NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination

Lieutenant Colonel Michael E. Smith
Editor, Captain Gary P. Corn
Technical Editor, Charles J. Strong

*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $29 each ($36.25 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General’s School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

*The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil or on 3 1/2” diskettes to: Editor, *The Army Lawyer*, The Judge Advocate General’s School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. Articles should follow *The Bluebook, A Uniform System of Citation* (17th ed. 2000) and *Military Citation* (TJAGSA, July 1997). Manuscripts will be returned upon specific request. No compensation can be paid for articles.

*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or electronic mail to charles.strong@hqda.army.mil.

Issues may be cited as *Army Law*. [date], at [page number].
NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?
Lieutenant Colonel Michael E. Smith

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

Legal Assistance Note (Payday Loans: The High Cost of Borrowing Against Your Paycheck; Gulf War Syndrome Sub Judice) .................................................................................................................... 23

Reserve Component Note (New Rights for Reserve and National Guard Soldiers Suffering Heart Attack or Stroke)............ 28

The Art of Trial Advocacy
Faculty, The Judge Advocate General's School, U.S. Army

Effective Motions Practice ..................................................................................................... 30

USALSA Report
United States Legal Services Agency

Environmental Law Division Notes

DOD Range Rule Withdrawn With a View Towards Reproposal .................................................................................................................... 33

New Executive Order on Trial Consultation ........................................................................ 33

NEPA and Cumulative Impacts Analysis ........................................................................... 35

Army Environmental Center Prepares Guidance on Fuel Tanker Trucks ......................... 37

Litigation Division Note


Note from the Field

A Practitioner’s Note on Physical Evaluation Boards ............................................................. 49
Captain Thaddeus A. Hoffmeister

CLE News ........................................................................................................................................ 57

Current Materials of Interest .................................................................................................. 62

Individual Paid Subscriptions to The Army Lawyer .............................................................. Inside Back Cover
NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?

Lieutenant Colonel Michael E. Smith  
Operational Law Attorney  
Office of The Judge Advocate General  
International and Operational Law Division

Introduction

Operation Allied Force, the recent North Atlantic Treaty Organization (NATO) intervention in the Federal Republic of Yugoslavia (FRY), relied solely on air power to force Slobodan Milosevic’s troops out of Kosovo. No NATO ground forces were used. There were, however, ground troops deployed in Kosovo that were fighting the FRY forces; the Kosovo Liberation Army (KLA) was fighting for an independent Kosovo.

This article examines the KLA and its relationship with NATO during the two months of fighting. On several occasions during the war, NATO forces apparently supported, either directly or indirectly, the KLA in its battles with FRY forces. If NATO forces provided assistance to the KLA, a rebel force within the sovereign state of Yugoslavia, it may have violated traditional understandings of the United Nations (UN) Charter and committed unlawful aggression against Yugoslavia.

Customary international law permitted unilateral humanitarian intervention to protect nationals and even non-nationals, under some circumstances. The majority view is that the UN Charter replaced this customary law and now prohibits such intervention. Some believe that humanitarian intervention is still permitted and will not run afoul of Article 2(4), so long as the intervention does not affect the “territorial integrity” or “political independence” of the state against which the humanitarian intervention is directed.1 The intervention in Kosovo is unique in that it was not a unilateral action, but action initiated by a regional organization, after the UN had addressed the matter and failed to authorize the use of force. Further, while NATO’s primary purpose was humanitarian, it de facto supported the KLA’s fight for independence from the FRY.

This article begins by examining the history of the KLA and why it sought to secede from Yugoslavia. It next discusses NATO’s legal basis for intervening in Kosovo and the conduct of the war, focusing on NATO’s relationship with the KLA. The article then provides a legal analysis of intervention in civil wars, starting with an examination of the traditional rule of non-intervention, to include a look at the International Court of Justice’s decision in the Nicaragua case. It discusses self-determination and Article 2(4) of the UN Charter and, after demonstrating that a right of self-determination exists under the UN Charter, the article explores the following issues: when the right to secede arises; whether the situation in Kosovo justified the KLA’s demand for secession; whether it was lawful for NATO to assist the KLA in its fight for independence; the role that the humanitarian crisis in Kosovo played in NATO’s intervention; and, finally, the enduring impact of NATO’s intervention in Kosovo.

This article posits that NATO—acting without UN authorization—did not violate the UN Charter by using force against Yugoslavia. NATO’s tenous military support to the KLA, which was fighting for an independent Kosovo, was perfectly legitimate. However, NATO’s refusal to characterize honestly its actions actually undermined the rule of law, exacerbated the suffering of the people it was trying to help, and set a damaging precedent for intervention in future civil wars. From the beginning, NATO should have stated that the government of Yugoslavia illegally and systematically denied the Albanian Kosovars their right of self-determination. As a result of NATO’s failure to make such a statement early on, the Albanian Kosovars, through the KLA, rebelled, fought for independence, successfully captured substantial territory in Kosovo and freely elected their own government. It was not until this point that NATO intervened and came to the Albanian Kosovars’ assistance in their pursuit of the UN Charter’s bedrock principle of self-determination. NATO’s biggest mistake was its failure to provide the KLA with more support, more quickly. Doing so could have greatly reduced the suffering of the Albanian Kosovars.

The Kosovo Liberation Army: Background and Beliefs2

For 800 years, since the beginning of the Ottoman Empire, control of Kosovo has shifted back and forth between the Albanians and the Serbs.3 This continued until 1913 when the Serbs

---

2. In January 1999, weeks before NATO’s intervention in Kosovo, Professor Julie A. Mertus of Ohio Northern University Law School completed a timely and scholarly history of Kosovo. Her book successfully dispels many myths about the roots of conflict in Kosovo and clarifies some misconceptions. The central myth is that: “Although tensions between Serbs and Albanians have long existed, the war in Kosovo was not preordained by ancient hatreds. Rather, the war was ignited by more recent storytelling.” Julie A. Mertus, Kosovo: How Myths and Truths Started a War 22 (1999). “[T]he conflict was propelled through media propaganda and political hate speech. These orchestrated efforts were successful at instilling a sense of fear and victimization.” Id. at 262.
proclaimed Kosovo their fatherland. The Serbs initially lost their foothold in Kosovo in 1689 when they failed to free themselves from Ottoman rule:

Fearing murderous reprisals, the Serbian archbishop of Pec led some 30,000 Serbian families into exile in Hapsburg-ruled southern Hungary, where their descendants live to this day. Henceforth the Albanians in Kosovo (as the region is known in their language), favored by the Ottomans as loyal Muslims, rose to demographic predominance.

It was not until the Balkan War of 1912 that the Serbs successfully conquered and annexed Kosovo. The Serbs wreaked terrible violence on the Muslim Albanians. The Albanians got their revenge during World War II, however, when the Nazi’s raised a Waffen SS division of Kosovar Muslims whereby “[m]urderous attacks on Serbs were carried out . . . .”

Having lost their fight to remain independent from Yugoslavia after World War II, some 250,000 Albanians fled Kosovo to escape the discriminatory, colonial Serb rule. Finally, in 1968, after violent Albanian demonstrations, Tito granted Kosovo wide-ranging autonomy. The stage was then set for the rise of Serb nationalists in the 1980s and the arrival of Slobodan Milosevic.

Until 1989, Kosovo was one of two autonomous provinces in the Federal Republic of Yugoslavia. This autonomy ended in 1989 when the newly-elected Serbian leader Slobodan Milosevic established virtual martial law in Kosovo, changed the constitution, and took away Kosovo’s autonomy. In 1991, with the break up of Yugoslavia, the Kosovar assembly saw an opening and voted for independence.

3. See Michael P. Scharf & Tamara A. Shaw, International Institutions, 33 Int’l. Law. 567, 573-75 (1999) (citations omitted); see also William W. Hagen, The Balkans’ Lethal Nationalisms, Foreign Affairs, July/Aug. 1999, at 53. “[T]he Balkan states were all born in the nineteenth and early twentieth centuries as irredentist nations—that is, as nations committed to the recovery of their ‘unredeemed’ national territories. Their legitimacy rested entirely on their ability to embody the national ‘imagined community.’” Id.

4. See Scharf & Shaw, supra note 3, at 573-75; see also Hagen, supra note 3, at 56 (describing Kosovo as the “cradle of the medieval Serbian monarchy”).

5. Hagen, supra note 3, at 57.

6. Id. at 57-58.

7. Id. at 58.

8. Id.

9. Id.

10. Id.

11. See MERTUS, supra note 2, at 29-46 (discussing the 1981 student demonstrations). What started as a small demonstration for better cafeteria food spread across Kosovo and turned into demands for better conditions for Albanians in Kosovo. As the unrest grew larger, allegations of outside influences and conspiracies abounded and the confrontations grew violent. “According to both Kosovo Serbs and Albanians, 1981 was the year in which many previously harmonious relationships between members of different groups grew sour or broke off completely.” Id. at 41. Professor Mertus concluded: “[O]ver the next eight years, 584,373 Kosovo Albanians—half the adult population—would be arrested, interrogated, interned or remanded. Albanians would not only lose their demand for a Kosovo republic—they would lose their status under the 1974 Constitution. And Yugoslavia would be lost altogether.” Id. at 46.


13. Slobodan Milosevic was elected President of Serbia on 9 December 1990. MERTUS, supra note 2, at 299.


15. See Hagen, supra note 3, at 59; see also MERTUS, supra note 2, at xviii (“The break-up of Yugoslavia, [the Kosovo Albanians] contend, threw open all questions of sovereignty within Yugoslavia, and Albanians living in Kosovo have voted for autonomy and established their own government.”). Professor Mertus ties these critical events together:

After the Serbian Constitution of 1990 revoked the autonomous status of Kosovo, Albanians protested the changes as illegal acts, arguing further that since the old Yugoslavia no longer existed, Kosovars could choose their fate. In 1991, in a popular referendum not recognized by Serbia, Kosovars voted to separate from Serbia. Ibrahim Rugova was elected president of an independent Kosova, but the elections were branded illegal by the Serbian regime and went unrecognized by any government other than Albania’s.

Id. at 269.
Around this time, Ibrahim Rugova, the popular leader of the Albanian Kosovars, promoted a pacifist, non-violent response to Serbian repression.16 This approach was not shared by all in Kosovo because, beginning in 1996, the KLA emerged and claimed responsibility for a series of bomb attacks against Serbs.17

The political views of the KLA have been described as having “hints of fascism on one side and whiffs of communism on the other.”18 Beginning in January 1997, the KLA stepped up its bombing campaign19 and, during the summer of 1998, it grew stronger.20 Originally, the group’s numbers were small, “but by July 1998, the KLA enjoyed widespread popular support across Kosovo and controlled roughly one third of the territory.”21

In May 1998, U.S. envoy Richard Holbrook brought Milosevic and Rugova together for peace talks, but the fighting continued.22 The presence of the KLA and their violent attacks on Serbian police gave Milosovic the justification he needed for the ensuing vicious attacks on Albanian Kosovars. In the summer of 1998, Milosovic repeated history and used the Yugoslav Army and the Interior Ministry to force over 800,000 ethnic Albanians from Kosovo into Albania, The Former Yugoslav Republic of Macedonia (FYROM), and Montenegro.23 In June 1998, however, UN Secretary General Kofi Annan warned NATO that it must obtain a Security Council mandate prior to any military intervention in Kosovo.24

### NATO Enters the War

#### Legal Basis

On 24 March 1999, NATO began its bombing campaign and Operation Allied Force was underway. The following discussion outlines the legal theory upon which NATO relied to justify its use of force against Yugoslavia.

Article 1 of the North Atlantic Treaty mirrors Article 2(4) of the UN Charter in that it obligates member states “to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.”25 The heart of the Treaty is contained in Article 5, which mirrors Article 51 of the UN Charter.26 Although Article 5 provides for the collective self-defense of all member states, the only NATO member state even close to Kosovo is Greece,27 and it is separated from Kosovo by FYROM. Therefore, NATO did not rely on collective self-defense to justify its use of force.

At the same time NATO warplanes were bombing Yugoslavia, the 50th Anniversary NATO Summit was taking place in Washington, DC. On 24 April 1999, NATO released the “Alliance’s Strategic Concept,”28 Paragraph 6 of which states: “Based on common values of democracy, human rights and the rule of law, the Alliance has striven since its inception to secure a just and lasting peaceful order in Europe.”29 However, Paragraph 11 states: “the Alliance will continue to respect the legitimate security interests of others . . . .”30 While Paragraph 6 seems to provide a rationale for NATO’s action in Kosovo, such action also appears to violate Paragraph 11.

---

16. On 24 May 1992, Ibrahim Rugova was elected President of the Republic of Kosovo with ninety-five percent of the vote. See Joseph S. Nye, Jr., Redefining the National Interest, FOREIGN AFFAIRS, July/Aug. 1999, at 33; see also MERTUS, supra note 2, at 301.
17. See Nye, supra note 16, at 33; see also MERTUS, supra note 2, at 307.
19. See MERTUS, supra note 2, at 307-08 (providing a chronology of key KLA attacks and Serbian responses).
21. Id. at 462 (citation omitted); see also MERTUS, supra note 2, at 308.
22. MERTUS, supra note 2, at 308.
23. See Galbraith, supra note 12, at 598 (postulating additional motivating factors) (“The prospect of removing ethnic Albanian civilians from areas containing mineral wealth and Orthodox Christian religious sites at least partially motivated the assault.”).
24. Id.
26. Id.
27. The other NATO members are: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom, and the United States. North Atlantic Treaty Organization, NATO Member Countries, at http://www.nato.int/structur/countries.htm (last modified Dec. 19, 2000).
Former Secretary-General of the North Atlantic Treaty Organization, Javier Solana, characterized the NATO operation in Kosovo as follows:

For the first time, a defensive alliance launched a military campaign to avoid a humanitarian tragedy outside its own borders. For the first time, an alliance of sovereign nations fought not to conquer or preserve territory but to protect the values on which the alliance was founded.31

Arguably, NATO bombed Yugoslavia to enforce its values against a non-member of NATO. Russia and China made it clear that they would oppose any military action in Kosovo.32 On 26 March 1999, Russia drafted a resolution that was supported by India and Belarus (only Russia, China and Namibia subsequently voted for the resolution) urging NATO to stop its use of force.33 At least one state opposing the resolution felt NATO had the authority to use force.

The representative of Slovenia, which was among the states opposing the resolution, made the key point that the Security Council does not have a monopoly on decision-making regarding the use of force. It has “the primary, but not exclusive, responsibility for maintaining international peace and security.”34

A few days before NATO started its bombing campaign in Kosovo, Mr. Douglas Dworkin, Principal Deputy Department of Defense (DOD) General Counsel, speaking at a Pacific Command (PACOM) Conference, outlined the U.S. justification for NATO’s use of force in Kosovo.35 While acknowledging that no U.N. resolution expressly authorized the use of force, and no traditional legal justification appeared to support the use of force, Mr. Dworkin instead provided a list of factors supporting the use of force:

(1) The United Nations Security Council (UNSC) might not be able to act effectively;
(2) There were some similar precedents for use of force by regional defense-type organizations (the Organization of American States during the Cuban Missile Crisis by concurring in the quarantine, and the Organization of Eastern Caribbean States approval of U.S. action in Grenada);
(3) There was, in fact, a threat to regional peace and security;
(4) The UN Security Council recognized this threat in UN Security Council Resolution 1199;
(5) NATO had a unique role to play in the Balkans, given its current involvement in Bosnia and general interest in peace and security in that region of the world;
(6) The decision to use force would be a multilateral one (by NATO), not unilateral;
(7) There was a tremendous threat for human catastrophe in Kosovo, which calls out for humanitarian intervention; and
(8) All of these factors coalesced in the Balkans, a very unique area representing a tinderbox which could explode and spread instability, insecurity, and conflict throughout the adjoining areas.36

On 23 March 1999, the day before the bombing campaign began, Samuel R. Berger, Assistant to the President for National Security Affairs, sent a letter to Senator Trent Lott, the Senate Majority Leader, outlining the President’s legal authority for using force:

The United States’ national interests are clear and significant. As the President stated in his October 6 letter to you, “Kosovo is a tinderbox that could ignite a wider European war

29. Id.
30. Id.
33. Id. at 105.
34. Id. (citation omitted).
36. Id.
with dangerous consequences to the United States.” This concern lies at the core of our analysis. As the President stated as recently as Friday, March 19, “this is a conflict with no natural boundaries. If it continues it will push refugees across borders, and draw in neighboring countries.” The special historical significance of the Balkans provides additional urgency for our concerns. The House reached this same conclusion on March 12, 1999, when it passed H. Con. Res. 42 finding that “[t]he conflict in Kosovo has caused great human suffering and, if permitted to continue, could threaten the peace of Europe.” The threat is particularly acute for neighboring NATO Allies, and NATO has also concluded that the use of force in this case would be justified. Not acting will undermine the credibility and effectiveness of NATO, on which the stability of Europe depends . . . .

. . . . NATO would be acting to deter unlawful violence in Kosovo that endangers the fragile stability of the Balkans and threatens a wider conflict in Europe, to uphold the will of the international community as expressed in various U.N. Security Council resolutions, as well as to prevent another humanitarian crisis, which itself could undermine stability and threaten neighboring countries . . . .

This justification appears to be a combination of self-defense and the fact-based factors provided by Mr. Dworkin. While Mr. Berger mentioned humanitarian intervention in passing, he still tied it directly to the resulting instability it would cause in the region, rather than arguing that it provided an independent moral basis for using force.

In June 1999, the Honorable Judith A. Miller, General Counsel of the Department of Defense, provided this justification for NATO’s use of force in Kosovo: “It was designed to terminate unlawful attacks on the civilian population, to defeat FRY’s threats to regional peace and stability, and to restart diplomatic and political efforts to resolve the crisis.” It is interesting to note that, unlike Mr. Berger, she listed humanitarian intervention first.

The British apparently believed that humanitarian intervention alone provided a sufficient justification for using force in Kosovo. In a June 2000 report to Parliament, Kosovo: Lessons from the Crisis, the Ministry of Defence wrote:

The nineteen NATO democracies had made every effort to find a diplomatic solution to the crisis, but NATO now had no choice but to act if a humanitarian catastrophe was to be prevented.

The report went on to state:

The UK was clear that the military action taken was justified in international law as an exceptional measure and was the minimum necessary to prevent a humanitarian catastrophe. All NATO Allies agreed that there was a legal base for action.

And finally, the British made it clear that they believed NATO could have acted with or without the UN approval:

We would have welcomed the express authorisation of the UN Security Council through a resolution before the NATO air campaign. This would have represented the strongest possible expression of international support. But discussions at the United Nations in New York had shown that such a resolution could not be achieved. Nevertheless, the UK and our NATO Allies, and many others in the international community, were clear that as a last resort, all other means of resolving the crisis having failed, armed intervention was justifiable in international law as an exceptional measure to prevent an overwhelming humanitarian catastrophe in Kosovo.

German Foreign Minister, Klaus Kinkel, relied on a “cluster of conditions,” which taken together, supported the use of force. Mr. Kinkel’s argument was similar to that of Secretary General Solana, who relied on the following relevant factors as justification:


40. Id. ch. 3.

41. Id. ch. 5.
(1) The failure of Yugoslavia to fulfill the requirements set out by [Security Council] Resolutions 1160 and 1199, based on Chapter VII of the UN Charter;

(2) The imminent risk of a humanitarian catastrophe, as documented by the report of the UN Secretary-General Kofi Annan on 4 September 1998;

(3) The impossibility to obtain, in short order, a Security Council resolution mandating the use of force; and

(4) The fact that Resolution 1199 stated that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region.43

French President Chirac somewhat relied on Resolution 1199 and its reference to Chapter VII action, but declined to emphatically state a position.44 The Italian’s at first seemed to argue that collective self-defense warranted the use of force, then later appeared to insist that Security Council approval was required.45

Clearly, the mere mention of Chapter VII in a UN resolution does not imply that force is authorized. This holds especially true when two permanent members of the Security Council—Russia and China—“accompanied their votes by legally valid declaratory statements spelling out that the resolutions should not be interpreted as authorising the use of force.”46 At least two authors, however, support NATO’s position that Resolution 1199 opened the door for the use of force, simply because it was based on Chapter VII:

Technically, the resolution can be interpreted to open the door for the use of military force because, while its text does not specifically address the threatening of force or set a deadline for compliance, it was adopted under Chapter VII of the U.N. Charter which permits military action to enforce compliance.47

Responding to an author critical of NATO’s intervention, James B. Steinberg, Deputy Assistant to the President for National Security Affairs, apparently relied on humanitarian intervention, rather than Resolution 1199 and its Chapter VII implications:

Since NATO fought on behalf of the [Albanian Kosovars] while embracing the Serb-backed view that Kosovo should remain part of Serbia, [Michael Mandelbaum] claims that NATO’s effort was an incoherent failure. But NATO did not go to war in Kosovo over any principle of sovereignty. NATO fought to end Serb repression in Kosovo and to protect southeastern Europe from its consequences.48

One author further argued that Kosovo, which combined civil war and genocide, illustrates the intersection of international human rights law and humanitarian law.49 She asserted that “increasingly, they [humanitarian interventions] give primacy to human rights over the sovereignty of states when the two principles conflict.”50

42. See Catherine Guicherd, International Law and the War in Kosovo, 41 INT’L INST. FOR STRATEGIC STUD. 20, 27 (1999). Mr. Kinkel’s conditions were:

[T]he inability of the Security Council to act in what was an emergency situation; the fact that a military threat was in the “sense and logic” of Resolutions 1160 and 1199 [although, he conceded, the latter did not provide direct legal ground]; and the particular high standards for the protection of human rights reached by European states in the [Organization for Security and Cooperation in Europe] context, in particular regarding the protection of minorities.

Id. (citation omitted).

43. Id. at 27-28.

44. Id. at 28.

45. Id. Eventually, the Italians simply stopped raising any objections and essentially acquiesced.

46. See id. at 26.


49. Guicherd, supra note 42, at 21. Catherine Guicherd is Deputy for Policy Coordination to the Secretary General at the NATO Parliamentary Assembly (formerly North Atlantic Assembly), Brussels.

50. Id. at 21-22.
As the previous discussion reveals, there was no single justification for NATO’s use of force in Yugoslavia upon which everyone could agree. Of particular note, not one NATO member ever argued that intervention was justified to help the Albanian Kosovars regain their right of self-determination from Yugoslavia.

