

Editor, Captain Scott B. Murray
Editorial Assistant, Mr. Charles J. Strong

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Trial Advocacy—Success Defined by Diligence and Meticulous Preparation

*Lieutenant Colonel Lawrence M. Cuculic
Circuit Judge, Fourth Judicial Circuit
United States Army Trial Judiciary
Fort Lewis, Washington*

Introduction

Typically, attorneys think that a successful trial advocate is someone with excellent courtroom demeanor and the ability to speak eloquently. This understanding is only partially correct; it fails, however, to recognize that successful trial advocacy in the courtroom is, in reality, the culmination of an attorney's diligent efforts prior to walking into the courtroom. The backbone of trial advocacy, the essence of being a successful trial advocate, is thoughtful and meticulous preparation from case inception¹ through action by the convening authority.² A trial advocate's demeanor and eloquence are the result of diligence and careful preparation.³

The Deliberative Process

A court-martial is a process. After counsel introduce their evidence and the military judge instructs the members on the law that is to be applied,⁴ the court is closed, and the deliberative process begins. The members "determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused."⁵ Effective trial advocates understand this deliberative process and the significant interrelationship of facts and

law. Successful trial advocates must prepare for trial while considering facts and law concurrently.⁶

Know the Facts of the Case

In preparing for trial, counsel should read and reread every statement, interview every witness, examine the evidence, and visit the crime scene. The trial advocate's goal is to know everything about the case so that if a witness states something that is incomplete or incorrect, counsel knows exactly where contradictory information is located and can find it in an instant.⁷

Know and Apply the Law

It is imperative for trial attorneys to understand the United States Constitution and its Amendments, the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), the Military Rules of Evidence (M.R.E.), appellate case law, applicable Army regulations (ARs),⁸ and the local rules of court. Counsel can stay informed about changes in the law by reading case law as it develops⁹ and by attending con-

1. For trial counsel, this begins with proper legal advice to law enforcement personnel who are investigating the alleged criminal activity. For defense counsel, this begins with professional advice to clients concerning the attorney-client relationship and the need for only the best of behavior by the potential accused.
2. If the accused is acquitted, advocacy terminates at the announcement of findings (even though there are administrative matters to attend to, such as the creation of the record of trial). If the accused is found guilty of any offense, advocacy continues through the clemency phase.
3. See U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. Rule 1.1 states: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.*
4. Assuming, of course, that it is a trial with members. If not, the military judge will apply the same legal analysis without instructions being given. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920 (1995) [hereinafter MCM].
5. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, sec. V, at 50 (30 Sept. 1996) [hereinafter BENCHBOOK].
6. Trial advocates should review the *Military Judges' Benchbook* early in the process and ensure that they fully investigate and develop facts that will later require advantageous instructions. See generally *id.*
7. This is especially important for defense counsel who must attack the credibility of every government witness. Prior inconsistent statements are an effective method of attack. See MCM, *supra* note 4, MIL. R. EVID. 613 (pertaining to prior statements of witnesses).
8. Counsel must know the provisions of AR 27-10. See U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (24 June 1996) [hereinafter AR 27-10]. For example, paragraph 5-26 of AR 27-10, which pertains to personal data and character of prior service of the accused, provides examples of evidence under R.C.M. 1001(b)(2) and 1001(d). Counsel should keep a copy of AR 27-10 in a trial notebook and take it to court. The trial notebook should also contain: the script from the *Military Judges' Benchbook*, the local rules of court, a two or three page quick reference to the Military Rules of Evidence, a one-page list of common objections, common evidentiary foundations (business records for example), copies of new and important appellate case law, a calendar, a current pay chart, and other items of general interest such as the noncommissioned officers creed or leadership quotes from past leaders (that can be incorporated into sentencing arguments or used to cross-examine character witnesses who testify that the accused is a "good soldier").

tinuing legal education courses and officer professional development classes.

A thorough understanding of the law will benefit counsel in three ways. First, they will be able to analyze the available evidence and litigate its admissibility. Second, they will understand what admissible evidence is relevant to establishing an element of an offense or a potential defense. Third, they will be able to develop a case theme and a logical presentation that the members can consider during the deliberative process.

Attention to Detail

Specifications

Specifications must be written carefully to ensure they properly allege offenses.¹⁰ Counsel should read the discussion to R.C.M. 307(c)(3), “How to draft specifications.” This discussion and the sample specifications provided in Part IV of the *Manual for Courts-Martial* are counsel’s primary references when drafting specifications. If imagination is required (for example, when drafting an Article 134 specification for crimes and offenses not capital) counsel should use extra care and seek the advice of experienced counsel.¹¹

In a recent case, the specification read: “did between March and April 1996” Is it wrong? Maybe it is, but maybe it is not. Surely, it is inartful. There is but a nanosecond between March and April, and it is more accurate to allege: “did between on or about 1 March 1996 and on or about 30 April 1996” As stated in the *Manual for Courts-Martial*, “[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged.”¹² Counsel should allege dates with “sufficient precision” such that the accused can identify the offense and provide a defense.¹³ While counsel can and should use terms such as “on or about” when a

period of time is alleged (for example, when the specification alleges multiple acts occurring over a period of time), counsel should ensure that the interval has specific beginning and end dates.

In another recent case, the specification read: “did strike him in the head with a force likely to produce death or grievous bodily harm . . . and did thereby intentionally inflict grievous bodily harm upon him” This specification is duplicitous and violates R.C.M. 906(b)(5), which provides that each specification may state only one offense.¹⁴ It alleges two offenses in one specification—aggravated assault by intentionally inflicting grievous bodily harm and aggravated assault with a force likely to produce death or grievous bodily harm. The normal remedy for a duplicitous specification is severance into two separate specifications; however, a lesser included offense should not be severed. The surplus language of the lesser included offense should be stricken from the specification, and the military judge should instruct the panel on the lesser offense.¹⁵ Nonetheless, counsel should keep in mind that each specification should allege only one offense.¹⁶

The specification for an alleged violation of Article 92, UCMJ, on another recent charge sheet read: “did . . . violate a lawful general regulation . . . by wrongfully possessing drug paraphernalia.” On its face, this specification would appear complete and correct. The issue is that the regulation which the accused is alleged to have violated prohibits the possession of drug paraphernalia *with the intent to use or deliver*. As written, does this specification allege an offense? Does the accused have notice of the alleged offense? Is the accused protected from re prosecution?¹⁷ Counsel should ensure that Article 92 violations accurately allege criminal misconduct that is sanctioned by the order or regulation.¹⁸

Six specifications in another case alleged that the accused received stolen property, but the specifications failed to state

9. Judge advocates who engage in trial work might consider creating a digest system in a word processing document with key words, such as “BAQ larceny.” When a new case is published, or when the attorney researches a new issue, the attorney could then enter the case cite with a brief summary at the appropriate location in the digest. The next time the issue arises, the attorney will have a place to begin research.

10. See MCM, *supra* note 4, R.C.M. 907(b)(1)(B) (discussing motions to dismiss for failure to state an offense).

11. See BENCHBOOK, *supra* note 5, para. 3-60-2 (containing a sample specification for “Crimes and Offenses Not Capital”).

12. MCM, *supra* note 4, R.C.M. 307(c)(3). See *United States v. Sell*, 11 C.M.R. 202 (C.M.A. 1953). One test for whether an amendment to a specification is a “minor change” is whether the amendment will mislead the accused. MCM, *supra* note 4, R.C.M. 603(a).

13. MCM, *supra* note 4, R.C.M. 307(c)(3), discussion, para. (D).

14. *Id.* R.C.M. 906(b)(5) and discussion. *But see* *United States v. Mincey*, 42 M.J. 376 (1995) (holding that the maximum punishment for a bad-check “mega-spec” is calculated by adding up the maximum punishments for each check alleged).

15. MCM, *supra* note 4, R.C.M. 307(c)(3), discussion, para. (G)(iv).

16. Similarly, it is incorrect to allege in one specification that the accused committed an aggravated assault by striking at the victim “with a dangerous weapon, a means or force likely to produce death or grievous bodily harm.” This specification has alleged or described three types of aggravated assaults. Defense counsel should make a motion requiring the government to strike surplus language.

17. See *Sell*, 11 C.M.R. 202.

that, at the time the accused received the stolen property, the accused knew that the property had been stolen. Failure to include an element in a specification is disastrous, and a defense motion to dismiss will be granted in such a case. Additionally, this error created other issues (such as speedy trial) that plagued the case—errors beget errors.

Trial counsel should not rely upon others to draft charges and specifications. The trial counsel will be in court arguing whether a proposed amendment is a minor or a major change¹⁹ or whether specifications and charges are multiplicitous.²⁰ Additionally, the trial counsel should develop the theme of the case during the drafting of charges and specifications.

Panel Membership

A court-martial must be composed in accordance with rules on the number of members and their qualifications. Panel membership is jurisdictional and must be scrupulously monitored.²¹ Days before trial, counsel should review the vicing and detailing orders to ensure that the court is properly composed.²²

Counsel need to be intimately familiar with the convening authority's "automatic" detailing provisions. Are new members automatically detailed when excusals occur? In the alternative, is there a number the panel must fall below before alternate members are automatically detailed to bring the number of members back to a certain number? Either method is correct. The government should propose to the convening authority automatic detailing provisions that are easy to understand and simple to implement. Defense counsel should receive a copy of the description of the court-martial panel selection process, including automatic detailing provisions, as soon as the convening authority selects new members. Both trial and defense counsel should carefully review the process. Unless they understand how the convening authority's process works, defense counsel will not know if there is a basis to chal-

lenge member selection or replacement, and trial counsel will not be able to explain and to defend the vicing and detailing process.

Long before the morning of trial, trial counsel must ensure that the members have been notified personally to appear. While personal notification is recommended, members should never be told anything about the case other than the information on the convening order, the uniform, date, time, and location for the trial. Counsel should not wait until the last minute to check to see if someone else has properly performed these critical functions. The morning of trial may be too late, and everyone's time will be wasted in needless delay.

Discovery

The goals of the military justice system are truth and justice, and the discovery rules promote these goals by encouraging the free flow of information. Counsel should reacquaint themselves with R.C.M. 701, the M.R.E. Section III discovery requirements,²³ and local rules of court. For example, Section III of the M.R.E. requires disclosure to the defense of statements of the accused, seized property of the accused, or identifications of the accused.²⁴ This disclosure is required "prior to arraignment."²⁵ If the government has not provided this disclosure, defense counsel should consider objecting to arraignment taking place (by requesting a continuance under R.C.M. 701(g)(3)(B)) or, in the alternative, asking the court to prohibit the later introduction of the evidence.²⁶

In several recent cases, trial counsel have attempted to satisfy the M.R.E. 304(d)(1) notice requirement by providing defense counsel with a memorandum that states: "All statements of the accused previously provided." This vague statement, which does not provide the specific notice required by the rules, is insufficient.²⁷

18. Additionally, counsel should check the purpose and applicability paragraphs to ensure that the regulation establishes prohibitions for the accused, at the alleged location, and for the alleged misconduct.

19. See MCM, *supra* note 4, R.C.M. 603.

20. See *id.* R.C.M. 907(b)(3)(B).

21. UCMJ arts. 16, 25 (West Supp. 1996). See also MCM, *supra* note 4, R.C.M. 201, 503, 505.

22. See MCM, *supra* note 4, R.C.M. 505(c). There is a difference between the convening authority vicing members and the staff judge advocate excusing members under R.C.M. 505(c)(1)(B). The latter is announced on the record when accounting for members and is not reflected on an amending court-martial convening order. See *United States v. Gebhart*, 34 M.J. 189, 192 (C.M.A. 1992). "The administration of this court-martial in terms of the detailing of the servicepersons to sit as members . . . and arranging for their presence prior to assembly of the court can best be described as slipshod." *Id.* The court held that the defense counsel waived any "administrative" error. *Id.*

23. MCM, *supra* note 4, MIL. R. EVID. 304(d)(1), 311(d)(1), 321(c)(1).

24. *Id.*

25. *Id.*

26. See *id.* R.C.M. 701(g)(3)(C).

Counsel should review the discussions about R.C.M. 701(a)(6) and R.C.M. 701(b)(5) in the *Manual for Courts-Martial*, which provide detailed listings of government and defense discovery requirements, some of which are often overlooked. If counsel fail to provide required discovery, military judges have broad discretion under R.C.M. 701(g)(3) to fashion appropriate remedies.

Entry of Pleas

Defense counsel must carefully prepare the entry of pleas. Even if local rules of court do not require the filing of notice of pleas with the military judge prior to trial, it is evidence of professional trial preparation. Providing the military judge and opposing counsel with notice of pleas in cases of mixed pleas, and when counsel are pleading by exceptions or by exceptions and substitutions, avoids errors during a critical phase of a court-martial.²⁸ When an accused is represented by civilian counsel, military defense counsel should provide the civilian counsel with written pleas. Military defense counsel should not assume that civilian counsel are familiar with the peculiarities of military pleas.

Pretrial Agreements

Pretrial agreements must be precise and should define exactly what happens to every specification, charge, and greater offense to which the accused pleads not guilty. For example, the accused is charged with four specifications of drug distribution. In accordance with the pretrial agreement, she will plead guilty to specifications one, two, and three, and the charge. The document should explicitly state the agreement concerning specification four—it can be withdrawn,²⁹ the government could agree not to present evidence on it³⁰ (resulting in dismissal), or the government can attempt to prove it.

If the accused is pleading guilty to an offense with a sentencing aggravator, the agreement should address the issue of the aggravator. For example, the accused is charged with larceny

of military property of a value of more than \$100.00.³¹ The sentence aggravators for this Article 121 offense are the type of property (military) and the value of the property (more than \$100). The offer portion of the pretrial agreement should not simply state that the accused will plead guilty to larceny. That does not establish if the sentencing aggravators apply. Rather, the agreement should state that the accused agrees to plead guilty to larceny of military property of a value in excess of \$100.00.

As for the quantum portion of the agreement, counsel must carefully word the sentence limitation so that it does not violate the jurisdictional limits of the court. For example, at a special court-martial, the quantum portion should not provide that the convening authority may approve forfeitures of all pay and allowances for six months.³²

Stipulations of Fact

At a minimum, a guilty plea stipulation of fact should contain every relevant fact in support of every element of the applicable offenses. It should tell the who, what, where, when, and, if possible, the why of the criminal activity. It should not merely be conclusory statements of the elements. The stipulation of fact should read like a story.³³ The parties should be introduced, and the tale should be told, including the law enforcement investigation.³⁴ The stipulation will be published to the members, either by the trial counsel reading it to them or by providing a copy to each member. Putting the facts in a chronological, story-like format makes the stipulation easier to comprehend.

The trial counsel should write the stipulation of fact as soon as the offer to plead guilty is received from the defense. In the stipulation's introductory paragraph, all parties should agree to the truth and admissibility of the stipulation's contents and that all objections are waived.³⁵ Additionally, the government should ensure that stipulations of fact contain sufficient facts to waive all potential defenses. For example, if the accused is pleading guilty to an assault by intentional offer and the facts

27. See *id.* MIL. R. EVID. 304(d)(1), analysis. "Disclosure should be made in writing in order to prove compliance with the Rule and to prevent misunderstandings." *Id.* A general statement, such as "all statements of the accused previously provided," will not later serve as sufficient proof of compliance.

28. See generally *id.* R.C.M. 910. If counsel enters pleas to a named lesser included offense without the use of exceptions and substitutions, the defense counsel "should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit." *Id.* R.C.M. 910(a)(1) discussion.

29. *Id.* R.C.M. 705(b)(2)(C).

30. *Id.* R.C.M. 705(b)(2)(D).

31. Part IV, paragraph 46e, of the *MCM* lists the maximum punishments for larceny and wrongful appropriation. The nature of the property (military property, property other than military property, motor vehicle, aircraft, vessel, firearm, or explosive) and the value of the property (of a value of more than \$100.00 or of a value of \$100.00 or less) are sentencing enhancers. See *id.*, pt. IV, para. 46e.

32. The jurisdictional limitation of a special court-martial for forfeitures is forfeiture of two-thirds pay per month for six months. UCMJ art. 19 (West Supp. 1996).

33. Consider, for example, "It was the best of times, it was the worst of times . . ." CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (The Riverside Press, Cambridge 1891).

provide that the accused consumed four bottles of beer in the two-hour period prior to the intentional offer, the stipulation of fact should include the following language:

Although the accused drank four twelve-ounce bottles of beer in the two-hour period prior to the assault, the accused's ordinary thought process was not materially affected. The accused is seventy-four inches tall, weighs 200 pounds, and is in excellent health. He consumed food along with the four bottles of beer. The accused was not intoxicated. The accused was aware at the time of the offense of his actions and their probable results. The accused was able to have, and did in fact have, the specific intent to offer to do bodily harm to the victim.

Counsel should consider enclosing exhibits with the stipulation, such as the accused's pretrial statements or photographs of evidence, the crime scene, or the victim. Enclosed exhibits help the military judge conduct a thorough providence inquiry, and they then accompany the sentencing authority into closed session deliberations. From the government's perspective, the stipulation of fact will contain all aggravation evidence that is directly related to the guilty plea offenses.³⁶ If exhibits are enclosed with the stipulation, however, counsel should not simply staple the exhibits to the stipulation without referencing them in appropriate locations within the story.

Documentary Evidence

34. Language like that contained in the following example could be included in a stipulation:

When Sergeant Smith learned of the accused's criminal activity, he immediately reported the accused's conduct to the accused's chain of command. The company commander notified the CID. The CID then interviewed the accused on 8 July 1997. The interview began with Special Agent Jones advising the accused of his rights. The accused waived his rights on a DA Form 3881 (enclosure 1) and agreed to be interviewed. At first, the accused denied even knowing the victim. This denial lasted for approximately one hour. After being caught in several inconsistencies, however, the accused orally and in writing admitted that The accused's written statement is enclosure 2.

35. For example, a stipulation of fact should provide in its introductory paragraph:

The government and the defense, with the express consent of the accused, stipulate that the following facts are true, susceptible of proof, and admissible in evidence. These facts may be considered by the military judge and any appellate authority in determining the providence of the accused's pleas of guilty and may then be considered by the sentencing authority and on appeal in determining an appropriate sentence, even if the evidence of such facts is deemed otherwise inadmissible. The accused expressly waives any objections he may have to the admission of these facts into evidence at trial under the Military Rules of Evidence, the Rules for Courts-Martial, the United States Constitution, or applicable case law. Any objection to or modification of this stipulation of fact without the consent of the trial counsel amounts to a breach of the pretrial agreement, from which the convening authority may withdraw.

Of course, this assumes that the pretrial agreement contains a provision requiring the accused to agree to a stipulation of fact. With such an introductory paragraph, if defense counsel objects to facts contained in the stipulation, the government should not be bound by the pretrial agreement. See MCM, *supra* note 4, R.C.M. 811; see also *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989).

36. See MCM, *supra* note 4, R.C.M. 1001(b)(4).

37. *Id.* M.L. R. EVID. 902(4a).

38. See Colonel Gary J. Holland, *Tips and Observations from the Trial Bench: The Sequel*, ARMY LAW., Nov. 1995, at 8 (containing a succinct example of foundation questions for the business record exception to the hearsay rule, M.R.E. 803(6)).

Prior to trial, opposing counsel must review all documentary evidence and consider all potential objections. For example, has the proper person authenticated the offered exhibit? It is impermissible for a "substitute" to sign an authentication certificate "for" the records custodian; an offered exhibit requires "an attesting certificate of the custodian of the document or record."³⁷ Additionally, the authentication sheet should be compared to the documents attached. In a recent case, an authentication sheet claimed to authenticate *only* the accused's DA Form 2A and DA Form 2-1, but the accused's enlistment contract, with inadmissible arrest information, was erroneously attached with the DA Forms 2A and 2-1. In another case, the DA Forms 2A and 2-1 that were attached to the certificate belonged to another soldier with a similar name.

Counsel must remain vigilant and ensure that proponents of offered documents lay the required foundations.³⁸ While government counsel are usually prepared to lay the required foundation for the business records exception to the hearsay rule, defense counsel sometimes forget that they too are required to lay this foundation prior to the admittance of documents during the findings portion of the trial.

Counsel should keep in mind that documentary evidence may not be admissible if the document contains evidence that would not be admissible through testimony. For example, defense sentencing letters from friends or family of the accused may not be admissible (without redaction) if they seek to inform the panel that a punitive discharge is not appropriate. A witness would not be allowed to testify concerning this opinion under R.C.M. 1001; likewise, a letter from the accused's relative or acquaintance may not be admissible with such an opinion, unless the inadmissible material is redacted.³⁹

The Evidence is Admitted—Argue It

Every piece of evidence must be logically and legally relevant to be admitted. That is the purpose of M.R.E.s 401, 402, and 403. Once relevant evidence is admitted, counsel must argue the relevance of that evidence to the factfinder. For example, if counsel fought hard to get the accused's nonjudicial punishment admitted into evidence during the presentencing proceedings, he should pay attention to detail and argue the relevance of that nonjudicial punishment—the accused was involved in prior misconduct, was provided an opportunity at rehabilitation, and chose subsequent criminal misconduct.

Anything Worth Doing Is Worth Doing Well

The need to focus on details continues at every stage of the trial. Counsel must ensure that they and the accused are in the proper uniform and that medals are properly worn. Trial counsel must properly subpoena all witnesses;⁴⁰ make sure that the flyer is correct;⁴¹ enclose in the members' packets the correct flyer, the convening order or orders, members' question forms, paper, and pencils; and correctly draft the findings and sentencing worksheets.⁴² The bottom line is that attention to detail should be the trial advocate's obsession. If counsel let down their guard, something will go wrong. Counsel who are not convinced of this point should peruse any of the forty-six volumes of the Military Justice Reporters containing reported cases.

Critically Analyze the Elements of the Offenses

The trial counsel's analysis of what offenses to charge, and the defense counsel's analysis of those charges, should include a careful examination of each element of the offenses.⁴³ Counsel can best accomplish this task by mapping out the elements of the offenses and aligning next to each element the *admissible* evidence and instructions that can be relied upon to establish that element.

For example, if the accused is charged with larceny of non-military property, the four elements of the charge⁴⁴ should be listed on a sheet of paper. Counsel should then list, branching out from each element, the admissible⁴⁵ evidence and witnesses to establish those elements. Counsel for each side should analyze and evaluate all potential evidence in terms of admissibility and foundation requirements.⁴⁶ Additionally, counsel should list next to their corresponding elements the instructions that will apply. For example, to establish the first element, that the accused "took" certain property, there is a permissible inference and a corresponding instruction that the accused took this property if the facts establish that the property was wrongfully taken and was shortly thereafter found in the knowing, conscious, and unexplained possession of the accused.⁴⁷ This permissible inference instruction should be listed next to the first element in the analysis.⁴⁸ Hopefully, counsel will recognize the importance of this instruction and incorporate it into the development of their theme, voir dire, opening statement, and closing argument.

Defense counsel should also diagram the elements, available evidence, and instructions. A thorough, critical analysis of the government's evidence in relation to the law will reveal

39. While R.C.M. 1001(c)(3) allows the military judge to relax the rules of evidence for extenuating and mitigating evidence, even to the extent that unauthenticated letters from friends or relatives may be admitted, the content of the letters should be reviewed by counsel for objectionable material.

40. MCM, *supra* note 4, R.C.M. 703(e)(2).

41. For example, if the accused pleads guilty by exceptions and substitutions and has elected to be sentenced by members, the flyer must reflect the findings of the court rather than the original charges and specifications. This flyer should be done in advance of the court-martial, but the timing depends on the defense counsel providing timely notice of the accused's pleas.

42. For example, at a special court-martial empowered to adjudge a bad-conduct discharge, the trial counsel must ensure that the sentencing worksheet complies with the jurisdictional limits of the court and does not provide for confinement for a period of years. Depending upon the local rules of court, there may be a requirement to provide findings and sentencing worksheets to the military judge one day prior to trial. Even if there is no requirement, it is sound practice to review these important documents with the military judge in an R.C.M. 802 conference prior to trial. Ensuring the correctness of these documents prior to trial eliminates the need to have members wait while the worksheets are reviewed and corrected during trial.

