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## Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement

*Breakin' rocks in the hot sun; I fought the law and the law won.*<sup>1</sup>

*Major Joseph B. Berger III*<sup>2</sup>

Unfortunately, there is a widely-held misconception in the Army that hard labor, a form of punishment under the Uniform Code of Military Justice (UCMJ),<sup>3</sup> is “dead.”<sup>4</sup> By definition, labor is a physical or mental exertion.<sup>5</sup> A sentence to hard labor without confinement “must amount to punishment; otherwise it is not only irregular but of no effect.”<sup>6</sup> Commanders who require convicted Soldiers to perform only routine extra duty tasks when executing a sentence of hard labor without confinement execute a sentence that is of no effect. Commanders and judge advocates (JAs) may make this mistake if they believe they cannot require Soldiers sentenced to hard labor without confinement to do anything that even approximates historical notions of *making little rocks out of big rocks*.<sup>7</sup> Commanders, however, are not as restricted as they or their JAs may believe.<sup>8</sup> Although arduous physical labor remains legally permissible, lack of consistency in its application threatens its viability.

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<sup>1</sup> THE BOBBY FULLER FOUR, *I Fought the Law*, on I FOUGHT THE LAW (De-Fi Records 1966). The Bobby Fuller Four formed in El Paso, Texas, home to Fort Bliss, in the early 1960s where they performed for a number of years before moving to California. Tom Simon Home Page, *The Bobby Fuller Four*, at <http://www.tsimon.com/fuller.htm> (last visited Sept. 20, 2003).

<sup>2</sup> Currently assigned as the Regimental Judge Advocate, 160th Special Operations Aviation Regiment (Airborne), U.S. Army Special Operations Command, Fort Campbell, Kentucky. This article was written while assigned as the Chief, Military Justice, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas.

<sup>3</sup> UCMJ art. 15 (2002) (permitting commanders to impose extra duty as punishment for up to forty-five days, depending on the rank of the officer imposing the punishment). See also U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE tbl. 3-1 (6 Sept. 2002) [hereinafter AR 27-10]. Extra duty is generally defined by customs of the service. MANUAL FOR COURTS MARTIAL, UNITED STATES, pt. V, ¶ 5c(6) (2002) [hereinafter MCM]. Extra duty routinely includes such tasks as grass mowing, general cleaning (*i.e.*, headquarters buildings where there is a lack of junior enlisted Soldiers assigned or working), conducting police calls around unit areas, or general area beautification or maintenance of roads or housing areas sponsored by the assigned unit. The MCM provides some general guidance on what constitutes extra duty, defining “extra duties” as the following:

[T]he performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grade or position.

*Id.* Army Regulation 27-10 provides examples of prohibited extra duties, but does *not* provide examples of what is permissible. It prohibits using the offender as a personal servant, assigning him duty intended as an honor, requiring him to perform any duty in a ridiculous or unnecessarily degrading manner (*e.g.*, cleaning a barracks floor with a toothbrush), requiring him to perform any duty that constitutes a safety or health hazard to the offender or that would demean the Soldier's position as a noncommissioned officer or specialist. AR 27-10, *supra*, para. 3-19.

<sup>4</sup> Some commanders and senior noncommissioned officers (NCOs) feel that hard labor is missing the arduous element that distinguishes it from the non-physically taxing extra duty (*i.e.*, unit police call) routinely adjudged under non-judicial punishment. Interview with Command Sergeant Major (CSM) Clifford T. West, CSM, U.S. Army Sergeants Major Academy, Fort Bliss, Texas (Dec. 23, 2002) [hereinafter West Interview].

<sup>5</sup> WEBSTER'S II NEW COLLEGE DICTIONARY 613 (1995) [hereinafter WEBSTER'S]. Webster's further defines “hard labor” as “compulsory physical labor assigned to criminals as part of a prison term.” *Id.* at 505. See also BLACK'S LAW DICTIONARY 717 (6th ed. 1990). Current military dictionaries do not define hard labor. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (14 Aug. 2002); U.S. DEP'T OF ARMY, REG. 310-25, DICTIONARY OF UNITED STATES ARMY TERMS (21 May 1986); U.S. DEP'T OF NAVY, MARINE CORPS REFERENCE PUB. 5-12C, MARINE CORPS SUPPLEMENT TO THE DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (29 July 1998).