Support to the KLA

In an interview with Azen Syla, a founding member of the KLA who sits on its central council, journalist Peter Finn of The Washington Post wrote less than a week after the start of the bombing campaign that the KLA “is facing imminent military defeat unless NATO airdrops heavy weaponry to help the guerrillas survive . . . .”\textsuperscript{51} NATO apparently ignored the rebel pleas for arms, reflecting U.S. skepticism of the KLA: “U.S. officials have said repeatedly that they do not want NATO warplanes to become ‘the KLA’s air force,’ even as they support the rebel group’s resistance to government repression.”\textsuperscript{52}

NATO was in a very delicate position. Its premise for starting the war was to stop the humanitarian crisis in Kosovo. The bombing campaign, however, had served to aggravate the suffering of ethnic Albanians in Kosovo. The only forces capable of stopping the Serbian attacks were the KLA.\textsuperscript{53} Once the Albanian government saw that the KLA was winning widespread support among Albanian Kosovars, it began to put pressure on the U.S. and NATO to supply arms to the KLA.\textsuperscript{54}

NATO’s hesitancy to embrace the KLA was based on several legitimate concerns. The KLA started as a terrorist organization, at times receiving support from Islamic fundamentalists in the Middle East.\textsuperscript{55} The U.S. Drug Enforcement Administration believed that “Turkish [drug] trafficking groups are using Albanians, Yugoslavs and elements of criminal groups from Kosovo to sell and distribute their heroin . . . .” These groups are believed to be a part of the financial arm of the [KLA’s] war against Serbia.”\textsuperscript{56} The KLA’s radical political views and desire to unify “Albanians in Kosovo, Albania and Macedonia in a greater Albanian state” also concerned NATO leaders. Further, if Western countries started supplying the KLA with arms, they might start a conventional arms race with the Russians supplying weapons to the Serbs. There was also evidence that the KLA was forcibly conscripting Albanian refugees into its Army.\textsuperscript{58}

As NATO contemplated the introduction of ground forces, it was being drawn into a closer relationship with the KLA, while publicly continuing to keep the KLA at arms length. KLA officials have denied receiving any significant assistance from NATO countries or from undercover Western special forces teams believed to be operating in Kosovo. But an indirect relationship between the two forces is emerging. Rebel officials conduct regular satellite telephone discussions with designated contacts about tactical and strategic military matters, and these contacts in turn relay helpful information to NATO’s target planning staff.\textsuperscript{59}

NATO’s reluctance to openly cooperate with the KLA and fully integrate them into its battle planning process frustrated the KLA leadership, apparently resulted in many lost targeting opportunities, and possibly prolonged the campaign. The principal impediment to closer military cooperation at this stage, sources report, is that NATO continues to use a cumbersome process for selecting its targets, involving advance planning and complicated logistical support. That fact, more than anything else,
is preventing KLA members from acting as spotters for Western warplanes. “Sometimes,” [Sokol] Bashota [a top official of the KLA’s political directorate] said, “they are doing the right thing and going to the right place, and sometimes not.”

On 25 April 1999, the normally secretive KLA took the unusual step of holding a press conference to “plead anew for a battlefield alliance with NATO.”

As the campaign moved into late May, the KLA appeared to be gaining ground against FRY forces. More recruits, weapons and ammunition were reaching KLA troops. One KLA official speculated that NATO countries were “closing one eye” to the rebels’ black market weapons purchases. Lieutenant General John W. Hendrix, commander of U.S. forces in Albania, stated: “They seem to have an endless supply of weapons and ammunition.”

Officially, NATO continued to deny they were cooperating with the KLA.

The subject of NATO’s cooperation with the rebels is sensitive, and details are not volunteered. But sources say that NATO war planners have been relying on scouting reports by KLA rebels inside Kosovo to direct airstrikes, and that members of the alliance have ignored some recent arms shipments to the KLA.

NATO commanders knew from their experiences in a previous Balkan bombing campaign that, to be successful, they must rely on ground observers for critical intelligence and infantry-to-infantry engagements.

The real lesson of those 1995 events [Operation Deliberate Force, the NATO bombing campaign against Serb targets in Bosnia] might be a very different one: that if NATO wants to have some effect, including through air-power, it needs to have allies among the local belligerents, and a credible land-force component to its strategy.

Additionally, NATO erred in ruling out the use of ground troops at the beginning of the campaign.

The initial exclusion of the option of a land invasion was the most extraordinary aspect of NATO’s resort to force . . . . [T]he initial exclusion of even the threat of a land option had adverse effects: in Kosovo, the FRY forces could concentrate on killing and concealment rather than defence, while in Belgrade the Yugoslav government could hope simply to sit out the bombing. Within the Alliance, creating at least a credible threat of

60. Id.


62. R. Jeffrey Smith, Training, Arms, Allies Bolster KLA Prospects, WASH. POST, May 26, 1999, at A25. Mr. Smith also notes that “here in Kukes there is ample evidence that the KLA’s recruitment activities, training and field operations are receiving at least tacit allied military assistance.” Id.

63. Id.


In conducting the air campaign against the forces in the field in Kosovo, we used every conceivable bit of information we could find. But we never had direct information from, cooperation or coordination with the KLA. We just kept our eyes and ears open, and what information was made available, what targets appeared, those we struck.

Id.


Although NATO troops are already stationed in Macedonia, and KLA spotters near the border are already providing NATO with intelligence critical to a safe deployment [of NATO ground troops] . . . . NATO is in close consultation with KLA commanders, who are providing NATO with some of the only on-the-ground information on the situation in Kosovo that the alliance receives . . . . The combination of increased NATO air strikes and the possibility of the KLA marking individual Serbian units on the ground—either to help guide NATO’s strikes, or to fight against them with anti-tank weapons and ammunition it has procured on its own—may serve to reduce the number of Serb military units still in Kosovo . . . .

Id.

a land option proved to be one of the most important and difficult tasks.67

The drastic increase in violence against ethnic Albanians in Kosovo after the bombing started put even more pressure on NATO commanders to do something to stop the killing. Without eyes and ears in Kosovo, it was obvious they could not stop the FRY forces with aerial bombing alone.

During a 27 May 1999 Pentagon briefing, Rear Admiral Thomas Wilson, the top intelligence officer for the Joint Chiefs of Staff, stated: “NATO warplanes are targeting Yugoslav mechanized armor and heavy weapons on the ground in part to ‘level the playing field’ between the secessionist militia and its adversaries.”68 Admiral Wilson reiterated that the “KLA is not a partner in the war . . . .”69 Pentagon spokesman Kenneth Bacon clarified that Admiral Wilson was not implying a new relationship with the KLA:

He just stated the obvious, which is that after 64 days of pounding, the [Serb forces] have been diminished in their capability . . . . [O]ur goal has never been to empower the KLA to create more fighting. Our goal has been to end fighting in Kosovo.70

Mr. Bacon’s statement seems to contradict the statement by the Chairman of the Joint Chiefs of Staff concerning the mission of the Kosovo campaign:

Diplomacy and deterrence having failed, we knew that the use of military force could not stop Milosevic’s attack on Kosovar civilians, which had been planned in advance and already was in the process of being carried out. The specific military objectives we set were to attack his ability to wage combat operations in the future against either Kosovo or Serbia’s neighbors. By weakening his ability to wage combat operations, we were creating the possibility that the military efforts of the [Albanian Kosovars], which were likely to grow in intensity as a result of Milosevic’s atrocities in Kosovo, might be a more credible challenge to Serb armed forces.71

A plain reading of the Chairman’s comments reveals a specific intent to assist the KLA in their war against the Yugoslav Army. There was no mention of humanitarian intervention. It appears that the intent was indeed “to empower the KLA to create more fighting.”

On 2 June 1999, in a front page story, The Washington Post revealed that, contrary to Admiral Wilson’s assertion above, the KLA and NATO were in fact partners in the war. Dropping all previous pretexts, NATO warplanes provided coordinated air support to a massive KLA offensive called Operation Arrow.72 NATO and the Clinton administration have denied helping the KLA directly . . . . But U.S. intelligence officials said NATO responded last week to “urgent” KLA pleas for air support to rebuff a Serb counterattack on Mount Pastrik just inside Kosovo. The bombings marked the first known air support by NATO aircraft for the Kosovo rebels.”73

The Pentagon continued to deny a direct link between NATO’s air strikes and the KLA, but KLA official Visa Reka, when asked whether NATO and the KLA were coordinating strategies replied: “I wouldn’t say coordination. I would say that NATO is following with much more care and interest [in] what is happening.”74 The story noted that NATO and KLA forces routinely talked to each other on the telephone, NATO regularly monitored KLA communications, and the KLA kept NATO informed of its positions.75

67. Id. at 112.


69. Id.

70. Id.


73. Id.

74. Id.

75. Id.
The decisive battle of the war occurred on 7 June 1999 on Mount Paštrović. Two days after this devastating NATO air strike, Yugoslav generals signed an agreement that eventually ended the campaign.76 The KLA had been fighting its way down Mount Paštrović for several days, attempting to establish a new supply line.77 Serbian forces were massed on the Kosovo side of the mountain, successfully stalling the KLA assault. The KLA called in the Serbian positions to NATO, and U.S. B-52 and B-1 bombers delivered the decisive blow.78

It seems fairly clear that NATO provided indirect and direct military support to the KLA in its war for independence from Yugoslavia. Whether the KLA used NATO or NATO used the KLA, the result was a victory for the KLA and another messy, long-term Balkan entanglement for NATO and the United States.

**Intervention in Civil Wars**

*Traditional Rule v. Intervention: The Nicaragua Case and Other Civil War Examples*

[The combined right of victims to assistance and the right of the Security Council to authorise humanitarian intervention with military means do not amount to a right of humanitarian intervention by states, individually or collectively. Indeed, the overwhelming majority of international lawyers consider that such a right cannot be recognised because it would violate the [UN] Charter’s prohibition of the use of force. This prohibition would hold even in the case in which international law recognises most clearly the absolute character of the rights protected, that is humanitarian law.79

This quote succinctly states the traditional rule regarding the use of force to intervene in a civil war setting like Kosovo. It is prohibited. The Charter prohibition referred to in the quote is contained in Article 2(4), which states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes80 of the United Nations.81

In Kosovo, NATO used force to intervene in the internal affairs of a sovereign nation. Whether intended or not, NATO’s intervention assisted ethnic minority fighting for independence.82 It appears to have violated the traditional rule.

Javier Solana, the Secretary-General of NATO at the time, recognized this was a violation of Article 2(4), but felt that an exception was in order:

> The ACTORD83 of October 1998 had already raised the difficult issue of whether NATO could threaten the use of force without an explicit Security Council mandate to do so. The allies agreed that NATO could—for it had become abundantly clear that such a step was the only likely solution. It was equally clear, though, that such a step would constitute the exception from the rule, not an attempt to create new international law.84

It would appear that no further analysis is required. The UN Charter clearly prohibits the unauthorized use of aggression to intervene in the affairs of a sovereign state. There exists in the Charter, however, another equally important purpose: respect for human rights and the self-determination of peoples.85 The UN expanded on these principles in the form of two important resolutions. In 1970, the UN General Assembly released the Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance...
with the Charter of the United Nations (Resolution 2625).86 Considered to be the authoritative statement of the right to self-determination, Resolution 2625 states that “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development . . . .”87 Resolution 2625 imposes a duty on every state to “promote, through joint and separate action, realization”88 of self-determination and authorizes the subjugated peoples to “seek and to receive support in accordance with the purposes and principles of the Charter.”89 As one author notes:

The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case. Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter.90 It would appear that Resolution 2625 supports NATO’s intervention in Kosovo. What once was a general principle contained in the UN Charter, has now been elevated to the level of a fundamental human right, that is, “self-determination and the correlative prohibition of States using force to deprive peoples of that right.”91 The problematic prohibition of unlawful aggression, however, remains.

In 1974, the UN General Assembly issued its “Definition of Aggression,” Resolution 3314.92 Resolution 3314, Article 3, prohibits “[t]he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”93 This language seemingly prohibited Operation Allied Force. Article 7 of Resolution 3314, however, states that nothing in Article 3 “could in any way prejudice the right of self-determination . . . of peoples forcibly deprived of that right . . . nor the right of these peoples to struggle to that end and to seek and receive support . . . .”94 One author sums up the conflict this way:

An apparent inconsistency therefore exists under Resolutions 3314 and 2625. Certain peoples have the right to overthrow repressive regimes and to receive some degree of external assistance in achieving self-determination, as viewed from the perspective of those peoples. Yet such external “support” provided by a state must conform to the general prohibition on interfering with the territorial integrity and political independence of another state. The apparent inconsistency really can only be resolved by returning to the basic Charter purposes that originally contemplated self-determination and state sovereignty as being mutually reinforcing principles. Any other formulation would effectively embrace one of the principles to the exclusion of the other. Therefore, if the right to receive support in seeking self-determination is to retain any meaning under Resolutions 3314 and 2625, certain forms of external assistance that are otherwise defined as direct or indirect aggression may be permissible if they are provided in support of a people struggling for self-determination.95

85. See U.N. CHARTER art. 1, para. 2; see also Captain Benjamin P. Dean, Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model, 122 MIL. L. REV. 149, 151 (1988) (noting that: “In light of the Charter’s stated purposes, these two principles were designed to be mutually reinforcing. In the context of insurgencies and national liberation movements, striking the balance between these has become a continuing source of controversy within the international legal community.”).


87. Id.

88. Id.

89. Id.

90. Dean, supra note 85, at 153-54 (footnotes omitted).


93. Id.

94. Id.

95. Dean, supra note 85, at 166 (footnotes omitted).
In light of these two resolutions, one might ask if there is in fact a traditional rule of non-intervention. As this article will demonstrate, intervention in civil wars on the side of rebel insurgents has a long history of acceptance in international law.96

**Civil War**

*Americans should be very wary about intervention in civil wars over self-determination. The principle is dangerously ambiguous; atrocities are often committed by activists on both sides and the precedents can have disastrous consequences.*97

This warning concerning our involvement in Kosovo went unheeded for many reasons. The primary reason was the natural affinity of Americans for helping people fight off the yoke of oppression and win independence.98 American history promotes this belief.99 There is a valid concern, however, that anarchy will reign if every ethnic minority within every sovereign state fights for independence.100 How does one determine which civil wars are legal and which are not? When, if ever, can a third state use force to intervene on behalf of a rebel insurgent group? There is no clear-cut test.

Some authors have developed criteria for determining when a third-party state can use force to support a rebel insurgency.101 Others have proposed standards for the initiation of hostilities in support of governments facing rebel insurgents.102 One author identifies the central problem as follows:

> This issue of who is a proper subject for protection as a “people” paradoxically has become an obstacle to constructive efforts at ensuring self-determination and humane treatment of peoples. As the law struggles to distinguish between popular democratic movements and radical opposition groups, the labels “freedom fighter” and “terrorist” have become interchanged carelessly. The same 1985 General Assembly resolution that reaffirmed the right of self-determination also purported to condemn all acts of terrorism as criminal conduct. The Resolution is widely viewed, however, as permitting an exception for terrorist violence in national

---

96. See Moore, supra note 1, at 122 (noting that the Organization of African Unity and the Arab League openly support national liberation movements, believing that regional assistance to insurgent groups for the purpose of restoring self-determination is not “enforcement action” requiring Security Council authorization. Professor Moore, however, states that “the prevailing view seems to be that, absent United Nations authorization, assistance to insurgent groups is unlawful.”).


98. See Baggett, supra note 20, at 457.

99. See Townsend Hoopes & Douglas Brinkley, FDR and the Creation of the U.N. 104 (1997) (writing about FDR’s discussions with Stalin regarding a Baltic states plebiscite) (“He [FDR] wanted Stalin to understand the great importance the American people attached to the idea of self-determination.”).


It is true that old-fashioned state sovereignty is eroding—both de facto, through the penetration of national borders by transnational forces, and de jure, as seen in the imposition of sanctions against South Africa for apartheid, the development of an International Criminal Court, and the bombing of Yugoslavia over its policies in Kosovo. But the erosion of sovereignty is a long-term trend of decades and centuries, and it is a mixed blessing rather than a clear good. Although the erosion may help advance human rights in repressive regimes by exposing them to international attention, it also portends considerable disorder. Recall that the seventeenth-century Peace of Westphalia created a system of sovereign states to curtail vicious civil wars over religion. Although it is true that sovereignty stands in the way of national self-determination, such self-determination is not the unequivocal moral good it first appears. In a world where there are some two hundred states but many tens of thousands of often overlapping entities that might eventually make a claim to nationhood, blind promotion of self-determination would have highly problematic consequences.

**Id.**

101. See Dean, supra note 85, at 162.

As to the status of entities other than states that might be able to assert rights under international law, a group in armed opposition to an established government traditionally could rise to the status of belligerent only if it met certain defined criteria. Thus, classified, it could then assert an international status that imposed a legal requirement of neutrality on third states in their relations with the two combatants. These prerequisites for belligerent status included: (1) a well-organized opposition group; (2) conventional military operations conducted in compliance with the law of war; and, (3) de jure or de facto control over an identifiable portion of the territory or population.

**Id.** (citations omitted).

102. See Moore, supra note 1, at 140-44. Professor Moore provides standards for various factual scenarios. For example: military assistance to a widely recognized government—both prior to insurgency and after insurgency is reached; intervention for the protection of human rights; impermissible assistance to a faction challenging the authority structure of a state; and assistance to offset impermissible assistance to insurgents.
The question remains: Could NATO have intervened with force in Kosovo solely to assist the KLA in its fight for an independent Kosovo?

The Montevideo Convention on Rights and Duties of States, written in 1933 and adopted by the Seventh International Conference of American States, lists four requirements that are considered the customary characteristics of statehood in modern international law: “a permanent population, a defined territory, [a] government, and a capacity to enter into relations with other States.” Ted Bagget argued that the Albanian Kosovars met all four of the requirements and that the UN or NATO should have intervened to help them win independence. Mr. Bagget relied on two distinguished international legal scholars, Bryan Schwartz and Susan Waywood, to support his argument. Schwartz and Waywood posed fourteen criteria for determining whether repressed minorities can assert their right to self-determination. Mr. Baggett concluded that Kosovo satisfied most of the requirements under the Schwartz-Waywood analysis. The Schwartz-Waywood concept of self-determination is based on a belief that “individuals do not exist to serve the state, but governmental structures exist to serve individuals.” They proposed the following standard:

In general, the population of part of an existing state only has a unilateral right to self-determination in the form of sovereign statehood when it is clear that the existing state has engaged in the serious denial of these basic rights, and there is no realistic possibility that these rights can be honored within a reasonable time frame by less drastic means such as limited self-government within the existing state.

Kosovo satisfied the standard articulated by Schwartz and Waywood. In March 1989, Serbia rewrote its constitution, stripping Kosovo of its autonomy. In December of the following year, Milosevic was elected president of Yugoslavia. Thus began years of oppression, violence and subjugation. The Albanian Kosovars had tried “less drastic means” of regaining their self-determination for over eight years. Finally fed up with the situation, the KLA began to implement more drastic means. They gained support, got stronger, and eventually forced Milosevic to resort to all out war in Kosovo. Applying the Schwartz-Waywood standard, the Albanian Kosovars were fully justified in exercising their right to fight for an independent Kosovo under these circumstances. This conclusion is further supported, noted Mr. Baggett, by the way Kosovo was treated following the Yugoslavia breakup:

The question that needs to be asked is why Kosovo was treated differently from other provinces in the former Yugoslavia. The other provinces, now states, asserted similar claims to the right of self-determination. Intervention was utilized for every other former province of Yugoslavia that has now been established as a separate nation. Why is it that Slovenia, Croatia, FYROM, and Bosnia and Herzegovina are entitled to nationhood and Kosovo is not?

While the Albanian Kosovars may have been justified in exercising their right to fight for an independent Kosovo, popular support for the KLA quickly eroded after the war. If an election was held in the fall of 1999, Ibrahim Rugova, the moderate Albanian leader who led the passive resistance campaign against the Serbs, would have won with ninety-two percent of

103. Dean, supra note 85, at 161. The resolution referred to is Resolution 2625.


105. Id. at 471-72.

106. Id. at 472-73 (citing Bryan Schwartz & Susan Waywood, A Model Declaration on the Right of Succession, 11 N.Y. Int’l L. Rev. 1 (1998)).

107. Id. at 474.

108. Id. at 472-73.

109. Id. at 473 (citation omitted).

110. See Mertus, supra note 2, at 295-96.

111. Id. at 297.

112. Baggett, supra note 20, at 474 (citations omitted). Mr. Baggett notes that the most common argument against an independent Kosovo is the fear of a “Greater Albania.” The KLA announced at one point that they were “fighting for the liberation of all occupied Albanian territories . . . and their unification with Albania.” Id. at 475. He makes the valid point that there is no evidence that all ethnic Albanians in the surrounding Baltic countries support this idea.

the vote against Hashim Thaçi, the political leader of the
KLA.\textsuperscript{114} The KLA’s arrogant power grabs after the war, to
include installing their people in local leadership positions,
angered and alienated many Albanians.\textsuperscript{115}

If the KLA did not have widespread support among Alba-
nian Kosovars, then arguably they were just a terrorist organi-
zation, and NATO’s de facto military support for the KLA,
therefore, would have been illegal. However, before and during
the bombing campaign the KLA did have widespread support.
Its forces held up to one third of the Kosovo territory, and Kos-
ovo Albanians had declared their independence and even held
their own elections.\textsuperscript{116} Clearly, the KLA had risen to the level
of a legitimate rebel force and they met the standards to be con-
sidered an insurgent group, rather than a mere terrorist organi-
zation.

\textit{The Nicaragua Case}

The principle of non-intervention involves
the right of every sovereign State to conduct
its affairs without outside interference; though examples of trespass against this
principle are not infrequent, the Court consi-
ders that it is part and parcel of customary
international law. . . . “Between independent
States, respect for territorial sovereignty is
an essential foundation of international rela-
tions. “\textsuperscript{117}

This is the International Court of Justice’s (ICJ) statement of
the traditional view of non-intervention in \textit{Nicaragua v. United
States}. The ICJ went on to find that:

[T]he support given by the United States, up
to the end of September 1984, to the military
and paramilitary activities of the contras in
Nicaragua, by financial support, training,
supply of weapons, intelligence and logistic
support, constitutes a clear breach of the
principle of non-intervention.\textsuperscript{118}

By a twelve to three vote, the ICJ rejected the U.S. collective
self-defense justification for its intervention.\textsuperscript{119} In his dissent,
Judge Schwebel disagreed with the majority holding that the
U.S. unlawfully intervened in Nicaragua.\textsuperscript{120} Nevertheless,
applying Judge Schwebel’s rationale to the Kosovo scenario,
customary international law would prohibit NATO’s interven-
tion in Kosovo. Judge Schwebel wrote:

In contemporary international law, the right
of self-determination, freedom and indepen-
dence of peoples is universally recognized.
[T]he right of peoples to struggle to achieve
these ends is universally accepted; but what
is not universally recognized and what is not
universally accepted is any right of such peo-
lies to foreign assistance or support which
constitutes intervention. That is to say, it is
lawful for a foreign State or movement to
give to a people struggling for self-determi-
nation moral, political and humanitarian
assistance; but it is not lawful for a foreign
State or movement to intervene in that strug-
gle with force or to provide arms, supplies
and other logistical support in the prosecu-
tion of armed rebellion. This is true whether
the struggle is or is proclaimed to be in pursu-
ance of the process of decolonization or
against colonial domination.\textsuperscript{121}

At least one author, Anthony D’Amato, has caustically crit-
icized the ICJ’s \textit{Nicaragua} opinion for its analysis of customary
international law:

[T]he Nicaragua case was not forged out of
the heat of adversarial confrontation.
Instead, it reveals the judges of the World
Court deciding the content of customary
international law on a \textit{tabula rasa}. Sadly, the
Judgment reveals that the judges have little
idea about what they are doing.\textsuperscript{122}

Instead of starting with state practice and the resulting cus-
tomary international law, Mr. D’Amato notes that the ICJ begins

\begin{footnotesize}
115. \textit{Id.}
116. \textit{Mertus, supra note 2, at 295-97.}
117. \textit{Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27) (Merits) (citation omitted).}
118. \textit{Id.} at 124 (Merits) (citation omitted).
119. \textit{See id.} at 146. The United States, however, never argued on the merits because it declined to submit to the jurisdiction of the court
120. \textit{See id.} at 381-85 (dissenting opinion of Judge Schwebel).
121. \textit{Id.} at 351. One must remember that Judge Schwebel is referring to Nicaragua’s actions with respect to El Salvador, not United States actions with respect to the

\end{footnotesize}
with a disembodied rule, that is, non-intervention, and finds that state acceptance of this rule in various treaties is *opinio juris*:

The Court thus completely misunderstands customary law. First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, *opinio juris* has nothing to do with “acceptance” of rules in such documents. Rather, *opinio juris* is a psychological element associated with the formation of a customary rule as a characterization of state practice.123

If one follows the logic of the ICJ, Mr. D’Amato contends, then state practice carries no authority if it conflicts with a treaty rule.124

After listing several examples of state interventions directly contrary to the ICJ’s non-intervention theory of customary international law—for example, humanitarian intervention, antiterrorist reprisals, individual as well as collective enforcement measures, and new uses of transboundary force such as the Israeli raid on the Iraqi nuclear reactor125—Mr. D’Amato states:

The process of change and modification over time introduces a complex element that is missing from the Court’s handling of Article 2(4). It is true that when 2(4) was adopted as part of the UN Charter in 1945, it had a major impact upon customary law. But Article 2(4) did not “freeze” international law for all time subsequent to 1945 (no more than an equivalent customary-law incident would have done). Rather, the rule of Article 2(4) underwent change and modification almost from the beginning. Subsequent customary practice in all the categories mentioned above has profoundly altered the meaning and content of the non-intervention principle articulated in Article 2(4) in 1945.126

The facts of the *Nicaragua* case are sufficiently distinguishable from the Kosovo conflict to render it of little use in analyzing whether NATO properly used force against Yugoslavia. Further, because the ICJ’s analysis of the customary international law concerning non-intervention virtually ignored state practice, it seriously undermined the decision’s precedential value. A more useful exercise would be to examine actual situations in which third states intervened in civil wars and the reaction of the international community to these interventions.