43. As part of this examination, counsel should read the specific UCMJ articles, the *Manual for Courts-Martial* elements and accompanying text, and the *Military Judges' Benchbook*.

44. See MCM, *supra* note 4, pt. IV, para. 46.

45. The admissibility of the evidence is crucial. If it is not admissible, it should not be used in this critical analysis of the elements of the offense.

46. Counsel should evaluate the evidence critically and ensure that they have an established methodology for its introduction. For example, to establish value, counsel might seek to introduce store records of the initial sale of the item or the current replacement cost. Prior to these documents being admitted, they must be properly authenticated, and a hearsay exception must be established. See MCM, *supra* note 4, MIL. R. EVID. 803(6), 901. These issues need to be considered early in the process so that counsel can identify required witnesses.

47. BENCHBOOK, *supra* note 5, paras. 3-46-1 (larceny), 3-46-2 (wrongful appropriation).

strengths and weaknesses in the government's case and will also aid in the development of the defense theme. Additionally, this analysis is invaluable when keeping track of evidence that has been introduced during the court-martial and when presenting motions to dismiss under R.C.M. 917.

Analogously, both counsel should analyze potential defenses. For example, in a drug distribution case, based upon the facts, counsel may need to analyze whether the defense of entrapment exists. Although this defense does not have traditional "elements," there are components that can be critically analyzed in order to determine if the defense exists.⁴⁹ Defense counsel should use this analysis to carefully plan how the defense will be established. The government should use this analysis to plan an appropriate response, recognizing that the government must prove beyond a reasonable doubt that the defense of entrapment does not exist.⁵⁰

Mapping out the elements of the charged offenses and potential defenses provides early, thorough, critical analysis of the facts and the application of the law to the facts. It is the origin of the case theme.

Develop a Theme

In courts-martial, themes are very important. Military personnel thrive on consistency and order, march in step in perfectly composed rectangles, and are taught that a lack of order is detrimental to war-fighting capability. They seek unity.⁵¹ Criminal conduct is defined as "prejudicial to *good order* and discipline."⁵² The Court of Appeals for the Armed Forces has held that prejudice to good order and discipline is implicit in all offenses under the UCMJ.⁵³ Given this perspective, the military factfinder will apply logic, attempt to put the evidence in proper order, and seek a theme that packages the evidence so that it "makes sense." The trial advocate's goal is to have the factfinder accept his theme.⁵⁴

When evidence fits within a consistent theme, it is judged as being more believable. Advocates should seek to convince the factfinder that what they are presenting fits within their logical theme, is more believable, and should therefore be accepted as true. Counsel should consider a theme as being tinted eyeglasses through which counsel want the factfinder to view all of the evidence presented. If the factfinder accepts a particular advocate's theme, the factfinder will wear those eyeglasses and view the evidence with that advocate's tint on it.

How does an advocate develop a theme? He must ask himself, what is the proposition or concept which, if the factfinder believes it to be true, will lead to the conclusion that the evidence must also be true? Within this theme or framework, an advocate presents evidence that both reinforces the theme and establishes or defeats the elements of the offense, depending upon which side the advocate represents. While the theme is not an element of the offense, it provides a context within which the factfinder can evaluate the evidence.

The following example illustrates how to develop and to use a theme in a court-martial. In a murder case, the prosecution recognizes that the keys to proving premeditated murder will be establishing beyond a reasonable doubt the identity of the accused as the killer and that at the time of the killing the accused had a premeditated design to kill. As a result, the prosecution decides that its theme must encompass the motive for the killing. If the panel believes the accused had a motive, they will view the evidence through the tint of the motive, and they will be more likely to believe that the accused killed the victim and that the homicide was premeditated.⁵⁵ The evidence supports the theme that the accused was a rejected paramour who could not allow the victim to live because she refused his love. The government will develop the following facts within this theme: the accused had a romantic relationship with the victim; the victim acrimoniously terminated the relationship; the accused had several confrontations with the victim in the days prior to the shooting; and the accused obtained a weapon. These facts establish the theme. The theme then provides the

48. Likewise, during the analysis of the elements, the value instruction should be listed next to the value element and the circumstantial evidence instruction should be listed next to the intent element. *See id.* para. 7-16, 7-3; *see also* MCM, *supra* note 4, pt. IV, para. 46c(1)(f)(ii) (explaining the intent element of larceny). Paragraph 46c(1)(f)(ii) of the MCM, part IV, provides insight into the types of circumstantial evidence that can be presented at trial and incorporated into a specific intent, circumstantial evidence instruction.

49. The three components of entrapment are: (1) the transaction was completed; (2) the accused lacked the predisposition to commit the offense; and (3) the government induced the accused to commit the offense.

50. "When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition." MCM, *supra* note 4, R.C.M. 916(g), discussion (citing MIL. R. EVID. 404(b)).

51. U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-4 through 2-6 (14 June 1993) [hereinafter FM 100-5].

52. *See* UCMJ art. 134 (West Supp. 1996).

53. *United States v. Foster*, 40 M.J. 140, 143 (1996).

54. The factfinder may adopt a theme somewhere in between. For example, in adult-on-adult sexual assault cases, the prosecution and defense evidence often appears to be at opposite ends of the consensual spectrum. The prosecutrix alleges that nothing she did could have been mistaken as granting consent. The accused, on the other side of the spectrum, alleges that the prosecutrix agreed to everything prior to and during the alleged offenses. Faced with these contrary themes, factfinders could and have adopted a theme somewhere in between (recognizing that the government has the burden of proving lack of consent beyond a reasonable doubt).

context or “tint” by which identity and premeditation can further be established. For example, scientific evidence such as analysis of blood stains found on the accused’s clothing becomes more incriminating. Eyewitness identifications of the accused are more convincing. The accused’s self-serving statements are less believable. Having established its theme, the government finds it easier to prove identity and premeditation because the factfinder is wearing the “eyeglasses” tinted with motive. Of course, this theme should be woven into the government’s voir dire, opening statement, presentation of evidence, and closing arguments.

In the same example, the defense theory may be that the accused did not commit premeditated murder; rather, the accused killed the victim while in a fit of anger and, therefore, can be guilty only of voluntary manslaughter. The defense theme provides that there was no plan because the accused acted on an uncontrollable impulse. Here, the defense seeks to focus on the accused’s acts only at the time of the killing, because it was at this point that the accused was “in the heat of sudden passion caused by adequate provocation.”⁵⁶ Although a rejected paramour, the accused visited the victim to rekindle their relationship. The victim treated the accused mercilessly, taunted him, and sent him into a rage. It was the victim’s maliciousness at the time of the killing that caused the regrettable event.

These themes are inconsistent as to the accused’s degree of guilt, but the government’s burden of proof has not shifted. The factfinder will decide which theme is more logical when evaluating the evidence. Within the framework of the more logical theme, the factfinder will evaluate the credibility of witnesses and decide if the government has carried its burden of proof.

If the trial advocate does not provide a theme, the factfinder (military personnel trained to apply logic⁵⁷) will develop their own theme. It is to the trial advocate’s advantage to assist factfinders in the development of a theme or context within which members can *logically* analyze the evidence.

Apply Common Sense to the Case and Its Presentation

Having noted that factfinders seek a theme within which they can evaluate evidence, counsel should also recognize that factfinders will use common sense in evaluating the evidence. Members are selected based upon age, education, training, experience, length of service, and judicial temperament.⁵⁸ The purpose of establishing these criteria is the creation of a panel with common sense and maturity of judgment. Noting their qualifications, the military judge will instruct the members to use their common sense, knowledge of human nature, and ways of the world.⁵⁹

If counsel do not use common sense when orchestrating their presentations, factfinders will note the deficiencies of counsel and, to counsels’ detriment, apply their own common sense. For example, the accused is charged with assault in which grievous bodily harm is intentionally inflicted. The accused is claiming voluntary intoxication for the purpose of raising a reasonable doubt as to the existence of specific intent.⁶⁰ The accused takes the witness stand on the merits. While the accused testifies that he cannot remember anything incriminating because of his intoxication, he can amazingly remember everything that is exculpatory and which took place just prior to, during, and after the incident. While the accused may have consumed numerous alcoholic beverages, common sense will lead the factfinder to conclude that the defense of voluntary intoxication does not apply and that the accused lacks credibility.⁶¹

In another example, the accused pleads guilty to receiving stolen military property (explosives). After having been found guilty, the accused states in his unsworn statement that although he knew the explosives were stolen when he received them, he did not turn the property over to his chain of command because they were “distant and aloof.” The accused alleges that the chain of command consisted of poor leaders who had closed down lines of communication with the lower-ranking enlisted soldiers. At this point, such a contention seems plausible because there is no logic error. The accused has presented extenuating evidence of why he kept the stolen explosives hidden in his room—he could not turn to the poor leaders in his

55. Motive is such strong evidence that members may equate it with an element of the offense. While its potency makes it a strong theme, counsel must be wary. Trial counsel should use this strength if it is available. If there is no apparent motive, defense counsel should consider using its absence as the defense theme: “There is no reason, no motive, for the accused to have committed this crime. Common sense tells you that based upon this lack of motive, the accused did not commit this crime.”

56. See MCM, *supra* note 4, pt. IV, para. 44.

57. See FM 100-5, *supra* note 51, at 2-12 (discussing the logic framework within which commanders integrate and coordinate functions to synchronize battle effects).

58. UCMJ art. 25 (West Supp. 1996).

59. The closing substantive instructions on findings include the following: “In weighing and evaluating the evidence, you are expected to utilize your own common sense, your knowledge of human nature, and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence.” BENCHBOOK, *supra* note 5, at 53.

60. See MCM, *supra* note 4, R.C.M. 916(1)(2).

61. See BENCHBOOK, *supra* note 5, instr. 7-7-1 (pertaining to the credibility of witnesses). “These rules apply equally to the testimony given by the accused.” *Id.*

chain of command. Next, the defense presents numerous members of the accused's chain of command, to include past and present team leaders, squad leaders, platoon sergeants, and platoon leaders. They all claim to have worked closely with the accused (to include daily contact with the accused during the period that covers the possession of stolen explosives), to know the accused extremely well, and to have opinions concerning his outstanding rehabilitative potential. Are these two presentations logical? Common sense provides that they are inconsistent. The defense began by attacking the professionalism of the chain of command and impeaching their abilities as leaders. Then, the defense called upon this same chain of command to render good-soldier testimony, as if they are competent leaders with opinions that should matter. Which of these two inconsistent presentations should be believed? Has the defense presentation lost credibility, making both presentations unbelievable?

Voir Dire

The discussion for R.C.M. 912(d), Examination of Members, states that "[t]he opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."⁶² Not minimizing the requirement to select a fair and impartial panel, counsel should nonetheless also use voir dire to educate the panel and to introduce case themes.⁶³

Establishing the Theme

Voir dire is the first opportunity to educate the panel concerning the key issues of the case and respective themes. During voir dire, counsel should present their themes through well-worded questions that take the members from general statements with which everyone agrees to more pointed questions that establish counsel's themes. The following example illustrates this technique: Defense counsel in a rape case wants the members to accept the theme that the prosecutrix is lying about lack of consent so that she can preserve her marriage. Going from general to more particular, questions might be:

The military judge will instruct you that an element of rape is that the sexual intercourse must be nonconsensual. Does everyone understand that it is not rape if the woman consented to sex?

Do each of you understand that you have the duty to determine the credibility of witnesses?

Does everyone agree that one way for you to deter-

mine credibility is if a person has a motive to lie?

Do you all agree that in general, no one wants to be caught doing something to cause their divorce?

Does everyone agree that infidelity is a cause of divorce?

Does everyone generally agree that a woman could lie about her infidelity to protect her marriage?

These voir dire questions begin by educating the panel concerning the lack of consent element required for a rape conviction. The second and third questions address credibility in general. The remaining questions become more focused and introduce the defense theme—a married prosecutrix wants to protect her marriage and will lie concerning consensual sex. Since the military judge will later similarly instruct the panel concerning rape's required element of lack of consent and determining witness credibility, it is beneficial for defense counsel to link these key instructions to the defense theme as early as voir dire.

Establishing Challenges for Cause

Counsel should not use group voir dire to establish individual challenges for cause. In the ordinary voir dire setting, the military judge asks the panel members numerous "qualification" questions from the *Military Judges' Benchbook*, and all members answer either affirmatively or negatively in unison. If a panel member provides a response that indicates a potential disqualification, counsel should note the response and address the issue during individual voir dire of the member. Asking questions that attack the impartiality of a member in front of the other members could be viewed by the group as an attack upon the group itself.⁶⁴

Once in individual voir dire, counsel should not begin an attempt to establish a challenge for cause by asking the individual member leading questions that call for legal conclusions. For example, counsel should not ask "Isn't it true that because your senior rater is also on the panel, you would not independently weigh the evidence and vote your conscience?" Rather, he should begin with questions that require factual answers. Counsel should ask how often the individual member and his senior rater work together, when was the last time the junior told the senior that he disagreed with the senior in the presence of others, when is the junior member due to receive an officer or noncommissioned officer evaluation report, and whether the

62. MCM, *supra* note 4, R.C.M. 912(d), discussion.

63. Counsel should draft questions carefully, ensuring that the questions have a proper purpose and are not compound or confusing. Counsel do not want to be interrupted and corrected while making their first impression with the members.

64. Also, a member's response to a question has the potential to taint others. This issue can be avoided by using individual voir dire to ask questions that could disqualify others. See MCM, *supra* note 4, R.C.M. 912(d), discussion.

junior member will be in a promotion zone or a service school zone in the near future. These facts lay a foundation, and counsel can then ask leading questions, such as: "Wouldn't you agree that someone who is receiving a rating within a month may be hesitant to express disagreement with her rater?" The fact-based questions have accomplished two purposes: (1) they have exposed the potential disqualification to the military judge, and (2) they have exposed the bias to the member such that the member might be unable to give clear, reassuring, unequivocal answers concerning the potential disqualification.

When exercising challenges for cause, counsel should combine several reasons together and argue the mandate of the military appellate courts to liberally grant challenges. For example, a member is an officer who is rated by another member, knows a witness, and has "some" law enforcement training. While none of these facts alone establishes a challenge for cause, when grouped together and argued with the "liberal grant" mandate, an argument could be made that a challenge should be granted "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."⁶⁵

You Can Never Talk to a Witness Too Often

Trial attorneys should talk to potential witnesses early in the trial process and should talk to them often. During the entire process, counsel must remember to treat witnesses with courtesy and respect and to keep them informed of the status of the case. Counsel should also tell witnesses to call if the opposing

party interviews them. This will enable counsel to stay apprised of opposing counsel's discussions with witnesses. To put witnesses at ease, counsel should also consider interviewing witnesses at their locations. Who knows what counsel will discover if they find themselves at the accused's unit?

Counsel should not discourage their witnesses from speaking to opposing counsel, with limited exceptions.⁶⁶ Justice is served when both counsel have full knowledge of the facts of the case. The court-martial is then a true test of the evidence.

Assisting Victims and Witnesses

If the witness is a victim, the witness will be more eager to assist in the trial process when counsel are eager to help the witness. When appropriate, trial counsel should inform the victim of her rights under Article 139.⁶⁷ Although it is often overlooked, Article 139 provides a method for compensating victims of certain property crimes. Counsel should be thoroughly familiar with procedures to direct meritorious claimants through the claims process. Additionally, counsel should strive to protect victim and witness rights under Chapter 8, *Army Regulation 27-10*.⁶⁸ Protecting the rights of victims ensures justice and mitigates victim suffering.

Cross-Examine Every Witness⁶⁹

Cross-examination should be brief and to the point—less is usually better. When asking non-foundational, essential ques-

65. *Id.* R.C.M. 912(f)(1)(N). See *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988).

66. AR 27-26, *supra* note 3, Rule 3.4. The rule provides that:

A lawyer shall not:

....

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent to a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Id. The comment to Rule 3.4 notes:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like

....

Paragraph (f) permits a lawyer to advise relatives, employees, or other agents of a client to refrain from giving information to another party, for such persons may identify their interests with those of the client.

Id. comment.

67. UCMJ art. 139 (West Supp. 1996) (pertaining to the redress of injuries to property).

68. See AR 27-10, *supra* note 8, ch. 18 (pertaining to victim/witness assistance).

tions, counsel should phrase the question in a leading fashion. Every question should have a purpose and should be written out in advance.⁷⁰ Counsel should seek to impeach foundations, to expose biases, and to impeach memory. To be effective, trial attorneys must not simply rehash direct examination. Additionally, counsel should never cross-examine in chronological order because chronology allows the witness to simply repeat the story as practiced. Instead, counsel should ask questions out of their natural sequence so that the witness' memory will truly be tested.

Trial counsel must *always* be prepared to cross-examine the accused. If the opportunity to cross-examine the accused on findings or on sentencing arises, trial counsel should seize the opportunity. Cross-examination of the accused can be, and often is, the turning point in a court-martial. Trial counsel should attempt to get the accused to agree with some, if not all, of the elements. For example, the prosecutor could ask the accused, "You agree that the compact disk player is worth \$125.00?" When he agrees, value is then uncontroverted.

All too often, the government counsel is unwilling to ask the defense's good-soldier witness relevant questions that test the foundation of the witness' opinion. Assume the accused's staff sergeant supervisor testifies that the accused is a good soldier. Counsel should cross-examine the witness with pointed questions. For example, trial counsel could ask the good-soldier witness how many promotion points the accused has and what the cutoff score is for the accused's military occupational specialty. If the witness doesn't know, the factfinder may discount the good-soldier opinion because the witness lacks sufficient knowledge of the accused, his current status, and his service record. Has the witness ever recommended the accused for an award, a citation, or soldier of the month? Has the witness ever given the accused, the alleged excellent performer, a positive counseling statement? If the accused is really that good, why didn't the witness somehow tangibly recognize the accused's work performance? Additionally, if there is uncharged misconduct, counsel may cross-examine the good-soldier witness about that misconduct if it would logically bear upon a character trait to which the witness testified.⁷¹

Argument

69. The exception to this general rule may be the accused's parents during sentencing.

70. This is possible because counsel will have interviewed every witness; knows what every witness will say; and can, therefore, plan a cross-examination accordingly. Counsel should keep in mind the adage which warns, "Do not ask a question to which you do not know the answer."

71. See *United States v. Brewer*, 43 M.J. 43, 47 (1995).

"[I]nstances of conduct in between the period that was the basis of the opinion and the time of the offense equally are relevant on the question whether, as the direct testimony would imply, appellant had the same character traits when the charged crime occurred as when the witness knew him."

Id.

72. BENCHBOOK, *supra* note 5, para. 3-46-1, note 4.

Every panel member in front of whom military counsel will argue has given or has attended military briefings. They anticipate a similar format from trial advocates: an introduction, a body, and a conclusion. For an advocate to be successful, he should use the introduction and conclusion to stress his theme.

In the introduction, counsel should inform the members that his presentation has a certain number of major points in support of the theme, and he should identify those points. The body should be organized into three to five components or major topic areas. All components must support the theme. Although major topics will necessarily vary from case to case, some common major topics are: elements of the offenses and the facts of the case, physical evidence, credibility of witnesses, investigator errors, eyewitness identification, special defenses, and a discussion of instructions (for example, a discussion of why the panel should or should not apply the permissible inference relating to the unexplained possession of recently stolen property in a larceny case⁷²).

Organization

As an advocate proceeds through the major topics, he must keep the members on track. In this vein, counsel could tell the members, "I am now going to address the second major point—the lack of credibility of the government's witnesses." Counsel could then argue the issue as it applies to each witness. The members expect counsel to be organized. If counsel is not organized, he will lose credibility with the members.

Being organized begs for the use of charts or diagrams. Charts force advocates to outline their presentations and to think in terms of three to five major components. They give the factfinder visual aids which make them better able to follow, to understand, and, hopefully, to adopt an advocate's arguments and theme. Every trial and defense counsel has access to some graphics presentation program, and they should use it. Since the members will not have access to the visual aids during their closed-court deliberations, counsel can tell the members to copy important information from the visual aids.

The members will hold a full and free discussion prior to voting. Advocates should encourage the members to use that time to discuss the major topics in the sequence in which they

were presented. An advocate's chances for success increase when the members follow the sequence of his topics.

Avoid Arguing Personal Beliefs or Opinions

Counsel must not argue personal beliefs or opinions,⁷³ such as: "I (or we or the government) believe the accused committed larceny." Instead, counsel should argue: "The accused committed larceny."

Be Pessimistic

Prior to the first Article 39a session in a case, counsel should assume that things will go wrong with their cases and should plan accordingly. Has everything been done to ensure that the crime laboratory will be done with the evidence prior to trial? What if the military judge holds that some critical piece of evidence is not admissible? What if opposing counsel "opens a door" or introduces a certain piece of evidence? Does a potential ruling render one of the elements unsupported by evidence? Is there an alternate plan?⁷⁴ Counsel must be prepared for anything and everything. If advocates expect and plan for the worst, nothing will take them by surprise.

Project Confidence

While a pessimist prior to trial, an advocate must exude confidence once he is in court. He must always be and look in control. When opposing counsel calls a witness, counsel should pull out his manila folder for that witness⁷⁵ and show the members that he is ready. Counsel should know what his opponent's cross-examination of witnesses will be and should have effective redirect questions prepared.

Counsel should be positive and use positive language. For example, the following argument uses weak language: "The government hopes that you adjudge a bad-conduct discharge." A more positive way to make the argument is: "A bad-conduct discharge is the required punishment for the accused's serious criminal misconduct. Give him what he deserves. Justice demands it." Counsel who have carefully prepared can and should be confident.

Conclusion

There is no secret to success in the courtroom. Diligence and careful preparation produce quality presentations and result in justice being served. The accused, the convening authority, the triers of fact, the military justice system, and the United States deserve nothing less.

73. United States v. Clifton, 15 M.J. 26 (C.M.A. 1983); United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).

74. Evidence that may be held inadmissible for one purpose may become admissible for another. For example, the military judge may hold that certain uncharged misconduct is inadmissible under M.R.E. 404(b), other crimes, wrongs, or acts. This evidence may become admissible for cross-examination of a defense character witness under M.R.E. 405(a).

75. If using a file system, the folder should contain the prepared direct or cross-examination for that witness, as well as unmarked copies of all prior statements of that witness. The prior statements may be needed for refreshing the witness' memory or for impeachment. See MCM, *supra* note 4, MIL. R. EVID. 612, 613.

Joint Service Combat Shotgun Program

*W. Hays Parks
Special Assistant for Law of War Matters,
Office of The Judge Advocate General, U.S. Army
Washington, D.C.*

Introduction

There is a long history of the use of shotguns in combat. But in the closing days of World War I, Germany objected to the U.S. use of shotguns, claiming their use violated the law of war. Although the German claim was promptly rejected by the United States, questions about the legality of shotguns persisted. This article¹ sets forth the history of the combat use of shotguns, the 1918 German protest and U.S. response, and an analysis of the issue in contemporary terms. The memorandum of law upon which this article is based was coordinated with the other services, Army and DOD General Counsel, and the Department of State, and it reaffirms the legality of the shotgun for combat use.

The Requirement for a Legal Review

Various regulations require a legal review for all weapons which will be procured to meet a military requirement of the armed forces of the United States.² The purpose of the legal review is to ensure that the intended use of each weapon, weapon system, or munition is consistent with customary international law and the international law obligations of the United States, including law of war treaties and arms control agreements to which the United States is a party. Accordingly, the commander of the United States Marine Corps Systems Command requested a joint legal review of the Joint Service Combat Shotgun program by the Offices of the Judge Advocate Generals of the Army, Navy, and Air Force.

The Program

The Joint Service Combat Shotgun (Combat Shotgun) is a joint program to select and field a lightweight, semiautomatic, 12-gauge shotgun to replace pump action shotguns currently in use by each of the military services. The Marine Corps is acting

as the lead service for the program, and the U.S. Army, Navy, Air Force, and Coast Guard are the participating services. The Joint Service Small Arms Program office conducts general oversight of the program and provides research, development, testing, and evaluation funding to support the procurement effort. The commander of the Marine Corps Systems Command has been designated as the Milestone Decision Authority for the program.