<sup>6</sup> WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 400 (1st ed. 1886).

<sup>7</sup> The misperceptions conveyed in comments by commanders to the author following cases where hard labor without confinement was adjudged are reinforced by experiences such as a panel returning from deliberations to request the military judge define “hard labor without confinement” and its limitations.

<sup>8</sup> This disturbing misperception among trial counsel is reflected by the virtually identical reaction of multiple trial counsel and chiefs of justice from separate general courts-martial (GCM) convening authority jurisdictions, each of whom was specific and adamant in that they would “never” put any guidance “in writing,” including e-mail, to commanders on how to execute a sentence to hard labor without confinement. This comment is based on the author's recent professional experiences and correspondence with various trial counsel and chiefs of justice.

This article provides guidance on how to impose sentences to hard labor without confinement based on the applicable law, and contains recent lessons learned drawn largely from one special court-martial convening authority's jurisdiction.<sup>9</sup> Additionally, this article examines the lack of concrete guidance for executing sentences to hard labor without confinement and proposes changes to the *Manual for Courts-Martial* (MCM),<sup>10</sup> *Army Regulation* (AR) 27-10,<sup>11</sup> and the Military Judges' Benchbook.<sup>12</sup> The article then provides JAs and the commanders they support an analytical framework for executing sentences to hard labor without confinement.

### History of Hard Labor

Historically, the public "believes, in theory at least, that prisoners should work—and work hard."<sup>13</sup> The question has long been whether to make prisoners work for rehabilitative purposes, economic production, or punishment.<sup>14</sup> Hard labor as a component of criminal punishment finds its roots in 16th century England.<sup>15</sup> In 1557, London's municipal government "opened an old royal palace as a house of correction."<sup>16</sup> The hope was that by providing convicts "useful labor," they would be rehabilitated into "productive workers rather than idlers."<sup>17</sup>

By the mid to late 1800s, however, prisoners were generally not employed in useful labor. A number of "nonproductive labor devices were employed in some institutions to carry out the sentence to hard labor. These devices included carrying cannon ball to and fro, the treadmill,<sup>18</sup> and the crank."<sup>19</sup> Obviously, these served no productive end, but filled the need for "hard and servile labor."<sup>20</sup> Ultimately, England's Prisons Act of 1898 abolished the treadmill and the crank from the prisons.<sup>21</sup>

Early American military writings reinforce the legitimacy of hard labor as a form of punishment, but provide little insight into the specifics of form or duration. In 1886, influenced largely by the Armies' experiences in the Civil War, Colonel (COL) William Winthrop wrote "confinement at *hard labor* is executed . . . by employing the prisoners in road-making, bridging, erecting or repairing fortifications or quarters, gardening, woodcutting, and policing, &c."<sup>22</sup> Colonel

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<sup>9</sup> The jurisdiction in reference is the 11th Air Defense Artillery (ADA) Brigade, 32d Army Air and Missile Defense Command, Fort Bliss, Texas. See FORT BLISS REG. 27-10, MILITARY JUSTICE para. 3-2a(2) (13 Feb. 2003) [hereinafter FB 27-10] (establishing the Commander, 11th ADA Brigade as a special court-martial convening authority).

<sup>10</sup> See *supra* note 3.

<sup>11</sup> *Id.*

<sup>12</sup> U.S. DEP'T OF THE ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 62.1 (1 Apr. 2001) (C2, 1 July 2003) [hereinafter BENCHBOOK].

<sup>13</sup> HARRY ELMER BARNES & NEGLEY K. TETTERS, NEW HORIZONS IN CRIMINOLOGY 717 (2d ed. 1951).

<sup>14</sup> *Id.*

<sup>15</sup> David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 83 (1998).