**Other Civil War Intervention Examples**

*It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.*127

An examination of civil wars resulting in intervention by foreign states reveals a consistent theme. When states intervene on one side or the other in a civil war, a legal justification is rarely offered by the intervening state or demanded by the international community. One author, A. Mark Weisburd, concludes that: “Almost none of the intervening states encountered sanctions from third states.”128 After examining nineteen examples of civil wars with international involvement, from the Greek Civil War (1946-1949) to the Liberian Civil War (1989-1997), Mr. Weisburd states:

122. Anthony D’Amato, *Trashing Customary International Law*, 81 Am. J. Int’l L. 101, 101-02 (1987). *But see* Tom J. Farer, *Drawing the Right Line*, 81 Am. J. Int’l L. 112 (1987). Mr. Farer praises one aspect of the ICJ opinion in the *Nicaragua* case: “While this is not an inevitable interpretation of contemporary international law, in my judgment it is the one that most effectively reconciles the international system’s preeminent interests: conflict containment and national sovereignty (expressed in terms of territorial integrity and political independence).” *Id.* at 113. Mr. Farer’s support for the opinion, however, does not conflict with the faults noted by Mr. D’Amato. For purposes of this article and the argument that NATO’s use of force to support the KLA was lawful, Mr. Farer notes that:

In the colonial context and in the name of national self-determination, the United Nations has gone behind the political institutions established by metropolitan governments to locate sovereignty in the people of the territory. There is, therefore, some precedent at the global level for regarding people, not governments, as the ultimate locus of sovereignty.

*Id.* at 115. This recognizes the trend, discussed above, that international law supports the rights of individuals and minorities at the expense of state sovereignty. *See* Guicherd, *supra* note 42, at n.40.

123. D’Amato, *supra* note 122, at 102.

124. *Id.*

125. *Id.* at 103 (citations omitted).

126. *Id.* at 104.

127. Military and Paramilitary Activities (Nicar. v. United States), 1986 I.C.J. 14, 97 (June 27) (Merits) (citation omitted).
Taking all these events together, then, it appears that interventions in civil strife are frequent and that there seems to be a high degree of international acceptance of such interventions. Applying the obey-or-be-sanctioned standard, it would appear that interventions of this type should not be considered unlawful.\textsuperscript{129}

All of these conflicts occurred after the creation of the United Nations—and after adoption of Article 2(4). This article briefly examines three of these conflicts and compares them to NATO’s intervention in Kosovo.

In the Laotian May 1958 elections, the Communist Lao Patriotic Front (LPF) handily defeated the opposition, rightist military officers backed by the United States, giving rise to the Laotian Civil War (1959-1975). During this civil war, Weisburd asserts, the United States provided military equipment and civilian-clothed advisors, organized various “irregular” units, and even began bombing targets in Laos at the same time it was bombing targets in Vietnam.\textsuperscript{130} The Democratic Republic of Vietnam (DRV) was also providing assistance to the LPF.\textsuperscript{131} The United States initially tried to conceal its activities, but after it admitted bombing communist targets in Laos, it justified its use of force by pointing to communist activities in Laos.\textsuperscript{132}

In summary, Mr. Weisburd concludes:

This case, then, involved support of internal factions by outside states, which included active participation in combat. To the extent that they justified their actions, the outside states did so by reference to one another’s activities. Their motives were ideological . . . Third states reacted very little to the situation, apparently seeing it, understandably, as inseparable from the larger problem of the Second Indochina War.\textsuperscript{133}

In the Chadian Civil Wars (1969-1972, 1975-1993), as in Kosovo, a Muslim minority rebelled against the oppression of non-Muslim President Tombalbaye. France supported President Tombalbaye. Libya supported the Muslim rebels. Mr. Weisburd notes that: “The conflict attracted little third-state interest and no sanctions.”\textsuperscript{134} Further, the “United Nations played almost no role in this crisis.”\textsuperscript{135} Even after Libya became a combatant in the conflict and occupied substantial areas of Chad, “no UN organ made any serious effort to address the conflict, preferring to leave it to the [Organization of African Unity] with its traditionally mediational approach.”\textsuperscript{136}

Finally, in the Liberian Civil War (1989-1997), the National Patriotic Front of Liberia revolted against the government of President Samuel Doe. The fighting between ethnic groups was extremely brutal and many civilians were caught in the middle.\textsuperscript{137} Eight months into the civil war, the Economic Community of West African States (ECOWAS) deployed a peacekeeping force in Liberia “citing the danger to nationals of member states then in Liberia and the refugee problem the war was creating for the region.”\textsuperscript{138} The fighting continued for several years and President Doe was eventually assassinated. Most third-party states supported the ECOWAS intervention, and the UN Security Council adopted a resolution commending the work of ECOWAS.\textsuperscript{139}

The Liberian Civil War most resembles the Kosovo intervention, “a civil war in which a regional organization intervened.”\textsuperscript{140} The UN failed to condemn ECOWAS’s non-UN-authorized use of force; in November 1992, more than two years after ECOWAS deployed its forces, the UN actually

\begin{itemize}
  \item \textsuperscript{128} A. Mark Weisburd, \textit{Use of Force: The Practice of States Since World War II} 207 (1997).
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.} at 180-81.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} at 181.
  \item \textsuperscript{133} \textit{Id.} at 181-82.
  \item \textsuperscript{134} \textit{Id.} at 190.
  \item \textsuperscript{135} \textit{Id.} at 195.
  \item \textsuperscript{136} \textit{Id.} at 196.
  \item \textsuperscript{137} \textit{Id.} at 204.
  \item \textsuperscript{138} \textit{Id.} at 204-05.
  \item \textsuperscript{139} \textit{Id.} at 205.
  \item \textsuperscript{140} \textit{Id.} at 206.
\end{itemize}
blessed the ECOWAS operation with a resolution.\textsuperscript{141} Owing to this example, Mr. Weisburd concludes “it would appear that such multilateral interventions may be considered affirmatively lawful.”\textsuperscript{142}

\textit{Self-Determination and the Need for a New Interpretation of Article 2(4)}

\textit{Invocations of state sovereignty to justify gross human rights abuses is unequivocally contrary to international law. Moreover, in 1989 Serbian politicians illegally stripped Kosovo of its autonomous status in old Yugoslavia, shortly before that country was torn apart. This calls the legal status of Kosovo within Serbia into question and exposes the fallacy of claims that it is an internal Serbian problem.}\textsuperscript{143}

At least three authors argue for a new interpretation of UN Charter Article 2(4).\textsuperscript{144} The argument is that humanitarian intervention “is not directed against the territorial integrity or political independence of the state in which it takes place . . . .”\textsuperscript{145} Further, while the Charter does not specifically authorize unilateral or collective humanitarian intervention, “neither does it specifically abolish the traditional doctrine.”\textsuperscript{146} What happens when humanitarian intervention is combined with a civil war in which the victims are fighting for self-determination? In other words, could NATO intervene both to prevent human rights abuses and to assist the KLA regain self-determination for Albanian Kosovars? If self-determination is a recognized “right” under international law, then assisting the KLA in its fight for self-determination is still humanitarian intervention. The problem is that self-determination can lead to independence, which is in fact “directed against the territorial integrity or political independence of the state in which it takes place . . . .”\textsuperscript{147}

Most scholars would agree that the legal concept of self-determination did not qualify as a rule of international law at the creation of the UN Charter.\textsuperscript{148} Self-determination is not mentioned in the 1948 Universal Declaration of Human Rights.\textsuperscript{149} Self-determination gradually moved from a general “principle” to a “right” that was formalized in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.\textsuperscript{150} The question remained, however, whether the right existed outside of the decolonization context.\textsuperscript{151}

A continuing debate among international lawyers is whether or not there exists a right to self-determination in customary international law, and, if so, whether or not it is limited to colonial situations. Professors Brownlie and Gros Espiell submit that the right to self-determination constitutes \textit{jus cogens}, a peremptory norm of international law, while Professor Verzijil represents the other extreme in holding that self-determination is “unworthy of the appellation of a rule of law.”\textsuperscript{152}

It is clear that the right of self-determination “exists for peoples under colonial and alien domination, that is to say, who are not

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} at 205.
\item \textsuperscript{142} \textit{Id.} at 208; see also Captain Davis Brown, \textit{The Role of Regional Organizations in Stopping Civil Wars}, 41 A.F.L. REV. 235, 258 (1997) (citation omitted):
\begin{quote}
ECOWAS has never requested [UN Security] Council approval of the operation, nor has the Council ever passed judgment on its legality. This suggests either that in “commending” ECOWAS the Council was authorizing future ECOMOG [ECOWAS Monitoring Group] activities in Liberia, or that the Council decided ECOWAS needed no formal authorization.
\end{quote}
\item \textsuperscript{143} \textit{MERTUS, supra} note 2, at 279.
\item \textsuperscript{144} See Guicherd, supra note 42, at 24; see also Moore, supra note 1, at 149.
\item \textsuperscript{145} Guicherd, supra note 42, at 24.
\item \textsuperscript{146} Moore, supra note 1, at 152.
\item \textsuperscript{147} Guicherd, supra note 42, at 24.
\item \textsuperscript{148} See \textit{HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS} 33 (1996).
\item \textsuperscript{149} See id.
\item \textsuperscript{150} See id. (citing G.A. Res. 1514, UN GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960)).
\item \textsuperscript{151} See \textit{HANNUM, supra} note 148, at 34, 44.
\item \textsuperscript{152} \textit{Id.} at 44-45 (citations omitted) (emphasis in original).
\end{itemize}
living under the legal form of a State."153 But for the exception of Bangladesh, however, “no secessionist claim has been accepted by the international community since 1945.”154

**Secession: When Does the Right to Secede Arise?**

Why did Yugoslavia rewrite its constitution and take away Kosovo’s autonomy? Among other reasons, it probably feared that autonomy would lead to outright secession.155 In fact, ethnic states that won some form of independence in the 1990s “did so in the absence of negotiations, not because of them.”156 Further, “[i]n most recent wars of self-determination, fighting usually began with demands for complete independence and ended with negotiated or de facto autonomy within the state.”157

The restrictive view of secession under the UN Charter is that the right of self-determination is consistent with the Charter “only insofar as it implied the right of self-government of peoples and not the right of secession.”158 The expansive view of secession holds “the right of peoples everywhere to establish any regime they chose . . . .”159 To date, no author asserts that international law currently recognizes a right of secession.160 There is a common string running through the debate, however, which may justify the right to secede: the violation of fundamental rights by the state.161 One author contends that the “only reliable test for determining the reasonableness of self-determination has to be the nature and extent of the deprivation of human rights of the subgroup claiming the right.”162 Arguably, the Albanian Kosovars had more than sufficient grounds to support a legitimate demand for secession.

Prior to initiating its bombing campaign in Kosovo, NATO should have followed the example of the Organization of American States (OAS) in 1979. In a bold and principled move the OAS withdrew recognition of the Somoza government in Nicaragua on human rights grounds, declaring inter alia “[t]he inhuman conduct of the dictatorial regime governing the country . . . . [i]s the fundamental cause of the dramatic situation faced by the Nicaraguan people.”163 Was the situation in Kosovo any less “dramatic” than that in Nicaragua?

In the fall of 1999, just months after the campaign in Kosovo ended, it became clear that U.S. officials privately considered Kosovo independence a foregone conclusion. On 24 September 1999, *The Washington Post* reported that: “Senior U.S. officials have privately dropped their opposition to Kosovo’s independence from Yugoslavia and say the Clinton administration increasingly sees the province’s secession as inevitable.”164 While continuing to publicly declare it had not changed its policy, one official stated off the record: “Our attitude before the war was, it’s better if it doesn’t happen. Now, we know it’s clearly on the way . . . . [I]t’s the mostly unspoken assumption [of all U.S. policy-makers.]”165 Had Yugoslavia not taken away Kosovo’s autonomy in 1989, the KLA probably never would have surfaced, the civil war could have been avoided, and perhaps the province’s secession would not have been inevitable.

**The Humanitarian Intervention Factor**

Did the presence of human rights abuses by Yugoslavia against the Albanian Kosovars tip the scales in favor of using force to intervene on behalf of the KLA? Prior to the creation of the UN, the notion of humanitarian intervention was recog-

153. *Id.* at 46 (citation omitted).

154. *Id.*


156. *Id.* at 56.

157. *Id.* at 57.


159. *Id.*

160. See HANNUM, supra note 148, at 471; see also Stromseth, supra note 158, at 374. The international community may not be willing to recognize a right to secede, but it may be willing to shine the spotlight of world scrutiny on struggles for self-determination, and—at least today—the principle of domestic jurisdiction is unlikely to stand in the way.

161. See HANNUM, supra note 148, at 471.

162. *Id.* at 472 (citation omitted).

163. *Id.* at 470.


165. *Id.*
nized where the “the treatment of a state to its nationals shocks the conscience of mankind.”

Most authors agree that the Charter replaced these self-help measures and now precludes unilateral humanitarian intervention.

Post-UN Charter, humanitarian intervention without UN approval is still recognized but strictly limited. Generally, it should be used as a last resort, have a limited duration, and should not be aimed at a permanent transformation of pre-existing legal arrangements—for example, the secession of a province. To these “classical conditions,” one author adds two additional criteria:

1. Any humanitarian military intervention should be carried out by a group of states—whether they act in the context of an alliance, a regional organisation, or a “coalition of the willing”—so as to dispel the suspicion that intervention is undertaken for the sake of narrow national interest.

2. The participating states should act in close coordination with the UN, demonstrate a clear readiness to obtain post facto legitimisation by the Security Council and, when possible, to hand the matter back to the UN.

It is well established in international law that state sovereignty may be subordinate to the self-determination goals of an oppressed group. The rationale being that the inviolability of a state from external interference is based on the assumption that the state is meeting its international human rights obligations to its citizens. Kosovo was not simply a civil war. It was a unique situation in which well-established autonomy had been stripped away and brute force used to oppress and brutalize an ethnic minority.

The clear trend is that the protection of human rights, minority rights, and self-determination are no longer considered internal, domestic problems. Off limits to outside interference. This is especially so when the conflict spills over into neighboring states.

Intervention’s Ramifications

NATO would have taken criticism and suffered repercussions no matter what justification it formulated for intervening in Kosovo. That does not mean it should not have acted. Taking a leadership role in a volatile situation is never easy. The problem for NATO is that it relied on a politically correct, questionable, and at times, non-existent legal bases for using force against Yugoslavia. If it had taken an aggressive but sound legal position, it still would have angered some states, but in the end the criticism would be about its aggressiveness and not its lack of clarity and legal indecisiveness. Smoothing over the

Although a role for regional organizations in humanitarian intervention has been established, until the advent of the Economic Community of West African States (ECOWAS) missions in Liberia and Sierra Leone, states’ practices suggested that prior approval by the Security Council was a prerequisite to any humanitarian intervention. However, for the first time the ECOWAS Cease-Fire Monitoring Group (ECOMOG missions in Liberia and Sierra Leone provide two clear examples of unilateral humanitarian intervention by a regional actor that enjoyed support from the whole of the international community.

Id.

Although a role for regional organizations in humanitarian intervention has been established, until the advent of the Economic Community of West African States (ECOWAS) missions in Liberia and Sierra Leone, states’ practices suggested that prior approval by the Security Council was a prerequisite to any humanitarian intervention. However, for the first time the ECOWAS Cease-Fire Monitoring Group (ECOMOG missions in Liberia and Sierra Leone provide two clear examples of unilateral humanitarian intervention by a regional actor that enjoyed support from the whole of the international community.

Id.

The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case. Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter (quoting Western Sahara (Spain v. Mauritania v. Morocco), 1975 I.C.J. 12, 31 (Advisory Opinion) (citing the Namibia decision, held that self-determination as expressed in Resolution 2625 is an established principle under international law with respect to peoples in non-self-governing territories)).

Id.
fall-out from Operation Allied Force would have been much easier for NATO and the individual countries involved had NATO taken the aggressive but legitimate position advocated by the authorities discussed herein.

No one will dispute that NATO’s intervention alienated both China and Russia. By entering the campaign without stating a coherent legal position, however, NATO’s critics, like predators, sensed the weakness of NATO’s conviction and pounced accordingly. China and Russia made the most of NATO’s mistakes and missteps and won concessions to strengthen their bargaining position on future, unrelated disputes. This inevitable posturing could have been reduced had NATO entered the campaign from a position of strength, rather than of weakness.

One of the most damaging criticisms is that the bombing made things worse for those NATO sought to protect—the Albanian Kosovars.

Before NATO intervened on March 24, approximately 2,500 people had died in Kosovo’s civil war between Serb authorities and the ethnic Albanian insurgents of the Kosovo Liberation Army (KLA). During the 11 weeks of bombardment, an estimated 10,000 people died violently in the province, most of them Albanian civilians murdered by Serbs.

An equally important NATO goal was to prevent the forced displacement of the [Albanian Kosovars]. At the outset of the bombing, 230,000 were estimated to have left their homes. By its end, 1.4 million were displaced.

This, too, could have been avoided. Had NATO stated from the outset that its goal was to restore Kosovo’s autonomy, and or gain its independence, then it could have outwardly and aggressively supported the KLA with arms, troops, and air support. The KLA was in the best position to stop the reign of terror in Kosovo. Granted, the KLA did not have clean hands, but it had earned the right under international law to speak for the Albanian Kosovars in their fight for independence.

State actors, especially developed democratic states, are responsible for promoting the rule of law. If a group of states, like the members of NATO, are perceived to have violated international law, why should less-developed, emerging democracies follow the law? As one author notes, legal advisors bear a substantial burden for promoting the rule of law:

[W]e as lawyers need to be concerned about the integrity of international law, particularly as practiced in the diplomacy and military arenas. It has been said that the “real lesson in Kosovo is that ‘international law’ in political and military matters is increasingly exposed as an academic sham . . . [and this crisis gives] us a more realistic sense of the limits and inadequacies of the chimera of international legal theorizing. We can and should do better.”

Another common criticism leveled at NATO questions why it intervened in Kosovo, but not in Africa or Chechnya. Arguably, Africa is not within NATO’s area of concern, and Africa has ECOWAS, a regional organization with a proven track record on humanitarian intervention. As for Chechnya, no mass of refugees was spilling over into neighboring coun-

173. See Correll, supra note 82; see also Peter Rodman, The Fallout from Kosovo, FOREIGN AFFAIRS, July/Aug. 1999, at 49-50. Rodman warned that if the outcome of the war is viewed as a failure:

Sino-American relations will suffer thanks to the nasty Chinese overreaction after the accidental U.S. bombing of the Chinese embassy in Belgrade. America’s relationship with Russia may pay a price for Moscow’s coddling of Milosevic . . . . The American people and military are likely to be gun-shy about any future interventions. And leaders around the world, from Baghdad to Beijing, will draw their conclusions about America’s credibility, staying power, and competence.

Id.


175. Mandelbaum, supra note 48, at 3.

176. See Roberts, supra note 32, at 107 (arguing that the massive multilateral support among the nineteen member states in NATO represented “an international-community interest, and not just the interests of one single state,” and that a “further element was sometimes woven into the argument, namely the claim that democratic states have a greater right to engage in military interventions than do autocracies, or at least have a greater claim to international support when they do so.”).

177. See John F. Murphy, Introduction: International Legal Developments in Review: 1998, 33 INT’L L. & POL’Y 229, 230 (1999). “The United States has also been sharply criticized for actions that allegedly violate international legal standards, most recently for the NATO bombing in Kosovo and Serbia. At a minimum these allegations raise serious issues regarding the U.S. commitment to the rule of law in international affairs.” Id.


180. See Weisburd, supra note 128.
tries. Without some direct impact on neighboring countries, it would be difficult to stretch the aggressive theory of humanitarian intervention all the way to Chechnya. The background and circumstances of the Muslim minority in Chechnya is also substantially different than that of the Albanian Kosovars. NATO could lead by example and pressure Russia to do the right thing in Chechnya, but the circumstances would not allow the same intervention in Chechnya that was legally defensible in Kosovo. 181

The Albanian Kosovars accounted for ninety percent of the population of Kosovo. For over nine years they lived under substantial autonomy. It was not until this autonomy was stripped away and they were subjected to extreme and consistent brutality by the Milosevic government that the KLA surfaced and began to fight back. When taken together, the revocation of autonomy, the accompanying human rights abuses, and the direct impact of refugees on neighboring countries, provided the legal justification for the Albanian Kosovars to take up arms in the pursuit of self-determination. These factors also allowed them to seek assistance in their fight for self-determination. NATO cannot address all of the world’s ills, but it had the power and authority to help the Albanian Kosovars.

“Kosovo is not ready for independence. Pernicious influences from northern Albania—organized crime, political intimidation, and lawlessness—are threatening to take root.” 182 This quotation, while true, takes a myopic view of the future of Kosovo. Do the problems now facing Kosovo mean NATO should not have intervened? The problems in Kosovo are difficult ones, but they are now Kosovar Albanian problems. Ani-
mosity between the Serbs and the Albanians run deep. 183 It will take years to undo what rabid nationalism and state-sponsored hatred has created.