The Combat Shotgun to be procured and fielded will be required to satisfy the following operational and physical requirements described in the Joint Operational Requirement Document and further amplified in the contract Purchase Description:

- (1) Capable of semiautomatic operation.
- (2) Capable of firing both standard Department of Defense (DOD) 2.75-inch, 12-gauge No. 00 buckshot, No. 7 1/2 shot, No. 9 shot, and slug ammunition,³ and 3.0-inch 12-gauge commercial ammunition conforming to Sporting Arms and Ammunition Manufacturers' Institute (SAAMI) standards without adjustment to the operating system. The Marine Corps Systems Command is unaware of any DOD acquisition programs to procure and type classify 3.0-inch, 12-gauge ammunition for use by DOD components.⁴
- (3) Have a maximum effective range of forty meters (fifty meters desired) with the DOD standard 2.75-inch No. 00 buckshot ammunition, and 100 meters (125 meters desired) with slug ammunition.
- (4) Have a length of 41.75 inches or less and be capable of being reconfigured to, and be operated at a length of, 36 inches or less.
- (5) Weigh no more than 8.5 pounds (six pounds desired) unloaded.

1. This article is derived from the author's legal review, dated 24 January 1997, of the Joint Service Combat Shotgun Program, which he wrote for The Judge Advocate General, U.S. Army.

2. U.S. DEP'T OF DEFENSE, DIR. 5000.1, DEFENSE ACQUISITION (15 Mar. 1996) [hereinafter DOD DIR. 5000.1]; U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (1 Jan. 1979); U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5711.8A, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (29 Jan. 1988); U.S. DEP'T OF AIR FORCE, INSTR. 51-402, WEAPONS REVIEW (13 May 1994).

3. The 12-gauge door-breaching cartridge was the subject of a coordinated review that approved that round. Shotgun slug ammunition, an antimateriel munition, will be the subject of a separate review.

4. Memorandum, Commander, Marine Corps Systems Command, subject: Joint Service Combat Shotgun Program, Request for Legal Review (13 Sept. 1996).

(6) Be equipped with Low Light Level iron sights and a standard U.S. Military accessory mounting rail integral to the upper receiver, to permit use of other sight enhancement devices.

The Combat Shotgun will be employed by personnel in each of the armed services in international armed conflict, internal armed conflict, and military operations other than war and will be used for missions to include the execution of security/interior guard operations, rear area security operations, guarding prisoners of war, raids, ambushes, military operations in urban terrain, and selected special operations.

History⁵

As history constitutes State practice, consideration of the legality of the Combat Shotgun requires a summary of the history of the military use of shotguns and related legal issues.

The military history of the shotgun dates to the middle of the sixteenth century, when the blunderbuss was invented in Germany and the smoothbore Birding Piece or Long Fowler was developed in England. While the latter was developed for hunting, the former was a close-range, antipersonnel weapon from the outset. The dual use—for hunting and personal protection—and greater range of the Long Fowler caused it to survive and to flourish as the blunderbuss began to wane in the first quarter of the nineteenth century.

The blunderbuss saw considerable use by British, European, and American military forces before its ultimate demise. Austrian, Prussian, and British regiments were equipped with the blunderbuss; for example, British General Sir John Burgoyne raised a Light Dragoon Regiment in 1781 equipped with the blunderbuss. Navies employed the blunderbuss as a weapon for repelling boarding parties. The blunderbuss and the shotgun established the character of the modern military shotgun: a multiple-projectile weapon for close-range combat. Development of the high-velocity, small-caliber rifle which possesses greater range and accuracy, resulted in an initial decline in the use of the shotgun in combat, a trend which began to reverse in World War I. There is no known evidence that shotgun use in combat diminished because of a question as to its legality.⁶

The combat shotgun or military rifle with a shotgun-type munition continued to be used in the United States. In the American Revolution, General George Washington encouraged his troops to load their muskets with “buck and ball,” a load

consisting of one standard musket ball and three to six buckshot, in order to increase the probability of achieving a hit. In the subsequent Seminole Indian Wars in Florida (1815-1845), buck-and-ball was standard issue for military muskets.

As the buck-and-ball round slowly succumbed to improvements in small arms technology that brought greater rifle accuracy, the shotgun remained in military use. Texans made effective use of the shotgun in their unsuccessful defense of the Alamo (6 March 1836) and their defeat of the Mexican Army forces of General Santa Anna in the battle of San Jacinto six weeks later. In the subsequent war with Mexico in 1846, Marine Corps Major Levi Twiggs employed a shotgun, reportedly with good effect, during the Marine Corps' march from Vera Cruz to Mexico City. During the American Civil War, .58- and .69-caliber smoothbore rifles using buck-and-ball, and shotguns, were used in combat by Union and Confederate forces, primarily by cavalry units. For example, the shotgun was a preferred weapon for the Confederate cavalry commanded by General Nathan Bedford Forrest, who readily saw its value for close-quarter combat. United States Cavalry units subsequently employed shotguns during the Indian wars between 1866 and 1891.

Shotguns were employed by United States Army and Marine Corps units during the insurrection that raged in the Philippines from 1899 to 1914, and by Brigadier General John Pershing in the 1916 punitive expedition into Mexico in pursuit of Pancho Villa. When World War I entered its stalemated trench warfare phase, both French and British High Commands considered, but rejected, the use of double-barreled shotguns in trench defense. The rejection of their use was not due to any questions as to their legality, but was due to the perceived ineffectiveness of their light bird shot loads and, undoubtedly, the requirement for and difficulty of frequent, quick reloading of a double-barreled shotgun in close combat. When the United States entered World War I in 1917, General Pershing was placed in command of the American Expeditionary Forces (AEF). General Pershing's forces employed 12-gauge repeating (pump action) shotguns, loaded with six No. 00 buckshot shells, for close-range defensive fires against enemy infantry assaults, trench raids, and assaults on enemy trenches and machine gun positions.

The highly-effective use of the shotgun by United States forces had a telling effect on the morale of front-line German troops. On 19 September 1918, the German government issued a diplomatic protest against the American use of shotguns, alleging that the shotgun was prohibited by the law of war.⁷ After careful consideration and review of the applicable law by The Judge Advocate General of the Army, Secretary of State

5. The primary source for this historical section is Thomas F. Swearingen's authoritative source on the subject. THOMAS F. SWEARENGEN, *THE WORLD'S FIGHTING SHOTGUNS* (1978); see also Paul B. Jenkins, *Trench Shotguns of the AEF*, *THE AM. RIFLEMAN*, Nov. 1935, at 14-15, 22; Howard M. Madaus, *The Use of the Percussion Shotgun in Texas Prior to and During the American Civil War, 1861-1865*, *ARMAX*, at 133-172 (1995).

6. The 1918 German protest and the language of its present law of war manual are discussed *infra*.

7. The German protest and U.S. response are discussed in greater detail *infra*.

Robert Lansing rejected the German protest in a formal note. This is the only known occasion in which the legality of actual combat use of the shotgun has been raised.

Shotguns were employed by Allied-supported partisans and guerrillas in Europe and Asia during World War II, and by the United States Army and Marine Corps in the Pacific and China-Burma-India (CBI) theaters. The short range of the shotgun made it of limited value for conventional forces in the open European battlefields, but its close-range effectiveness made it invaluable in the dense jungle battlefields of the Pacific and CBI theaters. Shotguns were employed in combat in the Korean War, primarily for command post security and close-range protection for machine-gun positions. Human-wave attacks by North Korean and Chinese forces led to the development of the Claymore mine, a multiple-fragmentation antipersonnel munition that performs like a shotgun in its directed dispersion of fragments.

In the post-World War II insurgency/counterinsurgency era, shotguns were employed by guerrilla and military forces in virtually every conflict in sub-Saharan Africa, Latin and South America, and Southeast Asia. In their successful counterinsurgency campaign in Malaya (1948-1959), British forces employed shotguns in jungle operations, as did British, Australian, and New Zealand special operations forces in their 1963-1966 Borneo campaign. Shotguns were employed by Viet Minh and French forces in the Indochina War (1946-1954) and by the Viet Cong against the military forces of the Government of the Republic of South Vietnam (1956-1975). United States, Australian, and New Zealand units employed shotguns in their operations against Viet Cong guerrillas and North Vietnamese military forces in the Republic of Vietnam (1965-1972). They also used the Claymore mine and a shotgun round for the M79 grenade launcher. United States Marine Corps personnel employed shotguns in the recapture from Cambodian forces of the container ship *Mayaguez* on 12 May 1975. United States Air Force security police employed shotguns in base security operations in Saudi Arabia during Operations Desert Shield and Desert Storm (1990-91) to protect them from attack by terrorists or Iraqi military units, and some personnel in British armored units were armed with shotguns as individual weapons during that conflict.

The history of combat use of the shotgun reveals that it is a limited range but highly effective close-range, specialized weapon. Although recorded use has been primarily by United States and British military forces and their close allies, the shotgun has been employed in combat by the militaries of other nations and guerrilla or partisan forces where its use was of value for a specific mission, or in a particular conflict where its close-range effectiveness provided a military advantage. There

is substantial State practice of shotgun use in combat over more than two centuries. In contrast, there is no known evidence that shotgun use in combat has been curtailed by any nation due to concerns as to its inconsistency with the law of war.

Legal Considerations and Analysis

The Combat Shotgun raises two issues with regard to its legality. First, does a weapon capable of inflicting multiple wounds upon a single enemy combatant cause *superfluous injury*, as prohibited by Article 23(e) of the Annex to the Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907? Second, does the No. 00 buckshot projectile, or other smaller buckshot projectiles, expand or flatten easily, in violation of the Hague Declaration Concerning Expanding Bullets of 29 July 1899? Each of these questions will be addressed in the analysis that follows.

Does a Weapon Capable of Inflicting Multiple Wounds upon a Single Enemy Combatant Cause Superfluous Injury, as Prohibited by the Law of War?

Treaty Law

The principal treaty provision to which the United States is a party relating to the legality of weapons is contained in Article 23(e) of the Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907,⁸ which prohibits the employment of “arms, projectiles, or material calculated to cause unnecessary suffering.”⁹ In some texts, the term *superfluous injury* is used in lieu of *unnecessary suffering*. While the two terms often are regarded as synonymous, the former is the more accurate translation from the authentic French text—“*propres a causer des maux superflus*.”¹⁰

Neither superfluous injury nor unnecessary suffering has been defined. In determining whether a weapon causes superfluous injury, a balancing test is applied between the force dictated by military necessity to achieve a legitimate objective vis-a-vis injury that may be considered superfluous to the achievement of the stated or intended objective (in other words, whether the suffering caused is out of proportion to the military advantage to be gained). The test is not easily applied; a weapon that can incapacitate or wound lethally at, for example, 300 meters or longer ranges may result in a greater degree of incapacitation or greater lethality at lesser ranges. For this reason, the degree of “superfluous” injury must be clearly disproportionate to the intended objective(s) for development of the weapon (that is, the suffering must outweigh substantially the military necessity for the weapon).

8. Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex, art. 23e, 36 Stat. 2277.

9. *Id.*

10. *Id.*

The fact that a weapon causes injury or death does not lead to the conclusion that the weapon causes superfluous injury, or is illegal *per se*. Military necessity recognizes that weapons of war lead to death, injury, and destruction; the act of combatants killing or wounding enemy combatants in battle is a legitimate act under the law of war. That the law of war prohibits *unnecessary* suffering is an acknowledgment that the law of war recognizes as legitimate *necessary* suffering in combat. Deadly force also may be used lawfully against persons who are committing or threatening to commit crimes of violence who are not protected by the law of war, such as terrorists.

What is prohibited is the design or modification and employment of a weapon for the purpose of causing suffering beyond that required by military necessity. In conducting the balancing test necessary to determine a weapon's legality, the effects of a weapon cannot be weighed in isolation. They must be examined against comparable weapons in use on the modern battlefield and the military necessity for the weapon under consideration.

*The 1918 German Protest*¹¹

On 19 September 1918, the Government of Switzerland, representing German interests in the United States, presented to the U.S. Secretary of State a cablegram received by the Swiss Foreign Office containing the following diplomatic protest by the Government of Germany:

The German Government protests against the use of shotguns by the American Army and calls attention to the fact that according to the law of war (*Kriegsrecht*) every [U.S.] prisoner [of war] found to have in his possession such guns or ammunition belonging thereto forfeits his life. This protest is based upon article 23(e) of the Hague convention [sic] respecting the laws and customs of war on land. Reply by cable is required before October 1, 1918.

The German protest was precipitated in part by the capture in the Baccarat Sector (Lorraine) of France, on 21 July 1918, of a U.S. soldier from the 307th Infantry Regiment, 154th Infantry Brigade, 77th Division, AEF, who was armed with a 12-gauge Winchester Model 97 repeating trench (shot) gun, and a second, similarly-armed AEF soldier from the 6th Infantry Regiment, 10th Infantry Brigade, 5th Division, on 11 September 1918 in the Villers-en-Haye Sector. Each presumably possessed issue ammunition, which was the Winchester "Repeater" shell, containing nine No. 00 buckshot.

The German protest was forwarded by the Department of State to the War Department, which sought the advice of The Judge Advocate General of the Army. Brigadier General Samuel T. Ansell, Acting Judge Advocate General, responded by lengthy memorandum dated 26 September 1918. Addressing the German protest, General Ansell stated:

Article 23(e) simply calls for comparison between the injury or suffering caused and the necessities of warfare. It is legitimate to kill the enemy and as many of them, and as quickly, as possible . . . It is to be condemned only when it wounds, or does not kill immediately, in such a way as to produce suffering that has no reasonable relation to the killing or placing the man out of action for an effective period.

The shotgun, although an ancient weapon, finds its class or analogy, as to purpose and effect, in many modern weapons. The dispersion of the shotgun [pellets] . . . is adapted to the necessary purpose of putting out of action more than one of the charging enemy with each shot of the gun; and in this respect it is exactly analogous to shrapnel shell discharging a multitude of small [fragments] or a machine gun discharging a spray of . . . bullets.

The diameter of the bullet is scarcely greater than that of a rifle or machine gun. The weight of it is very much less. And, in both size and weight, it is less than the . . . [fragments] of a shrapnel shell . . . Obviously a pellet the size of a .32-caliber bullet, weighing only enough to be effective at short ranges, does not exceed the limit necessary for putting a man immediately *hors de combat*.

The only instances even where a shotgun projectile causes more injury to any one enemy soldier than would a hit by a rifle bullet are instances where the enemy soldier has approached so close to the shooter that he is struck by more than one of the nine . . . [No. 00 buckshot projectiles] contained in the cartridge. This, like the effect of the dispersing of . . . [fragments] from a shrapnel shell, is permissible either in behalf of greater effectiveness or as an unavoidable incident of the use of small scattering projectiles for the nec-

11. See U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1918, Supp. 2 (*The World War*), at 785-86 (1933). This summary is based upon official correspondence contained in this and related official documents.

essary purpose of increasing [the] likelihood of killing a number of enemies.

General Ansell concluded his memorandum with the statement that “The protest is without legal merit.”

Acting Secretary of War Benedict Crowell endorsed General Ansell’s memorandum of law and forwarded it to the Secretary of State that same day. Secretary of State Robert Lansing provided the following reply to the Government of Germany two days later:

[T]he . . . provision of the Hague convention, cited in the protest, does not . . . forbid the use of this . . . weapon . . . [I]n view of the history of the shotgun as a weapon of warfare, and in view of the well-known effects of its present use, and in the light of a comparison of it with other weapons approved in warfare, the shotgun . . . cannot be the subject of legitimate or reasonable protest.

. . . .

The Government of the United States notes the threat of the German Government to execute every prisoner of war found to have in his possession shotguns or shotgun ammunition. Inasmuch as the weapon is lawful and may be rightfully used, its use will not be abandoned by the American Army . . . [I]f the German Government should carry out its threat in a single instance, it will be the right and duty of the . . . United States to make such reprisals as will best protect the American forces, and notice is hereby given of the intention of the . . . United States to make such reprisals.

World War I ended six weeks later, without reply by Germany to the United States response. There is no record of any subsequent capture by German forces of any U.S. soldier or marine armed with a shotgun or possessing shotgun ammunition, or of Germany carrying out its threat against the U.S. soldiers it captured earlier.

The position of the United States as to the legality of shotguns remains unchanged from that stated in the opinion of Brigadier General Ansell and the Secretary of State’s 28 September 1918 reply to the government of Germany.

*Further Consideration of the Article 23(e)
Prohibition on Superfluous Injury*

As the memorandum from which this article is derived is the first legal review of the combat shotgun since the institution of the Department of Defense program for such reviews,¹² the issue of whether a shotgun causes superfluous injury in violation of Article 23(e) of the Annex to the 1907 Hague Convention IV merits fresh examination.

Shotguns and shotgun cartridges are designed or chosen to produce a desired projectile pattern at a specific distance. Their military purpose is the simultaneous projection in the direction of a close-range target of a number of projectiles in order to increase the probability of striking the intended target. This objective has been borne out in combat. British examination of its Malaya experience determined that, to a range of thirty yards (27.4 meters), the probability of hitting a man-sized target with a shotgun was superior to that of all other weapons. The probability of hitting the intended target with an assault rifle was one in eleven. It was one in eight with a submachine gun firing a five-round burst. Shotguns had a hit probability ratio twice as good as rifles. A 1952 British study by the Commander of British Security Forces, compiled from combat action reports, tests, and other studies (including medical), reconfirmed the previous finding that the shotgun was a highly-effective combat weapon at ranges out to seventy-five yards (68.6 meters).¹³ Traveling at velocities one-third to one-half that of a modern military rifle bullet, with a poor ballistic coefficient (particularly when compared to the good ballistic coefficient of modern military rifle bullets), shotgun buckshot also diminish risk of injury from projectile over-penetration (through walls or doors) to civilians who are not taking a direct part in the hostilities or to friendly force combatants during military operations in urban terrain. These reasons confirm the military necessity for shotguns.

The second issue is whether wounding by a shotgun constitutes superfluous injury, that is, that the wounds it causes are disproportionate when compared to its military necessity or to comparable wounding mechanisms to which a soldier may be exposed on the battlefield. The proposed transition from a pump (manually-operated slide) action to a semiautomatic action poses no law of war issues, but simply follows the military weapons evolution that began at the beginning of this century with military pistols and rifles.

Whether a shotgun creates wounds that are excessive to its military necessity will be addressed, in part, later in the discussion of shotgun ammunition. In the general sense, it is addressed here in terms of the fact that the use of a shotgun at close range increases the probability that targeted enemy combatants may be struck by more than a single projectile; the present question is whether multiple wounding is contrary to

12. The program commenced with a DOD Instruction. U.S. DEP’T OF DEFENSE, INSTRUCTION 5500.15 (16 Oct. 1974). The successor to that DOD Instruction was implemented in 1996. DOD DIR. 5000.1, *supra* note 2.

13. Swaengen, *supra* note 5, at 15.

the prohibition on superfluous injury. It is not, and State practice is substantially to the contrary. Wounding by more than one projectile is extremely common on the battlefield due to the various lawful fragmentation munitions in use, such as antipersonnel landmines, artillery and mortar fragments, canister rounds, Claymore mines,¹⁴ and hand or rifle grenades, as well as the extensive projection towards an enemy force of automatic and semiautomatic small arms fire.

A corollary question is whether shotgun projectiles as such inflict wounds greater than those imposed by comparable wounding mechanisms in use on the modern battlefield. Although it can result in fatal wounds, shotgun wounds appear substantially less significant than those inflicted by weapons such as artillery fragments, incendiary weapons, and antipersonnel landmines.¹⁵

For the foregoing reasons, the possibility that an enemy combatant may suffer multiple wounds as the result of the battlefield use of a shotgun as such does not contravene the prohibition on superfluous injury contained in Article 23(e) of the Annex to the 1907 Hague Declaration IV.

Other Initiatives Relevant to the Question

In August 1992, the Government of Germany issued a new law of war manual.¹⁶ Paragraph 407 of the manual states: "It is prohibited to use bullets which expand or flatten easily in the human body (e.g., dum-dum bullets) (Hague Decl 1899). This also applies to the use of shotguns, since shot causes similar suffering unjustified¹⁷ from the military point of view. . . ."¹⁸

The issue of whether shotgun buckshot violates the prohibition contained in the Hague Declaration Concerning Expanding Bullets of 29 July 1899¹⁹ is addressed later in this article. Since the German manual's objection to the shotgun relies upon the

1899 Hague Declaration Concerning Expanding Bullets, it can be assumed that the Government of Germany no longer regards the combat use of shotguns as a violation of the general prohibition of weapons causing superfluous injury, contained in Article 23(e) of the Annex to Hague Convention IV of 18 October 1907, as previously asserted in its diplomatic note of 23 September 1918.

As previously indicated, the United States developed the M18 (later the M18A1) Claymore mine following the Korean War. The M18A1 is an antipersonnel directed fragmentation device containing 760 10.5-grain steel balls which, on detonation, are dispersed in a sixty-degree arc extending fifty meters at a maximum height of two meters in front of the mine. It is employed with obstacles or on the approaches, forward edges, flanks, and rear edges of protective minefields as close-in protection against a dismounted infantry attack. Although initially developed to address human-wave attacks, the Claymore can be, and has been, employed as a perimeter-security weapon against individual enemy combatants. The Claymore subsequently has been manufactured by several nations, and it is in the military inventory of many nations, including Germany.²⁰

On 10 October 1980, following two years of negotiations, the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects adopted a convention bearing the same name (UNCCW). Protocol II of the UNCCW regulates the employment of landmines, booby traps, and other devices.

On 3 May 1996, the United Nations concluded its first review conference for the UNCCW. A primary objective of that review conference was the amendment of Protocol II of the UNCCW to address the indiscriminate effect of the irresponsible use of landmines. In the course of those negotiations, the

14. As indicated herein, a Claymore mine projects 760 steel fragments. In contrast, a No. 00 buckshot shotgun round projects nine. The comparable wounding effect on an enemy combatant at the same distance is apparent.

15. See, e.g., William W. Tribby, MD, Examination of 1,000 American Casualties Killed in Italy, in *WOUND BALLISTICS* 437-471 (Wash., D.C.: Office of the Surgeon General of the Army, 1962) [hereinafter *WOUND BALLISTICS*] (containing a narrative and photographs of the extent of battlefield wounds); see also Amended Protocol II on Mines, Booby Traps, and Other Devices to the 1980 Conventional Weapons Convention, May 3, 1996, 1997 WL 49691 (restricting the employment of antipersonnel landmines (APL) in order to protect civilians not taking a direct part in the hostilities). The Amended Protocol did not conclude that APL are illegal per se or prohibit their use against enemy combatants. *Id.* Current proposals for a worldwide ban on APL have as their basis the indiscriminate effect of their irresponsible and illegal use in a limited number of conflicts and the concomitant, adverse effect on the civilian population, rather than their effect in injuring combatants.

16. HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL (DSK VV207320067) (August 1992) [hereinafter *MANUAL*].

17. The German manual's use of the term unjustified suffering is not explained. It is not a standard recognized in the law of war. It also apparently is a standard with which the Government of Germany no longer agrees, given its endorsement of the legality of the Claymore mine, discussed *infra*, and German military possession of shotguns and Claymore mines as part of its Table of Equipment.

18. *MANUAL*, *supra* note 16.

19. The Hague Declaration Concerning Expanding Bullets, July 29, 1899, 1 A.J.I.L. 157-59 (Supp.). See also *THE LAWS OF ARMED CONFLICTS* 109-111 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988); *DOCUMENTS ON THE LAWS OF WAR* 39-42 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

20. Following reunification on 3 October 1990, the German Army redesignated the landmine as the DM-51 and retained the former East German Army MON-50, which is the USSR copy of the U.S. M18A1 Claymore mine.