<sup>16</sup> *Id.* at 84 (quoting ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992)).

<sup>17</sup> *Id.*

<sup>18</sup> The treadmill,

as invented by the engineer, Sir William Cubbit, consisted of twenty-four steps, fixed lengthwise, like the floats of a paddlewheel, to a wooden cylinder sixteen feet in circumference, the steps being eight inches apart. The wheel made two revolutions per minute and there was a mechanical contrivance by which, at the end of each thirtieth revolution, a bell rang; the twelve men at the wheel then stepped off and were replaced by twelve more . . . . Sometimes these treadwheels did accomplish something such as grinding corn or pumping water; more often they did nothing.

BARNES & TETTERS, *supra* note 13, at 719.

<sup>19</sup> Invented in 1846, the crank

consisted of a crank attached to a narrow iron drum placed on the legs. In the interior of the drum, a series of revolving cups scooped up a thick layer of sand at the bottom, carried it to the top and emptied it, to be again caught up by the revolving cups. On this machine a dial plate was fixed, which registered the number of revolutions made.

JOHN LEWIS GILLIN, CRIMINOLOGY AND PENOLOGY 401 (3d ed. 1945).

<sup>20</sup> FRANK TANNENBAUM, CRIME AND THE COMMUNITY 364 (1938).

<sup>21</sup> *Id.*

<sup>22</sup> WINTHROP, *supra* note 6, at 425.

Winthrop went on to describe “hard labor” as “a distinct punishment,” which “in some instances, [has] been adjudged alone—*i.e.*, unaccompanied, in the sentence, by confinement.”<sup>23</sup> Colonel Winthrop described tasks which are productive forms of labor but offered no opinion as to whether or not the punishment must, or even should, be productive labor.<sup>24</sup> Furthermore, COL Winthrop did not address whether hard labor completed is to time or to task. He described tasks, such as “road-making,” which are ongoing tasks whose completion would likely take longer than the entire duration of all but the most severe sentence of any individual Soldier.

During the Civil War, “sentences simply of ‘hard labor,’ or of ‘hard labor at the public works,’ or of certain particular labor or labor on particular works—such as fortifications, bridges, roads, &c. (sic), or in breaking stone—unconnected in the sentence with confinement, were not unfrequently [sic] imposed.”<sup>25</sup> Reported sentences from the Civil War include one prisoner sentenced to “serve at hard labor for a certain term ‘with an iron collar around his neck weighing eight pounds,’” and another sentenced to hard labor “chained to a wheelbarrow.”<sup>26</sup> Again, there is no historical requirement that this labor be productive labor and the Civil War demonstrates the historical acceptability of unproductive, and thus purely punitive labor, by making a distinction between ‘hard labor’ and ‘hard labor at the public works.’

In an effort to draw a distinction between permissible and prohibited punishments, COL Winthrop defined cruel and unusual punishments prohibited by the Eighth Amendment as “such punishments as are corporal in their nature, namely such as impose restraint or suffering upon the body.”<sup>27</sup> He went on to define “cruel” as punishment which is “harsh and severe, and even in a degree unmerited, without being cruel; and perhaps a satisfactory explanation of the term as can readily be given would be a punishment which inflicted an amount of bodily (or mental) suffering or injury out of all reasonable proportion to the full demands of justice.”<sup>28</sup> When addressing what was “cruel and unusual” and thus prohibited, COL Winthrop wrote, “the law doubtless had in view the punishments involving needless agony.”<sup>29</sup>

The two reported Civil War punishments of the iron collar and the wheelbarrow would be legally impermissible today. What was legally permissible, however, was arduous, physical labor that, although it may have caused some physical suffering or pain, was commensurate with the full demands of justice. While he was careful to define constitutionally prohibited punishments, COL Winthrop emphasized that a “sentence to hard labor [at confinement] is not legally executed by putting the prisoners at *light* work.”<sup>30</sup> The need to have a consistent program for executing sentences of hard labor has not changed in 130 years; consistency is the critical component of any successful contemporary plan for executing sentences to hard labor without confinement.

