC rotation, the JRTC hosts a Leader's Training Program (LTP). Attendance at this event is critical for the JA, as it is often the complete staff's first and last CPX before the rotation. Normally, by D-90 the brigade has stabilized its key personnel to ensure that all staff officers present for LTP are in the positions they will occupy during rotation. The LTP is so significant that slice element commanders and staff members are also present, to include Reserve Component leaders from Civil Affairs and Psychological Operations units, and off-post unit leaders such as commanders from mechanized or armored units.

Under the guidance of LTP coaches, the brigade and battalion staff elements review their procedures and SOPs, conduct a complete Military Decision-Making Process (MDMP), and prepare an OPORD for a detailed computer-driven CPX. The coaching, exercise, and subsequent After Action Review examine the full staff's synchronization and integration, enabling the commander to evaluate and fine-tune his SOPs. The end-state of LTP is a final TACSOP revision and a staff that has completed one full MDMP and exercise together, employing every BOS and staff section.

Staff Integration on Paper

Most brigades have an SOP that governs operations at the brigade level.[6] The brigade TACSOP contains information such as the TOC layout, unit call signs, and methods of marking brigade obstacles, among other things. The TACSOP standardizes routine tasks for all members of the brigade task force to enhance understanding and teamwork among commanders,

6. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 7-30, THE INFANTRY BRIGADE app. A (3 Oct. 1995).

staffs, and troops; to establish synchronized staff drills and accelerated decision-making processes; and to simplify combat orders to subordinates.[7] While the TACSOP is often the second-most used document in the field (after the exercise OPORD), it is intended for garrison reading as well, so that all newcomers to the brigade can familiarize themselves with the unit's method of operations.[8] As such, the TACSOP is also a baseline document for training key leaders within the brigade.

Upon arrival at the unit, the JA should introduce himself to the S-3 and get a copy of the TACSOP. Like all soldiers in the brigade, the BOLT personnel must familiarize themselves with the unit's method of operations, call signs, and other key elements.

As the command legal advisor, the JA ought to conduct a legal review of the TACSOP to identify questionable practices and suggest improvements. For example, one recent TACSOP seen at the JRTC instructed brigade units to employ Riot Control Agents (RCA) to separate combatants from noncombatants and to control "disturbances in rear areas," without further qualifications. A JA reviewing this TACSOP provision would recognize that RCA use is sufficiently sensitive that the higher command may retain control, and the JA would discuss the issues surrounding the use of RCA with the brigade commander.

In addition to providing a legal review, the JA should ensure that the TACSOP captures the BOLT's role in the TOC. The team should be inserted into the TACSOP's TOC layout, call sign list, distribution list, briefing order, and any other area in which it has an interest. The team should be listed in field phone lists. If other staff sections have individual annexes to the OPORD, the JA should draft a legal annex defining the BOLT's role and capabilities, including its Mission Essential Task Lists (METL), critical tasks, and routine procedures. This annex should also address any requirements from the Division TACSOP or OSJA Field SOP affecting legal operations at the brigade level. Finally, the JA should review the reports annex, if any. The TACSOP is an ideal location to establish reporting procedures for serious incidents of legal interest, such as fratricides and law of war violations.

By defining the BOLT's purpose in the TACSOP, the JA educates the staff on the team's role during combat operations. Secondly, the JA establishes the team's duties, location, procedures, and information requirements in an enduring document. This ensures some continuity for successors and reduces the personality-based struggles common to staff integration. Finally, because the TACSOP is the base document for brigade operations, the brigade regularly incorporates the BOLT's procedures in its training. Company, battalion, and brigade staffs will become accustomed to reporting fratricides, certifying completion of ROE training, and conducting preliminary investigations of serious incidents during every field exercise.

Like the air defense and military intelligence company commanders, the brigade JA maintains a separate office and chain of command in garrison, actively joining the brigade staff only upon commencement of operations. Unlike these other captains, the JA and his team face the daunting task of demonstrating to the combat-arms and combat-support staff members that the BOLT has a legitimate role in combat operations. To the extent that integration is personality driven, the best way to get to know them is to conduct physical training with them, socialize with them, and most importantly, support them during staff meetings in garrison. To earn the brigade's respect, the JA should go to the field and "get dirty" with them, learn what they do, and show them that JAs have a significant job in their world. To improve the brigade, the JA should memorialize his enhanced role in the brigade's SOP so that the doctrinal staff relationship will survive the inevitable annual personnel changes. These steps go a long way to ensure the BOLT will be able to receive, process, and manage for the commander the full range of information affecting legal issues inherent in today's operations.