States Parties drafted and adopted the following language in paragraph 6, Article 5 of Protocol II:

Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in subparagraph 2(a) of this Article for a maximum period of 72 hours, if:

- (a) they are located in immediate proximity to the military unit that emplaced them; and
- (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.

This provision was written expressly to exclude Claymore mines from the requirements for the employment of antipersonnel landmines when employed in the manner stated. It was adopted by the consensus of the participating States Parties,²¹ including Germany. In promulgating this provision, the States Parties expressly confirmed the legality of the Claymore mine, which (as previously noted) performs like a shotgun, and with far more devastating effect on enemy personnel. This acknowledgment of the legality of the Claymore mine also serves to reconfirm the legality of the potential multiple-wounding characteristic of the shotgun.

Conclusion as to the First Legal Issue

As evidenced by the customary practice of nations and a review of applicable treaty law, the possible multiple-wounding characteristic of the combat shotgun does not violate the law of war prohibition of superfluous injury.

Does the No. 00 Buckshot Projectile, or do Other Smaller Buckshot Projectiles, Expand or Flatten Easily, in Violation of the Hague Declaration Concerning Expanding Bullets of 29 July 1899?

Description

21. The participating States Parties were: Australia, Argentina, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Cuba, Cyprus, the Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Laos, Liechtenstein, Malta, Mexico, Mongolia, the Netherlands, New Zealand, Norway, Pakistan, Romania, the Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Ukraine, the United Kingdom, the United States, and Uruguay.

22. U.S. DEP'T OF NAVY, NAVSEA SWO10-AD-GTP-010, TECHNICAL MANUAL, SMALL ARMS AND SPECIAL WARFARE AMMUNITION 4-13 (1 May 1995). The requirements document for the Combat Shotgun also lists No. 7 1/2 shot and No. 9 shot, while the Navy M257 round contains No. 4 shot. Each is substantially smaller than No. 00 buckshot, and even less likely to deform on impact with soft tissue, hence the focus on the No. 00 buckshot round.

23. See *supra* note 19.

24. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF ARMED CONFLICT, para. 34 (1956).

Historically and currently, the primary antipersonnel round used in a combat shotgun is loaded with nine No. 00 buckshot (.33 inch diameter (.8382 cm.)) projectiles, with a propellant charge of approximately twenty-six grains (1.68 grams) of smokeless powder.²² The projectiles are lead and contain two to four percent antimony.

Treaty law

In addition to the law of war prohibition on superfluous injury, there exists the Hague Declaration Concerning Expanding Bullets of 29 July 1899.²³ This treaty prohibits the use in international armed conflict "of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

The United States is not a party to this declaration, which was intended to prohibit the so-called "dum-dum" projectile manufactured as the Mark IV caliber .303 round in the late Nineteenth Century by the British at its arsenal near Calcutta. The United States has, however, taken the position that it will adhere to the terms of the declaration to the extent that its application is consistent with the object and purpose of the prohibition on superfluous injury contained in Article 23(e) of the Annex to the 1907 Hague Convention IV.

As discussed earlier, the shotgun, with its capability for inflicting multiple wounds, does not violate the prohibition on superfluous injury. A separate question is whether buckshot projectiles violate the prohibition contained in the 1899 Hague Declaration and, if so, whether the United States would be legally obligated to refrain from their use.

Historical Statements

Comments on the legality of shotguns in manuals and opinions of the armed services have supported the intent of the 1899 Hague Declaration. An Army field manual from 1956 states that the prohibition on superfluous injury in Article 23(e) of the Annex to the 1907 Hague Declaration and State usage "has . . . established the illegality of . . . the scoring of the surface or the filing off of the ends of the hard cases of bullets."²⁴ In further interpretation, a 1960 opinion of The Judge Advocate General stated that:

[T]he legality of the use of shotguns depends upon the nature of the shot employed and its effect on a soft target The use of shotgun projectiles sufficiently jacketed to prevent expansion or flattening upon penetration of a human body and shot cartridges with chilled shot²⁵ regular in shape would not constitute violations of the laws of war.²⁶

This statement was reaffirmed in opinions of The Judge Advocate General in 1961²⁷ and 1964,²⁸ and is repeated in *Department of the Army Pamphlet (DA Pam) 27-161-2*.²⁹

While clearly stated, the statement apparently has resulted in some misunderstanding. The language previously quoted from the German law of war manual, which relied upon the language of *DA Pam 27-161-2*, suggests that its author incorrectly assumed that any No. 00 buck shot projectile would deform easily,³⁰ performing in a manner similar to the dum-dum bullet prohibited by the 1899 Hague Declaration. The issue is how No. 00 buckshot projectiles perform on impact in soft tissue and whether their performance is consistent with the law of war obligations of the United States, as enunciated in previous opinions of The Judge Advocate General.

Characteristics and Wound Ballistic Performance of 00 Buck Projectiles

A pure lead No. 00 buckshot projectile has not been used by the United States military for more than three decades, if at all. Tests conducted at Frankford Arsenal in 1962 to improve military shotgun ammunition determined that soft lead shot deformed during setback as the shell fired, flattening on one or more sides. It suffered further flattening and deformation as it accelerated down the barrel, resulting in a worsened ballistic

coefficient, erratic ballistic flight paths, increased dispersion, poor pattern uniformity, and excessive velocity loss. The deformation of soft lead projectiles also causes a reduction in the penetration of soft tissue.³¹

Through the addition of two to four percent antimony, the undesirable ballistics of pure lead projectiles are reduced, shot dispersion is decreased, the shot is more evenly distributed throughout the pattern, and the shot has a higher terminal velocity. Long range accuracy and terminal performance are enhanced by maintaining spherical shot shape. The question is whether lead-and-antimony buckshot expands or flattens easily in a manner inconsistent with the prohibition contained in the 1899 Hague Declaration and previous opinions of The Judge Advocate General.

Wound ballistics has advanced substantially over the past fifteen years, and a clearer picture exists today than may have been possible previously. Wound ballistics tests conducted over the past decade establish that lead-and-antimony buckshot may deform mildly upon impact with soft tissue at close range, but it does not expand or flatten easily. Some deformation is likely with any lawful military rifle projectile, including full-metal jacketed bullets.³² Lead-and-antimony shotgun buckshot (or shot) do not mushroom in the way the dum-dum bullet performed.

The prohibition in the 1899 Hague Declaration on projectiles that “flatten or deform *easily*” constitutes acknowledgment of the inevitability of some deformation, and it does not prohibit projectiles that may deform mildly in limited circumstances. Unlike the dum-dum bullet, the lead-and-antimony No. 00 buckshot does not rely upon expansion to increase its wounding effect and, as explained, has been developed to minimize any change in its spherical shape to increase perfor-

25. There is no industry-wide or international law definition for “chilled shot.” It commonly is used to refer to hardened shot. Shot are hardened by a lead-and-antimony mixture to reduce deformation.

26. Op. OTJAG, Army, JAGW 1960/1305 (4 Jan. 1961) [hereinafter JAGW 1960/1305].

27. Use of Shotguns in Conventional or Unconventional Warfare, Op. OTJAG, Army, JAGW 1961/1210 (11 Sept. 1961).

28. Op. OTJAG, Army, JAGW 1964/1333 (19 Aug. 1964).

29. U.S. DEP’T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, VOLUME II (Oct. 1962).

30. This statement is based on the author’s correspondence with the author of the German manual. It also was determined that its author erroneously relied upon the statement in *Department of the Army Pamphlet 27-161-2* that “the United States Army does not now issue shotguns to troops for combat use” as evidence of lack of justification for their combat use. See *id.*; JAGW 1960/1305, *supra* note 26. As United States forces were not engaged in armed conflict at the time that opinion was prepared, the statement is a *non sequitur*. As the history of combat shotgun use indicates, shotguns are issued on a mission-specific, as-needed basis. Lack of issue of shotguns in 1961 was not based upon an assumption by the United States that combat shotgun use was either unlawful or unjustified. In 1961, the United States Army was performing deterrence missions in Europe and Korea against threats by the conventional forces of the Warsaw Pact and North Korea, respectively, and shotguns would have been of limited effect. As the historical summary explains, United States forces were equipped with shotguns upon conventional force entry into Vietnam in 1965.

31. See Swearingen, *supra* note 5, at 459; Gus Cotey, Jr., *Number 1 Buckshot, The Number 1 Choice*, WOUND BALLISTICS REV. 10-18 (1996); Duncan MacPherson, *Technical Comment on Buckshot Loads*, WOUND BALLISTICS REV. 19-21 (1996).

32. See, e.g., Ashley W. Oughterson et al., Study of Wound Ballistics—Bouganville Campaign, in WOUND BALLISTICS, *supra* note 15, at 383, 396, figs. 190, 204; Martin L. Fackler, MD, *Wounding Patterns for Military Bullets*, INT’L DEF. REV. 55-64 (Jan. 1989).

mance, range, and target penetration. Wound profiles and recovered buckshot confirm the nominal change in shape that may occur. The change is insignificant, and a No. 00 buckshot projectile is unlikely to result in a wound as severe as that caused at the same range by, for example, 5.45 x 45mm AK-74; 5.56 x 45mm M855; 7.62 x 39mm AK-47; or 7.62 x 51mm full-metal jacket projectiles, today's commonly-used military small-caliber projectiles.³³

Conclusion as to the Second Legal Issue

Lead-and-antimony buckshot does not "expand or flatten easily," and therefore violates neither the 1899 Hague Declaration nor the criteria for legality previously articulated in opinions of The Judge Advocate General, United States Army.

Conclusion

The combat shotgun and its lead-and-antimony buckshot (or shot) ammunition are consistent with the law of war obligations of the United States.

The memorandum from which this article is derived was coordinated with the offices of the Judge Advocates General of the Air Force and Navy; Army General Counsel; the Staff Judge Advocate to the Commandant of the Marine Corps; the Office of the General Counsel, Department of Defense; and the Office of the Legal Adviser, Department of State, each of whom concurred with its analysis and conclusions.

33. See NATO, EMERGENCY WAR SURGERY 23-25, 29, 31 (2d United States revision, 1988) (providing wound profiles for projectiles); Cotey, *supra* note 31, at 14 (illustrating recovered buckshot).

“So Judge, How Do I Get That FISA Warrant?”: The Policy and Procedure for Conducting Electronic Surveillance

Major Louis A Chiarella
Chief, Administrative Law
Office of the Staff Judge Advocate
Fort Carson, Colorado

Major Michael A. Newton
Professor, International and Operational Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

It's another slow Friday afternoon in the staff judge advocate's (SJA) office. Those individuals not out doing extended PT are enjoying another challenging game of solitaire. Things don't get much better for the new deputy SJA. Then the phone rings. The director of information management is talking in a muted voice. "Judge, I think I've got a problem with one of my system administrators. He has access to plenty of classified information on Army aircraft and ongoing operations. He hasn't been acting right since his car got repossessed last week. Plenty of hush-hush personal calls. And now I found out he's secretly copying files and taking documents home that are outside his area of responsibility. I know that he is very sympathetic to some of the foreign governments who are trying to upgrade their aviation assets. I think he may try to sell this information to a foreign power. Boy, that would cause some damage! During the SOLO course, I heard something about the requirements of FISA.¹ So Judge, how do I get that FISA warrant?"²

This hypothetical scenario is not all that unlikely. Army judge advocates confront intelligence law issues on a daily basis. The Army is a major collector, producer, and consumer of intelligence³ and is one of thirteen agencies that comprise the Intelligence Community (IC).⁴ The extensive statutory and reg-

ulatory framework governing intelligence activities demands constant and proactive legal involvement.

One of the most complex aspects of the framework is the Foreign Intelligence Surveillance Act (FISA). This article reviews the FISA and its implementing mechanism, which is contained in procedure 5 of *Department of Defense (DOD) Directive 5240.1-R*.⁵ At the operational level, judge advocates need to have a clear understanding of when FISA authorization is necessary and what information is required by statute to obtain authorization. This article describes the step-by-step process for getting FISA authorization when required.

The Importance of Counterintelligence

No governmental interest is more fundamental than guaranteeing the security of the nation.⁶ Only in a secure nation can the rights and liberties guaranteed by the Constitution be secure.⁷ United States intelligence activities play a vital role in the protection of national security, and judges advocates must be familiar with the components of intelligence in order to understand the FISA.

One aspect of intelligence, foreign intelligence, focuses upon the collection and analysis of information about foreign

1. "FISA" is the common abbreviation for the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 (1978) (codified at 50 U.S.C. §§ 1801-1829 (1994)). The term SOLO refers to the Senior Officer Legal Orientation Course taught at the Judge Advocate General's School, U.S. Army, several times a year.

2. See *infra* notes 66-76 and accompanying text.

3. See Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C.A. § 401 (West 1996) [hereinafter EO 12,333]; see also U.S. CENTRAL INTELLIGENCE AGENCY, OPAI No. 93-00092, A CONSUMER'S GUIDE TO INTELLIGENCE (1993) [hereinafter CONSUMER'S GUIDE] (copy on file with the authors).

4. CONSUMER'S GUIDE, *supra* note 3, at 28. Members of the United States Army routinely serve in four other IC agencies: the Defense Intelligence Agency, the National Security Agency, the National Reconnaissance Office, and the Central Imagery Office.

5. U.S. DEP'T OF DEFENSE, DIR. 5240.1-R, ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (7 Dec. 1982) [hereinafter DOD DIR. 5240.1-R]. The Directive implements the requirements of EO 12,333 within the DOD. Together, EO 12,333 and DOD Directive 5240.1-R govern the collection of intelligence against United States persons, whether they are located within the United States or outside the United States. "[A]gencies are not authorized to use such techniques as electronic surveillance, unconsented physical searches, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the agency concerned and approved by the Attorney General." EO 12,333, *supra* note 3, para. 2.4. procedure 5 of DOD Directive 5240.1-R implements the requirements of the FISA.

6. See *Haig v. Agee*, 453 U.S. 280 (1981) (stating that it is "obvious and unarguable" that no governmental interest is more compelling than the security of the nation).

powers related to the conduct of United States governmental functions.⁸ Foreign intelligence is offensive in nature, and primarily occurs outside the boundaries of the United States.

The defensive aspect of intelligence, known as counterintelligence, is of equal, if not greater, importance to national security than foreign intelligence is. The fundamental purpose of counterintelligence is protection against intelligence-gathering and covert activities directed against the United States by other countries.⁹ Counterintelligence activities are designed to “discover, and where possible to counter, such clandestine activities of foreign intelligence services in order to protect United States military and diplomatic secrets as well as the integrity of United States governmental processes.”¹⁰ Counterintelligence can also

have a very real impact upon United States citizens, as it frequently focuses on Americans who are suspected of collaborating with foreign agents.¹¹

In an interesting statutory quirk, the FISA ignores conventional intelligence terminology and uses its own definitions. For example, the term “foreign intelligence information” in the FISA is a term of art which resembles the normal definition of counterintelligence.¹² Consequently, the first point of analysis for the judge advocate who seeks legal authority for electronic surveillance conducted for intelligence purposes is the determination of whether the information sought falls within the coverage of the FISA definition.¹³

7. Stephen A. Saltzburg, *National Security and the Fourth and Fifth Amendments*, in NATIONAL SECURITY LAW 1001 (John Norton Moore et al. eds., 1990) [hereinafter NATIONAL SECURITY LAW]; see also Stephen A. Saltzburg, *National Security and Privacy: Of Governments and Individuals Under the Constitution and the Foreign Intelligence Surveillance Act*, 28 VA. J. INT'L L. 129, 133 (1987) [hereinafter Saltzburg, *National Security and Privacy*] (“Personal liberty has prospered, both inside and outside U.S. courtrooms, because Americans have felt secure as a nation.”).

8. Federal law defines foreign intelligence as “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons.” 50 U.S.C. § 401a(2) (1994). However, the provisions of procedure 5 of both *DOD Directive 5240.1-R* and *Army Regulation 381-10* apply to intelligence collection by DOD personnel, regardless of the target or location.

9. Counterintelligence collection is defined as: “The systematic acquisition of information on espionage, sabotage, terrorism, and related hostile intelligence activities conducted for, or on behalf of, foreign powers, organizations, or persons, that are directed against or threaten DOD interests.” U.S. DEP'T OF DEFENSE, INSTR. 5240.10, DOD COUNTERINTELLIGENCE SUPPORT TO UNIFIED AND SPECIFIED COMMANDS, para. C1 (18 May 1990) [hereinafter DOD INSTR. 5240.10]. Despite the end of the Cold War, many countries still maintain massive organizations directed at the collection of intelligence and the conduct of covert actions of which the United States is a major target. See generally REPORT OF THE COMMISSION ON THE ROLES AND CAPABILITIES OF THE UNITED STATES INTELLIGENCE COMMUNITY, PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE (MAR. 1, 1996) [hereinafter APPRAISAL]; *Current and Projected National Security Threats to the United States and its Interests Abroad: Hearings Before the Senate Select Comm. on Intelligence*, 104th Cong., 2d Sess. (1996).

10. Daniel B. Silver, *Intelligence and Counterintelligence*, in NATIONAL SECURITY LAW, *supra* note 7, at 913, 916. See also 50 U.S.C. § 401a(3) (The objective of counterintelligence is the gathering of information to protect against “espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorist activities.”).

11. Reflecting the impact of counterintelligence, Americans have frequently challenged the intrusiveness of various forms of counter-intelligence surveillance as violating basic Constitutional rights. See Americo Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 817 n.126 (1989); see also U.S. v. Nicholson, 955 F. Supp. 588 (E.D. Va. 1997); Saltzburg, *National Security and Privacy*, *supra* note 7, at 130; Note, *The Foreign Intelligence Surveillance Act of 1978*, 13 VAND. J. TRANSNAT'L L. 719, 747-59 (1980). As of this writing, no federal or state court has found the requirements of the FISA to be in conflict with either statutory or constitutional rights of citizens. For some background to the privacy issues protected by the FISA, see *Final Report of the Senate Select Comm. To Study Governmental Operations With Respect to Intelligence Activities and the Rights of Americans, Book II*, S. REP. No. 94-755, at 325 (1976) [hereinafter CHURCH COMM. REPORT].

In recognition of the constitutional rights of United States citizens, the FISA includes a requirement that the surveillance follow minimization procedures which are specified in the statute. 50 U.S.C.A. § 1801(h) (West 1997). The FISA also provides that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution. *Id.* § 1805 (a)(3)(A). In addition, the Attorney General must include a statement of the proposed minimization procedures when seeking a warrant from the Foreign Intelligence Surveillance Court (FISC). *Id.* § 1804(a)(5).

12. The FISA does not regulate the collection of foreign intelligence by United States agencies outside the United States. Within the United States, the term “foreign intelligence information” is specifically defined by statute. See 50 U.S.C.A. § 1801(e).

13. The FISA authorizes electronic surveillance or physical searches only when the certifying official is seeking “foreign intelligence information,” as defined in the statute. See *id.* § 1802.

“Foreign intelligence information” means—

- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
 - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—
 - (A) the national defense or the security of the United States; or
 - (B) the conduct of the foreign affairs of the United States.

Id. § 1801(e).

Counterintelligence Versus Law Enforcement

As a practical matter, judge advocates must always remember that counterintelligence within the United States is distinct from domestic law enforcement. Counterintelligence and law enforcement are both necessary to protect society and to preserve democracy, but the similarity between the two ends there. Counterintelligence and law enforcement have different goals: providing for national security versus deterring and punishing criminal activity. As a result of the contrasting goals, counterintelligence and law enforcement employ different methods.¹⁴ They also differ in the manner of disclosure to the subject of the surveillance. The subject of a law enforcement investigation eventually learns of or knows about any searches and surveillance, even if the collection of the evidence does not result in prosecution.¹⁵ The “subject” of counterintelligence collection techniques will not learn of searches and surveillance conducted, except in those exceptional instances where the Attorney General later approves the use of the collected information as criminal evidence.¹⁶

The most important distinction between counterintelligence and law enforcement is that they differ in the uses of the information collected. The primary use of law enforcement information is the conduct of criminal prosecutions. The hallmarks of a law enforcement investigation are repeated conferences with the appropriate criminal prosecutor, concerted efforts to acquire specific information needed to prove each element of

every charged offense at trial, and the deliberate collection of the evidence required to sustain the prosecutorial theory of the case. In contrast, the primary use of counterintelligence information is the conduct of United States foreign and national defense policies.¹⁷ Guidance from the DOD specifically states that the purpose of counterintelligence collection is to detect espionage, sabotage, terrorism, and related hostile intelligence activities to “deter, [to] neutralize, or [to] exploit them.”¹⁸

The purpose for collecting the information has great significance beyond merely distinguishing between counterintelligence and law enforcement. The primary purpose of the investigation determines the lawful procedures for collecting evidence. Counterintelligence collection may produce evidence which is ultimately used at trial and which will often provide reasonable belief that the targets have committed crimes. However, the primary purpose of any information collection effort is critical for ascertaining its legality at the time of initiation, as well as dictating the subsequent standard of legal review. Crossing the “primary purpose” line for information collection—from the pursuit of counterintelligence to law enforcement—subjects the investigation and evidence to extensive legal scrutiny and policy concerns.¹⁹

Within the United States, the Federal Bureau of Investigation (FBI) is the lead agency for conducting counterintelligence and coordinating the counterintelligence efforts of other agencies within the IC.²⁰ The FBI is also the lead agency for developing the evidence necessary for the Department of Justice

14. See, e.g., U.S. DEP'T OF DEFENSE, DIR. 5505.09, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT (20 April 1995). This DOD Directive specifically does not apply to “the interception of wire, electronic, and oral communications for counterintelligence or foreign intelligence, including information on the foreign aspects of narcotics production and trafficking.” *Id.*

15. For criminal investigations, Federal Rule of Criminal procedure 41 requires that the target receive a copy of the warrant and an inventory of seized property. Normal wiretaps and search warrants are ultimately made public, even if criminal charges do not result. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES 325 (1996); Daniel J. Gallington, Deputy Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Department of Justice, Address in Washington, D.C. (Dec. 1, 1994) [hereinafter Gallington] (notes from this speech are on file with the authors).

16. The fruits of counterintelligence investigations can become part of criminal prosecutions, but most counterintelligence investigations do not result in criminal prosecutions and receive little or no public disclosure. MCGEE & DUFFY, *supra* note 15, at 303. The decision to pursue a criminal case following the termination of the counterintelligence investigation involves a delicate balancing test. The Attorney General must determine when the benefit of criminal prosecution outweighs the impact of revealing the existence and effectiveness of American electronic surveillance efforts. Gallington, *supra* note 15. In the context of electronic surveillance, the statute requires the federal district court judge, upon a motion by the accused to suppress evidence obtained under the FISA, to:

review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C.A. § 1806(f).

In the context of courts-martial, this statutory requirement means that the trial judge will have to delay the military proceedings pending a determination of the legality of the FISA warrant and its subsequent evidence. See, e.g., U.S. v. Ott, 637 F. Supp. 62 (E.D. Cal. 1986). Airman Ott was convicted at a general court martial and sentenced to a dishonorable discharge, total forfeitures, reduction to airman basic, and 25 years confinement. U.S. v. Ott, 26 M.J. 542 (A.F.C.M.R. 1988). See also U.S. v. Horton, 17 M.J. 1131 (N.M.C.M.R. 1984).

17. “In law enforcement, the purpose of surveillance is to prosecute the guilty. In intelligence, the purpose of surveillance is to gather information which should not be used for or against any individual, but to safeguard the country from foreign enemies.” S. REP. NO. 97-691, at 9-10 (1982).