The Civil War era provides additional usable guidance for today’s military on the permissible duration of hard labor tasks. Specifically, the “provision of the Act of June 25, 1868, known as the ‘eight hour law,’ [did] not apply to prisoners employed at hard labor under sentence of court-martial.”<sup>31</sup> During this time, sentences to confinement at hard labor were executed at the U.S. Disciplinary Barracks, Fort Leavenworth, by “means of the ‘labor and trades’ prescribed for the prisoners by Sec. 1351, Rev. Sts., and the manufacturing of supplies for the army.”<sup>32</sup> While confinees were clearly used as a workforce, their hours were specifically exempted from labor regulation. This nonexistent restraint on the duration of hard

<sup>23</sup> *Id.* at 421. As with all individual Soldier tasks, some degree of noncommissioned officer supervision is required. That supervision, however direct, does not amount to confinement. See generally U.S. DEP’T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP (31 Aug. 1999). See also West Interview, *supra* note 4.

<sup>24</sup> WEBSTER’S, *supra* note 5, at 939 (defining “productive” as “constructive; of or involved in the creation of goods and services to produce wealth or value”).

<sup>25</sup> WINTHROP, *supra* note 6, at 421 (citing Department of the Missouri, Gen. Order No. 11 (1862)).

<sup>26</sup> *Id.* (citing Gen. Order (unnumbered) (31 Oct. 1820)).

<sup>27</sup> *Id.* at 398.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 399. Nowhere is productivity a requisite component nor does the nonproductive nature of the work required make the work *per se* “cruel and unusual punishment” or otherwise prohibited. See *Gregg v. Georgia*, 428 U.S. 153, 173-74 (1976) (outlining two aspects of “excessiveness” for Eighth Amendment constitutional analysis purposes); see also *State v. Lobato*, 603 So.2d 739, 751 (1992) (defining a sentence as excessive only if, when considered in light of the harm done to society, it “shocks the sense of justice”). But see *Weems v. United States*, 217 U.S. 349, 378 (1910) (defining cruel and unusual punishment as a progressive concept which acquires meaning as the public becomes enlightened). See also *McLamore v. South Carolina*, 409 U.S. 934, 935-36 (1972) (citing *Weems*’ progressive definition of cruel and unusual punishment); *Gregg*, 428 U.S. at 171 (noting the Eighth “Amendment has been interpreted in a flexible and dynamic manner”).

<sup>30</sup> WINTHROP, *supra* note 6, at 425.

<sup>31</sup> *Id.* (citing Gen. Order No. 71, Dep’t of the South (1869)).

<sup>32</sup> *Id.*

labor remains a critical distinction between hard labor and extra duty and, like its historical counterpart of hard labor at confinement, is essential to making hard labor without confinement an effective contemporary punishment.<sup>33</sup>

The final critical historical point goes directly to the nature of punishment, which the spectrum of historical documents unfortunately fails, individually or collectively, to specifically define. Discussing punishments generally, and using confinement to bread and water as the specific example, COL Winthrop explains that although such punishments are “infrequently imposed,” they are “not ‘unusual’ since they are still sanctioned by usage and not prohibited by law.”<sup>34</sup> President Lincoln’s Attorney General, Edward Bates commented that punishments “contrary to the usage of the service would...be forbidden by law.”<sup>35</sup> Attorney General Bates went on to note that customs of the service have “sanctioned... imprisonment with or without hard labor.”<sup>36</sup> It is therefore critical that the current customs of the service<sup>37</sup> continue to sanction hard labor. Failure to do so could lead to a future loss of the effectiveness of this unique tool in a commander’s disciplinary toolbox.

### Hierarchy of Punishments

The general nature of what the *MCM* allows and the specific parameters of each service’s implementing regulations are critical to defining the specifics of each type of judicial and nonjudicial punishment, including hard labor without confinement. For example, while the UCMJ still allows commanders to impose confinement on bread and water or diminished rations for up to three consecutive days,<sup>38</sup> implementing service regulations greatly restrict upon whom and when the command can impose that punishment.<sup>39</sup> The relevant customs of the respective service shape this interplay. These customs define, at least partially, the limits of each level of available punishment.