Conclusion

NATO’s justification for intervention in Kosovo was tortured and disingenuous. Instead of dancing on the head of a pin about whether Resolution 1199 authorized the use of force, the Alliance should have argued from the beginning that intervention was justified because: Yugoslavia illegally withdrew Kosovo’s autonomy, it denied the Albanian majority in Kosovo its fundamental right to self-determination; and it continued to trample on numerous other basic human rights guaranteed under the UN Charter. In so doing, Yugoslavia forfeited its right to Kosovo. These egregious Yugoslav violations of international law gave NATO sufficient legal grounds for using force to assist the KLA in its fight for an independent Kosovo.

Kosovo was the only autonomous province with the former Yugoslavia that did not win independence at the break up in 1991. 184 Whether due to racism, oversight, or pressure from Russia, the Albanian Kosovars were left under the boot of a repressive regime. Some commentators persuasively argue that the only winner in Operation Allied Force was the KLA. 185 It

181. Although some might argue that the only real difference between the two situations is that might makes right. NATO could stand up to Serbia but not Russia.

182. David Rohde, Kosovo Seething, FOREIGN AFFAIRS, May/June 2000, at 76.

183. See id. at 66. “One year on, NATO’s largest-ever military intervention appears to be creating a ‘new Kosovo’ that is the polar opposite of the alliance’s stated goals. The province remains widely corrupt, lawless, intolerant of both ethnic and political minorities, and a source of instability.” Id.

184. Id. at 72. On the political level, the cause that once unified Albanians—their struggle against Belgrade—has largely disappeared. The Democratic League of Kosovo, the group headed by Ibrahim Rugova that ran the shadow government during the Serb crackdown, remains popular but disorganized. The KLA itself has splintered into various groups—some criminal, others not. Id.

185. Id. at 71, “An unreleased public-opinion survey of [Albanian Kosovars] conducted last October by the U.S. State Department illustrated the depth of the animosity. Of those surveyed, 91 percent said there had been too much damage in Kosovo for ethnic Albanians and Serbs to live together peacefully.” Id.

186. See Baggett, supra note 20, at 474 (citation omitted). “Intervention was utilized for every other former province of Yugoslavia that has now been established as a separate nation. Why is it that Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina are entitled to nationhood and Kosovo is not?”

187. Richard Cohen, And the Winner Is . . . the KLA, WASH. POST, June 17, 1999, at A35.

Say what you will about the KLA, it has been the one player in the current Balkan drama that has known from the start precisely what it wanted and how to get it . . . . The KLA had a simple, but effective, plan. It would kill Serb policemen. The Serbs would retaliate, Balkan style, with widespread reprisals and the occasional massacre. The West would get more and more appalled, until finally it would—as it did in Bosnia—take action. In effect, the United States and much of Europe would go to war on the side of the KLA.

Id. Other commentators share this view, believing that NATO and the United States were duped by the KLA into entering the war with Yugoslavia.

The KLA’s guerilla campaign was a deliberate attempt to provoke Belgrade into reprisals that would attract the West’s attention. Knowing it could not defeat Yugoslavia without NATO’s military support, the KLA waged a nasty insurgency that included assassinations of Serbian political and military officials. The KLA calculated—accurately—that a violent Yugoslav retaliation would pressure Washington and it’s allies to intervene. Although U.S. intelligence warned the Clinton administration of the KLA’s intentions, Clinton and his advisers took the bait: Washington placed the blame for events in Kosovo on Belgrade and absolved the KLA.

Christopher Layne & Benjamin Schwarz, We Were Suckers for the KLA, WASH. POST, Mar. 26, 2000, at B1, B5.
is hard to argue with these commentators who dramatically illustrate the risks associated with intervening in a nasty civil war on the side of rebel forces. The risks, however, were warranted in the case of Kosovo. NATO should have exercised intellectual integrity and relied on the Albanian Kosovars’ fight for self-determination to justify intervention, rather than on the amorphous argument that Resolution 1199 authorized its use of force. If it had, the criticism outlined in this article would have been avoided and the respect for the rule of law promoted.
Legal Assistance Note

Payday Loans: The High Cost of Borrowing Against Your Paycheck

ATTENTION: ALL ACTIVE MILITARY PERSONNEL
If your (sic) in need of some FAST cash, we are here to accommodate your request in the quickest, easiest, and most convenient way for you.¹

Short On Cash?
Military Financial Network offers Advance Pay loans exclusively to the active duty military. Unlike some competitors who limit the amount you can borrow to a few hundred dollars, with MFN, your income is your credit.²

If you surf the Internet, check out newspaper advertisements, or just drive off post, you have seen advertisements like the ones above for payday loans. Legal assistance attorneys (LAA) often deal with the aftermath of payday lending. Rarely does the service member emerge from these situations in better financial condition and often only gets deeper in debt.

Payday loans go by a variety of names, including “deferred presentment,” “cash advances,” “deferred deposits,” or “check loans.” They all work basically the same way: the consumer provides the lender a current or post-dated check written on his bank account for the amount borrowed plus a fee. The fee is stated as either a percentage of the check or loan amount or in a dollar amount. This fee translates into annual percentage rates typically not less than 390% and averaging close to 500%.³ The check is then held for one to four weeks (usually until the consumer’s payday), at which time the consumer redeems the check by paying the face amount, allows the check to be cashed, or pays another fee to extend the loan. To qualify, consumers need only be employed for a period of time with the current employer, maintain a personal checking account, and show a pay stub and bank statement.⁴ For military members, a Net Pay Advice (formerly a Leave and Earnings statement) is often all that is required. Credit checks or other inquiries about ability to repay are not routinely performed.

Cash-strapped consumers can rarely repay the entire loan on payday because that leaves little or nothing to live on until the next paycheck. Lenders encourage consumers to rollover or refinance one payday loan with another. This results in the consumer paying another round of charges and fees and obtaining no additional cash in return. Further, payday lenders often threaten to use the criminal justice system to collect these debts or routinely file criminal charges when a check is returned for insufficient funds.⁵

For legal assistance attorneys assisting soldiers, determining whether payday loans and the accompanying abuses violate state and federal laws often depends on state law. The states fall into three categories: states requiring payday lenders to comply with the small loan or criminal usury laws; states that permit payday lenders to operate and charge any interest rate or fee the parties to the loan agree to; and states that explicitly authorize payday lending.⁶

In twenty states, the Virgin Islands, and Puerto Rico, payday lenders must comply with the state’s small loan or criminal usury laws.⁷ These laws typically contain extensive provisions specifying the maximum loan amount, the maximum or minimum term, the maximum interest rate and permitted charges, and the penalties for charging excessive interest and other violations.⁸ Since the allowable interest rates and fees are substantially below what the payday industry charges, the lenders in these states usually operate illegally by ignoring the small loan laws. It is in these states where the lenders have the greatest incentive to disguise the transactions.

⁴. Id. at 280.
⁵. Id.
⁶. See id. at 281.
⁷. Id. at 280 (these states are Alabama, Alaska, Arizona, Connecticut, Georgia, Indiana, Maine, Maryland, Massachusetts, Michigan, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, Texas, Vermont, Virginia, Virgin Islands, and West Virginia).
⁸. Id.
In eight states, the small loan laws permit payday lenders to operate and charge any interest rate or fee that the parties to the loan agree to pay.9 These lenders must usually comply with other provisions of the state’s small loan statutes.

In twenty-three states and the District of Columbia, specific laws authorize payday lending.10 Generally, these laws require either licensing or registration. They typically specify a maximum term and maximum amount of the loan and fix the interest rate or fees to be charged.11 While these fees seem small in the abstract, $15-$33 per $100, they translate into enormous annual percentage rates. For example, one writes a personal check for $115 to borrow $100 for up to fourteen days. The payday lender agrees to hold the check until the borrower’s next payday. In this example, the cost of the initial loan is a $15 finance charge which equates to a 391% annual percentage rate.12

The first line of defense raised by payday lenders sued in states where these loans are illegal is to claim that the transaction is really not a loan. The lenders characterize these deals as deferred presentment of a check.13 In category one states, the courts uniformly pierce this smoke screen to hold that the transaction is, in substance, a loan.14 Several consequences flow from this fundamental finding. The lender violates the state usury law because the usury cap is exceeded. In small loan states, the lender violates the law because the lender ignores licensing and the Truth in Lending Act (TILA)15 requirements.

Transactions in which a cash advance is made to a consumer in exchange for the consumer’s personal check, or in exchange for the consumer’s authorization to debit the consumer’s deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer’s deposit account will not be debited, until a designated future date.17

Further, a fee charged in connection with such loans would typically constitute a finance charge.18 If the creditor regularly extends credit and imposes a finance charge, that lender must provide TILA disclosures.19 Having the Federal Reserve Board step into this fray is important because the lenders take the position that the transactions are not loans but rather deferred presentment of checks.20 Even more insidiously, some lenders structure these transactions as purported catalogue sales and sale-leaseback arrangements. The Federal Reserve Board

---

9. Id. at 281 (these states are Delaware, Idaho, Illinois, New Mexico, Oregon, South Dakota, and Wisconsin).

10. Id. (these states are Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Washington, and Wyoming).

11. Id.


13. Other attempts to claim the transaction is not really a loan include the sale-leaseback or the catalog sale disguise. Under a sale-leaseback arrangement, rather than offering a direct loan with repayment of interest and principal, a lender “buys” an item from the borrower, such as an appliance, and “leases” it back for a “rental payment.” While most of these companies offer two-week “rental” periods, some assess “rental fees” daily. With catalog sale disguises, catalog companies require a borrower to purchase an item (a certificate) and they charge a fee for that item. Customers who need cash purchase catalog certificates ($20-$30 certificate per $100 loaned) for merchandise that is sold in the company catalog. Customers write a check for the amount of the loan plus the catalog certificate cost (loan fee). Two weeks later the company cashes the check and gives the customer the certificate, at which time they can use the certificate to purchase merchandise from the catalog.


15. 15 U.S.C. §§ 1601-1667t (2000). The TILA was passed by Congress in an effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit and to enable consumers to make informed choices in the credit marketplace. The most significant disclosures required under TILA are the finance charge and the annual percentage rate. Without these disclosures it is impossible to determine the true cost of credit.

16. Truth in Lending (Regulation Z), 12 C.F.R. §§ 226.1-33 (2000). Congress delegated broad authority for the implementation of the Truth in Lending Act to the Federal Reserve Board. The Board responded by promulgating a comprehensive set of Truth in Lending rules known as Regulation Z and an Official Staff Commentary on the Regulation. When assessing any transaction for compliance with any Regulation Z provision, the LAA should also review the corresponding commentary provision.


19. Id. at 49.
Commentary is designed to pierce these subterfuges. The Commentary’s Supplementary Information states:

Some commenters expressed concern that by referring specifically to “payday loans,” the proposed comment might be limited to transactions labeled as such. Comment 2(a)(14)-2 has been modified to address this concern. Transactions in which the parties agree to defer payment of a debt are “credit” transactions regardless of the label used to describe them.21

Another potential way to attack these types of loans is under the Racketeer Influenced and Corrupt Organizations Act (RICO).22 In the payday loan context, a claim arises under RICO where the state usury law is violated and the amount of interest charged or collected exceeds twice the cap.23 Violating RICO is particularly significant for recovery purposes because the Act allows the consumer to hold individuals liable in addition to companies.24

Additionally, if the lender threatens or uses the criminal bad check law to collect the debt, such behavior may violate the state Unfair or Deceptive Acts or Practices Act (UDAP) as well as those state fair debt collection practices acts that apply to creditors as collectors.25 It is an unfair or deceptive act because the lender knows the consumer does not have sufficient funds in the checking account at the time of the loan to cover the amount of the cash advance (hence the transaction does not involve the passing of a “bad” check). Therefore, it constitutes an unfair or deceptive act to threaten to do what the creditor has no legal right to do.

Viable defenses also exist even in those states whose laws expressly permit these transactions.26 Many payday lenders fail to give TILA disclosures,27 making it impossible to understand the true cost of these loans. Even when TILA disclosures are given, they are frequently inaccurate, or present additional information in such a way so as to violate the requirement that the disclosures be clear and conspicuous and separately segregated.28 In addition, the doctrine of unconscionability can be used to challenge the amount of fees and interest that are charged in states with no caps.29

Lastly, practitioners should not overlook state UDAP statutes. Substantive unfairness and procedural unfairness and deception taken together may lead to actionable overreaching. This may be true even if the procedural defect is simply a failure to disclose the disadvantageous cost or nature of a loan. In the payday loan context, disguising a small loan as check cashing, and failing to disclose the interest rate and charges, constitutes a UDAP violation.30 Similarly, disclosing a charge but listing it as a “carrying charge” rather than as “interest” states a UDAP claim.31

Legal Assistance Practitioners should be aware of the potential arguments they can make on behalf of service members who find themselves compounding their financial problems by using Payday Loans. More importantly, legal assistance attorney’s, as part of the Preventive Law Program should aggressively seek to educate service members and their families on the dangers of payday loans. Major Kellogg.

20. Id. at 58.
22. 18 U.S.C. §§ 1961-1968 (2000). The Act provides powerful civil remedies to victims of a broadly defined range of “racketeering activity” or to those who have been subjected to the collection of an “unlawful debt,” which is defined as any usurious debt bearing interest of at least twice the “enforceable rate.” Id. § 1961(6). For a detailed analysis of RICO, see NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 583-621, 799-804 (4th ed. 1997 and Supp.).
24. See, e.g., Fogie v. THORN Americas, Inc., 190 F.3d 889 (8th Cir. 1999); Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995) (stating that officers or employees may properly be held liable under RICO as “persons” managing the affairs of their corporation as “enterprise” through pattern of racketeering activity).
25. NCLC, THE COST OF CREDIT, supra note 3, at 281-82.
26. See supra notes 6-12 and accompanying text.
27. See supra note 14.
28. Smith v. Cash Store Mgmt., Inc., 200 F.3d 511 (7th Cir. 1999) (court reinstated a TILA claim based on the creditor’s practice of stapling a receipt over part of the TILA disclosure, listing the finance charge as a “deferred deposit check fee”).
29. E.g., Besta v. Beneficial Loan Co., 855 F.2d 532, 535 (8th Cir. 1988) (stating that a bargain is unconscionable “if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”).
31. Id.
Gulf War Syndrome Sub Judice

After ten years, 192 studies, and hundreds of millions of public and private research dollars, the jury is still out as to whether there is a Gulf War Syndrome or merely a collection of unrelated illnesses, let alone definitive answers as to a cause or a cure. Nevertheless, the lack of definitive answers has not stopped a variety of litigation and legislative efforts to compensate Persian Gulf War veterans and their families. This article examines the more prominent of these efforts designed to aid those suffering from Gulf War Syndrome, why litigation will most likely fail, and why relief, if any, will probably have to come from the United States government.

One of the first targets for litigation by ill veterans and their families was the federal government. In Minns et al. v. United States of America, three families sued the United States for negligence under the Federal Tort Claims Act (FTCA), alleging that their respective children’s birth defects were the result of experimental and defective vaccinations given to the servicemen fathers. The district court dismissed their claims for lack of subject matter jurisdiction. Almost any claim filed by a service member or their family member would meet with a similar fate due to the Feres Doctrine. In Feres v. United States, the Supreme Court held that the United States has not waived its sovereign immunity for service members “where the injuries arise out of or are in the course of activity incident to [military] service.” The Court stated that civilian courts should not second-guess military decisions. Not only does the Feres Doctrine prevent suits by service members, but also derivative suits by their family members arising out of a service member’s injuries.

Applying the Feres Doctrine bar in Gulf War Syndrome cases follows a long list of precedents. Claims by family members for injuries were likewise barred in the Vietnam era Agent Orange defoliant cases and the atomic bomb test radiation exposure cases; cases in which the government’s culpability was clearer than with the potential Gulf War Syndrome. Any result other than dismissing these plaintiffs’ claims would result in judicial review of the military’s determination to inoculate, how, and with what.

In dismissing the plaintiff’s claims, the Minns court found that the government’s decision to vaccinate service members, and not to warn them or their family members of any potential side effects of these vaccinations, were “discretionary” functions. Discretionary functions of the government are specifically excluded from the FTCA waiver of federal sovereign immunity. Just as the Feres Doctrine is in part designed to prevent judicial second-guessing of military decisions, the discretionary function exception to the FTCA is also designed to prevent judicial review of the policy decisions of the executive and legislative branches of government. The district court’s opinion was upheld on appeal, and the Supreme Court refused to hear the case on certiorari.

The lawsuits on behalf of veterans and their families, however, have not been aimed solely at the federal government. Marshall Coleman et al. v. Alcolac et al., involves a current class action of potentially 100,000 veterans claimed to have been injured by exposure to chemical and biological weapons allegedly used during the Persian Gulf War. Filed in a Texas state court against twenty-seven companies, the plaintiffs allege that the defendant corporations were negligent in con-

36. Id. at 508.
38. Feres, 340 U.S. at 146.
40. Id.
41. Id. at 506.
42. Id. at 505.
structing, manufacturing, and selling to Iraq chemical components or equipment used to make Iraqi chemical and biological weapons.\textsuperscript{46} Begun in 1995, the litigation continues today.

In all likelihood, however, this attempt will fail just as the attempts against the federal government have failed. In the litigation dealing with Agent Orange, Vietnam veterans and their families claimed that the military's use of the defoliant caused injuries and sued the companies that produced it for, among other things, their failure to warn of the dangers of exposure to the chemical.\textsuperscript{47} Those plaintiffs that did not accept a settlement offer lost in federal district court, in part because they were unable to prove successfully that their injuries were caused by exposure to Agent Orange.\textsuperscript{48} In the case of Gulf War Syndrome, it is also likely, with the research to date, that the plaintiffs would be unable to prove, by a preponderance of the evidence, that the chemicals or equipment sold by the defendant corporations are responsible for the various illnesses they or their family members experience. It is more likely that the plaintiffs anticipate a settlement similar to that in the Agent Orange litigation, in which the defendant corporations created a 180 million-dollar fund for the sick veterans and their families.\textsuperscript{49} The nexus between the hazards of Agent Orange and the manufacturer's failure to warn of its dangers is stronger, however, than that of the chemicals and equipment produced and sold by the defendant corporations and the existence, or foreseeability, of a Gulf War Syndrome.

Both avenues of litigation against the government and private corporations are therefore likely to fail. As stated in the appellate court decision of \textit{Minns et al. v. United States}, while the court recognized that the parents of the disabled children were without a judicial remedy, it felt that it was up to Congress to provide the relief to these and other veterans and families suffering from the effects of the Gulf War Syndrome.\textsuperscript{50} Congress has taken some steps in this direction. In 1992, Congress passed the Persian Gulf War Veterans' Health Status Act, creating a database of Gulf War veterans' health information to facilitate later research.\textsuperscript{51} In 1994, Congress gave the Veteran's Administration the authority to pay disability payments to Persian Gulf War veterans suffering from chronic illness manifesting itself in any of thirteen symptoms, including fatigue, muscle pain, and sleep disturbances.\textsuperscript{52} Reportedly, however, over ninety-three percent of the claims have been denied.\textsuperscript{53} Congress also passed The Persian Gulf War Veterans Act\textsuperscript{54} of 1998, establishing a presumption of a service-connection, and therefore a means of compensation and treatment, for illnesses associated with exposure to one or more of over thirty toxic agents present in the Persian Gulf War, much like the Agent Orange Act of 1991.\textsuperscript{55} The Act will apply, however, only after a link is established between one of the toxins and the Gulf War Syndrome, a connection that has not yet been made.

Other legislative initiatives have been proposed. The Persian Gulf War Syndrome Compensation Act of 1999\textsuperscript{56} would recognize Gulf War Syndrome as a war-related injury, and would make it easier for veterans and their families to receive disability and death benefits, even if the veteran's symptoms did not arise during their military service.\textsuperscript{57} The bill has remained in committee since its introduction in August of 1999.\textsuperscript{58} The Gulf War Veterans' Iraqi Claims Protection Act of 1999 is another legislative initiative to aid veterans.\textsuperscript{59} It pro-

\begin{itemize}
\item \textsuperscript{45} Id. at 1394.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} \textit{In re “Agent Orange” Product Liability Litigation}, 597 F. Supp. 740 (E.D.N.Y. 1984).
\item \textsuperscript{48} \textit{In re “Agent Orange” Product Liability Litigation}, 611 F. Supp. 1223 (E.D.N.Y. 1985) (appellate court affirmed motion to dismiss on basis of Government Contractor Defense).
\item \textsuperscript{49} Hercules, Inc. v. United States, 516 U.S. 417, 420 (1996).
\item \textsuperscript{50} \textit{Minns v. United States}, 516 U.S. 417, 420 (1996).
\item \textsuperscript{51} \textit{Compensation for Certain Disabilities due to Undiagnosed Illnesses}, 38 C.F.R. § 3.317 (2000).
\item \textsuperscript{52} Don Manzullo, \textit{Manzullo Unveils Legislation to Help Veterans with Gulf War Syndrome} (1999), at http://www.house.gov/manzullo/pr092799.htm.
\item \textsuperscript{56} H.R. 2697, 106th Cong. (1999).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} H.R. 618, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 2697.
\item \textsuperscript{59} H.R. 618, 106th Cong. (1999).
\end{itemize}
poses to authorize the Foreign Claims Settlement Commission of the United States to process claims of Gulf War veterans against the billions of dollars of Iraqi assets frozen in United States banks. Veterans would have priority of awards and would be eligible to receive up to $100,000 each. The Act was passed by the House and is now before a Senate committee.60

While no legislation can cure ill veterans or their families, Congress has at least taken initial steps towards helping them. As stated in Minns et al. v. United States, there is unlikely to be any judicial remedy for these plaintiffs. If there is to be any relief for the victims of Gulf War Syndrome, it will have to be provided by Congress. Captain (Retired) Swank.

Reserve Component Note

New Rights for Reserve and National Guard Soldiers Suffering Heart Attack or Stroke

A fifty-year-old sergeant first class in the United States Army Reserve reports for inactive duty “drill” weekend on Saturday at 0700. He feels fine. In fact, he has always enjoyed excellent health. At 1500, he departs on a formation run with his unit. At 1510, he remarks to the soldier next to him that his left arm feels “funny.” At 1513, he collapses. The emergency room diagnosis is quick and certain: the soldier suffered a serious, permanently disabling heart attack. Until recently, this sergeant first class would not have been eligible for veterans’ benefits.

Congress recently amended Title 38 of the United States Code to correct this problem by expanding eligibility for veterans’ benefits. Legal advisors involved in line of duty investigations need to understand the scope—and limitations—of this change.