18. DOD INSTR. 5240.10, *supra* note 9, para. C1.

(DOJ) to prosecute espionage cases.²¹ To maintain the proper “primary purpose” during counterintelligence investigations, the Attorney General’s guidelines require the Office of Intelligence Policy and Review to approve all contacts between the FBI and the DOJ Criminal Division attorneys.²²

The distinction between intelligence collection and law enforcement is fundamental. For judge advocates, the primary purpose line determines whether *DOD Directive 5240.1-R* (and its implementation in *Army Regulation 381-10*) even applies. Components of the DOD cannot use the procedures for collecting intelligence information as a subterfuge for collecting evidence for a prosecutorial purpose.²³

Counterintelligence Versus Domestic Security

Counterintelligence within the United States is also distinct from domestic security. Domestic security involves protecting the state from internal threats that do not have connections with foreign powers or international organizations.²⁴ As a result, domestic security functions lie in the middle ground between

counterintelligence and the normal preparation of criminal cases. Threats posed by domestic organizations which seek to attack and to subvert the existing structure of government can be as grave as those involving foreign powers.²⁵ The absence of a foreign power linkage, however, prevents the use of the FISA mechanism to collect counterintelligence information.

The critical distinction for judge advocates is whether the information collection requires a warrant under normal criminal procedures.²⁶ The United States Constitution requires the issuance of a warrant to conduct all electronic surveillance for domestic security criminal investigations. However, courts reviewing the methods employed to secure the nation have balanced the “[g]overnment’s right to protect itself from unlawful subversion and attack” against “the citizen’s right to be secure in his privacy against unreasonable government intrusion.”²⁷

In *United States v. United States District Court* (generally referred to as the *Keith* case), the United States Supreme Court determined that no safeguards other than appropriate prior warrant procedures satisfy the Fourth Amendment for domestic security matters.²⁸ The underlying rationale for this holding is

19. MCGEE & DUFFY, *supra* note 15, at 321-43. See *U.S. v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1986); *U.S. v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974), *cert. denied*, 491 U.S. 881 (1974) (Even though the warrantless surveillance collected the conversations of American citizens, it was deemed lawful because: (1) the “primary purpose” of the surveillance was to obtain foreign intelligence information and (2) the efficiency of the nation’s intelligence process would be lost if courts required intelligence operatives to interrupt collection and “rush to the nearest available magistrate.”).

The FBI is keenly aware of the distinction between law enforcement (and its corollary of preparing criminal cases) and the collection of intelligence information. The distinction touches every facet of a criminal case and affects such issues as what information must be turned over pursuant to the Jencks Act, which attorneys within the Department of Justice make those decisions, which attorneys in which offices review applications under the FISA, and which policymakers decide on the disposition of criminal cases which touch on national security matters. The United States Court of Appeals for the Fourth Circuit originally articulated the test for reviewing the use of information gathered using electronic surveillance in subsequent criminal prosecutions. *United States v. Truong Dinh Hung*, 629 F.2d 908, 915-16 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) (based on facts which predated the FISA). In upholding the primary purpose propounded by the government, the court rejected the appellant’s claim that an electronic surveillance would be lawful in the absence of a warrant only where the purpose was “solely” for foreign policy reasons.” *Id.*

20. EO 12,333, *supra* note 3, pt. 1.14.

21. The Central Intelligence Agency (CIA) is precluded from conducting electronic surveillance within the United States except for the purposes of training, testing, or conducting countermeasures to counter hostile electronic surveillance. *Id.* pt. 2.4(a). The National Security Act specifies that the CIA “shall have no police, subpoena, or law enforcement powers or internal security functions.” 50 U.S.C.A. § 403-3(d)(1) (West 1997).

22. MCGEE & DUFFY, *supra* note 15, at 336. On 19 July 1995, Attorney General Reno issued a confidential four-page memorandum which established new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations and employing electronic surveillance under the FISA. *Id.* at 341. Under the new rules, the FBI and the Criminal Division are forbidden from contacting each other independently, and the FBI is further prohibited from contacting a U.S. Attorney’s office without prior permission from both the Office of Intelligence Policy and Review and the Criminal Division of the DOJ. *Id.* Agents of the FBI who are working on counterintelligence investigations are also required to “maintain a log of all contact with the Criminal Division, noting the time and participants involved.” *Id.* “The Criminal Division shall not . . . instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches.” *Id.*

23. DOD Dir. 5240.1-R, *supra* note 5, procedure 1, A, 3.

24. The Oklahoma City bombing, which involved no known connection to a foreign power or international organization, is an example of domestic security. See Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3. One characteristic which distinguishes national security from domestic security is the entity at which action is directed. National security involves government action directed at other nations (or foreign forces) and their agents, while domestic security involves government action directed at individuals. Saltzburg, *National Security and Privacy*, *supra* note 7, at 131.

25. For example, in *United States v. United States District Court*, 407 U.S. 297, 299 (1972), the United States charged three defendants with conspiracy to destroy Government property in violation of 18 U.S.C. § 371 and also charged one defendant with the dynamite bombing of the CIA office in Ann Arbor, Michigan. (This case is generally referred to as the *Keith* case.)

26. See generally 18 U.S.C. §§ 2510-20 (1994).

that warrantless electronic surveillance does not pass the reasonableness test of the Fourth Amendment with regard to internal security.²⁹ The Supreme Court, however, expressly declined to address whether the domestic security warrant requirements also applied to the surveillance of foreign governments or their agents.³⁰ Without waiting for Supreme Court clarification regarding the proper line between national security concerns and personal privacy when foreign governments or their agents are involved, Congress passed the FISA as a legal mechanism to serve both purposes.

What is the FISA?

On 25 October 1978, President Carter signed the FISA into law. The explicit purpose of the FISA was to balance the protection of individual privacy with the needs of national security through the development of a regulatory framework for certain counterintelligence activities of the executive branch of the fed-

eral government.³¹ Many factors necessitated this express balancing act. First, the Supreme Court's decision in *Keith* did not address the extent of the executive's constitutional powers in the area of counterintelligence.³² Writing for the majority, Justice Powell explicitly stated that the opinion made no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers or their agents.³³ Second, congressional hearings revealed that both the FBI and the Central Intelligence Agency (CIA) had operated outside the law, in the name of intelligence collection.³⁴ The Church Committee³⁵ realized that counterintelligence was essential to the preservation of American civil liberties, and it recognized the need to collect intelligence and to establish appropriate limits on intrusive investigative techniques.³⁶ Through the efforts of key officials from the DOJ and the Church Committee,³⁷ the FISA became "the gold standard of legality in the world of counterintelligence."³⁸

27. *Keith*, 407 U.S. 297. See also *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986) (holding that a purportedly political motive for a warrantless wiretap of a national security staffer was irrelevant if an objectively reasonable national security rationale was also present); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974) ("the President's . . . inherent power to protect national security in the conduct of foreign affairs" authorized "warrantless wiretaps for the purpose of gathering foreign intelligence").

28. *Keith*, 407 U.S. at 309. The Supreme Court in *Keith* also determined that the President's constitutional powers to protect the government against those who would subvert or overthrow it by unlawful means did not include warrantless searches in connection with domestic security matters. *Id.*

29. *Id.* at 315. The Supreme Court recognized that domestic security, with its ongoing intelligence gathering activities, was different from "ordinary crime." *Id.* at 322. Accordingly, domestic security is not subject to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-20 (1994)), which regulates electronic surveillance for ordinary federal crimes. The Supreme Court's recognition that a less precise standard was acceptable even for domestic security investigations gave impetus to subsequent legislation and judicial determinations that warrantless surveillance was permissible for national security investigations involving foreign powers and their agents. Cinquegrana, *supra* note 11, at 805.

30. *Keith*, 407 U.S. at 321-22, n. 20.

31. The FISA does not extend to all types of intelligence gathering. As originally enacted, the FISA did not apply to physical searches of real and personal property. See *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property*, slip op. (U.S. For. Intell. Surveillance Ct., June 11, 1981). In the wake of the Aldrich Ames case, Congress amended the FISA to include physical searches conducted "to obtain foreign intelligence information." 50 U.S.C.A. § 1823(a)(7) (West 1997). See Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807 (codified at 50 U.S.C. §§ 1821-29). The FISA covers neither the electronic surveillance of United States persons who are abroad nor "watch listing" that targets the international communications of foreign nationals who are in the United States. See 50 U.S.C.A. § 1801(f)(1). The lack of regulation under the FISA does not mean that some intelligence collection techniques are unregulated. The approval of the Attorney General is required for any technique used for intelligence purposes which would require a warrant if it were undertaken for a law enforcement purpose. EO 12,333, *supra* note 3. Additionally, the DOD regulates all DOD electronic surveillance for intelligence purposes, regardless of location, technique, or target. DOD. DIR. 5240.1-R, *supra* note 5, procedure 5.

32. The FISA, an authorization of Congress, increased the President's power in this area:

When the President acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate A seizure executed by the President pursuant to an act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

33. *Keith*, 407 U.S. at 322.

34. CHURCH COMM. REPORT, *supra* note 11.

35. See APPRAISAL, *supra* note 9, app. A (providing an overview of the role of the Church Committee in the evolution of the United States intelligence community).

36. MCGEE & DUFFY, *supra* note 15, at 310. The Church Committee also recognized the need for a "wall" between federal law enforcement and the nation's intelligence community. *Id.*

37. *Id.* at 310-13.

The FISA is a complex statute, with an elaborate structure and flexible procedures.³⁹ It is not, however, a comprehensive statute for all intelligence activities. The FISA regulates counterintelligence investigations;⁴⁰ it does not extend to domestic security investigations. The FISA also regulates specific counterintelligence collection techniques—primarily “electronic surveillance,”⁴¹ but physical searches as well. Other intelligence collection techniques have separate statutory and regulatory provisions.⁴² Additionally, the FISA has no extraterritorial applicability;⁴³ therefore, it does not regulate the use of electronic surveillance outside of the United States. Because of the limited application under the FISA, there are other statutory and regulatory sources which control other counterintelligence activities.

All electronic surveillance for counterintelligence purposes within the United States is subject to the requirements of the FISA. This does not mean, however, that prior judicial authorization is always required. The Attorney General may acquire foreign intelligence information for periods up to a year without a judicial order if the Attorney General certifies in writing under oath that:

(A) the electronic surveillance is solely directed at . . . communications used exclusively between or among foreign powers⁴⁴. . . [or] technical intelligence, other than the spoken communications of individuals, from

property or premises under the open and exclusive control of a foreign power . . . ;
(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and (C) the proposed minimization procedures⁴⁵ . . . meet [the statutory definition] of minimization procedures⁴⁶

The FISA establishes a much more stringent standard in circumstances involving the electronic surveillance of “United States persons.”⁴⁷ In such circumstances, the Executive may conduct electronic surveillance only pursuant to the FISA’s procedures for judicial review and approval.⁴⁸ Each application for a surveillance order must include, *inter alia*:

- 1) the identity of the federal officer making the application;
- 2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;
- 3) the identity, if known, or a description of the target of the electronic surveillance;
- 4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . [and] each of the facilities

38. *Id.* at 315.

39. “The elaborate structure of [the FISA] demonstrates that the political branches need great flexibility to reach the compromises and [to] formulate the standards which will govern foreign intelligence surveillance.” *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 n.4 (4th Cir. 1980).

40. The statute actually uses the term “foreign intelligence information,” but it still refers to information necessary to protect the United States from the acts of foreign powers and their agents. 50 U.S.C.A. § 1801(e) (West 1997).

41. There are four categories of “electronic surveillance”—watch listing, wiretaps, radio intercepts, and monitoring devices. *Id.* § 1801(f). The statutory definition encompasses communications within the United States “under circumstances where the person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.” *Id.* Although the FISA governs intelligence collection of the contents of communications, federal law stretches the FISA to cover other electronic surveillance such as pen registers, trap, and trace devices. 18 U.S.C.A. § 3121 (West 1996).

42. EO 12,333, *supra* note 3; U.S. DEP’T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (1 July 1984) [hereinafter AR 381-10].

43. A general presumption against the extraterritorial application of statutes exists in American jurisprudence. *Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). The primary purpose of this presumption against extraterritoriality is “to protect against the unintended clashes between our laws and those of other nations which could result in international discord.” *Id.* at 248.

44. *See* 50 U.S.C.A. § 1801(a) (defining “foreign power”).

45. Minimization procedures are measures adopted by the Attorney General that are reasonably designed to minimize the acquisition and retention, and to prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons. *Id.* § 1801(h). Detailed minimization procedures adopted by the Attorney General are classified. Telephone Interview with John Petrow, Office of Intelligence Policy and Review, U.S. Dep’t of Justice (Dec. 11, 1996) [hereinafter Petrow Interview] (notes on file with authors).

46. 50 U.S.C.A. § 1802(a)(1) (citations omitted). It is the policy, however, of the present Attorney General to seek judicial approval for the use of electronic surveillance within the United States involving non-U.S. persons. Petrow Interview, *supra* note 45.

47. 50 U.S.C.A. § 1801(i). The more stringent procedures of the FISA apply in all instances which do not involve an acknowledged foreign power or its agents. *Id.* § 1802(b).

48. *Id.* The Attorney General may, however, authorize immediate surveillance in times of emergency. The Attorney General must “as soon as practicable, but not more than twenty-four hours” later, seek judicial review of the emergency application. *Id.* § 1805(e).

or places [to be subjected to the surveillance] . . . is being used, or is about to be used, by a foreign power or an agent of a foreign power; 5) a statement of the proposed minimization procedures;⁴⁹ 6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance; [and] 7) a certification [from an appropriate executive branch official] . . . that the certifying official deems the information sought to be foreign intelligence information . . . that the purpose of the surveillance is to obtain foreign intelligence information . . . that such information cannot reasonably be obtained by normal investigative techniques⁵⁰

The application must also contain statements regarding all previous applications involving the target, the means by which the surveillance will be implemented (including whether physical entry⁵¹ is required to effect the surveillance), and the anticipated duration.⁵²

Each application approved by the Attorney General for the electronic surveillance of United States persons within the United States must have judicial approval. The Chief Justice of the United States Supreme Court has designated seven federal district court judges to be the Foreign Intelligence Surveillance Court (FISC) and to review the electronic surveillance search applications.⁵³ A FISC judge will approve the electronic surveillance application and issue an ex parte order⁵⁴ upon a finding that: (1) “the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;”⁵⁵ (2) an authorized federal official made the application and the application was “approved by the Attorney General;”⁵⁶ (3) there is probable cause to believe that the target is “a foreign power or an agent of a foreign power” and that each place subjected to surveillance “is being used, or is about to be used, by a foreign power or an agent of a foreign power;”⁵⁷ (4) “the proposed minimization procedures meet the [statutory] definition of minimization procedures . . . ;”⁵⁸ and (5) all required statements are contained in the application and, “if the target is a United States person, the [statutory] certification or certifications are not clearly erroneous”⁵⁹

Despite almost twenty years of implementation and thousands of applications, the FISC has not denied a single government request for electronic surveillance.⁶⁰ Opponents of the

49. A copy of the minimization procedures adopted by the Attorney General remain on file with the Foreign Intelligence Surveillance Court. Petrow Interview, *supra* note 45. The FISA application may include additional minimization procedures to protect the privacy of persons who are not the target of the requested electronic surveillance. *Id.*

50. 50 U.S.C.A. § 1804(a)(1)-(7). The executive branch official must include a statement of facts to support his certifications. *Id.* § 1804(a)(7)(E). The purpose of this certification is to ensure that a national security wiretap is being sought for “intelligence purposes” and not to obtain evidence for a criminal case through the backdoor of a counterintelligence inquiry. MCGEE & DUFFY, *supra* note 15, at 318. See Exec. Order No. 12,139, 44 Fed. Reg. 30,311 (1979), *reprinted in* 50 U.S.C.A. § 1803 note (setting forth the executive branch officials who are designated to make the certifications required by 50 U.S.C.A. § 1804(a)(7) in support of electronic surveillance applications). The officials designated by executive order include the Secretary and Deputy Secretary of Defense, the Director and Deputy Director of the Central Intelligence Agency, and the Director of the Federal Bureau of Investigation. Within the Department of Defense, certification authority has been delegated to the Secretary and Under Secretary of each military department and to the Director of the National Security Agency. DOD DIR. 5240.1-R, *supra* note 5, procedure 5, pt.1(B)(2).

51. The FISA has been amended to include physical searches of real and personal property. See *supra* note 31; MCGEE & DUFFY, *supra* note 15, at 321, 342. See also *U.S. v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997) (upholding the physical search provisions of the FISA against a Fourth Amendment challenge).

52. 50 U.S.C.A. § 1804(a)(8)-(10).

53. *Id.* §§ 1803-04.

54. The FISC order often includes secondary orders to phone companies, directing these entities to provide facilities and information to the intelligence agency identified in the primary order. Petrow Interview, *supra* note 45.

55. 50 U.S.C.A. § 1805(a)(1).

56. *Id.* § 1805(a)(2).

57. *Id.* § 1805(a)(3).

58. *Id.* § 1805(a)(4) (citation omitted).

59. *Id.* § 1805(a)(5) (citation omitted).

60. MCGEE & DUFFY, *supra* note 15, at 318; Gallington, *supra* note 15. Through the end of 1995, there were 8,812 orders issued under the FISA (one case, however, can generate multiple orders). Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Orders 1979-1995* (visited Apr. 28, 1997) <http://www.epic.org/privacy/wiretap/fisa_stats.html>. Through the first half of 1996, the DOJ was on a pace to process more than 800 requests for FISA orders. Jim McGee and Brian Duffy, *Someone to Watch Over Us*, WASH. POST MAGAZINE, June 23, 1996, at 9, 11.

FISC question its impartiality⁶¹ and the underlying reasoning by which courts have accepted the statute's constitutionality.⁶² Every United States federal district and circuit court that has conducted independent reviews of FISC authorizations has held that they are both lawful and constitutional.⁶³

Despite the utility of the FISA as an investigative tool, trial counsel should remember that electronic surveillance is only one component of the wider investigative arsenal. The intelligence investigation as a whole develops in accordance with established execution channels within the military intelligence community. The FISA approval channels are distinct and will often involve governmental agencies other than those that are part of the overall mechanism for conducting the intelligence investigation.

So Who is the Approval Authority?

The FISA is not an all encompassing source of approval for all intelligence-gathering situations. As noted earlier, the FISA only regulates the collection of information about activities involving a foreign power or an agent of a foreign power. Additionally, the FISA does not regulate all of the collection techniques employed for counterintelligence investigations. The use of concealed monitoring, searches and examinations of mail, physical surveillance, and undisclosed participation in organizations all have separate approval schemes. Even for some cases of electronic surveillance and physical searches employed for counterintelligence purposes, other provisions of procedure 5 may substitute for the FISA as a source of approval for the military practitioner.

So who approves electronic surveillance? The approval authority for the use of electronic surveillance fluctuates with the type of person, the location, and the type of situation involved. The approval level for the use of electronic surveillance and counterintelligence physical searches ranges from the unit commander to prior judicial review and endorsement. While the importance and intrusiveness of electronic surveillance remains constant, different expectations of privacy cause the approval level to change. In ascending order, the levels of approval authority are:

Table of Electronic Surveillance Approval Authority

Outside of the United States:

<u>Type of Entity</u>	<u>Approval Authority</u>	<u>Source(s) of Authority</u>
Non-U.S. person	Commanding General, Intelligence & Security Command and Designated Commanders ⁶⁴	AR 381-10, proc. 5, pt. 2: F
Emergency, ⁶⁵ U.S. person	Secretary & Deputy Secretary of Defense; Secretary and Under Secretary of the Army; Director & Deputy Director, National Security Agency; and General Officers ⁶⁶	DOD Dir. 5240.1-R, proc. 5, pt. 2: D, E
U.S. person	Attorney General ⁶⁷	Exec. Order 12,333, para. 2.5, DOD Dir. 5240.1-R, proc. 5, pt. 2: C

*Inside the United States:*⁶⁸

61. See, e.g., *Foreign Intelligence Surveillance Act: Oversight: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong. 27 (1983) [hereinafter *Hearings*] (testimony of Mark Lynch, Attorney, ACLU) (the FISC was viewed as a captive of the national security establishment).

62. See Gregory E. Birkenstock, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 GEO. L.J. 843, 849-50 (1992) (examining the FISA probable cause standard in terms of an administrative search instead of as an exception to the warrant clause).

63. *Hearings*, *supra* note 61, at 6-7 (testimony of Mary C. Lawton, Office of Intelligence Policy and Review, DOJ).

64. The Assistant Chief of Staff for Intelligence, Headquarters, Department of the Army; the Commander in Chief, U.S. Army, Europe and Seventh Army; the Commanding General, Eighth United States Army; and the Commanding General, Intelligence and Security Command, may approve electronic surveillance by Army intelligence components. All four officials may delegate authority to their deputies, chiefs of staff, or ranking intelligence staff officers; they, in turn, may delegate their authority to the responsible military intelligence group commanders. AR 381-10, *supra* note 42, procedure 5, pt. 2(F).

65. Emergency surveillance cannot last longer than the time required to obtain Attorney General approval of the collection, and in no event may it last longer than 72 hours without Attorney General approval. DOD DIR. 5240.1-R, *supra* note 5, procedure 5, pt. 2(D)(4). For the purposes of electronic surveillance, "emergency" means a situation where securing prior approval of the Attorney General is not practical because the time delay would cause substantial harm to national security, a person's life is reasonably believed to be in immediate danger, or the physical security of a defense installation or government property is reasonably believed to be in immediate danger. *Id.* Except for cases involving immediate danger to a person's life or physical safety, the certifying official must find probable cause to link the surveillance to collection against a foreign power using one of the five specific categories of activity. *Id.* pt. 2(C)(2)(a).

66. Authorization for emergency electronic surveillance may be granted by "[a]ny general or flag officer at the overseas location in question, having responsibility for either the subject of the surveillance, or responsibility for the protection of the persons, installations, or property that is endangered," or by the Deputy Director for Operations of the National Security Agency. *Id.* pt. 2(E)(2).

67. The Attorney General applies the same standards for approval of electronic surveillance involving U.S. persons abroad that the FISC applies to U.S. persons within the United States. The Attorney General executes a memorandum as the method for approving the use of electronic surveillance in such circumstances. Petrow Interview, *supra* note 45.

Type of Entity	Approval Authority	Source(s) of Authority
All emergencies	Attorney General	50 U.S.C. § 1805(e)
Non-U.S. person	Attorney General ⁶⁹	50 U.S.C. § 1802(a); Exec. Order 12,333, § 2.5
U.S. person	FISC Judge	50 U.S.C. § 1802(b)

How Does One Obtain a FISA Court Order?

Obtaining a court order which approves electronic surveillance or physical searches for counterintelligence purposes under the FISA is primarily a legal task. This is an extraordinarily complex area of practice involving cases with potentially explosive media coverage and damage to national security. Managing a national security case is a task that no one person or agency handles alone. When determining who to call, and throughout the development of the case, judge advocates must remember that only intelligence entities can conduct counterintelligence operations. Within the Army, intelligence entities include division and corps military intelligence (MI) assets, as well as the six regionally-oriented MI brigades or groups that are part of United States Army Intelligence and Security Command (INSCOM). The Army Criminal Investigation Command has no role in conducting counterintelligence operations, including the use of electronic surveillance.⁷⁰ The intelligence agency that will commonly assist in electronic surveillance efforts, and the one that is the lead agency for all counterintelligence activities within the United States,⁷¹ is the FBI.

The following is a recommended procedure for handling the hypothetical case described in the beginning of this article:

Step 1: Touch the Required Coordination Nodes

The installation must advise the FBI immediately of “any information, regardless of its origin, which indicates that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power.”⁷² Following the initial report to the FBI, the statute requires consultation “with respect to all subsequent actions” which are taken to determine the source or extent of the loss of classified information.⁷³

Even without specific information indicating a possible compromise of classified information to a foreign power, if the suspect is an employee or former employee of an Army intelligence component, the installation may be required to report the conduct to the Army General Counsel or Inspector General, who will in turn coordinate with the DOJ.⁷⁴ The 1995 Reporting of Crimes Memorandum outlines a detailed reporting mechanism and provides a detailed list of offenses which must be reported, even if the information pertains to non-employees. Finally, DOD policy requires the installation to report expeditiously “significant counterintelligence activities, criminal cases, and espionage activities.”⁷⁵ In the context of national security cases, the reporting requirement applies to counterintelligence activities that are likely to receive publicity or to involve conduct which is or may constitute criminal espionage.⁷⁶

68. The FISA applies to both electronic surveillance and physical searches for foreign intelligence purposes.

69. The Attorney General may elect, however, to seek FISC approval for the use of electronic surveillance within the United States involving non-U.S. persons.