Rule for Courts-Martial (RCM) 1003(b) establishes the hierarchy of court-martial punishments.<sup>40</sup> Although RCM 1003(b) fails to state that the punishments are listed in order of increasing severity, this fact is intuitively obvious; the first punishment listed, RCM 1003(b)(1), is a reprimand and the last, RCM 1003(b)(9), is death.<sup>41</sup> The *MCM* also contains the hierarchy of nonjudicial punishment.<sup>42</sup> The *MCM* empowers the concerned Service Secretary to limit the power granted by Article 15 “with respect to the kind and amount of the punishment authorized.”<sup>43</sup> The least severe forms of punishment are

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<sup>33</sup> See generally Interview with Private (E1) James T. Bruce, Headquarters and Headquarters Battery, 3-2 Air Defense Artillery (ADA) Battalion, 35th ADA Brigade, Fort Bliss, Tex. (Oct. 18, 2002) [hereinafter Bruce Interview]. Then-Staff Sergeant (SSG) James T. Bruce was convicted at a general court-martial (GCM) of taking indecent liberties with another. The military judge sentenced him to reduction to the grade of Private (E1), sixty day’s restriction, and sixty day’s hard labor without confinement. As a result of the bar to reenlistment stemming from his court-martial charges, PVT Bruce was discharged upon the expiration of his term of service (ETS) prior to completing his sentence to hard labor without confinement. Private Bruce specifically commented that “extra duty personnel have a set task—when they finish, they’re done. I have a set time; it doesn’t matter how fast or slow I go, I just have to keep working. The time is the worst thing about [hard labor].” *Id.*

<sup>34</sup> WINTHROP, *supra* note 6, at 398. The UCMJ still allows commanders to impose confinement on bread and water or diminished rations for up to three consecutive days. See *infra* note 38.

<sup>35</sup> *Id.* at 399.

<sup>36</sup> *Id.*

<sup>37</sup> Customs of the service are “sometimes called common law of the Army” and signify “generally a right or law not written, but established by long usage.” JASON A. MOSS, OFFICER’S MANUAL 227 (1917). A custom’s validity is established by a number of factors, including: (1) habitual or long-established practice; (2) continuance without interruption; (3) continuance without dispute; (4) reasonableness; (5) certainty; (6) compulsoriness; (7) inherent consistency between customs. *Id.*

<sup>38</sup> UCMJ art. 15(b)(2)(A) (2002); see also U.S. DEP’T OF NAVY, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (3 Oct. 1990) [hereinafter JAGMAN] (allowing confinement on bread and water or diminished rations); U.S. DEP’T OF NAVY, SEC. OF THE NAVY, INSTR. 1640.9B, U.S. DEP’T OF NAVY CORRECTIONS MANUAL (2 Dec. 1996) [hereinafter SECNAVINST 1640.9B] (providing implementation instructions on executing sentences to bread and water/diminished rations). The option of punishment of confinement on bread and water or diminished rations imposed by court-martial was deleted in 1995. *MCM, supra* note 3, app. 21 (analysis of RCM 1003).

<sup>39</sup> See, e.g., SECNAVINST 1640.9B, *supra* note 38 (limiting imposition of diminished rations upon only enlisted persons in the grade of E3 or below who are attached to or embarked in a vessel).

<sup>40</sup> See *MCM, supra* note 3, R.C.M. 1301(d)(1) (placing further limits on those punishments under RCM 1003(b) which can be adjudged by a summary court-martial).

<sup>41</sup> See BENCHBOOK, *supra* note 12, instr. 2-5-24 (requiring the military judge, in pertinent part, to instruct the panel members to vote on “each proposed sentence, in its entirety, beginning with the lightest”). Based on that instruction, the court provides the members a worksheet that lists, in order from least to most severe, the possible punishments. *MCM, supra* note 3, app. 11, Forms of Sentences (sample worksheet; providing another tool for evaluating the relative severity of the various forms of punishment).