Section 301 of the Veterans Benefits and Health Care Improvement Act of 200061 now defines any period of service in which an individual was disabled or died from an acute myocardial infarction (heart attack), a cardiac arrest, or cerebrovascular accident (stroke) as “active military, naval, or air service” for purposes of veterans’ benefits laws.62 The reason for the change appears clear from the legislative history. The provision was enacted to render heart attacks or strokes suffered during any type of military duty as “service-connected.”63

The Department of Veterans Affairs (VA) is implementing the law in accord with that intent. The director of the VA recently disseminated written guidance establishing entitlement to service connection for heart attacks and strokes incurred while performing (or in transit to or from) inactive duty for training.64

Neither the statutory change nor the VA guidance address the question of whether a heart attack or stroke which is the natural progression of long-term disease, as opposed to an acute injurious event, is now covered. Line of duty (LOD) officers often struggle with this question. The September 1986 version of Army Regulation 600-8-165 states that medical evidence of natural progression overcomes the normal presumption that military service aggravates a medical condition.66 Courts have drawn the same conclusion, determining that heart attacks during periods of short duty were the manifestations of disease existing prior to the duty—that is, existing prior to service (EPTS)—rather than injuries or aggravation of injuries suffered during duty.67

The new law authorizes no change to this process in military line of duty investigations. If an EPTS condition is not aggravated by military service, Army Regulation 600-8-1 directs a finding of “not in line of duty—not due to own misconduct.”68

Line of duty officers may still have to make a “not in line of duty” finding for heart attacks or strokes incurred during short

64. Fast Letter 00-90 from Director, Department of Veterans Affairs to All VBA Regional Offices and Centers (Dec. 4, 2000) [hereinafter Fast Letter] (directing VA examiners to obtain LOD determination or other supporting documentation to verify that disease or injury occurred while on duty) (copy on file with the author).
65. U.S. DEP’T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1 (1986)], superseded by U.S. DEP’T OF ARMY, REG. 600-8-1, PERSONNEL AFFAIRS: ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994). Practitioners should note that although AR 600-8-1 (1986) was replaced with the 1994 version, the later does not address Line of Duty (LOD) investigations. At present, there is no current regulation addressing LOD investigations, and practice has been to rely on the 1986 regulation as non-binding guidance.
66. AR 600-8-1 (1986), supra note 65, para. 41-9(e), (f).
68. AR 600-8-1 (1986), supra note 65, para. 41-9 (e).
periods of military duty. However, they should remember that the VA uses the LOD factual record to help make its own determination of eligibility for veteran’s benefits.69 This makes an accurate and complete LOD investigative record critically important.

Line of duty investigating officers might be inclined to articulate a simple finding that a heart attack or stroke occurring during a short period of military duty is an EPTS condition, and leave it at that. However, the LOD record must accurately reflect the timing and progression of symptoms in these cases, in relation to both the period of duty and the period of travel to and from the duty. This will allow the fairest possible determination of the facts and entitlement by the VA.

The new liberalized law may also provide recourse for veterans previously ineligible for VA benefits as the result of heart attack or stroke suffered during short periods of military duty.70 Affected veterans may want to consider reapplying for benefits.

Major Culver.

69. Fast Letter, supra note 64.

70. See 38 C.F.R. § 3.114 (2000). If a “liberalizing” law is passed, this regulation lays out rules for calculating retroactive entitlement.
Effective Motions Practice

You are the trial counsel on your first contested case, a barracks larceny. You are confident of victory because you have an eyewitness who saw the accused taking the stereo equipment out of the victim’s room. The day before trial you are looking over the latest defense witness list (given to you last week) and you notice a name you do not recognize, “Dr. Forize.” A quick call to Dr. Forize reveals that he is a self-styled expert in eyewitness identification, and he is prepared to testify that your star witness’s identification of the accused is severely flawed. It is panic time. You do some cursory research and quickly realize that you must somehow prevent Dr. Forize from testifying. The next morning, as the members are assembling, you tell the judge and opposing counsel that you have a motion to prevent Dr. Forize from testifying. The judge does not look pleased as he calls the Article 39(a)1 session to order and asks you for the basis of your motion.

Now is your chance. You launch into a long oration about how it is not fair for the defense to spring this witness on you at the last minute, how your research shows that these experts are really defense “hired guns,” and how Dr. Forize will become a human lie detector for the defense. After you get all of that off your chest you feel pleased with your performance, until the judge starts asking you some questions. First he asks you exactly what relief you want because it sounds to him like you want a delay (something you definitely do not want because the unit is deploying next week). Next he asks you which party has the burden of persuasion and what the standard of proof is (something you had not thought about). He also asks you if you have any witnesses to call on the motion (you were hoping that your brilliant argument would be enough to sway the judge and you have no witnesses). Finally, the judge asks you when you gave the notice of your motion to the defense counsel and if it was in compliance with the local rules (you never even knew there were any local rules). Instead of responding to these tough questions, you decide to run through your argument one more time, hoping that if you argue forcefully enough, the judge will decide in your favor. After a few minutes the judge stops you and says that your motion is denied. Needless to say, the trial heads down hill from there.

Hopefully, no one has experienced this scenario other than in a nightmare. This vignette, however, does point out some of the most common errors that trial attorneys make when raising and arguing motions before military judges. This article discusses the components of a proper motion, how to avoid some of the common errors, and how to effectively prepare and present a motion to the military judge.

Components of a Proper Motion

In order to present an effective motion, we first need to understand the components of a proper motion. A motion, either written or oral, has three primary parts. First, it should be a request for particular relief from the military judge. Second, the motion should state the specific legal basis for the relief sought. Third, the motion should set forth an offer of proof summarizing the pertinent facts that you are relying on in support of the motion. Each of these components is addressed in more detail below.

Request for Relief

Rule For Courts-Martial (RCM) 905(a) states that a motion is an application to the military judge for particular relief.2 That seems simple and obvious enough, yet counsel often struggle with this in practice. In our vignette, the trial counsel seemed to be concerned with the defense witness because of the substance of the witness’s testimony and because of the late notification by the defense. These two complaints, however, may warrant different remedies. One remedy would be to exclude the witness’s testimony altogether. If the real problem, however, is late notification, a different remedy may be to grant a delay. It is not clear from the trial counsel what particular relief he wants. This kind of confusion is not uncommon when counsel include several complaints in the same motion and fail to clarify what relief they are really requesting.

To avoid this problem, begin your motion by telling the judge exactly what you want. For example: “The defense respectfully requests that you suppress the knife seized from Sergeant Jones’s wall locker because the commander conducted a search without probable cause.” Put your bottom line up front so everyone knows why you are bringing this motion and what you hope to achieve. This will keep the litigation focused and keep everyone on track. This should not, however, prevent you from arguing for alternative remedies. For example, if you are litigating the admissibility of an expert witness, your first requested remedy might be to exclude the witness’s testimony all together. You may also want to tell the judge that if he does not grant that request, you would at least ask that he place certain limitations on the expert’s testimony, coupled with appropriate limiting instructions to the panel. By making the

1. UCMJ art. 39(a) (2000).
2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(a) (2000) [hereinafter MCM].
requested relief clear, and placing it at the beginning of your motion, you are much more likely to include only the information that is really relevant to the issues you are litigating. You will also be complying with the rules and helping the judge determine exactly what you want.

**Legal Authority**

After setting forth the request for particular relief, a proper motion next needs to tell the judge the legal authority the party is relying on to support the request. Research the rules, statutory authority, and relevant case law on the issue you are litigating and explain how the law supports your position. Consider a few pointers. First, include not only the case cites to relevant cases, but also copies of the actual cases for your military judge and opposing counsel. Many judges will appreciate the time you save everyone by having copies available of the cases and other materials you are relying on. Also, do not ignore the unfavorable cases. If those cases are controlling authority, you may have an ethical obligation to disclose them. Even if the unfavorable cases are not controlling, you should be aware of them and be able to distinguish them from your case. This will prevent you from being blind-sided, and your ability to deal with and distinguish unfavorable opinions will enhance your credibility and your persuasiveness.

You also need to know and set forth which party has the burden of persuasion. In our vignette, the trial counsel had not given this any thought. You cannot ignore this important point. Generally the burden of persuasion on any factual issue is on the moving party. However, there are a number of situations where the burden may shift from one party to another. For example, if the defense alleges unlawful command influence and introduces some evidence sufficient to render a reasonable conclusion in favor of the allegation, the burden shifts to the government to prove beyond a reasonable doubt that either the unlawful command influence did not occur or, if it did occur, it will not impact on the findings or sentence. It is vital that you know and clearly set forth who has the burden of persuasion so that the judge and all parties will know what their responsibilities are during the litigation. You simply cannot effectively present or argue a motion without this understanding.

### Offer of Proof

The third component of a proper motion is an offer of proof summarizing the pertinent facts that you are relying on in support of the motion. Once you know what relief you want, have a good understanding of the law, and know who has the burden of persuasion, presenting an offer of proof should be much easier. Armed with this understanding, you need to marshal all of the facts relevant to your issue and show how the law and the facts merge together to support the relief you are seeking. There are some additional pointers you need to understand about the offer of proof.

Just as it is important to know who has the burden of persuasion, it is also critical that you understand and set forth what the standard of proof is for your particular motion. Generally the standard of proof is a preponderance of the evidence. There are some motions, however, where the standard is higher. For example, if the defense claims that an inspection conducted by the government was really a subterfuge for a search without probable cause, the government must prove by clear and convincing evidence that the examination was an inspection. You must know the standard in order to know how much evidence is needed to support the motion. As with the other components of a proper motion, you should clearly set out the standard of proof.

Another important point that you must understand is that your offer of proof is not evidence, and is not sufficient standing alone to meet the factual standard of proof. In our vignette, the trial counsel had not planned to call any witnesses to support his claim that Dr. Forize was not qualified to testify. If you do not call witnesses, use stipulations, or introduce relevant documents or other physical evidence, you have not given the military judge a factual basis on which to decide the issue. As one appellate court put it, litigants should not lapse into a procedure where the moving party will state the motion and then launch right into argument without presenting any proof. Trial judges must force counsel to call witnesses, provide valid real and documentary evidence, or provide a stipulation. This procedure will save time and grief and provide a solid record.

It is true that the rules of evidence do not generally apply at the motions stage of the trial. This, however, does not relieve counsel of the responsibility to put on evidence and develop a

---

4. MCM, supra note 2, R.C.M. 905(c)(2).
6. MCM, supra note 2, R.C.M. 905(c)(1).
7. MCM, supra note 2, Mfr., R. Evfd. 313(b).
9. MCM, supra note 2, Mfr., R. Evfd. 104(a).
record. Most motions involve factual disputes, and the mere claim as to what the facts are, is insufficient. The military judge has the responsibility to determine preliminary questions and he needs facts in order to do this and to develop a complete record. If you are unprepared to call witnesses or introduce other necessary facts, this is an almost certain guarantee that you will fail to meet the standard of proof.

Other Tips for Success

Along with understanding the proper components of a motion, there are some other basic pointers that you should keep in mind in your motions practice. First, when litigating a motion before the military judge, listen carefully to the judge’s questions and do your best to answer them head on. If the question calls for a yes or no answer, first answer the question and then provide any explanation that you think is necessary. Do not do what the trial counsel did in our vignette, and ignore the tough questions in the mistaken belief that the force of your argument will somehow convince the judge. Questions from the judge provide you an important insight into what the judge is thinking and what issues are most important to him. Look at these questions as opportunities to focus your argument and address these important issues. If it is important to the judge, it better be important to you. Good oral argument requires thorough preparation and an ability to think on your feet. One way to better prepare yourself is to get other lawyers in your office to help you conduct a mock argument. This will give you an opportunity to think on your feet and to practice answering questions.

The other aspect of motions practice that you must be sensitive to are issues of timeliness and waiver. Rules for Courts-Martial 905, 906, and 907 set forth the timeliness requirements of the most common motions. The rules state that if a party fails to make the motion before the established deadline, the motion is waived unless the military judge grants relief from waiver for good cause. You must also be sensitive to the requirements of the local rules. The local rules cannot conflict with the Manual for Courts-Martial, but they often establish other requirements and procedures that you should comply with.

There are, of course, times when you are unable to raise the motion in a timely manner due to circumstances beyond your control. These circumstances should be the exception, not the rule. A failure by the trial counsel to look at the defense witness list until the day before trial, in most cases will not constitute good cause for a late motion. A successful motion will take some preparation and if it involves complex factual and legal issues, it will require a great deal of preparation. Habitually throwing together motions at the last minute after the deadlines have passed will probably only win you the anger and frustration of the military judge.

Understanding the key components and including them in your motion will make you a more effective trial attorney. If you put time and effort into your preparation you will be a more successful litigator, and you will avoid the pitfalls of the trial counsel in our vignette. In some instances, the case may be won or lost depending on the outcome of the motion. In any case where motions are litigated, they can have a significant impact on your case. Developing the skills to effectively litigate motions is an important component of your success as a trial attorney. Major Hansen.
Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

DOD Range Rule Withdrewn With a View Towards Reproposal

During the Department of Defense’s (DOD) Environmental Cleanup Stakeholders Forum in St. Louis, Missouri, in November 2000, the Deputy Under Secretary of Defense (Environmental Security), Ms. Sherri Goodman, announced that she had withdrawn the Range Rule1 from the Office of Management and Budget (OMB), with the intent to repropose the Rule.2

As Ms. Goodman pointed out, she withdrew the rule from the OMB for several reasons. First, DOD and the Environmental Protection Agency (EPA) must resolve difficult issues, especially the role of explosives safety. Second, as the Environmental Council of the States and National Association of Attorneys General pointed out to DOD, after several years of sorting through and refining the draft range rule, it is time to step back and hear from all the stakeholders and state regulators. Third, all the parties involved must achieve a greater understanding and consensus regarding the processes, tools, techniques, and end goals of the unexploded ordnance cleanup program. Keeping the Range Rule at OMB excludes further input from our community and state stakeholders. Finally, as DOD develops the major initiative of defining a range sustainment program, Ms. Goodman wants to be sure that everyone’s concerns are included in that process.

In the interim, DOD will issue a DOD Directive (DODD) and DOD Instruction (DODI) to provide consistent guidance regarding how to proceed with a closed, transferred, and transferring range response program. The DOD Policy for Closed, Transferred, and Transferring Ranges Containing Military Munitions Fact Sheet3 and the outlines for the proposed DODD and DODI were provided for public comment at DOD’s Environmental Clean-up Stakeholders Forum.

Environmental law specialists should continue to use DOD and EPA’s interim final guidance for implementing response actions4 until DOD issues the DODD and DODI. Lieutenant Colonel Schenck.

New Executive Order on Tribal Consultation

On 6 November 2000, President Clinton signed Executive Order (EO) 13,175, Consultation and Coordination with Indian Tribal Governments.5 Consistent with the Presidential Memorandum of 29 April 1994, Government-to-Government Relations with Native American Tribal Governments, EO 13,175 recognizes the following fundamental principles: (1) Indian tribes, as domestic dependent nations, exercise inherent sovereignty over their lands and members; (2) the United States government has a unique trust relationship with Indian tribes and deals with them on a government-to-government basis; and, (3)

---

1. Closed, Transferred and Transferring Ranges Containing Military Munitions, 62 Fed. Reg. 50,796 (proposed 26 Sept. 1997) (to be codified at 32 C.F.R. pt. 178). The proposed rule is summarized as follows:

The Department of Defense (DoD) is proposing a rule that identifies a process for evaluating appropriate response actions on closed, transferred, and transferring military ranges. Response actions will address safety, human health, and the environment. This rule contains a five-part process that is not inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and is tailored to the special risks posed by military munitions and military ranges. All closed, transferred, and transferring military ranges will be identified. A range assessment will be conducted in which a site-specific accelerated response (various options for protective measures, including monitoring) will be implemented. If these measures are not sufficient, a more detailed site-specific range evaluation will be conducted. Recurring reviews will be conducted, and an administrative close-out phase also is included.

Id.


Indian tribes have the right to self-government and self-determination. 6

When developing and implementing “policies that have tribal implications,” 7  section 3 of EO 13,175 directs federal agencies to adhere to the fundamental principles listed above in order to “respect Indian tribal self-government and sovereignty, to honor tribal treaty rights and other rights, and to strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” 8 In addition, federal agencies are required, when developing such policies, to encourage tribal development of policies to meet the agency’s program objectives, to defer to tribally established standards, and to consult with tribes to consider the need for federal standards and alternatives that would preserve tribal authority and prerogatives. 9

The EO also imposes significant new responsibilities on federal agencies that promulgate regulatory policies or rules that impact tribes or tribal governments. By February 2001, each federal agency must designate an official responsible for implementing the order. 10 By March 2001, the designated agency official must submit documentation to the OMB describing the agency’s process for ensuring timely and meaningful consultation with tribes early in the rule-making process. 11

Prior to going forward with any regulation that imposes substantial direct compliance costs on a tribal government 12 or any regulation that preempts tribal law, an agency must meet several cumbersome procedural requirements. The agency must consult with affected tribes early in the promulgation process, prepare a tribal summary impact statement as part of the regulation’s preamble, and submit to the Director, OMB, any written communications from tribal officials. 13 When transmitting a draft final regulation with tribal implications to OMB, the agency must certify that “the requirements of EO 13,175 have been met in a meaningful and timely manner.” 14

How will this impact the Army in its day-to-day operations? Initially, it is important to note that EO 13,175 is not limited to natural and cultural resource actions; it applies to any regulations or policies that have the potential to directly impact tribes, tribal governments and tribal resources. At Headquarters, Department of the Army (HQDA), EO 13,175 imposes several new responsibilities. Headquarters, Department of the Army must designate an agency official responsible for implementing EO 13,175 and forwarding a tribal consultation procedure to OMB. In addition, HQDA and the secretariat will need to ensure that proposed regulations and policies are reviewed early in the developmental process for potential impacts to tribes, tribal resources or tribal governments. Where such impacts are identified, HQDA and the secretariat must determine whether any of the requirements of EO 13,175 apply.

At the local installation level, EO 13,175 will apply to “policy statements or actions that have substantial direct effects on one or more tribes.” 15 This term is not defined in EO 13,175, and will be subject to interpretation by local decision makers. Management plans that impact tribally protected resources are the types of “actions” most likely to trigger section 3 of EO 13,175. 16 For all practical purposes, section 3’s requirements can be met by consultation with federally recognized Indian tribes in accordance with the principles and procedures set forth in the Department of Defense American Indian and Alaskan Native Policy, 17 and Department of the Army Pamphlet 200-4’s Guidelines for Army Consultation with Native Americans. 18

7. The EO broadly defines “policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” Id. § 1(a), 65 Fed. Reg. at 67,249.
9. Id. § 3(c), 65 Fed. Reg. at 67,250.
12. These requirements only apply to proposed regulations that are not mandated by statute.
14. Id. § 7, 65 Fed. Reg. at 67,251. Similar certification requirements apply to proposed legislation with tribal impacts submitted to OMB.
15. Id. § 1, 65 Fed. Reg. at 67,249.
Environmental law specialists (ELS) should work with cultural resource managers and the designated Coordinator for Native American Affairs to identify federally recognized tribes affiliated with their installation, and land impacted by installation activities. Environmental law specialists can then assist in identifying installation plans and policies with the potential to impact tribal governments or tribal resources protected by law or treaty. Where development and implementation of installation plans and policies may directly effect tribal governments or resources, ELSs should ensure that early tribal consultation occurs on a government to government basis in a manner consistent with Army policy and the principles discussed above. Mr. Farley.

NEPA and Cumulative Impacts Analysis

Army environmental law practitioners should be well familiar with the requirements of the National Environmental Policy Act of 1969 (NEPA). Requirements involving the use of categorical exclusions, and the merits of using an Environmental Assessment or an Environmental Impact Statement are generally well known and regularly applied by environmental lawyers. An area that can be overlooked in NEPA practice, however, is the analysis of the cumulative impacts of a federal action. This section will highlight the area of cumulative impacts analysis under NEPA and provide an example of a scenario where the need for cumulative impacts analysis may not be readily apparent.

The Council on Environmental Quality (CEQ) defines cumulative impact as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Army Regulation 200-2 requires consideration of cumulative impacts at all levels of NEPA analysis. The screening criteria of Appendix A dictate that categorical exclusions may only be used if “[t]here are minimal or no individual or cumulative effects on the environment as a result of this action.” Paragraph 5-2 states that “[a]n [Environmental Assessment] is required when the proposed action has the potential for . . . cumulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration.” The considerations above also apply to Environmental Impact Statements. In sum, cumulative impacts must be considered in the analysis of Army actions under NEPA.

Environmental attorneys must be cognizant of cumulative impacts in rendering advice on NEPA issues. Environmental Assessments and Environmental Impact Statements will include a section analyzing cumulative impacts. However, situations may arise where cumulative impacts might be overlooked. Consider a set of facts where there are several building projects on an Army installation either recently completed or where construction is ongoing. Assume that all of these

---

19. Protected tribal resources usually involve cultural resources such as those covered by the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (burial of ancestral human remains), and the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000) properties of traditional religious and cultural importance), or access to natural resources on traditional hunting areas guaranteed by treaty.
20. For example, an installation may develop a policy that restricts access to a site that is significant to a tribe for practice of traditional religion and culture.
21. Mr. Farley is an attorney with the Army Environmental Center’s Office of Counsel.
25. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.
26. See 40 C.F.R. § 1508.7.
27. Id.
29. Id. para. 5-1(a).
30. The methodology for examining the cumulative impacts of Army actions under NEPA is beyond the scope of this article. For those interested in the technical aspects of such analysis, see Council on Environmental Quality, Executive Office of the President, Considering Cumulative Effects Under the National Environmental Policy Act (1997), available at http://www.ceq.eh.doe.gov/nea/nea/papnet/gov.
projects are in the same general area, within two or three miles of one another. Now consider a proposal for the construction of another building on the same installation and in the same general area. Assume further that the proposed building is relatively small and no extraordinary circumstances are raised by its plans. It might be understandable to conclude, after analyzing the environmental impacts of the project itself, that there would be no significant impact on the environment. However, it is important to include in the analysis the cumulative impacts of the project in conjunction with the “past, present, and reasonably foreseeable future actions in the area.”

This would include all of the recent building projects and any other reasonably foreseeable actions to be taken in the area. The CEQ regulations require consideration of whether “a project’s environmental effects may be cumulatively significant in conjunction with other environmental conditions that are reasonably foreseeable, even if they are not significant by themselves.”

Analysis of the direct and indirect environmental effects of the project along with analysis of the cumulative impacts could, of course, still result in a finding of no significant impact (FNSI), but the cumulative impacts clearly must be considered.

Cumulative impact analysis raises a number of factual questions, such as: What geographic area should be considered in the analysis? What are foreseeable future actions? Is there a good baseline from which to base the analysis of cumulative impacts? The answers to these questions are rarely clear and

will depend upon the facts and conditions existing on and around the installation in question. What is clear is that a good faith attempt to analyze cumulative impacts is required for compliance with NEPA.

These facts also arguably raise the related but slightly different issue of the improper segmentation of projects. “Significance cannot be avoided by terming an action temporary or by breaking it down into small components.”

The courts have held that “agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without ‘significant’ impact.” Segmentation issues require analysis of the degree to which the actions are related and connected to each other. The CEQ regulations provide definitions and some factors to consider in making such determinations. Under our facts above, it would have been ideal to analyze all of the building projects in a single NEPA document. However, this is not always possible as new projects are not always foreseeable. Assuming good faith on the part of the agency, our facts more properly raise the issue of cumulative impacts as opposed to segmentation.

The importance of a proper cumulative impacts analysis under NEPA cannot be overemphasized. Awareness of cumulative impacts issues is vital to compliance with NEPA and should be understood by the environmental attorney. This note provides the environmental practitioner with a starting point for

32. Roanoke River Basin Ass’n v. Hudson, 940 F.2d 58, 64 (4th Cir. 1991).
33. A finding of no significant impact (FNSI) means:

a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.13.

34. See generally Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987); Hudson, 940 F.2d 58.
35. 40 C.F.R. § 1508.27(b)(7).
36. Coalition on Sensible Transp., 826 F. 2d at 68.
37. In the context of defining the scope of an action, “connected actions” are defined as those which are:

  closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements[;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[;] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). “Cumulative actions” are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. Id. § 1508.25(a)(2). “Similar actions” are those:

which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

Id. § 1508.25(a)(3).
spotting cumulative impacts issues and some basic references to begin legal research into this important issue. Major Tozzi.