Having established the BOLT's role with the brigade staff, the team must finally prepare the task force subordinate units and soldiers to prevent legal crises from interfering with the mission and to react properly when legal issues arise. CPT Pete Hayden, JRTC Observer-Controller.

Next month's Note will address TTPs to train the task force as a whole.

For more information on JRTC, or to contact the OCs, see CLAMO's "Combat Training Centers" database at http://www.jagcnet.army.mil/CLAMO-CTCs.

7. FM 101-5, *supra* note 1, at H-8.

8. *Id.*

Tort Claims Note

Claims Arising from the Performance of Duties by Members of the National Guard

The Federal Tort Claims Act (FTCA)[1] provides a remedy for persons who suffer personal injury, death, or property damage as a result of the negligent or wrongful acts or omissions of "employees" of the United States acting within the scope of their employment. Establishing whether a tortfeasor is a U.S. employee is the crucial first step in the FTCA process. Therefore, in evaluating a claim involving the alleged tortious activity of a member of the Army Reserve National Guard (ARNG), careful review of the member's status and the precise nature of the member's activities on the day of the incident is the first step in determining whether the state or federal government is responsible.

The ARNG has an unusual status because it is an agency with both federal and state components. All fifty states, Puerto Rico, the Virgin Islands, and Guam have their own National Guard.[2] In addition, the National Guard Bureau, an adjunct of the United States Departments of the Army and Air Force, gives National Guard personnel federal recognition as part of either the ARNG of the United States or the Air National Guard of the United States.[3] A member of the ARNG may be a state employee, federal employee, full-time Active Guard Reserve member, or a traditional National Guard member. Depending on the member's status, either the state government or the federal government may ultimately be responsible for the payment of claims arising from the tortious activity of a member of the ARNG.

The purpose of the ARNG is to serve as a modern militia in defense of the United States.[4] Guard members are uniformed, equipped, trained, and subject to federal military standards in much the same way as personnel serving in the regular U.S. Army. The main distinction between regular Army and ARNG units is that, in general, state governors control the latter.[5] In terms of national security, the benefit of the ARNG is that its units may be called into active federal service. When called into active federal service, the unit is no longer under the control of its governor, but ultimately under control of the President, as Commander-in-Chief.

In general, ARNG personnel serving in a state active duty status are considered state employees and not federal employees for purposes of the FTCA.[6] The state exercises immediate control over the member. Moreover, while in a state status, the member is performing a duty that furthers the interest of the state. Thus, National Guard members engaged in activities such as flood disaster relief or riot control are under the call of the governor and performing duties furthering the interests of their respective state rather than the federal government. Under these circumstances, the ARNG members are not considered "federal employees," and allegations of their negligence are not cognizable under the FTCA.

An ARNG member becomes a federal employee when called into service by the President pursuant to 10 U.S.C. §§ 331-333, or 12406[7] ("Title 10 status"). In contrast to members serving in a state status, a member in Title 10 status serves pursuant to a federal mission and the ability to direct and control the member's activity lies with the federal government.[8] Thus, any negligent acts or omissions of ARNG members in a Title 10 status and acting within the scope of their employment are cognizable under the FTCA.

Claims involving ARNG personnel become more difficult to analyze when the alleged tortfeasor is engaged in training under 32 U.S.C. §§ 316, 502-505[9] ("Title 32 status"). The ARNG personnel in a Title 32 status are considered "federal employees" for purposes of the FTCA.[10] A common claims scenario involves the allegation of negligence by a member while performing annual training pursuant to 32 U.S.C. § 502. Significantly, although the member is a state employee still under the

1. 28 U.S.C. §§ 1346, 2671-2680 (2000).

2. The District of Columbia National Guard is a federal force. *See* O'Toole v. United States, 206 F.2d 912 (3d Cir. 1993).

3. Jorden v. National Guard Bureau et al., 799 F.2d 99 (3rd Cir. 1986).

4. Maryland v. United States, 381 U.S. 41, 46 (1965), *vacated on other grounds* 382 U.S. 159 (1965).

5. Lee v. Yee, 643 F. Supp. 593, 601 (D. Hawaii 1986).

6. *Id.*

7. 10 U.S.C. §§ 331 (to suppress insurrection), 332 (to suppress rebellion), 333 (to safeguard rights of citizens during insurrection), 12406 (against a rebellion or the threat of rebellion against the authority of the United States) (2000).