<sup>42</sup> *MCM, supra* note 3, pt. V, ¶ 5b. See also AR 27-10, *supra* note 3, para. 3-19b.

<sup>43</sup> *MCM, supra* note 3, pt. V, ¶ 5a.

those that do not involve a deprivation of liberty. They include reprimands, forfeitures, fines, and reductions in pay grade.<sup>44</sup> Those punishments involving physical labor, a discharge, confinement, or death are more increasingly severe.<sup>45</sup>

Within the hierarchy of punishment, certain punishments overlap and are available under both courts-martial and nonjudicial punishment.<sup>46</sup> For example, an enlisted Soldier may be reduced at a court-martial and as punishment under Article 15. Yet, while a court-martial can reduce the enlisted Soldier to the lowest enlisted grade regardless of current rank, the imposing commander's authority under Article 15 may be far more limited.<sup>47</sup> Depending on the commander's rank and the rank of the Soldier being punished, the commander may be empowered to only reduce the Soldier one grade.<sup>48</sup>

Unlike fiscal punishments, physical punishments<sup>49</sup> at court-martial have little overlap with nonjudicial punishment. The maximum allowable punishments under Article 15 are less onerous than those allowable at court-martial.<sup>50</sup> Physical punishments appear to be no exception. Hard labor without confinement is an allowable punishment at a court-martial, but not under Article 15.<sup>51</sup> Extra duty is specifically allowed under Article 15, but not as punishment at court-martial.<sup>52</sup>

Within those punishments, however, overlap occurs with fatigue duty. Correctional custody, a permissible punishment under Article 15, may include "extra duties, fatigue duties, or hard labor as an incident of correctional custody."<sup>53</sup> Extra duties, a separate and distinct punishment under Article 15, "may include fatigue duties."<sup>54</sup> Unfortunately, like hard labor, neither the *MCM* nor *AR 27-10* provide any guidance as to what constitutes "fatigue duty." Webster defines "fatigue" as "physical or mental weariness due to exertion; exhausting effort or activity; manual or menial labor, as barracks cleaning, assigned to enlisted military personnel."<sup>55</sup> Historically, fatigue duty included:

[A]ll the irregular work that the Soldier is called upon to perform from time to time. In the fields, working upon roads, building field works, rifle pits, &c. (*sic*), making or removing obstructions, duty or forage parties, and, in fact, all the duties where men are required, without arms, for short periods. In the barracks or quarters, there are many duties that call for details for fatigue, such as loading or unloading of stores, the removal of stores from one place to another, digging of graves for deceased Soldiers or officers, labor on the grounds, works, or buildings of the post, &c (*sic*).<sup>56</sup>

This definition of "fatigue duty" includes tasks that might otherwise be considered "hard labor." Therefore, absent a sentence to correctional custody, fatigue duties imposed under Article 15 can amount to hard labor without confinement.

### Hard Labor and the Law

"The problem . . . is that that 'hard labor' as envisioned . . . by the early military writers, is no longer being performed . . ."<sup>57</sup> Since the establishment of the UCMJ, at least one court has recognized that when executed, the "labor required of present-day prisoners [sentenced to hard labor] is often no more strenuous than the cutting of grass or leaf raking."<sup>58</sup>

<sup>44</sup> *Id.* R.C.M. 1003(b)(1)-(4).

<sup>45</sup> Appendix A of this article illustrates the spectrum of available punishments under the UCMJ.

<sup>46</sup> *See* app. B, fig. 1 (containing a Venn diagram of this concept).

<sup>47</sup> *See* AR 27-10, *supra* note 3, para. 3-19b(6) (providing specific guidance).

<sup>48</sup> For example a company/battery commander (in the grade of O-3) can only reduce an E-4 (specialist) one grade, to E-3 (private first class). *Id.* tbl. 3-1.

<sup>49</sup> Physical punishments are defined here as those punishments that involve physical labor.