70. The Army Criminal Investigation Command (CIDC) is not a DOD intelligence component. AR 381-10, *supra* note 42, at A1-2. This differs from both the Navy and Air Force, as their investigative services each possess counterintelligence elements. In certain circumstances, Army intelligence components must provide details of intelligence investigations to the CIDC. U.S. DEP'T OF ARMY, REG. 381-20, U.S. ARMY COUNTERINTELLIGENCE (CI) ACTIVITIES (15 Nov. 1993) [hereinafter AR 381-20]. In the process of seeking a FISA court order for electronic surveillance, however, judge advocates should not contact either the CIDC or the local Provost Marshal. Telephone Interview with Edward G. Allen, Command Counsel, U.S. Army Foreign Intelligence Command/902D MI Group (Dec. 11, 1996) [hereinafter Allen Interview] (notes on file with authors).

71. EO 12,333, *supra* note 3, para. 1.14(a).

72. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 811, 108 Stat. 3455, *codified at* 50 U.S.C.A. § 402a (West 1996).

73. *Id.* If further investigation reveals that the suspect did not disclose the classified information to a foreign power but did improperly remove the classified information from the authorized storage area, the trial counsel should refer to 18 U.S.C.A. § 1924 (West 1996), which imposes a fine of up to \$1,000 or one year imprisonment for removal with the intent to “retain such documents or materials at an unauthorized location.”

74. EO 12,333, *supra* note 3, § 1.7(a); 1995 CRIMES REPORTING MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF JUSTICE (8 Sept. 1995) (copy on file with authors). *See also* 28 U.S.C.A. § 535(b) (West 1996) (requiring agencies to report violations of federal criminal laws to the Attorney General whether or not the offender is employed by an intelligence component).

75. U.S. DEP'T OF DEFENSE, INSTR. 5240.04, REPORTING OF COUNTERINTELLIGENCE AND CRIMINAL VIOLATIONS (22 Sept. 1992) (describing reportable items and outlining required reporting channels through the DOD Inspector General).

76. *Id.* para. C. The judge advocate must prepare a report describing the nature of the offense, a summary of the facts, identification of the persons involved, and a brief summary of actions taken. *Id.* In addition, cases involving counterintelligence or espionage should include a statement of the nature and sensitivity of the information involved. *Id.* para. G(5).

Step 2: Determine if the FBI has the Investigative Lead

After the 1995 Reporting of Crimes Memorandum, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.⁷⁷ The statute made it a crime to commit acts of terrorism which transcend national boundaries. The statute also gave the Attorney General "primary investigative responsibility for all federal crimes of terrorism,"⁷⁸ which are defined as offenses "calculated to influence or [to] affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"⁷⁹ and which involve violations of any of the federal criminal laws that are listed in the statute.⁸⁰

The hypothetical case at the beginning of this article does not appear to involve any of the offenses specified in the statute; therefore, the military would retain the lead. The FBI would assume the lead investigative responsibility for the investigation if later information links the suspect employee to one or more of the listed offenses (such as providing aviation information to assist terrorist groups).

Step 3: Define the "Primary Purpose" of the Investigation

At the onset of an investigation, judge advocates who seek warrants under the FISA must inform the SJA of the major command about the situation.⁸¹ The technical channel coordination will pave the way for eventual coordination through the appropriate General Counsel offices, but the required coordination with the SJA may prove to be beneficial in many ways.

Next, judge advocates should contact the MI Group field office that is responsible for the unit or activity in which the suspected person works.⁸² The MI field office will in turn relay all necessary information, including the request for the use of electronic surveillance, through company and battalion levels

to the MI Group.⁸³ At this level, Army counterintelligence planning occurs.

The critical stage of the initiation and development of the investigation involves the clear and prompt determination of its primary purpose. As former Attorney General Griffin Bell stated, "every one of these counterintelligence investigations . . . involves crime in an incidental way. You never know when you might turn up with something you might want to prosecute."⁸⁴ From the beginning, the investigators must determine whether the investigation is primarily an intelligence effort, which will be coordinated and conducted by counterintelligence agents, or a law enforcement investigation.

To assist in the primary purpose determination, the SJA should appoint an intelligence oversight officer⁸⁵ to serve in a quasi-judicial role as an impartial mediator between competing organizational interests. At the installation level, the intelligence oversight officer should convene a counterintelligence coordination meeting between the appropriate unit commanders, the local MI assets, and the Criminal Investigation Division representatives. It is vital for the intelligence oversight officer to include the commander in the meeting. The commander will be the one deciding how to dispose of any future criminal charges, and he is able to provide input concerning the importance of immediate prosecution of the case. In addition, the commander should be involved at this stage because the development of the case as an intelligence investigation will almost certainly mean that the suspect will continue to have access to classified information, which has implications for the unit's security.

In addition to serving as a convenient local forum for the exchange of information, the counterintelligence coordination meeting has several purposes. First, the intelligence oversight officer can use the meeting to collect information which will then be relayed to the Army Central Control Office. Prior to

77. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

78. *Id.* § 702, codified at 18 U.S.C.A. § 2332b (West 1996).

79. 18 U.S.C.A. § 2332b(g)(5)(A).

80. Judge advocates should refer to the extensive list of offenses in the statute. The list includes many offenses that could conceivably be committed in areas under military control, such as: 18 U.S.C.A. §§ 32 (relating to destruction of aircraft or aircraft facilities); 81 (relating to arson within special maritime and territorial jurisdiction); 175 (relating to biological weapons); 842(m), (n) (relating to plastic explosives); 844(e) (relating to certain bombings); 1361 (relating to injury of government property or contracts); 1362 (relating to destruction of communication lines, stations, or systems); 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States); 1992, 2152 (relating to injury of fortifications, harbor defenses, or defensive sea areas); and 2155 (relating to destruction of national defense materials, premises, or utilities).

81. Office of The Judge Advocate General, U.S. Army, Policy Letter 97-4, *Use of the Technical Channel of Communications* (17 Sept. 1996).

82. In situations where the MI field office is unknown, the judge advocate can call the legal advisor for the regional MI group. The MI group legal advisor will inform all subordinate MI activities. Allen Interview, *supra* note 70.

83. *Id.*

84. *United States v. Truong Dinh Hung*, 629 F.2d 908, 916 n.5 (4th Cir. 1980).

85. The chief of the SJA's administrative law office would be a good choice to serve in this capacity.

formally opening an intelligence investigation, the control office must determine that the offense and personnel believed to be involved are within the Army investigative jurisdiction.⁸⁶ Second, the participants should determine the offenses which may be involved in the incident. The list of possible offenses will help determine the primary purpose of the investigation.⁸⁷

Even though some of the alleged conduct might be identified as criminal, the intelligence interests of exploitation, damage assessment, development of an association matrix, or surveillance of foreign intelligence assets might indicate that the primary purpose for the investigation should be counterintelligence. Conversely, if the early stages of investigation eliminated the involvement of a foreign power, a primary purpose of law enforcement is logical and would require law enforcement assets and procedures. In either instance, the intelligence oversight officer should document the rationale for the determination of the investigation's primary purpose.

The involvement of the intelligence oversight officer during the early stages can prevent future problems in the resolution of the case. If the case results in a court-martial which will require the use of evidence derived from FISA warrants, the trial judge will delay the trial pending a federal district court's determination of the legality of the FISA procedure.⁸⁸ Rather than forcing the trial counsel to testify, the intelligence oversight officer will be available to testify to the federal district court if necessary. In addition, insulating the trial counsel from the determination of the investigation's primary purpose helps eliminate any prosecutorial taint which might endanger subsequent judicial review of the foreign intelligence information sought under the FISA.

In the hypothetical case at the beginning of this article, as in all domestic instances, the MI Group will apprise the FBI of the developing counterintelligence situation.⁸⁹ In most instances, the FBI will assume lead agency status for domestic investigations. Several reasons support this course of action. First, Army MI jurisdiction is much narrower than the scope of crim-

inal investigative jurisdiction; it extends only to soldiers and not to civilians.⁹⁰ Second, even in situations where Army MI jurisdiction exists, the FBI's greater experience favors its primary role. Third, the more byzantine procedures within the military approval process for electronic surveillance applications make the FBI a preferred choice in time sensitive situations.

Step 4: Coordinate the FISA Application Process

In instances where the Army retains jurisdiction for a counterintelligence activity, a request for authority to conduct electronic surveillance or to conduct a physical search for an intelligence purpose must pass through many hands. The application goes from the MI Group to the INSCOM.⁹¹ The INSCOM will provide notice of the counterintelligence matter to the Deputy Chief of Staff for Intelligence and will forward the developing FISA application to the Office of the Army General Counsel. After legal review and approval, the request for electronic surveillance goes to the DOD General Counsel's Office for review. The DOD General Counsel will then seek approval and the necessary executive branch certification from the Secretary of Defense, the Deputy Secretary of Defense, the Secretary of the Army, or the Under Secretary of the Army.

From the DOD General Counsel's Office, the FISA application must go to the DOJ. The Office of Intelligence Policy and Review (OIPR)⁹² is the section responsible for rewriting and assembling the electronic surveillance application to ensure that it contains all of the elements and certifications required by statute. The completed application goes from the OIPR to the Attorney General for final review and signature. An attorney from the OIPR will then take the completed product to one of the FISC judges for review and approval.⁹³

When the FBI is the lead agency for a counterintelligence activity, an application under the FISA has a different route for approval. The counterintelligence section of the FBI field office develops the facts of the case. An FBI counterintelli-

86. AR 381-20, *supra* note 70, para. 4-2f.

87. *Id.* para. 4-5. The CID has the investigative lead for actual or suspected instances of sabotage. *Id.*; U.S. DEP'T OF ARMY, FIELD MANUAL 34-60, COUNTERINTELLIGENCE D-4 (5 Feb. 1990).

88. *See supra* note 16.

89. Allen Interview, *supra* note 70.

90. Judge advocates may, in situations involving civilians, elect to call directly the local FBI senior resident agent, who will then contact the counterintelligence section of the nearest large office. The FBI is required to coordinate with the various defense departments when the counterintelligence activity involves DOD personnel. EO 12,333, *supra* note 3, § 1.14(a). Judge advocates should still inform the MI Group legal advisor about such situations. Allen Interview, *supra* note 70.

91. Allen Interview, *supra* note 70.

92. The OIPR not only reviews FISA applications at the end of the process, but also will provide advice and consultation to the legal advisors of counterintelligence agencies during the process. The primary point of contact for electronic surveillance operations and application requests is Allan Kornblum, Deputy Counsel for Intelligence Operations. Mr. Kornblum's phone number is (202) 514-2882. Petrow Interview, *supra* note 45.

93. A FISA court judge or the court's legal advisor can let the OIPR know if they see a problem with an application. The government can then withdraw or amend the application. MCGEE & DUFFY, *supra* note 15, at 318.

gence supervisory agent, located at the headquarters level, is responsible for developing the facts to support the FISA application. The FBI General Counsel's Office will then review the application and obtain the approval and certification of the Director of the FBI. Afterwards, the OIPR will prepare the final electronic surveillance application to ensure that it meets all statutory requirements. The Attorney General is the final review and approval authority before presentation to a FISC judge. This process can be very speedy if the installation works with the FBI to ensure that the application contains the most accurate and statutorily required information. In any case, the lawyers processing FISA applications will not know about pressing investigative circumstances unless the agents and lawyers from the field communicate their requirements.

Conclusion

The intelligence agencies of the United States are responsible for providing "timely and accurate information about the activities, capabilities, plans, and intentions of foreign powers and their agents."⁹⁴ Military attorneys are responsible for providing timely and accurate legal advice to ensure that military intelligence activities can protect the national security of the

United States while abiding by the statutory and regulatory frameworks which preserve civil liberties.

In the area of electronic surveillance, judge advocates must analyze three key aspects in each situation: purpose, approval authority, and process. They must ensure that the purpose for the desired collection of information is primarily one of counterintelligence and not law enforcement;⁹⁵ know the approval authority required for various situations, including some where the approval authority lies outside of the DOD; and know how to make the process work for, and not against, them. This will often mean that the military attorney serves as a conduit of legally defensible and factually correct information to support the certifications which support subsequent FISA warrants. An intellectual appreciation of the philosophical underpinnings of the law is little solace, for both lawyer and client, if the investigative process fails to preserve national security and allows criminals to remain unpunished. By providing timely and accurate information on these three aspects, Army lawyers can do their part to further the intelligence efforts of the United States while serving the ends of justice.

94. EO 12,333, *supra* note 3.

95. The FISA assists in this endeavor by requiring executive branch officials to articulate the rationale for planned activities. See Mary C. Lawton, *Review and Accountability in the United States Intelligence Community*, OPTIMUM: J. PUB. SEC. MGMT., at 101-02 (Autumn 1993).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

Consumer Law Note

The Federal Trade Commission Teams with State and Local Law Enforcement to Stop Scams

The Federal Trade Commission (FTC) recently announced the results of operation "Peach Sweep" in Georgia.¹ That operation was conducted in cooperation with several other federal agencies as well as state and local law enforcement.² It targeted a number of different companies which, according to the FTC, were defrauding consumers. As a result, the FTC was able to secure temporary injunctions against the companies and filed complaints for permanent injunctions and other relief for consumers.³ The companies' operations were essentially of two types and warrant attention from legal assistance practitioners since they are the types of scams that might be perpetrated against soldiers.

The first scam was alleged to have been run primarily by an organization called SureCheK Systems, Inc.⁴ The FTC alleges that this company conducted a credit card scam under the names Consumer Credit Corporation and Consumer Credit Development Corporation.⁵ SureCheK is alleged to have contacted consumers by phone and guaranteed them an unsecured major credit card with "absolutely no security deposit," regardless of their credit history.⁶ In order to receive this card, SureCheK required a fee ranging from \$79.95 to \$130.00.⁷ The FTC claims that, during the course of the solicitation, SureCheK would acquire the consumer's checking account information and use that information to debit the fee directly from the account, many times without the consumer's express authorization.⁸ The FTC's complaint further alleges that the consumers either did not receive the credit card promised or had to pay additional fees and submit additional applications to the bank which actually issued the card.⁹ The complaint alleges that this conduct violates the Federal Trade Commission Act¹⁰ and the Telemarketing Sales Rule.¹¹

The second scam is alleged to involve a company operating under the name Resort Sales Group, Inc.¹² This company marketed so-called "luxury vacations" via telephone. The FTC alleges that Resort Sales would offer combination vacations in Florida and the Bahamas with a round-trip cruise between the two points.¹³ The telemarketer would claim the trip was valued at \$1,500 and would offer it to the consumer for between \$498 and \$598.¹⁴ What the consumer actually received was a "con-

1. Federal Trade Commission News Release, *Federal, State, Local Law Enforcers Target Bogus Telemarketers: "Peach Sweep" Targets Bad Apples in Georgia* (visited 7 Aug. 1997) <<http://www.ftc.gov/www/opa/9707/peach.htm>> [hereinafter FTC News].

2. *Id.*

3. *Id.*

4. *Id.*

5. Complaint, Federal Trade Comm'n v. SureCheK Sys., Inc., No. 1-97-CV-2015 (N.D. Ga. filed July 15, 1997). The complaint is available in <<http://www.ftc.gov/www/os/9707/complainark.htm>>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. 15 U.S.C.A. § 45(a) (West 1997).

11. 16 C.F.R. Part 310 (1997).

12. FTC News, *supra* note 1.

13. *Id.*

firmation package” containing a video, some advertisements, and a reservation form. The consumer would have to pay another \$198 to \$298 to book the accommodations at the time they made the reservation.¹⁵ The FTC alleges that consumers who went through with the vacation were given a ferry boat ride to the Bahamas, not a “luxury cruise.”¹⁶ The consumers further allege that the accommodations were “vermin-infested” unless they paid an additional fee to “upgrade” their room.¹⁷

Information about companies that conduct questionable business practices can be invaluable for preventive law programs. In order to stay abreast of current scams that may affect soldiers, legal assistance practitioners should monitor information released by the FTC through its web site¹⁸ or the *FTC News Notes* newsletter.¹⁹ The cases discussed above demonstrate the continuing need to educate soldiers and their families on the fact that deals that appear too good to be true usually are too good to be true. Major Lescault.

Family Law Note

Federal Office of Management and Budget Approves Federal Forms for Interstate Family Support Cases

The Welfare Reform Act of 1996²⁰ required all states to adopt the Uniform Interstate Family Support Act (UIFSA)²¹ by 1 January 1998. In addition, the Welfare Reform Act mandated the production of federal forms for use in interstate family sup-

port cases.²² The Office of Management and Budget (OMB) approved the forms on 30 April 1997, and they are now available for use in all interstate support cases.²³

One of the significant differences between the old Uniform Reciprocal Enforcement of Support Act²⁴ system and the UIFSA system is that the UIFSA is applicable to all IV-D²⁵ cases and cases pursued by private attorneys.²⁶ The UIFSA governs the establishment, enforcement, and modification of child support orders in interstate cases. All interstate family support cases, therefore, should begin to look alike with the use of the federal forms.

The OMB approved the following forms: (1) Transmittal #1 (Initial Request), (2) Transmittal #2 (Subsequent Actions), (3) Transmittal #3 (Request for Assistance/Discovery), (4) Registration Statement, (5) Locate Data Sheet, (6) Uniform Support Petition, (7) Affidavit In Support of Establishing Paternity, and (8) General Testimony. The Federal Office of Child Support Enforcement (OCSE), as well as local child support enforcement agencies, can provide copies of the forms. The forms are also available on the OCSE homepage at <http://www.acf.dhhs.gov/ACFPrograms/CSE> (look at the Policy Documents segment then chronological view; and the forms are file 97-06).

Whether the petitioner seeks establishment, enforcement, or modification from the tribunal determines which of the federal forms are necessary. A UIFSA Forms Matrix is available on the

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. <<http://www.ftc.gov>>.

19. The printed newsletter is available by writing to the Federal Trade Commission, Office of Public Affairs, Washington, D.C. 20580.

20. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter Welfare Reform Act].

21. 9 U.L.A. 229 (1993) (amended 1996). Copies of the UIFSA and the 1996 amendments are available from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, telephone (312) 915-0195. The Commission will provide copies by mail, fax, or e-mail. Thirty-nine states and the District of Columbia have adopted the UIFSA, and legislation is pending in eight other states. The states with the UIFSA are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia. Legislation is pending in the following states: California, Connecticut, Georgia, Hawaii, Mississippi, Nevada, New Hampshire, and New Jersey.

22. See Welfare Reform Act, *supra* note 20, § 368.

23. *New UIFSA Forms*, C.S.R. (Child Support Report, Office of Child Support Enforcement, Wash., D.C.) June 1997, at 10.

24. 9B U.L.A. 567 (1953) (amended 1958). The Uniform Reciprocal Enforcement of Support Act was extensively revised in 1968 and called the Revised Uniform Reciprocal Enforcement of Support Act. All 50 states eventually adopted some version of the statute.

25. The IV-D cases are cases worked by the Child Support Enforcement Agency operating under Section IV-D of the Social Security Act.

26. See 9 U.L.A. § 309.

OCSE homepage to assist petitioners in determining which forms are required for their specific needs.

An understanding of the UIFSA is vital to the practice of family law. This is particularly true in military legal assistance because of the mobility of the clientele. An intrastate divorce case today quickly becomes an interstate modification case tomorrow. Legal assistance attorneys must be familiar with the workings of the UIFSA and the new federal forms in order to counsel clients adequately on all issues of family support. Major Fenton.

Tax Law Note

Tax Consequences of Dividing the Proceeds From the Sale of the Family Residence

The Tax Court recently ruled that a taxpayer is responsible for one-half of the gain on the sale of a home, even though a divorce court awarded his spouse seventy-five percent of the sale proceeds.²⁷ Mr. and Mrs. Urbauer were married in 1966 and divorced in 1990. During that time period, they jointly owned their principal residence. Upon their divorce, they agreed to sell their principal residence. Some of the proceeds were to go toward discharging debts that the parties had incurred during the marriage. The remainder was to be divided, with seventy-five percent going to Mrs. Urbauer and twenty-five percent going to Mr. Urbauer.

After the sale, Mr. Urbauer filed his tax return and was later audited. The Internal Revenue Service (IRS) determined that Mr. Urbauer owed taxes on fifty percent of the gain from the sale of the home. The IRS took this position because neither the settlement agreement nor the divorce court changed the ownership interest in the home. Since the home was owned by Mr. and Mrs. Urbauer as tenants by the entirety, Mr. Urbauer had a fifty percent ownership interest in the home. As a result, he was responsible for fifty percent of the gain.²⁸

Legal assistance attorneys should be careful when drafting separation agreements that call for the sale of the client's principal residence and a division of the proceeds. If the house is jointly owned and the proceeds are to be divided equally, there is no problem, so long as the client is aware that he will be responsible for the tax on one-half of the gain on the sale of the home. If the proceeds are to be divided in a manner other than fifty-fifty, the attorney should ensure that the ownership interest in the home is also changed. For example, if the client is only going to get twenty-five percent of the proceeds from the sale of the home, the attorney should ensure that the ownership interest is changed so that the client only owns twenty-five percent of the home upon its sale. This transfer of ownership will be a nontaxable event.²⁹ If the property settlement is properly drafted, the client would only be responsible for twenty-five percent of the gain. Lieutenant Colonel Henderson.

27. Urbauer v. Commissioner, 73 T.C.M. (CCH) 2788 (1997).

28. *Id.*

29. I.R.C. § 1041 (1994).

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, United States Army
Charlottesville, Virginia

This month, *The Army Lawyer* introduces a regular column on the art of trial advocacy. It will feature perspectives from the faculty of The Judge Advocate General's School, United States Army (TJAGSA), and others on military trial advocacy. The faculty welcomes submissions from practitioners, as well as samples from records of trial; send all submissions to the Criminal Law Department, TJAGSA.

Training Manual Released

Sprinting to the field this month is *The Advocacy Trainer, A Manual for Supervisors*. This manual provides numerous training scenarios that supervisors, both chiefs of justice (COJs) and senior defense counsel (SDCs), can use to conduct training on virtually any aspect of criminal trial advocacy. *The Advocacy Trainer* enables any COJ or SDC, regardless of experience, inclination, or office size, to train counsel. Instead of having to plan the training, they now only need to execute it. *The Advocacy Trainer* should go a long way toward stoking and maintaining a corps of trained, ready, and enthusiastic trial advocates.

Regional defense counsel and staff judge advocates received copies of the manual at the WorldWide CLE. All COJs and SDCs who have not yet received a copy can contact the Criminal Law Department, TJAGSA.

Trial Notebook

Before addressing discrete aspects of military trial practice, this column will address organization for trial. Every counsel in every trial, whether a guilty plea or a complex contest, should have a trial notebook. A notebook is simply a method of organizing counsel's resources—proof, witness exams, arguments—for the case at hand. It is not so critical that counsel follow this method but that they have *some* method for keeping track of documents and recording their thoughts. Such a system gives counsel easy access to what they need and mastery (and the important *appearance* of mastery) of the case during trial. Equally important, it gives peace of mind and frees counsel to listen to witnesses and concentrate on the case, because they are not worrying or scurrying—for example, trying to remember where they placed a document or where the Article 32 testimony is.

Trial notebooks should have sections for each of the following areas.