8. *Id.*

state's control, the member's Title 32 status places him within the definition of "federal employee" for purposes of the FTCA. Therefore, any negligent acts or omissions of ARNG members in a Title 32 status and acting within the scope of their employment are cognizable under the FTCA.[11]

Claims attorneys and judge advocates should also be familiar with the unique status of federal technicians. Federal technicians are personnel assigned to ARNG units under the command of state officers. Federal technicians are federal employees,[12] often employed in the administration and training of these units, or in the maintenance and repair of equipment issued to the ARNG.[13] Thus, any negligent act by a federal technician is cognizable under the FTCA if the technician is acting within the scope of his employment.

Claims arising out of the alleged negligent acts or omissions by ARNG members challenge claims attorneys because of the involvement of both state and federal governments. When an ARNG member is the alleged tortfeasor, the claims attorney or judge advocate should conduct a detailed investigation to determine whether the claim is a state or federal responsibility. When determining whether the ARNG member was performing duties in a Title 32 status, a mere review of the scope of employment statement provided by the member's unit is inadequate because it may not be accurate. The attorney should therefore obtain a copy of any orders pertaining to the member and should review the unit's training schedule to determine whether the activity was part of the planned training. The attorney should also interview the ARNG member as to the facts and circumstances surrounding the mission and the training. While documents may indicate that a member's actions were incidental to the unit mission or the individual's military occupational specialty, it is quite possible that the alleged negligent activity was not a part of the unit's training, or was an activity from which only the state derived a benefit (for example, an Armory improvement construction project).

Claims Under 10 U.S.C. § 2012

Claims personnel should also be familiar with potential ARNG claims arising from activities authorized by 10 U.S.C. § 2012, which permits Army support to eligible organizations outside the Department of Defense (DOD). Effective 10 February 1996, units or individual members of the armed forces engaged in civil-military innovative readiness training (IRT) activities may provide support and services to specified non-DOD organizations and activities.[14] The IRT is defined as military training conducted off base in the civilian community that utilizes the units and individuals of the armed forces under the jurisdiction of the Secretary of a military department or a combatant commander, to assist civilian efforts in addressing civic and community needs of the United States, its territories and possessions, or the Commonwealth of Puerto Rico.[15]

Certain units and personnel typically provide the civic and community assistance under 10 U.S.C. § 2012. These include combat service support units, combat support units, and personnel primarily in the areas of healthcare services, general engineering, and infrastructure support and assistance.[16] Assistance is available only if requested by a responsible official of the benefiting organization. It may not be provided if reasonably available from a commercial entity unless the commercial entity has agreed to the armed forces providing the service.[17]

As a further condition, the unit's assistance must accomplish valid unit training requirements.[18] An exception is made, how-

9. 32 U.S.C. §§ 316 (instructing civilians at rifle ranges), 502 (attending drill assemblies or participating in training at encampments, maneuvers, outdoor target practice or other exercises), 503 (participating in field exercises independently of or in conjunction with the Army or the Air Force or both), 504 (participating in small arms competition or attending schools for the ARNG), 505 (attending regular service schools and field exercises) (2000).

10. "Employee of the government includes . . . members of the National Guard while engaged in training or duty under §§ 316, 502, 503, 504, or 505 of Title 32." 28 U.S.C. § 2671 (2000).

11. In 1981, Congress amended the FTCA to make the federal government liable for acts or omissions of National Guard personnel serving in a Title 32 status. Guard personnel in a Title 32 status remained state employees, but were considered federal employees under the FTCA. Prior to the amendments, claimants injured by National Guard personnel in a Title 32 status were not entitled to relief under the FTCA, but under the National Guard Claims Act, which provided a limited administrative remedy, with caps placed on damages. 32 U.S.C. § 715. The limited relief afforded to the claimants was often made worse by states that had not yet waived sovereign immunity or consented to be sued for the negligent acts of their employees. This failure to waive sovereign immunity left Guard personnel at risk for being personally liable for their allegedly negligent acts. The 1981 amendments, therefore, provided an avenue of relief for claimants injured by Guard personnel in a Title 32 status and acting within the scope of employment, while eliminating the risk that a Guard member would be personally liable for his or her negligent acts.

12. *Id.* § 709(e).

13. *Id.* § 709(a).

14. 10 U.S.C. § 2012(a) (2000).

15. U.S. Dep't of Defense, Dir. 1100.20, Support and Services for Eligible Organization and Activities Outside the Department of Defense para E2.1.8 (30 Jan. 1997) [hereinafter DOD Dir. 1100.20].