Army Environmental Center Prepares Guidance on Fuel Tanker Trucks

The Army Environmental Center (AEC) is preparing compliance guidelines regarding fuel tanker trucks. In connection with this effort, AEC’s Office of Counsel (OC) has prepared a legal analysis of some of the issues associated with the tanker trucks.38 According to the opinion, if a fuel tanker truck leaves post (that is, it is not used exclusively within the confines of the installation), it is subject to Department of Transportation (DOT) spill regulations,39 and not EPA’s Spill Prevention Control and Countermeasures (SPCC) regulations.40 On the other hand, if the tanker truck is used exclusively within the confines of the installation, and the other prerequisites for the SPCC regulations are met, the SPCC regulations would apply, and secondary containment is required unless it can be shown to be impracticable. The AEC legal opinion provides some recommendations as to Army policy for fuel tanker trucks, including tanker trucks used during training exercises. Most importantly, AEC OC recommends that secondary containment be avoided for tanker trucks used in connection with training exercises, either because it is not required or because it is impracticable. Other fuel tanker trucks that serve in more of a storage role should be protected with some form of secondary containment. Ms. Rathbun.

Litigation Division Note


Introduction

On 17 April 2000 the Supreme Court of the United States transmitted to Congress amendments to both the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE) which took effect on 1 December 2000.41 These amendments could have a significant impact on judge advocates in the field who compile discovery in Army civil lawsuits, prepare litigation reports for use by Litigation Division and Department of Justice (DOJ) attorneys, and advise federal officials who are sued for acts occurring in the performance of their official duties. The changes to the FREs will likely impact military criminal practice as they foreshadow commensurate future changes to the Military Rules of Evidence.45 This article will discuss the changes to the FRCPs and FREs and their possible impact on military practice.

Amendments to the Federal Rules of Civil Procedure

The amendments to the FRCP focus primarily on the discovery process to expedite litigation, reduce costs of discovery, and allow for earlier and more extensive judicial intervention. The principle change makes the disclosure requirements universally mandatory by eliminating the local “opt out” provisions. Other significant changes appear in the scope of mandatory disclosure. The specific changes are discussed below.


40. EPA Oil Pollution and Prevention, 40 C.F.R. §§ 112.1-.21.


43. Id. at 398-99 (to be published at 529 U.S. 1191 (2000)). The amendments to the FREs include changes to: Rule 103, Rulings on Evidence; Rule 404(a), Character Evidence; Rule 701, Opinion Testimony by Lay Witnesses; Rules 702 and 703, Testimony by Experts; Rule 803(6), Hearsay Exceptions; and Rule 902, Self-Authentication.

44. Id. at 341, 398. The amendments to the FRCPs and FREs govern all proceedings in civil and criminal cases commenced after 1 December 2000 and, insofar as just and practicable, all proceedings in civil and criminal cases pending on that date. Id. at 341, 398-99.

45. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (2000) (stating that all amendments to the FREs shall apply to the Military Rules of Evidence (MRE) eighteen months after the effective date of the amendments unless the President takes action to the contrary).
Rule 4—Summons

Prior to amendment, FRCP 4 stated only that “[s]ervice upon an officer, agency, or corporation of the United States, shall be effected by serving” the United States and by sending a copy of the summons and complaint by registered or certified mail to the officer, agency, or corporation.46 The rule was silent as to whether service on the United States was required if an officer or employee was sued in his individual capacity, and courts provided inconsistent guidance on this point.47 As a result, the United States often did not learn of suits in a timely manner to the prejudice of both the United States and the named individual. The amendment now requires a party to serve the United States when an officer or employee of the United States is sued individually for “acts or omissions occurring in connection with the performance of duties on behalf of the United States – whether or not the officer or employee is sued also in an official capacity. . . .”48 The rule also requires the court to allow a reasonable time to cure improper service or lack of service on the United States, “if the plaintiff has served an officer or employee of the United States sued in an individual capacity.”49 In light of these changes, judge advocates should educate federal employees of the need to notify supervisors or legal offices if they are sued for activities that occurred in connection with their federal employment.

Rule 5—Service and Filing of Pleadings and Other Papers

As amended, FRCP 5 prohibits the filing of discovery materials “until they are used in a proceeding or the court orders filing.”50 Before this amendment, filing of discovery materials with the court was not uniform.51 Some jurisdictions, through local rules, opted for filing discovery with the court, while others did not.52 The amendment mandates uniformity in all jurisdictions. However, only the portions of the materials actually used in the proceedings need to be filed, although any party is free to file other pertinent portions of the materials and the court is free to order further filings.53 Pretrial disclosures, however, still must be filed with the court as now provided in FRCP 26(a)(3).54

Rule 12—Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

The amendments to FRCP 12 relate to the changes to FRCP 4.55 Officers and employees of the United States, whether sued in their official or individual capacities, now have sixty days after service to answer the complaint or the cross-claim,56 as opposed to the twenty days provided for in the pre-amendment rule.57 This change will give the United States more time to consider the officer or employee’s request for representation and to investigate the allegations in the complaint or counterclaim.58 This provision may mean that the United States’ answer is due earlier than the officer or employee’s answer since the government’s response date will begin running when the United States Attorney’s office is served, which could occur before service on the officer or employee.

47. See, e.g., Vaccaro v. Dobre, 81 F.3d 854, 856-57 (9th Cir. 1996); Armstrong v. Sears, 33 F.3d 182, 185-87 (2d Cir. 1994); Ecclesiastical Order of the Ism of Am v. Chasin, 845 F.2d 113, 116 (6th Cir. 1988); Light v. Wolf, 816 F.2d 746 (D.C. Cir. 1987).
49. Id. 4(i)(3)(B).
50. Id. 5(d).
51. See Amendments to the Federal Rules, supra note 42, at 381-82 (Committee Note to Rule 5 amendments).
52. Id.
53. Id. With the growing use of electronic filing, the restriction should help protect material covered by the Privacy Act, 12 U.S.C. §§ 3401-3422 (2000), although the issue of whether unfilled discovery is accessible by the public will undoubtedly be argued in the courts.
54. See infra notes 86-87 and accompanying text.
55. See supra notes 46-49 and accompanying text.
57. Id. 12(a)(1)(A).
58. Amendments to the Federal Rules, supra note 42, at 364 (Committee Notes to Rule 12 amendments).
Rule 26—General Provisions Governing Discovery; Duty of Disclosure

Rule 26(a) Required Disclosures: Methods to Discover Additional Matter

In response to widespread support for developing a nationally uniform initial disclosure rule, the local opt out provisions of FRCP 26(a)(1) have been eliminated. The old rule allowed local jurisdictions to use a variety of discovery procedures that were implemented as part of the Civil Justice Reform Act, with the expectation that allowing local systems to use their own specialized procedures would help refine the need for national uniformity and identify classes of cases in which the disclosure requirements were unnecessary. This goal was never achieved. The amended rule removes the authority to alter or opt out of the national initial disclosure requirements by either local rule or standing orders of individual courts or judges. Judges still may issue case specific orders that alter or eliminate the initial disclosure requirements, and the parties still may stipulate to avoid initial disclosure. Judges may not, however, issue standing orders altering the initial disclosure requirements.

The amendment to FRCP 26(a) eliminates the need to find and learn multiple local rules on initial discovery and should therefore make litigation report preparation easier. Still, judge advocates must be prepared to meet disclosure requirements in all cases.

In addition to providing for needed uniformity, the amendments to FRCP 26 also narrow the scope of the initial disclosure requirements. The old rule required a party to disclose all information, whether favorable or unfavorable, whether it intended to use the information or not, so long as the information was relevant to the proceedings, as well as to disclose all witnesses and documents “relevant to disputed facts alleged with particularity in the pleadings.” Now, parties must disclose only witnesses and documents “that the disclosing party may use to support its claims or defenses, unless solely for impeachment.” “Use” includes use at a pretrial conference, to support a motion, or at trial; it also includes intended use in discovery, such as using a document to question a witness during a deposition. Parties are no longer obligated to disclose witnesses or documents they do not intend to use.

Unchanged is FRCP 26(e)(1)’s requirement to supplement disclosures when additional information is later discovered. A party must therefore supplement its required disclosures when it determines that it may use a witness or document that it did not previously intend to use. Failure to supplement required disclosures is now a basis for FRCP 37 sanctions.

While Litigation Division and Department of Justice attorneys must ultimately decide issues of relevancy and whether or not evidence will be used, judge advocates who prepare litigation reports must continue to deliver all the discoverable evi-
evidence in a case, and should identify that evidence particularly related to claims and defenses.

Rule 26(a)(1)(E)

In addition to narrowing the disclosures required under FRCP 26(a)(1)(A) and (B), FRCP 26 was also amended to exempt eight categories of cases from the initial disclosure requirements. The exempted categories are:

(i) an action for review on an administrative record; (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.

The Federal Judicial Committee exempted these eight categories because these cases generally require little, if any, discovery, or are cases in which initial disclosure would be unlikely to contribute to the effective development of the case.

The exempted categories are meant to be “generic” and “are intended to be administered by the parties—and, when needed, the courts—with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories.” The eight categories are exclusive, however, and local rules or standing orders creating other general exemptions are invalid. The Federal Judicial Center estimates that these eight categories comprise approximately one-third of all civil filings. Notwithstanding the exemption of these eight categories of proceedings from the disclosure requirements, judge advocates in the field should continue to forward all documentary evidence with litigation reports. While the documents may not be subject to initial disclosure requirements, the information may be needed for subsequent discovery requests and preparing litigation strategy.

The time for the initial disclosures now required under amended FRCP 26(a) is extended to fourteen days. The rule states that “unless a different time is set by stipulation or court order, or unless a party objects during the [FRCP 26(f)] conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan,” parties must make disclosures at the Rule 26(f) conference, or within fourteen days thereafter. While the enlargement of time from ten to fourteen days will make it somewhat easier to meet the initial disclosure deadline, the DOJ recommended an enlargement to thirty days. Although on its face the rule provides more time for disclosure, it changes the way days are counted. Consequently, the rule does not always result in an extended deadline. For example, under the old rule, a ten-day limit starting on 2 April 2001 would require that the disclosure be made no later than 16 April 2001. However, under the new rule, a fourteen-day limit starting 2 April 2001, would require disclosure on the same day, 16 April 2001.

The disclosure date does not apply if a party objects to initial disclosure during the FRCP 26(f) conference and states its objection in the Rule 26(f) discovery plan. This provides a party an opportunity to raise objections to the court in cases where a party believes that disclosure would be “inappropriate in the circumstances of the action.” In a case where a party raises an objection to initial disclosure, the court must then rule on the objection and determine what disclosures, if any, should be made. Disclosure is stayed until such time that the court rules on the objections raised. This minor change will have lit-

74. See Amendments to the Federal Rules, supra note 42, at 386 (Committee Note to Rule 26 amendments).
75. Id.
76. Id. at 387.
77. Id. at 386.
79. Id. 6(a) (excluding intermediate Saturdays, Sundays, and legal holidays for deadlines less than eleven days).
80. Because the intermediate Saturdays, Sundays, and legal holidays are not excluded. See id. The new fourteen-day time limit seems only to lessen the burden of figuring out which days are excluded from a ten-day count.
82. Id.
83. Id.
tle impact on judge advocates. However, judge advocates should expeditiously forward all evidence for which disclosure is required.

Absent court order or stipulation, a new party added after the FRCP 26(f) conference has thirty days in which to make its initial disclosures.84 However, “it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.”85 This change may allow only a limited time to respond in third-party actions.

As described above, the amendments to FRCP 5(d) remove the requirement to file disclosures under Rule 26(a)(1) and (2) until they are used in the proceeding. Under the new rule, FRCP 26(a)(4) simply provides that, unless the court orders differently, all disclosures under FRCP 26(a)(1) through (3) must be made in writing, signed, and served.86 Additionally, the filing of pretrial disclosures under Rule 26(a)(4) is now required by Rule 26(a)(3). Pretrial disclosures must be provided to other parties and “promptly file[d] with the court.”87 In order to ensure compliance with this change, judge advocates must provide all evidence available with the litigation report.

**Rule 26(b) Discovery Scope and Limits**

As amended, FRCP 26(b) limits discovery to “any matter, not privileged, that is relevant to the claim or defense of any party.”88 Formerly, discovery extended as far as any matter “relevant to the subject matter involved in the pending action.”89 Under the new rule, discovery may extend as far as matters “relevant to the subject matter involved in the action,” only if ordered by the court “[f]or good cause.”90 “The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”91

Although the amendments to FRCP 26(b) narrow the scope of discovery, they do not change the requirements of judge advocates preparing litigation reports. Litigation Division and DOJ still require any matter relevant to the subject of the pending litigation. Judge advocates must help identify information relevant to the claims or defenses of the parties.

The modifying word “relevant” has been added to the sentence in FRCP 26(b)(1) to clarify that information sought in discovery need not be admissible at trial if reasonably calculated to lead to the discovery of admissible evidence.92 The new rule now reads: “Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”93 The word “relevant” was added to avoid the possibility that the sentence otherwise would be misinterpreted to undercut the amended rule’s newly added limitation on discovery to matters relevant to the parties’ claims or defenses.94 Thus, “relevant” information is discoverable, meaning information within the scope of discovery as defined elsewhere in the subdivision, whether or not the information is admissible, so long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.95

The amended rule also states that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii),” which have not been altered.96 “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”97

84. Id.
85. Amendments to the Federal Rules, supra note 42, at 387 (Committee Note to Rule 26 amendments).
87. Id. 26(a)(3).
88. Id. 26(b)(1)(emphasis added).
91. Amendments to the Federal Rules, supra note 42, at 389 (Committee Note to Rule 26 amendments).
92. See id. at 389-90.
94. Amendments to the Federal Rules, supra note 42, at 389-90 (Committee Note to Rule 26 amendments).
95. Id.
97. Amendments to the Federal Rules, supra note 42, at 389-90 (Committee Note to Rule 26 amendments).
The amendments to FRCP 26(b)(2) remove the ability of courts to implement local rules or standing orders that change presumptive limits on depositions and interrogatories, or the presumptive limit on the length of depositions under amended FRCP 30.98 These discovery activities can still be modified by court order or agreement of the parties in a particular case.99 Because there are no presumptive limits on the use of requests for admission, the new rule continues to allow courts to limit such requests by local rule.100 The amended rule should standardize most discovery tools. Judge advocates, however, must continue to check local rules and seek additional limits on discovery as needed.

**Rule 26(d) Timing and Sequence of Discovery**

Like other provisions in FRCP 26, the amendments to FRCP 26(d) eliminate the opt-out provision for pre-amendment Rule 26(d). Courts no longer have the authority to issue local rules or standing orders that allow parties to begin discovery before the FRCP 26(f) conference.101 Thus, the discovery moratorium now applies to all categories of cases, unless ordered otherwise by the court in a particular case or agreed to by the parties, with the exception of the eight categories of cases that are exempt from initial disclosure under FRCP 26(a)(1)(E).102

With regard to the eight categories of exempt proceedings, discovery can begin at any time. “Although there is no restriction on the commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases.”103 Defendants can seek additional time to respond to discovery in exempted actions by bringing a motion under FRCP 26(c).104 In cases that are in litigation, judge advocates should instruct potential witnesses that plaintiffs’ attorneys have no authority to seek information or other discovery prior to the discovery conference.

**Rule 26(f) Meeting of the Parties; Planning for Discovery**

The amended rule removes the ability of courts to exempt cases from the FRCP 26(f) discovery planning conference requirement by local rule or standing order.105 This change standardizes the requirement to have the parties confer about their discovery plans early in the litigation process. The eight categories of cases exempted from initial disclosure under FRCP 26(a)(1)(E), however, are also exempted from the requirement of the FRCP 26(f) conference.106 All other categories of cases are subject to the requirement, although a court may order that the conference not occur in a particular case, or order that it *should* occur in a case exempted under FRCP 26(a)(1)(E).107

The parties must now hold the FRCP 26(f) conference at least twenty-one days, instead of fourteen days, before the FRCP 16 scheduling conference or a FRCP 16(b) scheduling order is due.108 Additionally, parties must submit to the court the written report outlining their discovery plan within fourteen days, instead of ten days, after the FRCP 26(f) conference.109 These time periods may be shortened by local rule “[i]f necessary to comply with [a court’s] expedited schedule for Rule 16(b) conferences.”110 The court may also allow the parties to report orally on their discovery plan at the FRCP 16(b) conference in lieu of submitting a written plan.111 The discovery conference need not be held face-to-face, although, in a particular case, “[a] court may order that the parties or attorneys attend the

98. *Id.* at 391.
99. *Id.*
100. *Id.*
101. *Id.* at 392.
102. *Id.*
103. *Id.* at 389 (Committee Note).
104. *Id.*
105. *Id.* at 392-93.
109. *Id.*
110. *Id.*
111. *Id.*
conference in person.” 112 In light of these changes, extensions to provide litigation reports will be harder to obtain.

**Rule 30—Depositions Upon Oral Examination**

The amendments to FRCP 30 limit depositions to one day of seven hours unless otherwise authorized by the court 113 or stipulated by the parties. 114 Reasonable breaks for lunch or other reasons do not count for the seven-hour period. 115 The deposition of each person designated under FRCP 30(b)(6) counts as a separate deposition for purposes of the time limit. 116 Courts may no longer limit the time for depositions by local rule, although they may do so by order in particular cases. 117

Rule 30(d)(1) now requires “[a]ny objection during a deposition,” 118 as opposed to “[a]ny objection to evidence during a deposition,” 119 to be stated concisely and in a non-argumentative, non-suggestive manner. Similarly, the witness may be instructed not to answer to enforce “a limitation directed by the court,” 120 as opposed to “a limitation on evidence directed by the court.” 121 These changes are intended to avoid disputes about what constitutes “evidence,” and whether an objection is to, or a limitation is on, “evidence,” or merely discovery more broadly. 122 The requirements of the rule thus “apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition.” 123 Based on these changes, unnecessarily long depositions should cease. Agency counsel participating in depositions should have more leeway in raising objections to matters beyond “evidence.” Practitioners should note, however, that the standard for what is objectionable has not changed.

Consistent with the changes to Rule 5(d), the amendment to Rule 30(f)(1) deletes the requirement that deposition transcripts be filed with the court. 124

**Rule 37—Failure to Make Disclosure or Cooperate in Discovery: Sanctions**

The amendment to FRCP 37 adds the failure to supplement a prior discovery response 125 to the list of failures to disclose that, unless harmless, will prevent a party from using the non-disclosed information or witnesses or justify other court-imposed sanctions. 126 Department of the Army and DOJ litigation attorneys concerned about sanctions will want assurances that all discovery responses are complete and timely supplemented. All newly found information must be coordinated through the litigation attorneys as soon as possible. This will have a significant impact on agency counsel in the field who will be the primary providers of documents.

112. See Amendments to the Federal Rules, supra note 42, at 393 (Committee Note to Rule 26(f) amendments).

113. A party seeking a court order to extend the seven-hour time limit must show good cause. Id. at 395-96 (Committee Note to Rule 30 amendments). Factors for the court to consider when asked for an extension include whether the deposition will be prolonged because of the need for an interpreter, whether the deposition will cover events occurring over a long time period, whether the deponent’s own lawyer will want to examine the witness, and whether the deponent is an expert witness. Id. If multiple parties will need to examine the witness, additional time may be appropriate, although the examinations should not duplicate one another and parties with similar interests should try to designate one lawyer to ask questions about areas of common interest. Id.

114. Id. The parties and witnesses are expected to make reasonable accommodations to avoid the need for court intervention, and may agree to alter the deposition schedule to best suit their mutual convenience. Id.

115. Id.

116. Id.

117. Id. at 396.


120. FED. R. CIV. P. 30(d)(1).

121. FED. R. CIV. P. 30(d)(1) (amended by FED. R. CIV. P. 30(d)(1) (2000)).

122. See Amendments to the Federal Rules, supra note 42, at 395 (Committee Note to Rule 30 amendments).

123. Id.

124. Id. at 396.

125. See FED. R. CIV. P. 26(e)(2) and discussion supra notes 71-72 and accompanying text.

126. FED. R. CIV. P. 37(c) (1).
Amendments to the Federal Rules of Evidence

As noted in the introduction, the proposed amendments to the FRE also became effective on 1 December 2000. 127 While the amendments will affect both civil and criminal cases in the Army, we will only address the impact on civil cases in this article.

Rule 103—Rulings on Evidence

A party that unsuccessfully objects to the admission or exclusion of evidence will no longer need to renew its objection at trial in order to preserve the issue on appeal.128 Before the recent amendment, the requirement of renewing objections at trial varied among federal jurisdictions.129 In an effort to establish uniformity, the amendment added a sentence at the end of FRE 103(a) which provides that, “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”130 An analysis of the term “definitive ruling” is key to determining whether counsel must renew its objection at trial. If counsel has any doubts as to whether or not the court has reserved judgment on the ruling, counsel has an obligation to clarify the issue with the court.131 However, even if the court makes a definitive advance ruling, the amendment does not preclude the court from reviewing its decision once a party offers the evidence.132 As the committee note highlights, “[i]f the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal.”133 The same holds true where the material facts and circumstances at trial differ from those proffered at the advance hearing.134

The amendment to FRE 103(a) is not boundless. The amendment does not override FRCP 72(a)135 and its requirement to appeal, in writing, any adverse evidentiary decisions of a federal magistrate within ten days of receiving a copy of the order.136 One issue not addressed by the amendment to FRE 103(a) is whether a party who loses a motion in limine and who then offers the evidence in an attempt to minimize its prejudicial impact, waives the right to appeal the trial court’s ruling.137 Litigation attorneys should maintain a checklist of prior objections in a case and note those on which the court has definitively ruled.

Rule 701—Opinion Testimony by Lay Witnesses

The amendment to Rule 701 adds an additional clause that prevents counsel from using lay witnesses to provide expert opinions. In its entirety, amended Rule 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.138

127. See supra notes 43–44 and accompanying text. With regard to FRE 404, Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes, the amendment to Rule 404(a)(1) expands the government’s ability to introduce evidence of the accused’s negative character in certain circumstances. The amendment inserts an additional clause at the end of Rule 404(a)(1), such that it now allows for evidence of a pertinent trait of character of an accused to be admitted if:

offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution . . .

FED. R. EVID. 404(a)(1) (2000) (emphasis added). Because this change only effects criminal cases, it will not be discussed in this article.

128. See Amendments to the Federal Rules, supra note 42, at 411-14 (Committee Note to Rule 103 amendments).

129. Id.

130. FED. R. EVID. 103(a).

131. See Amendments to the Federal Rules, supra note 42, at 412 (Committee Note to Rule 103 amendments).

132. Id. at 412.

133. Id.

134. Id.


136. Amendments to the Federal Rules, supra note 42, at 413 (Committee Note to Rule 103 amendments).

137. Id. at 413-14.
Under the amendment, the true test of admissibility focuses on the nature of the testimony rather than the job title or description of the witness.\footnote{138. {\textit{Fed. R. Evid.} 701 (2000 amendment noted in italics).}} The court must examine testimony “under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”\footnote{139. Amendments to the Federal Rules, \textit{supra} note 42, at 416-17 (Committee Note to Rule 701 amendments).} Even with the amendment, it is possible for one witness to give both lay and expert testimony in the same case.\footnote{140. \textit{Id.}} As to those portions of a witness’s testimony qualifying as the latter, the amendment requires parties to lay the proper foundation under FRE 702.\footnote{141. \textit{Id.}} Furthermore, the amendment prevents a party from evading the disclosure requirements for expert witnesses set forth in FRCP 26.\footnote{142. \textit{See id.}} As such, FRE 701(c) should limit the number of surprise experts disguised as lay witnesses.