Allied Papers and Foundational Documents

- Convening orders and amendments
- Charge sheet
- Flyer
- Findings Worksheet
- Judge-alone request
- Offers to Plead Guilty
- Sentencing Worksheet

Foundational Documents/Consultation

- Discovery
- Other reports of investigation

Planning Documents

- Proof Analysis Sheet
- Chronology

Non-Evidentiary Court Documents

- Script
- Panel schematic
- Exhibit lists with columns for offered/admitted/comments (one list for counsel and one for opposing counsel)
- Witness List

Motions

- Copies of motions (one for counsel, one for opposing counsel, and one for the court)
- Supporting case law

Voir Dire

- Members' questionnaires, data forms, personnel records
- Questions to ask
- Form for recording responses (another copy of panel schematic)

Witness Exams

- Direct exams of all witnesses

- Notes for likely cross of opponent's witnesses

Witness statements

- Original copies of any statements that might be introduced into evidence
- Separate folder or divider for each witness
- Photocopies of all statements that counsel may mark up, highlight, and use for preparation and witness exams during trial (including impeachment and prior consistent statements)
- Copies (again copy for counsel and copy for possible introduction) of Article 32 transcripts

Documentary Evidence

- All documents which counsel know from the outset that they plan to introduce
- Foundation necessary to admit evidence

Arguments

- Opening Statement
- Closing
- Rebuttal

Whatever form of notes counsel uses to prepare and to deliver opening statements and closing arguments should be included in this section. Counsel can use the trial notebook throughout trial preparation and trial. As thoughts occur to counsel that might be useful in argument, counsel should scratch them on a piece of paper and toss them into the arguments folder, sort them, and assemble them for argument.

Sentencing

Generally, the above sections—witnesses, documents, argument—separately set out documents, evidence, and other materials that can be used for the sentencing phase of the case. There is a possibility of redundancy in this section with documents or witnesses, but it keeps counsel from having to sift through documents from the merits phase of the trial to use as sentencing material during that phase of the trial.

Conclusion

Though the term used is *trial notebook*, it should begin taking shape well before trial; perhaps it is better termed a *trial organizer*. It is peculiar to each advocate and must be shaped according to individual counsel's needs and shortcomings, as well as those of the case.

The physical form of the notebook is even more personal. Many counsel use commercially produced oversized binders; some prefer pockets (thereby not punching holes in documents); others use 3-ring binders. Some use accordion files or even manila folders. In a complicated or lengthy trial, it may be appropriate to bring a file drawer or cabinet into court. All of this illustrates the need for planning. The trial notebook should evolve as the case is prepared. Document control, witness examination, and argument planning are ongoing concerns. Having somewhere to place things and thoughts (when an insight regarding an argument or witness exam strikes, scratch it out and place it in the appropriate folder) keeps the trial preparation process orderly and free of distracting stress, and thus makes counsel more organized and compelling in court.

CLAMO Report

Center for Law and Military Operations (CLAMO), The Judge Advocate General's School

What's New in CLAMO?

The Center for Law and Military Operations (Center) is a resource organization for operational attorneys, and its mission is to examine legal issues that arise during all phases of military operations and to devise training and resource strategies for addressing those issues. One of the Center's newest initiatives is the development of the Operation Joint Endeavor After Action Review (JE AAR) database, which is now available on the JAGC.Net Lotus Notes information system. This note describes how judge advocates can access the information and includes a subject index.

Introduction

The JE AAR database contains over 600 documents relating to Operation Joint Endeavor, which are fully indexed and allow judge advocates to quickly search (by word or phrase) the entire database. These source documents give judge advocates access to information papers, examples of actions that recur during most deployments, and how-to manuals. The available documents include a complete set of the Operation Joint Endeavor General Orders, Joint Military Commissions and Foreign Claims manuals, and aircrew rules of engagement training scenarios. This historical record of the deployment will serve as the basis for the forthcoming formal Operation Joint Endeavor After Action Report. However, the Center is making this database available immediately because it provides current, invaluable information for deploying judge advocates.

How to Access the Database

Judge advocates can access the JE AAR database in two ways. The first, and simplest, way is to use Lotus Notes.¹ The second method is through the JAGC.Net World Wide Web and does not require the Lotus Notes software. To use this method, one must access the JAGC Home Page on the internet (www.jagc.army.mil); select the Information and Communications (JAGC.NET) option; and click on ENTER under JAGC.NET (Information Repositories). When signing into the JAGC.NET for the first time, a user will have to fill out a questionnaire for access and should request access to both CLAMO and the JE AAR database. Once the request is approved, the user may access the databases by following the prompts into the

CLAMO database index. The index is an alphabetical list by subject matter. When the user selects the blue triangle next to the relevant subject, a list of documents or a link to a separate database (e.g., JE AAR, COUNTRY MATERIALS, CORTINA) will appear.

File Organization

The documents in the JE AAR database are organized under forty topic headings or keywords,² ranging from "AAFES" to "Zone of Separation." If the user clicks the mouse on one of the keywords, a list of the documents that have been categorized using that keyword or phrase will appear on the screen. For example, clicking on the keyword "AAFES" will list: "AAFES Privileges in the Task Force Eagle (TFE) AOR, Information Paper;" "AAFES Use by BDM/Bosnian Translators - 3 Papers;" and "International Police Task Force use of AAFES and APO issue." These documents may be cross-referenced using other keywords as well. For example, the document regarding the International Police Task Force (IPTF) is also found under the "IPTF" and "United Nations" headings. The entire repository is also full-text indexed and may be searched for specific words or phrases by inserting a specific word or phrase (in the space just under the toolbar, selecting SEARCH, and following the prompts).

File Types

The JE AAR database contains several types of files, including word processing files (most of which are Microsoft Word© documents), Microsoft Powerpoint© presentations, and documents that the Center has scanned using Lotus Notes Document Imaging (LNDI) software. Users who access the database using Lotus Notes can view the Powerpoint files even if they do not have the Powerpoint software loaded on their computers. From the web, users will have to download the Powerpoint file and use Powerpoint to view it. The scanned images (the actual documents) are available for viewing to those who access the database using Lotus Notes software.³ To view the actual documents, users must add an LNDI viewer to their Lotus Notes software. In the case of Word documents, there is an icon containing the original scanned image and, just below the scanned icon, the text of the document. Because the quality of the scanned text sometimes suffers during the scanning process,

1. Many staff judge advocate offices now have access to Lotus Notes. If an office does not have access to Lotus Notes, the legal administrator should contact the LAAWS Project Office.

2. The keywords are listed in the appendix to this article.

3. At the present time, the actual scanned documents cannot be viewed or downloaded using a web browser.

users may want to consult the copy of the original document by clicking on the scanned image icon.

Viewing Scanned Images

To view the actual scanned document, users must add LNDI viewers to their Lotus Notes software using one of the two methods described below. The first method is the easiest: after opening the JE AAR database, click on "About the File Attachments in this Repository" and follow the instructions.

The second method is more complex and requires the user to enter Lotus Notes; select "File" from the top-line menu; select "Database;" and select "Open." The JAGC.Net Policies & FAQ database is located on each JAGC.Net server. To place an icon for the database on the Lotus Notes workspace and to open the database, select "Open." From the opening screen of the database, select "Frequently Asked Questions" (FAQ); find and select the keyword "Notes - Imaging;" and select the document "Lotus Notes Document Imaging Viewer for Notes 4.x." This will give step-by-step instructions on how to load the scan-read

software. Once the program is installed, the user will be able to read the scanned documents merely by clicking on the "scanned image" icon in the Lotus Notes files.

Conclusion

Together with the LAAWS Project Office, the Center has made this database available to provide deployed judge advocates with maximum access to all available documents from Operation Joint Endeavor. The feedback loop will allow judge advocates to benefit immediately from those experiences and lessons learned by all of those "tip of the spear" judge advocates who participated in, and are continuing to participate in, deployments to the Bosnia Theater of Operations. As in the case of all of its activities, the Center has developed this database in order to enhance the practice of operational law both within the Army and throughout the Department of Defense. Major Miller and Captain Kantwill.

CLAMO—Joint Endeavor After Action Review Index

On Lotus Notes, select (double click) any of the following subjects to see a list of documents within that topic.

AAFES	Intermediate Staging Base
Air Force	International Agreements
Balkan Endeavor	International Police Task Force (IPTF)
Bosnia	Joint Endeavor
Bosnia & Herzegovina	Joint Military Commission
Civilians	Legal Assistance
Claims	Macedonia
CLAMO	Military Justice
Croatia	Police
Dayton Accord	Procurement Law
Elections	Real Estate
Ethics	Redeployment
Financial Disclosure	Refugees
Fiscal Law	Reserve Component
Former Warring Factions	Rules of Engagement
General	Serbia-Montenegro
General Accounting Office Reports	Soldiers Guide
General Framework Agreement for Peace (GFAP)	Task Force Eagle
General Orders and Amendments	United Nations
Gifts	War Criminals
Images	Zone of Separation

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the third quarter of Fiscal Year 1997 are shown below. For comparison, the times for the two previous quarters and Fiscal Year 1996 are also shown below.

General Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97	3Q, FY 97
Records received by Clerk of Court	793	169	192	174
Days from charges or restraint to sentence	62	66	63	71
Days from sentence to action	86	86	94	93
Days from action to dispatch	9	7	11	9
Days en route to Clerk of Court	9	11	9	9

BCD Special Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97	3Q, FY 97
Records received by Clerk of Court	167	42	35	34
Days from charges or restraint to sentence	45	56	38	43
Days from sentence to action	85	83	82	69
Days from action to dispatch	6	5	15	6
Days en route to Clerk of Court	8	11	8	7

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial rates for the third quarter of fiscal year 1997, April-June 1997, are shown below. The figures in parentheses are the annualized rates per thousand.

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.41 (1.64)	0.40 (1.59)	0.65 (2.60)	0.44 (1.74)	0.00 (0.00)
BCDSPCM	0.15 (0.62)	0.15 (0.61)	0.25 (1.01)	0.11 (0.44)	0.39 (1.58)
SPCM	0.00 (0.02)	0.01 (0.02)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.23 (0.91)	0.28 (1.11)	0.13 (0.51)	0.09 (0.35)	0.00 (0.00)
NJP	21.44 (85.75)	22.62 (90.48)	18.86 (75.43)	25.96 (103.85)	15.39 (61.57)

Note: Based on average strength of 478,524.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin (Bulletin), which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the Bulletin electronically in the Environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service.

Underground Storage Tank Upgrade Compliance and the Environmental Protection Agency's Enforcement Policy

By 22 December 1998, all existing underground storage tank (UST) systems that do not meet the new UST performance standards of 40 C.F.R. § 280.20 must be upgraded in accordance with the technical requirements of 40 C.F.R. § 280.21 or be permanently closed. These Resource Conservation and Recovery Act (RCRA) regulations require various forms of corrosion protection, interior lining, and/or cathodic protection, depending on the type of UST. In addition, spill and overflow protection must be installed on all existing USTs, and all metal pipes that contain regulated substances and are in contact with the ground must be cathodically protected.

Data collection by the Department of the Army in 1996 provided inconsistent information, but indicated that a number of Army USTs may not meet the upgrade deadline. An audit is underway to determine the status of UST upgrade compliance for Army installations that have not already been audited by the Army Audit Agency or the DOD Inspector General. Tiger teams organized by the Army Environmental Center will perform on-site audits at thirty-eight priority installations, while self-audits will be carried out at all remaining installations.

The possibility of noncompliance with upgrade requirements raises the question as to whether the Environmental Protection Agency (EPA) can assess punitive fines against federal facilities for violating UST regulations.¹ The Federal Facility Compliance Act (FFCA) of 1992² amended the RCRA § 6961 to permit the assessment of punitive fines and penalties against federal facilities; however, this waiver of sovereign immunity applies only to the management of solid and hazardous waste and does not extend to UST operations. A separate RCRA section³ addresses USTs and requires federal facilities to comply with federal, state, interstate, and local requirements. The FFCA did not amend the provisions of that section of the statute to allow the assessment of fines and penalties against federal facilities. The UST section has language similar to the pre-FFCA language of § 6961 that the United States Supreme Court found insufficient to allow the enforcement of punitive penalties.⁴

1. Under the Resource Compensation and Recovery Act (RCRA), 42 U.S.C.A. § 6961(a) (West 1995), federal facilities are subject to federal, state, interstate, and local solid and hazardous waste disposal and management requirements.

2. Pub. L. No. 102-386 (1992).

3. 42 U.S.C.A. § 6991f(a) (West 1995).

4. U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992).

In a February 1997 memorandum to Regional Division Directors, the EPA asserted its authority under the RCRA Subtitle I and the FFCA to assess penalties against federal facilities for violations of UST regulations. This guidance allows EPA inspectors to issue field citations under a streamlined process, without consulting with the EPA's Federal Facilities Enforcement Office. Since this guidance was issued, EPA Regions have assessed UST penalties against the Army in Hawaii and against the Air Force in Louisiana. The Department of Defense (DOD) Hazardous Waste Subcommittee of the Defense Environmental Security Compliance Committee has created a tri-service panel to study the EPA field citation policy and to recommend a DOD position and response. Major Anderson-Lloyd.

Standing Under the National Environmental Policy Act: Beware the Plaintiff Alleging Procedural Harm

The National Environmental Policy Act (NEPA)⁵ is primarily a statute of procedure, and plaintiffs often attack agency actions by alleging a lack of compliance with the procedural requirements of the NEPA. Indeed, courts have granted substantial consideration to those who assert procedural rights. As the Supreme Court stated in *Lujan v. Defenders of Wildlife*,⁶ "[t]here is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."⁷

In *Florida Audubon Society v. Bentsen*,⁸ the United States Court of Appeals for the D.C. Circuit considered the issue of standing under the NEPA in the context of procedural rights. The court found that an interest in procedure, without more, is not enough to establish standing.⁹ Instead, procedural rights confer standing only when the right in question is designed to protect a threatened concrete interest of the plaintiff.¹⁰ The court concluded:

In this type of case, which includes suits demanding preparation of an EIS, in order to show that the interest asserted is more than a mere "general interest [in the alleged procedural violation] common to all members of the public" . . . the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff. The mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement.¹¹

Under the *Florida Audubon* decision, therefore, procedural rights still retain their "special" status; however, in the D.C. Circuit, a general interest in procedural compliance is not enough to confer standing to challenge a federal action under the NEPA. Major Romans.

Useful Product Defense Upheld

The United States District Court for the Eastern District of Arkansas recently upheld the "useful product defense."¹² The court held that Standard Chlorine of Delaware's sale of chlorinated benzene compound to Vertac was the sale of a useful product, not an arrangement for disposal under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹³ The court looked into the nature of the transaction and found that this transaction was a sale of a technical grade chemical product for use as a raw material. Standard Chlorine of Delaware avoided the contribution claims brought by Hercules Chemical Corp, Vertac's successor, by arguing that the plaintiff must first establish liability under section 107 of the CERCLA before it can prevail under contribution claims brought under section 113 of the CERCLA.¹⁴ Ms. Greco.

5. 42 U.S.C.A. §§ 4321-47 (West 1997).

6. 504 U.S. 555 (1992).

7. *Id.* at 572 n.7.

8. 94 F.3d 658 (D.C. Cir. 1996).

9. *Id.* at 664.

10. *Id.*

11. *Id.*, citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

12. *United States v. Vertac*, No. LR-C-80-109 (E.D. Ark. May 21, 1997).

13. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

14. *Vertac*, No. LR-C-80-109.

Sikes Act Reauthorization Update

The Sikes Act is expected to be revised and updated this year after two consecutive years of failed reform attempts.¹⁵ The latest draft of the revised Sikes Act¹⁶ details the following required elements for an installation Integrated Natural Resource Management Plan (INRMP):

Consistent with the use of military installations to ensure the preparedness of the Armed Forces, each integrated natural resources management plan . . . shall, where appropriate and applicable, provide for

- (a) fish and wildlife management, land management, forest management, and fish and wildlife oriented recreation;
- (b) fish and wildlife habitat enhancement or modifications;
- (c) wetland protection, enhancement, and recreation, where necessary for support of fish, wildlife, or plants;
- (d) integration of, and consistency among, the various activities conducted under the plan;
- (e) establishment of specific natural resources management goals and objectives and time frames for proposed actions;
- (f) sustainable use by the public of natural resources to the extent such use is not inconsistent with the needs of fish and wildlife resources;
- (g) public access to the military installations that is necessary or appropriate . . . subject to requirements necessary to ensure safety and military security;
- (h) enforcement of natural resource laws and regulations;
- (i) no net loss in the capability of military installation lands to support the military mission of the installation; and
- (j) other such activities as the Secretary of the military department considers appropriate¹⁷

Major Ayres.

Department of Justice Decides Field Citation Dispute Against the Department of Defense

On 16 July 1997, the Department of Justice (DOJ) issued a memorandum which resolved an ongoing dispute between the Environmental Protection Agency (EPA) and the Department of Defense (DOD) about the Clean Air Act's (CAA) field citation authority.¹⁸ The EPA had asserted that it could issue field citations to federal agencies for violations of the CAA, and the DOD had opposed the EPA's jurisdiction. The DOJ decided the issue in favor of the EPA.

The 1990 CAA amendments gave the EPA the authority to issue on-the-spot administrative penalties against any person for minor violations of the CAA and its implementing regulations.¹⁹ This authority allows the EPA to promulgate regulations to identify those minor violations that could result in civil penalties that do not exceed \$5,000 per day of violation. When the EPA proposed a field citation rule,²⁰ the DOD provided comments which opposed the EPA's authority to apply the rule to federal agencies. This prompted the EPA to seek an opinion from the DOJ.

The DOD argued that this interpretation would raise serious separation of power concerns because resorting to federal judicial review is part of the statutory recourse for field citations. The DOD also disputed the EPA's assertion that including federal agencies in the CAA's general definition of "person" necessarily means that federal agencies are subject to field citation enforcement.

The DOJ agreed with the EPA that the CAA provides a "clear statement" that its enforcement provisions allow the EPA to assess administrative penalties against other federal agencies. Although the CAA's enforcement section has no definition of the term "person," the DOJ rested its conclusion primarily on the CAA's general definition of "person," which includes "any agency, department, or instrumentality of the United States."²¹ The DOJ also used the CAA's legislative history to support its decision. Finally, the DOJ concluded that the EPA's exercise of this authority did not violate Articles II and III of the United States Constitution.

Since the EPA must finish making its field citation rule, the DOJ's decision will not have an immediate impact on the DOD.

15. *Managing Wildlife on Military Lands*, ENV'T AND ENERGY WKLY BULL., (Env't and Energy Study Conf., Wash. D.C.) Aug. 5, 1997, at 5.

16. The revised Sikes Act will likely be included in the Fiscal Year 1998 Defense Authorization Act. *Id.*

17. Unpublished draft, *Amendment to H.R. 1119 as Reported Offered by Mr. Saxton of New Jersey, Title XXIX, Sikes Act Improvement* (on file with author).

18. 42 U.S.C.A. § 7413d(3) (West 1997).

19. *Id.*

20. 59 Fed. Reg. 22,776 (1994).

21. 42 U.S.C.A. § 7602e.

The DOD will have an opportunity to comment on any procedures the EPA proposes that grant federal agencies a right of administrative review. The DOJ's opinion did not address the enforcement provisions of any media statute besides the CAA. Lieutenant Colonel Jaynes and Major DeRoma.

Update on E-mail Ethics

Environmental attorneys who are licensed to practice in Illinois can use e-mail to communicate confidential client matters. The Illinois State Bar Association recently issued an opinion that attorneys who use e-mail to communicate with their clients have an expectation of privacy similar to those who use the telephone.²² In reviewing whether the use of e-mail violated the attorney's duty to maintain the confidentiality of client information, the Illinois State Bar Association Committee on Professional Conduct identified three methods of e-mail (internal, commercial, and Internet) and decided that, because interception is difficult and illegal, e-mail communication provides a reasonable assurance that the message is kept confidential.²³ In a 1990 opinion, the committee determined that attorneys should not communicate confidential client matters over cordless or mobile telephones because of the ease with which one may intercept the conversation.²⁴ Ms. Greco.

Military Munitions Rule Effective 12 August 1997—Now What?

The EPA's long-awaited Military Munitions Rule (MR) became effective on 12 August 1997.²⁵ The MR identifies when military munitions become a hazardous waste and are therefore subject to the Resource Conservation and Recovery Act (RCRA).²⁶ The MR also provides for the safe storage and transportation of munitions and explicitly exempts military training, materials recovery, and emergency response activities from the RCRA's requirements.

Representatives of the military services have met several times over the past six months to discuss how the DOD proposes to implement the MR and to determine how individual states plan to implement the MR. During those discussions,

most states indicated that they support the MR, but most were unable to complete the administrative process for adopting the MR by its effective date. In fact, only Oregon has adopted the MR as of this writing. It appears, therefore, that the provisions of the MR will be effective in only four states—Alaska, Hawaii, Iowa (all of which do not have authorized RCRA programs), and Oregon—until more states are able to complete their state rulemakings.

Until these other states adopt the MR, military installations should maintain the status quo regarding munitions operations. In particular, military installations should continue to manage any items previously designated as waste munitions in accordance with appropriate RCRA regulations. The services have encouraged states to adopt an interim approach to implementation,²⁷ but each state is free to determine for itself the allowable degree of latitude.

Regional environmental coordinators are keeping tabs on the issues, monitoring the progress of state rulemakings, and serving as a source of information concerning the intentions of various states. Whether the MR is adopted in a particular state or not, environmental law attorneys should still coordinate with state and federal regulators. Lieutenant Colonel Bell.

Litigation Division Notes

Litigation Reports: An All Important First Step in the Litigation Process

There are two ways for an installation labor counselor to stand out in the mind of a litigation attorney: the first is to submit a good litigation report; the second is to submit a bad one. To assist labor counselors in improving their litigation reports, the Civilian Personnel Branch of the Litigation Division addressed the subject in the January 1995 issue of *The Army Lawyer*.²⁸ The routine reassignment of labor counsel, however, makes reiteration of some of the points contained in that article worthy of repeating to ensure an understanding by novices and experts alike.

The form and substance of litigation reports is set out in *Army Regulation 27-40* (AR 27-40).²⁹ Preparing a litigation

22. Illinois State Bar Association Committee on Professional Conduct, Op. No. 96-10 (May 16, 1997).

23. *Id.*

24. Illinois State Bar Association Committee on Professional Conduct, Op. No. 90-7 (Nov. 26, 1990).

25. 62 Fed. Reg. 6621 (1997).

26. 42 U.S.C. A. §§ 6901-6981.

27. For example, a state could adopt those provisions which the EPA has characterized as "interpretations" of existing law and regulations.

28. Litigation Div. Note, *Litigation Reports: The Foundation of Civilian Personnel Litigation Case Preparation*, ARMY LAW., Jan. 1995, at 33 [hereinafter Litigation Div. Note].

report that perfectly complies with the regulation, however, might require more time than some installation attorneys are able to devote to the task. So how does a busy attorney prepare a professional litigation report in a reasonable amount of time? The simple answer is: by timely submitting a report which thoroughly reviews the facts and provides a short assessment of whether the plaintiff has timely exhausted administrative remedies and has established a prima facie case.

The Time Deadline

In federal court, the Army has only sixty days to respond to a plaintiff's complaint.³⁰ While this may initially seem like a lot of time, the litigation attorney is typically left with less than two weeks to prepare the response to the complaint. The limited response period results from the time-consuming coordination between the installation, the Civilian Personnel Branch, the Department of Justice, and the Office of the Secretary of the Army. When the labor counselor submits a late litigation report, the litigation attorney is forced to submit either a hastily prepared response or a late response. By sending the litigation report to the Civilian Personnel Branch by the suspense specified in the litigation report request letter,³¹ the labor counselor can improve the quality of representation provided to the installation. Additionally, he can establish a good relationship with the litigation attorney and the Assistant United States Attorney assigned to the case.

The Facts

Attorneys from the Litigation Division often comment that what they need most from labor counselors is the facts. If the installation counsel has limited time to prepare the report and must choose between a brilliant legal analysis and a thorough recitation of the facts, he should choose the latter. The Litigation Division attorney is hundreds of miles away, might never have set foot on the installation, and is not as familiar with the case as local counsel may be. The litigation attorney can look to other sources for the relevant law, but the labor counselor is the only source for the facts.

The clearest and easiest way to prepare the facts is in chronological order, identifying each relevant event, stating the date

the event occurred, and specifically citing to the documents³² which relate to each event.³³ Good litigation reports have numerous tabs with documentary support for all relevant details and a comprehensive table of contents for the enclosures.