16. *Id.* para. 4.2.

17. 10 U.S.C. § 2012(c).

ever, if the assistance consists primarily of military manpower and the total assistance for a single project does not exceed 100 man-hours.[19] In these cases, unit volunteers will meet most manpower requests, and assistance other than manpower will be extremely limited. Government vehicles may be used, but only to provide transportation of personnel to and from the work site.[20]

Individual—as opposed to unit—assistance must involve tasks directly related to the member's military occupational specialty.[21] In addition, the assistance must not adversely affect the quality of training or the performance of the unit or member.[22] Further, it must not result in a significant increase in the cost of training.[23] Organizations and activities eligible for assistance under 10 U.S.C. § 2012 include: any federal, regional, state or local governmental entity; youth and charitable organizations specified in 32 U.S.C. § 508; and any other entity approved by the Secretary of Defense.[24]

Claims involving ARNG members arising from projects authorized by 10 U.S.C. § 2012 are cognizable under the FTCA even though a government entity or private organization may derive a benefit. Despite the expanded authority for the participation of ARNG personnel in civic and community activities, the ARNG continues to be involved in community projects which do not fall within the realm of 10 U.S.C. § 2012. These projects may be accomplished in a state active duty status, and any claims generated by such projects remain solely the state's responsibility.

Conclusion

Given the number of missions undertaken by the ARNG, claims attorneys and judge advocates will encounter a variety of claims alleging property damage and personal injury arising from the performance of duties by members of the ARNG. Whether a claim is cognizable under the FTCA or is a state responsibility is a question that should be expeditiously resolved. Claims attorneys will accomplish this by conducting a thorough investigation and working closely with the state Staff Judge Advocate and the Claims Service area action officer. Ms. Schulman and Captain Lozano.

18. *Id.* § 2012(d)(1)A(i).

19. *Id.* § 2012(d)(2).

20. DOD DIR. 1100.20, *supra* note 15, para. 4.4.2.1.3.

21. 10 U.S.C. § 2012 (d)(1)(A)(ii).

22. *Id.* § 2012(d)(1)(B).

23. *Id.* § 2012(d)(1)(C).

24. *Id.* § 2012(e).

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-OPB, 1 Reserve Way, 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, 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

2001

September 2001

10-14 September	2d Court Reporting Symposium (512-27DC6).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	1st Closed Mask Training (512-27DC3).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-11 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG). **(This course will be rescheduled).**
1 October-6 December	6th Court Reporter Course (512-27DC5).
9-26 October-	2nd JA Warrant Officer Advanced Course (7A-550A2).
12 October-20 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
15-26 October	3rd Voice Recognition Training (512-27DC4).
22-26 October	55th Federal Labor Relations Course (5F-F22).
22-26 October	2001 USAREUR Legal Assistance CLE (5F-F23E).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

5-8 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E). **(This course is tentatively rescheduled for February 2002).**

December 2001

3-7 December	2001 Government Contract Law Symposium (5F-F11).
3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
10-14 December	4th Fiscal Law Comptroller Accreditation Course—Hawaii (Tentative) (5F-F14).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
6-18 January	2002 JAOAC (Phase II) (5F-F55).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7-18 January	4th Voice Recognition Training (512-27DC4).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
14-18 January	2002 USAREUR Tax CLE (5F-F28E).
23-25 January	8th RC General Officers Legal Orientation Course (5F-F3).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	2nd Closed Mask Training (512-27DC3).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2002 Maxwell AFB Fiscal Law Course (**Tentative**) (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).
25 February-26 April	7th Court Reporter Course (512-27DC5).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).
18-22 March	4th Contract Litigation Course (5F-F103).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

15-18 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
22-26 April	4th Basics for Ethics Counselors Workshop (5F-F202).
22-26 April	13th Law for Legal NCOs Course (512-27D/20/30).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-7 June	5th Intelligence Law Workshop (5F-F41).