**Rule 702—Testimony by Experts**

The amendment to FRE 702 is a response to recent cases addressing expert witness testimony.\footnote{143. \textit{Id.}} As amended, the rule adds a new clause to the end that allows a witness to provide an expert opinion, “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”\footnote{144. \textit{See, e.g.}, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999).}

Recognizing that the circumstances surrounding each trial will differ, the amendment does not include procedural requirements instructing courts on how to exercise their gatekeeper function over expert testimony.\footnote{145. \textit{Fed. R. Evid.} 702 (2000).} Instead, courts will likely continue to rely on the list of factors recognized in \textit{Daubert} and later cases in assessing whether or not expert testimony is sufficiently reliable to be heard by the trier of fact.\footnote{146. Amendments to the Federal Rules, \textit{supra} note 42, at 423 (Committee Note to Rule 702 amendments).} As noted by the Rules Committee, “[c]ourts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under \textit{Daubert}, it is contemplated that this will continue under the amended Rule.”\footnote{147. \textit{Id.} at 418-19 (listing five non-exhaustive factors).} Thus, the trial court retains leeway in determining which opinion testimony meets the substantive requirements under the amended rule. This leaves considerable room for advocacy in addressing the issues of reliability. While proffered expert testimony need not rely upon scientific method, it must be properly grounded, reasoned, and explained according to an accepted body of learning or experience in the expert’s field.

**Rule 703—Bases of Opinion Testimony by Experts**

The presumption underlying the amendment to FRE 703 emphasizes the general notion that when an expert relies upon inadmissible information, such as hearsay, that information may not be brought before the trier of fact via the expert’s testimony.\footnote{148. \textit{Id.} at 418-19 (listing five non-exhaustive factors).} The amended rule does so by stating that “[t]ests or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”\footnote{149. \textit{Fed. R. Evid.} 703 (2000).}

In essence, the amendment created a reverse FRE 403\footnote{150. \textit{Fed. R. Evid.} 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”).} balancing test. Under amended FRE 703, inadmissible evidence upon which the expert reasonably relies in formulating the expert opinion is barred unless the probative value outweighs the prejudicial effect.\footnote{151. \textit{Fed. R. Evid.} 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”).} As the Rules Committee specifically states, “when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying informa-
tion is not admissible simply because the opinion or inference is admitted.” 153

The amendment to FRE 703 addresses only the disclosure of the inadmissible information to the trier of fact. “The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert’s opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.” 154 The language of the amended rule is limited to information offered by the proponent of the expert. Data or facts underlying the expert’s testimony may be offered by an adverse party on cross-examination, and such an attack may open the door allowing the proponent of the expert to disclose otherwise inadmissible information to the finder of fact in rebuttal.

Rule 803—Hearsay Exceptions; Availability of Declarant Immaterial and Rule 902—Self-Authentication

The amendment to FRE 803(6), Records of Regularly Conducted Activity, allows parties to meet the foundational requirements of the rule, “without the expense and inconvenience of producing time-consuming foundation witnesses.” 155 The amendment is a welcome change to the rule. Previously, courts required foundation witnesses to testify unless the parties agreed to a stipulation of expected testimony. 156

The amendment to FRE 902, Self-authentication, adds two subsections (11) and (12). 157 Rule 902(11) addresses certified domestic records of regularly conducted activity and provides for their self-authentication. Domestic records shall be self-authenticating where:

[t]he original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—
(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice. 158

Rule 902(12) addresses certified foreign records of regularly conducted activity. 159 The amendment uses language that mirrors FRE 902(11) and provides for self-authentication of foreign records. 160 However, the amendment regarding certified foreign records places an additional burden on the declarant. Regarding foreign records, “[t]he declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed.” 161

If a party intends to offer a domestic record into evidence under Rule 902(11) or a foreign record under 902(12), the party must provide all adverse parties with written notice of that intention. Further, the offering party must make the record and the supporting declaration available for inspection far enough in advance to provide the adverse party with a fair opportunity to challenge both. 162 Because of these requirements, judge advocates will need to obtain all documents and have them paginated and certified much earlier in the discovery process.

152. See Amendments to the Federal Rules, supra note 42, at 424-25 (Committee Note to Rule 703 amendments).
153. Id. at 424.
154. Id.
155. Amendments to the Federal Rules, supra note 42, at 426 (Committee Note to Rule 803 amendments).
156. Id.
158. Id. 902(11). To assist practitioners a sample declaration is provided at Appendix A.
159. Id. 902(12).
160. Id.
161. Amendments to the Federal Rules, supra note 42, at 427-28 (Committee Note to Rule 902 amendments).
162. Fed. R. Evid. 902 (11), (12).
Conclusion

The changes to the FRCP and the FRE will have an immediate impact on federal civil litigation. Taken together, the amendments to both the FRCP and FRE should create more uniform practice in the federal courts. It remains to be seen whether the discovery changes will serve their intended purposes to expedite litigation, reduce costs of discovery, and allow for earlier and more extensive judicial intervention. Major Amrein, Major King, Captain Ryan, and Captain McCoy.
Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ____________

NAME, )

) Plaintiff

) v. ) Civil Action No.

NAME, )

) Defendant

DECLARATION

1. I hereby certify that the document attached hereto consisting of _____ pages, is a true and exact copy of the __________________________ (e.g., the in-patient records of Jane Doe, regarding her hospitalization from ____ to ____), an official document in the custody of the ______________.

2. The records attached hereto were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

3. The records attached hereto were kept in the course of the regularly conducted activity at ______________. (TAMC, etc.)

4. The records were made by the regularly conducted activity as a regular practice.

5. I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746. (Use this language if the declaration is executed within the United States. If executed outside the United States, use “I declare (or certify, verify, or state) under penalty of perjury under the laws of the _______________ (country where declaration will be signed) that the foregoing is true and correct.

Executed on: ______________

NAME
Duty position
Note from the Field

A Practitioner’s Note on Physical Evaluation Boards

Captain Thaddeus A. Hoffmeister
Chief, Soldiers’ Legal Counsel
Walter Reed Army Medical Center
Washington, DC

Introduction

The Army’s disability system, in particular the Physical Evaluation Board (PEB), relies on a unique and complex body of law not readily understood by members of the military to include many judge advocates. This note is intended to help attorneys in the field who do not work directly with PEBs on a daily basis, but who may find themselves representing soldiers undergoing the process. The first part offers practitioners a step-by-step explanation of the PEB process, highlighting its most important aspects. The second part offers practitioners some useful suggestions to assist in case preparation. After reading this note and examining the applicable regulations, practitioners should have the tools necessary to guide clients through the PEB system.

Step One: Starting The PEB Process—The MEB

All PEBs begin with a Medical Evaluation Board (MEB). A treating physician, commander or Military Occupational Specialty (MOS) Medical Retention Board (MMRB) may refer a soldier to the MEB to determine if he meets retention standards. This is so because the whole person is reduced proportionally by the first, and each subsequent rating, as illustrated in the following example:

1. The soldier starts as a 100% whole person. Applying the first percentage rating to this figure yields 30% with a new baseline figure of 70%.

\[(100\% \times 30\%) = 30\% \times 70\% = 70\%\,.

2. The soldier is now only a 70% whole person. Applying the second percentage rating to this new baseline figure yields 14% with a new baseline figure of 56%.

\[(70\% \times 20\%) = 14\% \times 70\% = 56\%\,.

3. The soldier is now only 56% whole. Applying the third percentage rating to this new baseline figure yields 5.6%. Since there are three ratings, no new baseline is needed.

\[(56\% \times 10\%) = 5.6\% \times 56\% = 5.6\%\,.

4. All the percentages are added together, yielding 49.6%. (30% + 14% + 5.6% = 49.6%).

5. The resultant percentage is rounded to the nearest number divisible by 10, yielding 50%.

As stated earlier, 30%+20%+10%= 50%. Simple!

2. Currently the Army conducts PEBs at three locations, Fort Lewis, Fort Sam Houston, and Walter Reed Army Medical Center. Each location has at least one judge advocate assigned to represent soldiers before the PEB. In addition, the United States Army Physical Disability Agency (USAPDA) the higher headquarters for the three PEBs, has its own legal counsel.

3. In fiscal year 2000, USAPDA processed over 10,000 soldiers.


5. U.S. Dep’t of Army, Reg. 635-40, Physical Evaluation for Retention, Retirement, or Separation, paras. 2-8, 2-9 (1 Sept. 1990) [hereinafter AR 635-40]. The medical standards applied in MEBs are covered by U.S. Dep’t of Army, Reg. 40-501, Medical Services: Standards of Medical Fitness (30 Aug. 1995) [hereinafter AR 40-501].


7. The practitioner must understand that although the MEB and PEB address similar issues, they serve different functions. The PEB, which falls under U.S. Army Personnel Command (PERSCOM), makes a determination of fitness for duty and applies a disability rating if applicable. AR 635-40, supra note 5, paras. 4-17, 4-19. The MEB, which falls under U.S. Army Medical Command (MEDCOM), determines whether a soldier does or does not meet retention standards. Id. para. 4-10. The MEB, as opposed to the PEB, is a very informal process with minimal attorney-client involvement, if any. Although slight, the difference between the MEB and the PEB is very important and will be raised again later.
standards, the soldier is returned to his assignment. However, if the MEB finds that the soldier does not meet retention standards, the soldier’s file is forwarded to one of three PEBs for a fitness determination.

### Step Two: Informal Board vs. Formal Board

Once the PEB receives a soldier’s file from the MEB, the board conducts an informal adjudication, which is a record review of the MEB proceedings and findings, as well as applicable personnel documents to include the soldier’s medical records. The soldier does not appear in person before the informal board. After an informal decision is made, the soldier consults with his Physical Evaluation Board Liaison Officer (PEBLO) at the Medical Treatment Facility (MTF) for assistance in determining what action to take regarding the PEB’s informal findings. If the soldier concurs with the findings, the case is forwarded to the U.S. Army Physical Disability Agency (USAPDA) for final disposition.

#### Non-Concurrence

If the soldier non-concurs with the informal findings, he may submit a rebuttal for reconsideration and elect a formal board. This is normally the point where the judge advocate gets involved. When electing a formal board, the soldier may also: decide to appear or not appear; request an enlisted, female or minority representative on the board; and choose to be represented by the regularly appointed military counsel or counsel of choice at no expense to the government. In addition, the soldier may contact the Disabled American Veterans and inquire about potential representation.

#### De Novo Review

While it is the soldier’s absolute right to request a formal board, there are certain hazards associated with having a formal board. The formal board is not bound by decisions made during the informal board process, as it is a “de novo” proceeding. Therefore, if the soldier elects a formal board, he may have his disability rating raised, lowered or maintained. In addition, the formal board may find the soldier fit and return him to duty or recommend further tests at the MTF.

#### Formal Hearing

The hearing begins with the president of the board reading a script addressing the soldier’s rights and other administrative data. At this time the soldier elects to give either sworn or

---

8. *Id.* para. 4-13.
9. *Id.*
10. *Id.* para. 4-20. The soldier’s medically disabling condition(s) should be listed on the MEB Narrative Summary (NARSUM) or an official addendum. *Id.* para. 4-11. Any unlisted diagnosis may not be considered. *See id.* para. 4-18, app. D-8b. Therefore, if the soldier has a diagnosed condition not listed he should attempt to get a physician to write an addendum.
11. *Id.* para. 4-20.
12. The soldier has four election options: (1) Concurrence with the findings and recommendations and waiver of a formal hearing; (2) Nonconcurrence with the findings and recommendations; submission of a rebuttal explaining the soldier’s reasons for nonconcurrence; and waiver of a formal hearing; (3) Demand for a formal hearing with or without personal appearance; and (4) Choice of counsel if a hearing is demanded. *Id.*
13. *Id.* para. 2-4 (e)-(f). Authority to act as final approving authority for all cases except those involving general officers and medical corps officers has been delegated to USAPDA from the Secretary of the Army. *Id.* para. 3-13. While not frequently exercised, USAPDA retains inherent supervisory authority to review and revise PEB findings, make informal determinations, or to refer the case to a formal board. *Id.* para. 4-22. The president of a PEB may reconsider an informal decision or direct a formal board *sua sponte* if the soldier’s case has not been adjudicated by USAPDA. *Id.* para. 4-21r(2).
14. *Id.* para. 4-20. Due to personnel constraints, the same individuals generally adjudicate both the formal and informal boards.
15. *Id.* paras. 4-20c(d), 4-21h(1).
16. *Id.* para. 4-21h(1).
17. The request does not have to be granted if the soldier has been found fit for duty at the informal board. U.S. DEP’T OF DEFENSE, INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION, para. E.3.P1.3.3.1.2 (14 Nov 1996) [hereinafter DODI 1332.38].
18. AR 635-40, *supra* note 5, para. 4-21r(2).
19. *Id.*
20. *Id.*
21. *Id.* para. 4-21. *See Service as Service Members’ Counsel, supra* note 5, para. IVD5.
Once the soldier is sworn, he or his counsel presents the case-in-chief, which normally consists of a brief opening statement and direct examination of the soldier and any available witnesses. Next, the board members may question the soldier or witnesses. After the board members finish their questions, the soldier (or counsel) may offer a closing statement. The hearing is then closed for deliberation. When a majority of the board members reach an agreement, which typically requires twenty to thirty minutes of deliberation depending on the complexity of the case, both the soldier and the attorney return to the hearing room for the decision. A full hearing ordinarily lasts only sixty to ninety minutes, necessitating a well-organized and succinct presentation of matters.

### Appeal Rights

The soldier has ten days to concur or non-concur with the formal board decision. If the soldier agrees with the findings of the formal board, the case is sent to USAPDA for final disposition. If the soldier does not agree with the findings of the formal board and he submits the non-concurrence within the allotted time, the case will be reconsidered by the PEB without the presence of either the soldier or his attorney and is then forwarded to USAPDA for final disposition. If a USAPDA review confirms the PEB’s findings, the soldier’s case is finalized. If a USAPDA review modifies the PEB findings, the revised findings are forwarded to the soldier for his concurrence or non-concurrence. If the soldier non-concurs with the modified findings or provides a statement of rebuttal and the rebuttal does not result in a reversal of the USAPDA modification, the case will be forwarded to the U.S. Army Physical Disability Appeal Board for a final decision. If the soldier remains dissatisfied, he may appeal to the Army Board for Correction of Military Records. In addition, the soldier may bring suit in the Court of Federal Claims.

### Step Three: What Is The PEB Looking For?

The PEB, composed of a president, personnel management officer and medical member, has two purposes: to decide whether or not the soldier is fit for duty and to determine disability compensation, if applicable. However, the PEB cannot determine disability compensation until the soldier is first
found unfit for duty. The judge advocate should make the soldier aware of this fact and determine whether the client wants to be found fit or unfit prior to entering the boardroom. Equivocating between the two will cause both the soldier and the attorney to lose credibility. That is to say, the judge advocate should not request that the formal board find his client either “unfit with a 100% rating or fit and returned to duty.”

The Standard

The standard the PEB applies in determining fitness is whether the soldier can reasonably perform the duties of his office, rank, grade, or rating. The PEB is best described as a performance evaluation board as opposed to a physical evaluation board because the PEB will only find the soldier unfit for duty if he cannot reasonably perform his specific MOS due to a medical condition which fails medical retention standards. While the inability to qualify with a weapon, take the Army Physical Fitness Test (APFT), perform basic soldier skills, or deploy worldwide may impact on the fitness determination, each category does not by itself make the soldier unfit for duty. For example, if the soldier is unable to take the APFT, he may still be found fit for duty if able to perform his MOS. To determine whether the soldier is fit, the PEB compares the nature and severity of the soldier’s medical condition to the requirements and duties he may reasonably be expected to perform in his primary MOS. As a reference, the PEB uses Army Regulation 611-1 to determine what duties the soldier performs in his MOS and the physical requirements of those duties. Therefore, while a certain medical condition may make an infantryman unfit, the same condition may not make a doctor unfit. As the soldier’s advocate, you must also remember that this determination is based on the soldier’s rank. Consequently, a certain condition may make a lieutenant unfit, but not a colonel, due to the nature of the MOS.

Retention vs. Unfitness

To determine whether the soldier is unfit, the PEB will establish the medical condition(s) that ended the soldier’s career. It is possible for a soldier to be found unfit based on only one medical condition, even though he fails to meet medical retention standards in many different areas. As the soldier’s advocate, you must remind the soldier that even if he has more than one diagnosed condition that fails medical retention standards, the PEB will only rate those conditions which fail medical retention standards and make him unfit for duty. Remember the difference between the MEB and the PEB. For the board to consider disability compensation, the soldier’s condition must fail not only retention standards but make him unfit for duty as well.

Step Four: Determining Disability Compensation

The second function of the PEB is to determine possible disability compensation. If the soldier is found unfit, the PEB

---

39. See id. paras. 4-17a, 4-19a, 4-19i.
40. See id. paras. 4-19f, 4-19i.
41. Disability ratings range from 0% to 100%. In dealing with approximately 200 clients, the author has had only one receive a 100% rating.
42. This type of argument is illogical and may prove detrimental to the client’s case.
43. AR 635-40, supra note 5, para. 4-19a(1).
44. See AR 40-501, supra note 5.
46. Id.
48. The board members rely heavily on their own experience and knowledge of the Army to determine whether a soldier can function in a particular MOS.
49. AR 635-40, supra note 5, para. 4-19a(1).
50. Id. para. 3-1.
51. AR 635-40, supra note 5, para. 3-1c.
52. See note 7 supra and accompanying text.
53. AR 635-40, supra note 5, para. 4-19i.
54. Id.
will next determine whether the medical condition was caused or permanently aggravated by military service.\textsuperscript{55} If the PEB finds that the soldier’s military service neither caused nor permanently aggravated his condition, he will be separated without benefits. However, if the PEB reaches the opposite conclusion, it will assign a disability rating based on the diagnosed condition and its severity.\textsuperscript{56}

\textit{Severance Pay}

The soldier is entitled to severance pay if he receives a disability rating of less than 30%.\textsuperscript{57} Severance pay is calculated by multiplying the soldier’s most recent monthly base pay by two, then multiplying the resulting number by the total number of years on active duty up to twelve years (six months or more counts as a whole year).\textsuperscript{58} Financially, there is no difference between a 0%, 10%, or 20% rating. Under limited circumstances, both severance and disability retirement pay may be non-taxable.\textsuperscript{59}

\textit{TDRL vs. PDRL}

If the soldier receives a disability rating of 30% or more, he will be placed on either the permanent or temporary disabled retired list (PDRL/TDRL).\textsuperscript{60} Soldiers placed on the TDRL are temporarily retired, but must undergo periodic medical re-examinations to see if their condition changes or stabilizes.\textsuperscript{61} After each re-examination the results are forwarded to the PEB for disposition.\textsuperscript{62} If the PEB determines that the soldier’s condition has improved sufficiently, the PEB can find the soldier fit for duty.\textsuperscript{63} The soldier then has a statutory right to return to active duty.\textsuperscript{64} If the PEB determines that the soldier’s condition has improved but not to such an extent that the soldier is fit for duty, the soldier may be removed from the TDRL and offered severance pay.\textsuperscript{65} In addition, the board may permanently retire the soldier or keep him on TDRL.\textsuperscript{66} While on TDRL, the soldier receives at least 50% of his retirement base pay.\textsuperscript{67} If the soldier is placed on TDRL with a rating above 50%, his pay will be based on the higher rating.\textsuperscript{68}

\begin{itemize}
\item 55. \textit{Id.} para. 4-19f.
\item 56. The PEB relies on a number of regulations and directives to determine the disability rating. \textit{See} Department of Veterans Affairs, Schedule for Rating Disabilities, 38 C.F.R. §§ 4.1-.150 (2000); U.S. DEP’T OF DEFENSE, DIR. 1332.18, SEPARATION OR RETIREMENT FOR PHYSICAL DISABILITY (4 Nov 1996); DODI 1332.38, \textit{supra} note 17; U.S. DEP’T OF DEFENSE, INSTR. 1332.39, APPLICATION OF THE VETERANS ADMINISTRATION SCHEDULE FOR RATING DISABILITIES (14 Nov 1996); AR 635-40, \textit{supra} note 5.
\item 57. AR 635-40, \textit{supra} note 5, app. B-15, A-2, C-12.
\item 58. 10 U.S.C. § 1212(a) (2000).
\item 59. A soldier may receive all or a portion of his disability or retirement pay tax free if:
\begin{itemize}
\item (1) he was a member of the Armed Forces, National Oceanic and Atmospheric Administration or U.S. Public Health Service or was under binding written agreement to become such a member on 24 September 1975;
\item (2) the injury is a direct result of armed conflict or directly caused by an instrumentality of war, during a period of war; or
\item (3) on application to the VA the soldier is entitled to receive compensation.
\end{itemize}
\item 60. AR 635-40, \textit{supra} note 5, ch.7. Most soldiers are placed on TDRL as opposed to PDRL unless the unfitting medical condition involves an amputation or the soldier has over twenty years of military service. Under limited circumstances, a soldier with twenty years of service may be placed on TDRL with a rating below 30%. \textit{Id.} para. 3-9.
\item 61. \textit{Id.} para. 7-4. The maximum allowable time on TDRL is five years. \textit{Id.} para. 7-9d.
\item 62. \textit{Id.} para. 7-19.
\item 63. \textit{Id.} para. 7-11a(3).
\item 64. 10 U.S.C. §§ 1211(a), 1210(f)(1)(B) (2000) (giving the soldier the option of returning to duty).
\item 65. AR 635-40, \textit{supra} note 5, para. 7-11(2). At this stage, the soldier can opt for another formal board. \textit{Id.} para. 7-21.
\item 66. \textit{Id.} para. 7-11a(1).
\item 67. 10 U.S.C. §§ 1402, 1406, 1407. \textit{See also} AR 635-40, \textit{supra} note 5, apps. C-10, C-12.
\item 68. A soldier’s maximum disability retirement pay, like regular retirement pay, is capped at 75% of his monthly base pay. Consequently, even if the soldier receives a 100% rating he will not receive more than 75% of his monthly base pay. 10 U.S.C. § 1401.
\end{itemize}
Case Preparation

As the soldier’s advocate you must provide him advice and guidance to ensure that he makes an informed decision. Depending on caseload, judge advocates may need to rely on the soldier to take an active role in case preparation, such as getting statements from witnesses, gathering important documents, and following up on medical consultations.

While nothing replaces a personal in-depth consultation, focused instructions, if provided to the soldier early enough in the process, may lead to a more favorable rating before the formal board. While the soldier’s testimony alone may change the outcome, it is generally insufficient. The following checklists are offered to assist judge advocates in providing guidance to their clients and developing their cases.

Checklist To Obtain Higher Disability Rating

(1) Additional medical evidence demonstrating that his condition is more severe than originally diagnosed or described in his NARSUM. The soldier should attempt to have this new evidence drafted in an addendum to his MEB.