The Law

Before writing the memorandum of law³⁴ portion of the litigation report, installation counsel should call the Civilian Personnel Branch. In many cases, the litigation attorney will be able to waive the requirement for a memorandum of law after a brief discussion of the underlying facts. Sometimes, it is appropriate for installation counsel to suggest legal issues without a comprehensive review of applicable statutes and case law.

Many of the cases that come to the Civilian Personnel Branch have procedural or factual defects which warrant dismissal of the case. These defects exist at the time the judicial complaint is filed, and the installation counsel is in the best position to detect and to report these defects. The factual summary of the case should be prepared in a way that sets out the legal defects of the case. The two most obvious legal questions that every litigation report should attempt to answer are: (1) has the plaintiff timely exhausted administrative remedies? and (2) has the plaintiff set out a prima facie case?

Determining whether the plaintiff timely exhausted administrative remedies is largely a factual inquiry. The installation counsel should set out a time line which lists the dates of key events, such as: the alleged incident, first contact with an EEO counselor, receipt of notice of the right to file a formal complaint, and the filing of the formal complaint. If the plaintiff has skipped any portion of the administrative process, the installation counsel should specifically identify that portion.

To analyze the plaintiff's prima facie case, a recitation of the law is not necessary. The installation counsel should simply list the elements of the prima facie case and, for each element, use a sentence or two to explain which facts establish whether the plaintiff has satisfied that element.

Conclusion

29. U.S. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION (19 Sept. 1994) [hereinafter AR 27-40].

30. The litigation attorney at the Army's Litigation Division usually provides the Assistant United States Attorney with either a dispositive motion (such as a motion to dismiss) or an answer which addresses each paragraph of the plaintiff's complaint.

31. Immediately after the case is received by the Litigation Division, the Civilian Personnel Branch sends to the installation a letter which sets out the date on which the litigation report is due. This suspense date is generally set for a date 21 to 30 days in the future.

32. Citations to documents in the litigation report should be as specific as possible, including the page and paragraph in the document that proves the proffered fact.

33. For an example of how to set out and to cite the facts in a litigation report, see Litigation Div. Note, *supra* note 28, at 34.

34. AR 27-40, *supra* note 29, para. 3-9(d).

A good litigation report is the first and most vital part of a process that will ensure the best defense for the installation and the Army. Labor counselors who take the time to prepare a thorough litigation report and submit it on time can greatly assist in the preparation of the defense. Major Corneilson.

Offers of Full Relief

While the advent of compensatory damages under the Civil Rights Act of 1991 may have made offers of full relief more complicated,³⁵ labor counselors still may be able to resolve some complaints of discrimination by making such offers in accordance with federal regulations.³⁶ By offering a certified offer of full relief, the agency puts the complainant on notice that it is willing to resolve the complaint. While complainants should respond to such an offer, some will simply ignore it entirely, at their peril. Complainants are required to cooperate in good faith during administrative proceedings, and failure to respond to an offer of full relief violates this duty with significant results.

In *Francis v. Brown*,³⁷ the plaintiff rejected an agency offer of full relief without giving any reason. After the agency dismissed the complaint, the employee filed a complaint in federal district court. The court held that a "federal employee fails to exhaust his administrative remedies when he rejects a settlement offer for full relief on the specific claims he asserts."³⁸

A proper offer of full relief may resolve a complaint early in the dispute process, and it could create a dispositive issue in subsequent litigation.³⁹ Labor counselors should ensure that the offer of relief specifies in detail the relief proposed and how the agency offer is in full satisfaction of the complaint. Major Hokenson.

Review of Proposal and Decision Letters

The Litigation Division has a clearly meritless case pending due to an apparent lackadaisical attitude in the preparation of the proposal letter and a decision letter that failed to correct the problem. Specifically, the proposal letter provided that a specified employee should be suspended for five days for fighting

on 12 December 1994. When the employee was presented with the proposal, the supervisor allegedly noticed that the date listed for the altercation was incorrect and should have been 12 January 1995. The supervisor asserts that he drew the employee's attention to the error and orally informed him of the date of the offense, but the supervisor did not make any changes in ink. During his oral reply, the employee steadfastly maintained his innocence of the written charge. The decision letter, which amounted to nothing more than three short paragraphs that reiterated the charge and directed implementation of the suspension, did not note the error or the fact that it had been brought to the employee's attention.

The employee followed the EEO process and filed a complaint which alleged that the suspension was imposed because of his race. The employee's position was that he did not and could not have committed the offense alleged because, as the office time cards showed, he was on leave on the day the offense was alleged to have been committed. The Department of Defense Office of Complaints Investigations (OCI) found this position meritorious, noting that management's articulated reasons for the suspension in the proposal and decision were proven to be false because the employee was, in fact, on leave on 12 December. Fortunately for the installation, the Army's Equal Employment Opportunity Compliance and Complaints Review Agency did not adopt the OCI's recommended findings. The employee then filed suit, seeking all possible relief, including backpay and \$300,000 in compensatory damages.

While the Litigation Division was able successfully to defend this lawsuit in federal court,⁴⁰ all of the effort expended in this suit probably would not have been necessary if a little more attention had been paid to the proposal and/or decision letter. The employee in this instance never denied that the fight took place *ever*; rather, he asserted that he was not guilty of the offense on the date charged. Greater care in proofreading the proposal letter, or a detailed recitation in the decision letter of what occurred, might have saved this installation quite a few tense moments and hundreds of hours of work. Mr. Meisel.

Negotiated Settlement Agreements

35. For an example of how the Civil Rights Act of 1991 has made the issuance of offers of full relief more complicated see *Jackson v. Postal Service*, EEOC No. 01923399, 93 FEOR 3062, *request to reopen denied*, EEOC No. 05930306, 93 FEOR 3133 (1993).

36. 29 C.F.R. § 1614.107(h) (1997).

37. 58 F.3d 191 (5th Cir. 1995).

38. *Id.* at 193. See also *Wrenn v. Secretary, Dep't of Veterans Affairs*, 918 F.2d 1073, 1078 (2d Cir. 1990), *cert. denied*, 499 U.S. 977 (1991) ("A claimant who is offered full relief in the administrative process must either accept the relief offered or abandon the claim.").

39. In a recent case, the labor counselor at Corpus Christi Army Depot timely raised an offer of full relief during the administrative processing of a complaint; the complainant rejected the offer and filed suit. A motion to dismiss was filed in the case based substantially on the plaintiff's failure to cooperate in good faith.

40. Since this was a Title VII suit, the plaintiff had to show not only that management's articulated reasons were admittedly false, but also that the stated reasons were a pretext for discrimination.

Negotiated settlement agreements must not only solve the immediate dispute but also avoid causing or complicating future disputes. The agreement can accomplish these goals by providing specific relief for the actual dispute. General redress for future problems should be avoided, and labor counselors must consider factors such as the effect of the agreement on future Equal Employment Opportunity complaints and potential federal litigation.

Negotiated settlement agreements can cause problems when they broadly state that the agency will not discriminate against the complainant and that the Army will provide a work environment that is free of disparate treatment. That is the law; the Army must provide such an environment. Restating the proposition as a provision of a settlement agreement provides the complainant with two causes of action for every allegation of discrimination in the future: one cause of action for the new alleged discrimination and another for a breach of the settlement agreement. In addition, a jury sitting on a civilian personnel case could construe the clause as an admission of past discrimination, despite other clauses to the contrary.

The provisions of settlement agreements should address the current matter in explicit terms and should not attempt to create future avenues of redress for a single employee. For example, one current lawsuit involves a settlement agreement which provides for discussions “should conflict in employment matters surface” and provides for an “unbiased third party” to examine issues of conflict.⁴¹ The labor counselor’s interpretation of “conflict in employment matters” may be very different from that of the employee who files EEO complaints. Furthermore, the definition of an “unbiased third person” has the potential to become an issue in this litigation.

Concise, well thought-out settlement agreements can greatly assist the Army in its personnel management mission. The provisions of settlement agreements should, however, prevent rather than complicate future litigation. Major Martin.

41. The specific provision of the settlement agreement in question reads:

In settlement of this complaint, the Army agrees . . . to require the [employee’s] immediate and higher supervisors, should conflict in employment matters surface, to enter into open and frank discussion with the complainant on the issues involved in such conflict prior to consideration of any proposal of, or initiation of, any unfavorable action against the complainant. Where resolution of conflict cannot be realized between the supervisors and the complainant, the Army agrees to provide an unbiased third person to examine and discuss the issues of conflict jointly with the parties involved before the proposal of, or initiation of, any unfavorable action against the complainant.

This provision could be interpreted to include almost any action involving the employee, not just disciplinary actions. For instance, the propriety of work assignments or even an installation-wide reduction-in-force could arguably fall within the parameters of this agreement to mediate. (A copy of the settlement agreement is on file with the author.)

Claims Report

United States Army Claims Service

Personnel Claims Note

Dispatch Date Determines Timeliness of Notice of Loss and Damage

Notice of loss and damage which is dispatched to a carrier within seventy-five days of delivery will overcome the presumption that the carrier delivered items in good condition.¹ Typically, this notice consists of a DD Form 1840R. However, as pointed out in a Personnel Claims Note in a recent issue of *The Army Lawyer*,² other documents, such as a Government Inspection Report, a DD Form 1841, or a personal letter from

the claimant, will also constitute proper notice of loss or damage.³ All that is required is that the notice be *dispatched* to the carrier within seventy-five days.⁴ If a DD Form 1840R is used, the date stamped at the bottom of the form constitutes the dispatch date.⁵

Because of the importance of the dispatch date, field claims offices must mail each DD Form 1840R immediately on the day it is received. Field claims offices also should not send multiple DD Forms 1840R in the same envelope, especially if they have different dispatch dates.⁶ Lieutenant Colonel Masterton.

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1. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* ARMY LAW., Mar. 1992, at 45.
 2. Personnel Claims Note, *What Constitutes Timely Notice?*, ARMY LAW., June 1997, at 59 [hereinafter Claims Note].
 3. See *Lift Forwarders, Inc.*, B-249479, 1992 WL 328746 (Comp. Gen. Oct. 19, 1992).
 4. The note in the June 1997 issue of *The Army Lawyer* stated that to satisfy the requirement of timely notice “the carrier must *receive* the notice of loss or damage within seventy-five days of delivery.” Claims Note, *supra* note 2, at 59 (emphasis added). This is not correct. The note also states that the timely notice requirement “can be satisfied by any document stating that an item has been damaged in shipment, as long as the carrier receives the document within seventy-five days of delivery.” *Id.* This is correct, but the requirement can also be satisfied if such documents are *dispatched* within seventy-five days of delivery.
 5. *Senate Forwarding, Inc.*, B-249840, Mar. 1, 1993, 93-1 CPD ¶ 302.
 6. See Personnel Claims Recovery Note, *Proper Dispatch of DD Form 1840R*, ARMY LAW., Oct. 1992, at 43.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

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

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

1997-1998 Academic Year On-Site CLE Training

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

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

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riveraju@otjag.army.mil. Major Rivera.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromeo,.....tromeyto@otjag.army.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera,.....riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster,fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE
1997-1998 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO</u>		<u>ACTION OFFICER</u>
		<u>SUBJECT/INSTRUCTOR/GRA REP*</u>		
17-19 Oct	San Antonio, TX 1st LSO Hilton Airport Hotel 611 NW Loop 410 San Antonio, TX 78216 (210) 340-6060	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Gregory Coe MAJ Marsha Mills COL Keith Hamack	LTC Jim Jennings 1920 Harry Wurzbach San Antonio, TX 78209 unit: (210) 221-2900 bpn: (210) 530-6120 e-mail: 71134.3012@ compuserve.com or lbrown906@aol.com
1-2 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55425 (612) 854-3411	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ John Moran LTC Karl Ellcessor COL Thomas Tromeay	MAJ Tom Tate P.O. Box 41 South St. Paul, MN 55075 (612) 455-4448 bpn: (612) 457-6750
15-16 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Jacqueline Little MAJ Kay Sommerkamp MAJ Juan Rivera	COL Myron J. Berman 370 Lexington Avenue Suite 715 New York, NY 10017 (212) 696-0165 Fax (212) 696-0493
10-11 Jan 98	Long Beach, CA 78th MSO	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue MAJ Martin Sitler CDR Mark Newcomb MAJ Juan Rivera	LTC Andrew Bettwy 5241 Spring Mountain Road Las Vegas, NV 89102 (702) 876-7107
31 Jan-1 Feb	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Criminal Law Contract Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara MAJ Charles Pede MAJ David Wallace COL Thomas Tromeay	LTC David F. Morado 909 1st Avenue, #200 Seattle, WA 98199 (206) 220-5190, ext. 3531 email: david_morado@hud.gov

7-8 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue CPT Stephanie Stephens MAJ Geoffrey Corn MAJ Juan Rivera	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: tdonne2947@aol.com
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ Stephen Parke LTC James Lovejoy COL Keith Hamack	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
28 Feb- 1 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara LTC Mark Henderson MAJ John Einwechter COL Thomas Tromej	COL Robert P. Johnston Office of the SJA, 12th LSO Bldg. 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Michael Marchand BG John F. DePue MAJ Stewart Money maker MAJ Scott Morris COL Thomas Tromej	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Thoms W. Eres MAJ Christopher Garcia MAJ Norman Allen Dr. Mark Foley	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol.com
21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John Cooke BG John F. DePue MAJ Thomas Hong LTC Richard Jackson Dr. Mark Foley	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60008 (312) 443-6064
28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran COL Thomas Tromej	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows Dr. Mark Foley	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364

25-26 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Trng Ctr 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Maurice Lescault LTC Stephen Henley Dr. Mark Foley	MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (508) 796-2140/2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	COL Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton COL Keith Hamack	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17May	Kansas City, MO 89th RSC Westin Crown Center 1 Pershing Road Kansas City, MO 64108 (816) 474-4400	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	COL Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

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

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 requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1997

October 1997

1-14 October	144th Basic Course (Phase 1, Fort Lee) (5-27-C20).
6-10 October	1997 JAG Annual CLE Workshop (5F-JAG).
14-17 October	4th Ethics Counselors Workshop

15 October-19 December	144th Basic Course (Phase 2, TJAGSA) (5-27-C20).
20-21 October	USAREUR Criminal Law CLE (5F-F35E).
20-24 October	41st Legal Assistance Course (5F-F23).
21-25 October	USAREUR Trial Advocacy Course (5F-F34E).
27-31 October	49th Fiscal Law Course (5F-F12).
27 October-7 November	28th Operational Law Seminar (5F-F47).

November 1997

3-7 November	144th Senior Officers Legal Orientation Course (5F-F1).
17-21 November	21st Criminal Law New Developments Course (5F-F35).
17-21 November	51st Federal Labor Relations Course (5F-F22).
17-21 November	67th Law of War Workshop (5F-F42).

December 1997

1-5 December	145th Senior Officers Legal Orientation Course (5F-F1).
1-5 December	USAREUR Operational Law CLE (5F-F47E).
8-12 December	Government Contract Law Symposium (5F-F11).
15-17 December	1st Tax Law for Attorneys Course (5F-F28).

1998

January 1998

5-16 January	JAOAC (Phase 2) (5F-F55).
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6-9 January	USAREUR Tax CLE (5F-F28E).	20-23 April	1998 Reserve Component Judge Advocate Workshop (5F-F56).
12-15 January	PACOM Tax CLE (5F-F28P).		
12-16 January	USAREUR Contract Law CLE (5F-F15E).	27 April-1 May	9th Law for Legal NCOs Course (512-71D/20/30).
20-22 January	Hawaii Tax CLE (5F-F28H).	27 April-1 May	50th Fiscal Law Course (5F-F12).
20-30 January	145th Basic Course (Phase 1, Fort Lee) (5-27-C20).	May 1998	
21-23 January	4th RC General Officers Legal Orientation Course (5F-F3).	4-22 May	41st Military Judges Course (5F-F33).
26-30 January	146th Senior Officers Legal Orientation Course (5F-F1).	11-15 May	51st Fiscal Law Course (5F-F12).
		June 1998	
31 January-10 April	145th Basic Course (Phase 2, TJAGSA) (5-27-C20).	1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
February 1998		1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).
9-13 February	68th Law of War Workshop (5F-F42).		
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).	1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
23-27 February	42nd Legal Assistance Course (5F-F23).	1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
March 1998		8-12 June	28th Staff Judge Advocate Course (5F-F52).
2-13 March	29th Operational Law Seminar (5F-F47).	8-12 June	2nd Chief Legal NCO Course (512-71D-CLNCO).
2-13 March	140th Contract Attorneys Course (5F-F10).	15-19 June	9th Senior Legal NCO Course (512-71D/40/50).
16-20 March	22d Admin Law for Military Installations Course (5F-F24).	15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
23-27 March	2d Contract Litigation Course (5F-F102).	29 June-1 July	Professional Recruiting Training Seminar.
23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).	July 1998	
30 March-3 April	147th Senior Officers Legal Orientation Course (5F-F1).	6-10 July	9th Legal Administrators Course (7A-550A1).
April 1998		6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).

7-9 July	29th Methods of Instruction Course (5F-F70).	ICLE	Resolution Institute Atlanta, GA
13-17 July	69th Law of War Workshop (5F-F42).	For further information on civilian courses in your area, please contact one of the institutions listed below:	
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).	AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
22-24 July	Career Services Directors Conference.		
August 1998		ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
3-14 August	10th Criminal Law Advocacy Course (5F-F34).		
3-14 August	141st Contract Attorneys Course (5F-F10).	AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
10-14 August	16th Federal Litigation Course (5F-F29).		
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).	ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).		
24-28 August	4th Military Justice Managers Course (5F-F31).		
24 August-4 September	30th Operational Law Seminar (5F-F47).	ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
September 1998			
9-11 September	3d Procurement Fraud Course (5F-F101).	CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).		
14-18 September	USAREUR Administrative Law CLE (5F-F24E).	CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
3. Civilian-Sponsored CLE Courses			
1997			
October			
9 October	Third Annual Securities Litigation and Regulatory Practice Seminar Atlanta, GA	ICLE	CLESN: CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
November			
14-15 Nov.	Fourth Annual Alternative Dispute	ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600

	Falls Church, VA 22041-3202 (703) 379-2900	(800) 443-0100
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, D.C. 20006-3697 (202) 638-0252	NCDA: National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NITA: National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NJC: National Judicial College Judicial College Building University of Nevada Reno, NV 89557 (702) 784-6747
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	NMTLA: New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, D.C. 20052 (202) 994-5272	PBI: Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	PLI: Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	TBA: Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837	TLS: Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516	UMLC: University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403	UT: The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street

VCLE: University of Virginia School of Law
 Trial Advocacy Institute
 P.O. Box 4468
 Charlottesville, VA 229054.

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
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 1 April annually
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**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two-year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the July 1997 issue of *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Office of the SJA—90th Space Wing (<http://www.warren.af.mil/90sw/ja/>).

At this web site, you will find plenty of legal assistance information sheets with a focus on Wyoming law. This web site also features a cyber court-martial which takes the surfer step-by-step through the phases of a court-martial; this could be a useful starting point for the new trial or defense counsel.

b. United States Court of Appeals for the Armed Forces (<http://www.armfor.uscourts.gov/>).

Everything you wanted to know about the United States Court of Appeals for the Armed Forces. This site features the history, judges, practice, and procedure of the court. You can also read selected opinions, public notice of hearings, and the calendar of the court.

c. Army Times (<http://www.armytimes.com/index.html>).

There is a wealth of textual information along with downloadable software at this site. In the text library, under the reference and fact files, you will find, among other items, the 1997 pay and VHA charts, the Joint Travel Regulation, and a collection of military forms in Microsoft Word format (such as DA form 31, leave—under Career Builders database). Under the periodicals heading, you will find past issues of the Military Justice Gazette, and the graphics library contains Army unit seals, patches, government insignia, and more. The collection of software includes games, video clips, sound files, and military pay calculators which let you know what your next promotion or pay raise is really worth. You can do all of the above for free. However, certain privileges, such as a search of the extensive database of names (over 10 million), requires membership, which costs \$3.50 per month.

d. Law Guru (<http://www.lawguru.com/>).

Though this site is maintained by a private law firm, it has considerable public value. You can search many state law codes and over 250 sites and search engines. You can also subscribe to over 450 lists which cover a variety of interests (humor, law, business, food and wine, etc.) and which will send regular updates to your e-mail address for free.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA

receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

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

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$6, \$11, \$41, and \$121. The majority of documents cost either \$6 or \$11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

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

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

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
- AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
- AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

- AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).
- AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (59 pgs).
- AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

- *AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

- AD A282033 Preventive Law, JA-276-94 (221 pgs).

- AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

- AD A297426 Wills Guide, JA-262-97 (150 pgs).

- AD A308640 Family Law Guide, JA 263-96 (544 pgs).

- AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

- AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

- AD A322684 Tax Information Series, JA 269-97 (110 pgs).

- AD A276984 Deployment Guide, JA-272-94 (452 pgs).

Administrative and Civil Law

- *AD A327379 Military Personnel Law, JA 215-97 (174 pgs).
- AD A310157 Federal Tort Claims Act, JA 241-97 (136 pgs).
- AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).
- AD A311351 Defensive Federal Litigation, JA-200-96 (846 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).
- AD A311070 Government Information Practices, JA-235-96 (326 pgs).
- AD A259047 AR 15-6 Investigations, JA-281-96 (45 pgs).

Labor Law

- AD A323692 The Law of Federal Employment, JA-210-97 (288 pgs).
- *AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

- AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

- AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
- AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
- AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).
- AD A302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).
- AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
- AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95
(458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel
Policies Handbook, JAGS-GRA-89-1
(188 pgs).

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

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

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

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

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

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

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

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

(1) *Active Army.*

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>			
			BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
			CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.	CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.	CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAIBC, March 1997.
ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>The Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.	EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
			FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
			FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
			FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview (Part 1), November 1995.

FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview (Part 2), November 1995.	JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
			JA235.EXE	January 1997	Government Information Practices, August 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.	JA241.EXE	June 1997	Federal Tort Claims Act, May 1997.
			JA250.EXE	April 1997	Readings in Hospital Law, January 1997.
21ALMI.EXE	April 1997	Administrative Law for Military Installations Deskbook, March 1997.	JA260.ZIP	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
			JA262.ZIP	June 1997	Legal Assistance Wills Guide, June 1997.
50FLR.EXE	June 1997	50th Federal Labor Relations Deskbook, May 1997.	JA263.ZIP	October 1996	Family Law Guide, May 1996.
			JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.			
JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.	JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA210DOC.ZIP	April 1997	Law of Federal Employment, May 1997.	JA267.ZIP	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.	JA269.DOC	December 1996	Tax Information Series, December 1996.
JA215.EXE	June 1997	Military Personnel Law Deskbook, June 1997.	JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.	JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA230.EXE	April 1997	Morale, Welfare, Recreation Operations, August 1996.	JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.	JA275.EXE	June 1997	Model Income Tax Assistance Guide, June 1997.

JA276.ZIP	January 1996	Preventive Law Series, June 1994.	JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA281.EXE	February 1997	15-6 Investigations, December 1996.	JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.	JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.	JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.	JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/Reference), February 1997.	JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.	JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.	JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.	JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.	JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.	JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.	JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.	JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
			JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.

1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.	OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.	OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.	OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.	OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.	YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.	YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.	YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.	YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.	YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.	YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.			
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.			
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.			
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.			

YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
 ATTN: LAAWS BBS SYSOPS
 9016 Black Rd, Ste 102
 Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
 PKZIP110.EXE
 PKZIP.EXE
 PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP OCTOBER.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. TJAGSA Information Management Items

a. The Judge Advocate General's School, United States Army has upgraded its network server to improve capabilities for the staff and faculty, and many of the staff and faculty have received new pentium computers. These initiatives have greatly improved overall system reliability and made an efficient and capable staff and faculty even more so! The transition to Windows 95 is almost complete and installation of Lotus Notes is underway.

b. The TJAGSA faculty and staff are accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling the IMO.

c. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

8. The Army Law Library Service

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

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