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Legal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-27DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

28 September ICLE	Selecting and Influencing Your Jury Sheraton Colony Square Hotel Atlanta, Georgia
15-19 October	Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia

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
Idaho	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	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	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2001 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 2001***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2002 ("2002 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 2001***. 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 2002 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2002 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 2002 JAOAC.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

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
8-9 Sep 01	Park City, UT		Western States Senior JAG Workshop	COL Mike Christensen (801) 523-4408 mchristensen@co.slc.ut.us
22-23 Sep 01	Pittsburgh, PA 99th RSC		Criminal Law; Adminstrative Law	LTC Donald Taylor (724) 693-2152 Donald.Taylor@usarc-emh2.army.mil
26-28 Oct 01	West Point, NY		Eastern States Senior JAG Workshop	COL Randall Eng
17-18 Nov 01	New York, NY 77th RSC		Administrative Law (Claims, Legal Assistance); International and Operational Law	MAJ Isolina Esposito (718) 352-5654
18-20 Nov 01	Alexandria, VA		LSO Commanders/RSC SJAs Workshop	
8-9 Dec 01	Charleston, SC 12th LSO/SCARNG		Criminal Law (Administrative Separation Boards); Operational Law; Law of War; Ethics Tape	MAJ John Carroll (803) 751-1223 john.carroll@se.usar.army.mil
5-6 Jan 02	Long Beach, CA 63rd RSC		Operational Law; Operations other than War; Administrative Law (Legal Assistance)	CPT Paul McBride (760) 634-3829 ncsdlaw@pacbell.net
2-3 Feb 02	Seattle, WA 70th RSC/WAARNG		Administrative Law (Legal Assistance); Criminal Law	LTC Greg Fehlings (206) 553-2315 Gregory.e.fehlings@usdoj.gov
23-24 Feb 02	West Palm Beach, FL 174th LSO/FLARNG		Criminal Law (Administrative Separation Boards); Operational/Deployment Law; Ethics Tape	LTC John Copelan (305) 779-4022 john.copelan@se.usar.army.mil
8-10 Feb 02	Columbus, OH 9th LSO		Operational Law; Law of War; Administrative Law	SSG Lamont Gilliam (614) 693-9500
16-17 Feb 02	Indianapolis, IN INARNG		Criminal Law; Administrative Law	LTC George Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
2-3 Mar 02	Denver, CO 96th RSC/87th LSO		Administrative Law (Legal Assistance/Claims)); Criminal Law	LTC Vince Felletter (970) 244-1677 vfellett@co.mesa.co.us
9-10 Mar 02	Washington, DC 10th LSO		Operational Law; Contract Law	CPT James Szymalak (703) 588-6750 James.Szymalak@hqda.army.mil
9-10 Mar 02	San Mateo, CA 63rd RSC/75th LSO		International Law (Information Law); Contract Law; Ethics Tape	MAJ Adrian Driscoll (415) 274-6329 adriscoll@ropers.com
16-17 Mar 02	Chicago, IL 91st LSO		Administrative Law (Claims)	MAJ Richard Murphy (309) 782-8422 DSN 793-8422 murphysr@osc.army.mil

12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC		Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
15-18 Apr 02	Charlottesville, VA OTJAG		Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO		Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov
27-28 Apr 02	Newport, RI 94th RSC		Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil
4-5 May 02	Gulf Shores, AL 81st RSC/ALARNG		Criminal Law (Administrative Separation Boards); Administrative Law (Legal Assistance); Ethics Tape	MAJ Carrie Chaplin (205) 795-1516 carrie.chaplin@se.usar.army.mil

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

For a complete listing of TJAGSA Materials Available through DTIC, see the March 2001 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the March 2001 issue of *The Army Lawyer.*

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

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

b. Access to theJAGCNet:

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

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

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

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

(d) FLEP students;

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

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

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads “Enter JAGCNet.”

(b) If you already have a JAGCNet account, and know your user name and passwor, select “Enter” from the next menu, then enter your “User Name” anbd “password” in the appropriate fields.

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

(d) If you do not have a JAGCNet account, select “Register” from the JASGCNet Intranet menu.

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

(f) Once granted access to JAGCNet, follow step (b), above.

5. Articles

The following information may be useful to judge advocates:

Inbau, Fred E., *Some Avoidable Lie-Detector Mistakes*, 30 POLYGRAPH 98 (2001).

Inbau, Fred E., *Scientific Evidence in Criminal Cases II. Methods of Detecting Deception*, 30 POLYGRAPH 101 (2001).

Lacey, Major Michael, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293 (2000)

Maravilla, Christopher Scott, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in* Prosecutor v. Kunarac, Kovac, & Vokovic *on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (Spring 2001).

6. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2001 issue of *The Army Lawyer.*

7. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

8. The Army Law Library Service

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

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

9. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2001. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

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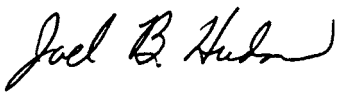

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