(2) Documentation of hospital or emergency room visits, sick call slips, and physical therapy records incurred after the MEB was dictated.

(3) Copies of all medical treatment records (civilian and military) to include VA disability award letter(s), if applicable.

Checklist for Seeking Fit for Duty Determination

(1) Letters of recommendation from commanders and supervisors indicating that he performs in his MOS and participates in unit Physical Training, Common Tasks Test, field exercises and deployments.

(2) An Army Physical Fitness Test (APFT) card or a copy showing that he has recently passed the APFT.

(3) His latest Non Commissioned Officer Evaluation Report/Officer Evaluation Report, if applicable.

Checklist for Attorneys Appearing Before the Formal Board

Finally, the judge advocate representing a soldier before a PEB should run through the following questions to ensure they are adequately prepared to present the soldier’s case:

1. Am I familiar with applicable regulations and the Veterans Administration Schedule for Rating Disabilities (VASRD)? Do I know which VASRD codes are applicable? Have I checked Appendix B of AR 635-40, DODIs, and USAPDA Policy Memorandums to see if there are modifications? Do I understand how the soldier’s symptoms and test results should be rated? Does the soldier understand this? Am I prepared to address the issue of fitness, even if the informal board found the soldier unfit? Do I understand the soldier’s MOS? What tasks can the soldier not accomplish in his MOS? Are supporting documents available?

2. If the soldier is on TDRL, have I looked at previous TDRL packets? Do I understand how the soldier’s condition has or has not changed since being placed on TDRL? Have I advised the soldier to obtain copies of all medical records from VA and civilian doctors?

3. If I have doubts about the value of a formal board, have I given the soldier the benefit of my opinion and advised him of the option to waive the hearing?

4. Are the soldier’s claims realistic and provable, in light of all the available evidence?

5. Have I advised the soldier that the formal board is “de novo”? 

6. Have I adequately prepared the soldier and witnesses for direct and cross-examination? Can I deal effectively with “questionable” matters?

7. Am I sure that the soldier does not have any last minute questions?

8. Are my questions for the soldier simple to follow? Does the soldier understand the questions that he will be requested to answer during the hearing? Am I prepared to summarize the expected answers into a short narrative if the soldier is unable to provide adequate responses?

69. Based on the author’s experience, the soldiers’ legal counsel assigned to Walter Reed Army Medical Center normally presents two cases daily before the PEB, depending on additional duties.

70. Keeping in mind that the soldier’s best opportunity to change the decision made at the informal board rests with producing new evidence, with medical evidence normally proving the most persuasive. See supra note 5 and accompanying text.
9. Do I fully understand what the soldier wants from the hearing?

10. Does the soldier understand that the PEB cannot address issues such as lack of treatment or mistreatment by medical personnel, reclassification to another MOS, or changing a finalized line of duty determination?

11. Do I know how the soldier’s injury or disease affects his ability to perform? Regardless of medical records, do I know what the soldier is feeling? Is the discrepancy between the soldier’s complaints and records so great that I should request that his case be returned to the MTF?

12. Does the soldier have the basic information regarding uniform, reporting, and the procedures to be followed in the hearing room?

13. Does the soldier understand that the formal board findings are subject to review by USAPDA?

14. Does the soldier have any additional appointments, treatments or surgeries scheduled which will change his level of disability? Can the board be delayed by the board president or recalled by the MTF?

15. Did I discuss available VA options with the soldier?

**Helpful Hints**

The PEBs place a great deal of weight on credibility. The soldier should answer questions honestly and consistently. The board will compare the soldier’s testimony to medical or personnel records. As the soldier’s advocate, you must remember that many soldiers never interact with high-ranking members of the Army and thus may be nervous during the formal board. In addition, the decisions rendered by the formal board hold long-term consequences. Going through a brief question and answer session before the actual formal board helps prepare the soldier so that he will be more at ease during the hearing. These sessions should stress the need for honest responses before the board and should not be used to coach the soldier or craft his responses. The following are some typical questions posed by board members during proceedings:

*What do you want the board to do for you?*  
This question may mean that the particular board member is not sure what he is going to do.

*How much work or school have you missed because of your medical condition?*

---

71. Remember that military hospital visits, prescriptions, dates of examinations, and other medical information may be checked electronically.
the board may ask a soldier suffering from a cold injury such as frost bite whether he goes into the frozen foods section of the grocery store.

*Are you married and do you have children?* Does your medical condition limit your interactions with your family?

*Describe a typical workday by the hour?*

*Is your driver's license restricted?* If the soldier's condition is severe, the Army or state may restrict or revoke driving privileges.  
*Do you get along with superiors? Do you enjoy the Army?* The board may be looking for ulterior motive. The board does not like to hear that superiors are out to get the soldier. When did you become unfit?

*What is your VA rating?* If the soldier has a rating, use it to compare the severity. This normally only applies to those soldiers already on TDRL or in the Reserves.

**Conclusion**

This note provides a basic road map on how to represent soldiers during the PEB process. It is intended as a guide to give the attorney in the field a better understanding of one portion of the Army's Physical Disability System. It is offered as a starting point, to be used along with all of the governing statutes and regulations, so that judge advocates can provide the best possible representation to soldiers faced with this complex process.
## CLE News

### 1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

- **TJAGSA School Code**—181
- **Course Name**—133d Contract Attorneys Course 5F-F10
- **Course Number**—133d Contract Attorney’s Course 5F-F10
- **Class Number**—133d Contract Attorney’s Course 5F-F10

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

The Judge Advocate General’s School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, 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

**February 2001**

<table>
<thead>
<tr>
<th>Dates</th>
<th>Course Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 February-6 April</td>
<td>154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).</td>
</tr>
<tr>
<td>5-9 February</td>
<td>75th Law of War Workshop (5F-F42).</td>
</tr>
<tr>
<td>12-16 February</td>
<td>2001 Maxwell AFB Fiscal Law Course (5F-F13A).</td>
</tr>
<tr>
<td>26 February-2 March</td>
<td>59th Fiscal Law Course (5F-F12).</td>
</tr>
<tr>
<td>26 February-9 March</td>
<td>35th Operational Law Seminar (5F-F47).</td>
</tr>
</tbody>
</table>

**March 2001**

<table>
<thead>
<tr>
<th>Dates</th>
<th>Course Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>5-9 March</td>
<td>60th Fiscal Law Course (5F-F12).</td>
</tr>
<tr>
<td>19-30 March</td>
<td>15th Criminal Law Advocacy Course (5F-F34).</td>
</tr>
<tr>
<td>26-30 March</td>
<td>3d Advanced Contract Law Course (5F-F103).</td>
</tr>
<tr>
<td>26-30 March</td>
<td>165th Senior Officers Legal Orientation Course (5F-F1).</td>
</tr>
</tbody>
</table>

**April 2001**

<table>
<thead>
<tr>
<th>Dates</th>
<th>Course Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-6 April</td>
<td>25th Admin Law for Military Installations Course (5F-F24).</td>
</tr>
<tr>
<td>9-13 April</td>
<td>3d Basics for Ethics Counselors Workshop (5F-F202).</td>
</tr>
<tr>
<td>16-20 April</td>
<td>12th Law for Legal NCOs Course (512-71D/20/30).</td>
</tr>
<tr>
<td>23-26 April</td>
<td>2001 Reserve Component Judge Advocate Workshop (5F-F56).</td>
</tr>
<tr>
<td>30 April-11 May</td>
<td>146th Contract Attorneys Course (5F-F10).</td>
</tr>
</tbody>
</table>

**May 2001**

<table>
<thead>
<tr>
<th>Dates</th>
<th>Course Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>7-25 May</td>
<td>44th Military Judge Course (5F-F33).</td>
</tr>
<tr>
<td>14-18 May</td>
<td>48th Legal Assistance Course (5F-F23).</td>
</tr>
</tbody>
</table>

**June 2001**

<table>
<thead>
<tr>
<th>Dates</th>
<th>Course Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>4-7 June</td>
<td>4th Intelligence Law Workshop (5F-F41).</td>
</tr>
<tr>
<td>4-8 June</td>
<td>166th Senior Officers Legal Orientation Course (5F-F1).</td>
</tr>
<tr>
<td>Date</td>
<td>Event</td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------------------------------------------------------</td>
</tr>
<tr>
<td>4 June-</td>
<td>8th JA Warrant Officer Basic Course (7A-550A0)</td>
</tr>
<tr>
<td>13 July</td>
<td></td>
</tr>
<tr>
<td>5-29 June</td>
<td>155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).</td>
</tr>
<tr>
<td>6-8 June</td>
<td>Professional Recruiting Training Seminar</td>
</tr>
<tr>
<td>11-15 June</td>
<td>31st Staff Judge Advocate Course (5F-F52).</td>
</tr>
<tr>
<td>18-22 June</td>
<td>12th Senior Legal NCO Management Course (512-71D/40/50).</td>
</tr>
<tr>
<td>18-29 June</td>
<td>6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>25-27 June</td>
<td>Career Services Directors Conference.</td>
</tr>
<tr>
<td>29 June-</td>
<td>155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).</td>
</tr>
<tr>
<td>7 September</td>
<td></td>
</tr>
<tr>
<td><strong>July 2001</strong></td>
<td></td>
</tr>
<tr>
<td>8-13 July</td>
<td>12th Legal Administrators Course (7A-550A1).</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>9-10 July</td>
<td>32d Methods of Instruction Course (Phase I) (5F-F70).</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>16-20 July</td>
<td>76th Law of War Workshop (5F-F42).</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>10 August</td>
<td></td>
</tr>
<tr>
<td>16 July-</td>
<td>5th Court Reporter Course (512-71DC5).</td>
</tr>
<tr>
<td>31 August</td>
<td></td>
</tr>
<tr>
<td>30 July-</td>
<td>147th Contract Attorneys Course (5F-F10).</td>
</tr>
<tr>
<td>10 August</td>
<td></td>
</tr>
<tr>
<td><strong>August 2001</strong></td>
<td></td>
</tr>
<tr>
<td>6-10 August</td>
<td>19th Federal Litigation Course (5F-F29).</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Event</td>
</tr>
<tr>
<td>--------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>26-30 November</td>
<td>168th Senior Officers Legal Orientation Course (5F-F1).</td>
</tr>
<tr>
<td></td>
<td>2001 Government Contract Law Symposium (5F-F11).</td>
</tr>
<tr>
<td>December 2001</td>
<td>5th Tax Law for Attorneys Course (5F-F28).</td>
</tr>
<tr>
<td>3-7 December</td>
<td>3-7 December 2001</td>
</tr>
<tr>
<td>3-7 December</td>
<td>3-7 December 2001</td>
</tr>
<tr>
<td>10-14 December</td>
<td>10-14 December 2001</td>
</tr>
<tr>
<td>2002</td>
<td>2-5 January 2002</td>
</tr>
<tr>
<td>2-5 January</td>
<td>2-5 January 2002</td>
</tr>
<tr>
<td>7-11 January</td>
<td>7-11 January 2002</td>
</tr>
<tr>
<td>7-11 January</td>
<td>7-11 January 2002</td>
</tr>
<tr>
<td>7 January-</td>
<td>7 January-</td>
</tr>
<tr>
<td>26 February</td>
<td>26 February</td>
</tr>
<tr>
<td>8 January-</td>
<td>8 January-</td>
</tr>
<tr>
<td>1 February</td>
<td>1 February</td>
</tr>
<tr>
<td>15-18 January</td>
<td>15-18 January 2002</td>
</tr>
<tr>
<td>16-18 January</td>
<td>16-18 January 2002</td>
</tr>
<tr>
<td>20 January-</td>
<td>20 January-</td>
</tr>
<tr>
<td>1 February</td>
<td>1 February</td>
</tr>
<tr>
<td>28 January-</td>
<td>28 January-</td>
</tr>
<tr>
<td>1 February</td>
<td>1 February</td>
</tr>
<tr>
<td>February 2002</td>
<td>February 2002</td>
</tr>
<tr>
<td>1 February-</td>
<td>1 February-</td>
</tr>
<tr>
<td>12 April</td>
<td>12 April</td>
</tr>
<tr>
<td>4-8 February</td>
<td>4-8 February</td>
</tr>
<tr>
<td>2002</td>
<td>4-8 February</td>
</tr>
<tr>
<td>2002</td>
<td>2001 Maxwell AFB Fiscal Law Course (5F-F13A).</td>
</tr>
<tr>
<td>2002</td>
<td>62d Fiscal Law Course (5F-F12).</td>
</tr>
<tr>
<td>2002</td>
<td>37th Operational Law Seminar (5F-F47).</td>
</tr>
<tr>
<td>2002</td>
<td>63d Fiscal Law Course (5F-F12).</td>
</tr>
<tr>
<td>2002</td>
<td>17th Criminal Law Advocacy Course (5F-F34).</td>
</tr>
<tr>
<td>2002</td>
<td>4th Contract Litigation Course (5F-F103).</td>
</tr>
<tr>
<td>2002</td>
<td>170th Senior Officers Legal Orientation Course (5F-F1).</td>
</tr>
<tr>
<td>April 2002</td>
<td>1-5 April</td>
</tr>
<tr>
<td>April 2002</td>
<td>26th Admin Law for Military Installations Course (5F-F24).</td>
</tr>
<tr>
<td>April 2002</td>
<td>15-19 April</td>
</tr>
<tr>
<td>April 2002</td>
<td>4th Basics for Ethics Counselors Workshop (5F-F202).</td>
</tr>
<tr>
<td>April 2002</td>
<td>15-19 April</td>
</tr>
<tr>
<td>April 2002</td>
<td>13th Law for Legal NCOs Course (512-71D/20/30).</td>
</tr>
<tr>
<td>April 2002</td>
<td>22-25 April</td>
</tr>
<tr>
<td>April 2002</td>
<td>2002 Reserve Component Judge Advocate Workshop (5F-F56).</td>
</tr>
<tr>
<td>April 2002</td>
<td>29 April-</td>
</tr>
<tr>
<td>April 2002</td>
<td>148th Contract Attorneys Course (5F-F10).</td>
</tr>
<tr>
<td>April 2002</td>
<td>29 April-</td>
</tr>
<tr>
<td>April 2002</td>
<td>45th Military Judge Course (5F-F33).</td>
</tr>
<tr>
<td>May 2002</td>
<td>13-17 May</td>
</tr>
<tr>
<td>May 2002</td>
<td>50th Legal Assistance Course (5F-F23).</td>
</tr>
<tr>
<td>June 2002</td>
<td>3-7 June</td>
</tr>
<tr>
<td>June 2002</td>
<td>171st Senior Officers Legal Orientation Course (5F-F1).</td>
</tr>
<tr>
<td>February 2002</td>
<td>3-14 June</td>
</tr>
<tr>
<td>February 2002</td>
<td>7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).</td>
</tr>
<tr>
<td>February 2002</td>
<td>3 June-</td>
</tr>
<tr>
<td>February 2002</td>
<td>9th JA Warrant Officer Basic Course (7A-550A0).</td>
</tr>
</tbody>
</table>
4-28 June 158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

10-14 June 32d Staff Judge Advocate Course (5F-F52).

17-21 June 13th Senior Legal NCO Management Course (512-71D/40/50).

17-22 June 6th Chief Legal NCO Course (512-71D-CLNCO).

17-28 June 7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).

24-26 June Career Services Directors Conference.

28 June- 149th Contract Attorneys Course (September II) (5-27-C20).

September 2002

4-6 September 2002 USAREUR Legal Assistance CLE (5F-F23E).


9-20 September 18th Criminal Law Advocacy Course (5F-F34).

11-13 September 3d Court Reporting Symposium (512-71DC6).

16-20 September 51st Legal Assistance Course (5F-F23).

23-24 September 33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

8-9 July 33d Methods of Instruction Course (Phase I) (5F-F70).

8-12 July 13th Legal Administrators Course (7A-550A1).

15 July- 8th Court Reporter Course (512-71DC5).

29 July- 149th Contract Attorneys Course (5F-F10).

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Reporting Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama**</td>
<td>31 December annually</td>
</tr>
<tr>
<td>Arizona</td>
<td>15 September annually</td>
</tr>
<tr>
<td>Arkansas</td>
<td>30 June annually</td>
</tr>
<tr>
<td>California*</td>
<td>1 February annually</td>
</tr>
<tr>
<td>Colorado</td>
<td>Anytime within three-year period</td>
</tr>
<tr>
<td>Delaware</td>
<td>31 July biennially</td>
</tr>
<tr>
<td>Florida**</td>
<td>Assigned month triennially</td>
</tr>
</tbody>
</table>
Georgia 31 January annually
Idaho December 31, 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
Michigan 31 March annually
Minnesota 30 August
Mississippi** 1 August annually
Missouri 31 July annually
Montana 1 March annually
Nevada 1 March annually
New Hampshire** 1 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 June biennially
Wisconsin* 1 February biennially
Wyoming 30 January annually

* Military Exempt
** Military Must Declare Exemption

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

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

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

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

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

If you have any further questions, contact Lieutenant Colonel Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. Lieutenant Colonel Goetzke.
## Current Materials of Interest

1. The Judge Advocate General’s On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

<table>
<thead>
<tr>
<th>DATE</th>
<th>TRAINING SITE AND HOST UNIT</th>
<th>AC GO/RC GO</th>
<th>SUBJECT</th>
<th>ACTION OFFICER</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-4 Feb</td>
<td>El Paso, TX</td>
<td>BG Romig COL(P) Walker</td>
<td>Civil/Military Operations; Administrative Law; Contract Law</td>
<td>POC: LTC(P) Harold Brown (210) 384-7320 <a href="mailto:harold.brown@usdoj.gov">harold.brown@usdoj.gov</a></td>
</tr>
<tr>
<td></td>
<td>90th RSC, 5025th GSU</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2-4 Feb</td>
<td>Columbus, OH</td>
<td>MG Altenburg COL(P) Pietsch</td>
<td>Criminal Law; International Law</td>
<td>POC: MAJ James Schaefer (513) 946-3038 <a href="mailto:jschaefer@prosecutor.hamilton-co.org">jschaefer@prosecutor.hamilton-co.org</a></td>
</tr>
<tr>
<td></td>
<td>9th LSO</td>
<td></td>
<td></td>
<td>ALT: CW2 Lesa Crites (614) 898-0872 <a href="mailto:lesa@gowebway.com">lesa@gowebway.com</a></td>
</tr>
<tr>
<td>10-11 Feb</td>
<td>Seattle, WA</td>
<td>MG Huffman COL(P) Arnold</td>
<td>Administrative and Civil Law; Contract Law</td>
<td>POC: CPT Tom Molloy (206) 553-4140 <a href="mailto:thomas.p.molloy@usdoj.gov">thomas.p.molloy@usdoj.gov</a></td>
</tr>
<tr>
<td></td>
<td>70th RSC, 6th MSO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10-11 Mar</td>
<td>San Franscisco, CA</td>
<td>MG Huffman COL(P) Pietsch</td>
<td>RC JAG Readiness (SRP, SSCRA, Operations Law)</td>
<td>POC: MAJ Adrian Driscoll (415) 543-4800 <a href="mailto:adriscoll@ropers.com">adriscoll@ropers.com</a></td>
</tr>
<tr>
<td></td>
<td>63rd RSC, 75th LSO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24-25 Feb</td>
<td>Indianapolis, IN</td>
<td>BG Barnes COL(P) Arnold</td>
<td>Administrative and Civil Law; Domestic Operations Law; International Law</td>
<td>POC: LTC George Thompson (317) 247-3491 <a href="mailto:ThompsonGC@in-arng.ngb.army.mil">ThompsonGC@in-arng.ngb.army.mil</a></td>
</tr>
<tr>
<td></td>
<td>INARNG</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2-4 Mar</td>
<td>Colorado Springs, CO</td>
<td>BG Barnes COL(P) Arnold</td>
<td>Space Law; International Law; Contract Law</td>
<td>POC: COL Alan Sommerfeld (719) 567-9159 <a href="mailto:alan.sommerfeld@jntf.osd.mil">alan.sommerfeld@jntf.osd.mil</a></td>
</tr>
<tr>
<td></td>
<td>96th RSC, NORD/USSPACECOM</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10-11 Mar</td>
<td>Washington, D.C.</td>
<td>MG Huffman COL(P) Pietsch</td>
<td>Administrative and Civil Law; Military Justice</td>
<td>POC: MAj Silas Deroma (202) 305-0427</td>
</tr>
<tr>
<td></td>
<td>10th LSO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22-25 Apr</td>
<td>Charlottesville, VA</td>
<td>BG Barnes COL(P) Walker</td>
<td>Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsibility</td>
<td>POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441</td>
</tr>
<tr>
<td></td>
<td>OTJAG</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>28-29 Apr</td>
<td>Newport, RI</td>
<td>MG Huffman COL (P) Walker</td>
<td>Fiscal Law; Administrative Law</td>
<td>POC: MAJ Jerry Hunter (978) 796-2143 <a href="mailto:Jerry.Hunter@usarc-emh2.army.mil">Jerry.Hunter@usarc-emh2.army.mil</a></td>
</tr>
<tr>
<td></td>
<td>94th RSC</td>
<td></td>
<td></td>
<td>ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143</td>
</tr>
<tr>
<td>5-6 May</td>
<td>Gulf Shores, AL</td>
<td>BG Marchand COL (P) Pietsch</td>
<td>Administrative and Civil Law; Environmental Law; Contract Law</td>
<td>POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) <a href="mailto:John.Gavin@se.usar.army.mil">John.Gavin@se.usar.army.mil</a></td>
</tr>
<tr>
<td>18-20 May</td>
<td>St. Louis, MO</td>
<td>BG Romig COL (P) Pietsch</td>
<td>Legal Assistance; Military Justice</td>
<td>POC: LTC Bill Kumpe (314) 991-0412, ext. 1261</td>
</tr>
<tr>
<td></td>
<td>89th RSC, 6025th GSU 8th MSO</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

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

3. Regulations and Pamphlets

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

4. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General’s School, United States Army, 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.arm.mil/tagjsa. Click on directory for the listings.

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.

5. The Army Law Library Service

Per Army Regulation 27-10, 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 numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.
Individual Paid Subscriptions to *The Army Lawyer*

**Attention Individual Subscribers!**

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

**Renewals of Paid Subscriptions**

To know when to expect your renewal notice and keep a good thing coming . . . the Government Printing Office mails each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows “ISSUE” on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.

```
ARLAWSMITH212J  ISSUE003  R 1
JOHN SMITH
212 MAIN STREET
FORESTVILLE MD 20746
```

The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew. You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

**Inquiries and Change of Address Information**

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

---

**Credit card orders are welcome!**

Fax your orders (202) 512-2250
Phone your orders (202) 512-1800

(ARLA) at $29 each ($36.25 foreign) per year.
(MILR) at $17 each ($21.25 foreign) per year.

For privacy protection, check the box below:

☐ Do not make my name available to other mailers

Check method of payment:

☐ Check payable to: Superintendent of Documents
☐ GPO Deposit Account
☐ VISA ☐ MasterCard ☐ Discover

Mail to: Superintendent of Documents, PO Box 371954, Pittsburgh PA 15250-7954

Important: Please include this completed order form with your remittance.

Thank you for your order!
By Order of the Secretary of the Army:

ERIC K. SHINSEKI
General, United States Army
Chief of Staff

Official:

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
0103801

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-ADL-P
Charlottesville, VA 22903-1781