<sup>50</sup> *See* app. B, fig. 2 (providing a Venn diagram of this concept).

<sup>51</sup> *MCM*, *supra* note 3, R.C.M. 1003(b)(6). Hard labor is permissible under Article 15, UCMJ, but only as an incident of correctional custody. *Id.* pt. V, ¶ 5c(4).

<sup>52</sup> *Id.* pt. V, ¶ 5b(2)(A)(v) and (2)(B)(v). Extra duty is also allowed incident to a sentence to correctional custody. *Id.* ¶ 5b(2)(B)(ii).

<sup>53</sup> *Id.* pt. V, ¶ 5c(4).

<sup>54</sup> *Id.* ¶ 5c(6).

<sup>55</sup> WEBSTER'S, *supra* note 5, at 467.

<sup>56</sup> U.S. WAR DEPARTMENT, REVISED U.S. ARMY REGULATIONS OF 1861 (C1, 25 June 1863).

<sup>57</sup> *United States v. Palmiter*, 20 M.J. 90, 94 (1985).

Evolving customs of the service, which are potentially disparate, conflicting, and inconsistent,<sup>59</sup> threaten to eviscerate both the unique deterrent and punitive value of traditional hard labor.<sup>60</sup> Judge advocates must assist commanders in understanding the legality of aggressively pursuing appropriately arduous and punitive “hard labor” in order to maintain a custom of the service that accurately defines the punitive nature of hard labor.

Hard labor, with or without confinement,<sup>61</sup> was established as a permissible punishment in the U.S. Army nearly 200 years ago.<sup>62</sup> Hard labor, with or without confinement, is a constitutionally permissible punishment.<sup>63</sup> Hard labor has since appeared as a lawful form of punishment in every version of the *MCM* from 1917 to the present edition.<sup>64</sup> Hard labor has also been included as a lawful punishment in the UCMJ since its enactment in 1950.<sup>65</sup> Despite its lengthy legal history, there was surprisingly little initial and virtually no subsequent guidance as to what actually constitutes permissible hard labor.

The 1951 *MCM* contains the most detailed definition of hard labor available. While it gives no description of what specific tasks might satisfy sentences of confinement at hard labor, it does state that hard labor without confinement:

may be adjudged only in the cases of enlisted persons. Hard labor without confinement, adjudged as punishment by courts-martial, shall be performed in addition to other duties which fall on the enlisted person; and no enlisted person shall be excused or relieved from any military duty for the purpose of performing such hard labor. A sentence imposing hard labor without confinement shall be considered satisfied when the enlisted person shall have performed hard labor during available time in addition to performing his military duties. Normally, the immediate commanding officer of the accused will designate the amount and character of the labor to be performed. The daily performance of the designated hard labor before or after routine duties are completed satisfies the sentence whether the particular daily assignment requires one, two, or more hours. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he is properly entitled.<sup>66</sup>

This description also appears virtually unchanged in the 1969 *MCM*.<sup>67</sup> The paragraph is inexplicably omitted, however, from post-1969 editions of the *MCM*.<sup>68</sup>

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<sup>58</sup> United States v. Bruce, 17 M.J. 1083, 1085 (A.F.C.M.R. 1984).

<sup>59</sup> The concern is both intra and interservice disparities and inconsistencies.

<sup>60</sup> “Traditional hard labor,” is defined as that which involves physical or mental exertion demanding great effort or endurance. See *infra* pp. 2-4 (History of Hard Labor).

<sup>61</sup> Confinement at hard labor as an enumerated punishment was deleted from the *MCM* in 1984 in an effort to promote uniformity in the wording of adjudged sentences. The authority executing the sentence still held the power to require hard labor; the words “hard labor” were not required in the sentence to confinement. *MCM*, *supra* note 3, R.C.M. 1003(b)(8) (1984).

<sup>62</sup> See An Act for Establishing Rules and Articles for the Government of the Armies of the United States, Ch. 20, 2 Stat. 359, art. 66-67 (1806).

<sup>63</sup> United States v. Weems, 217 U.S. 349 (1909); see also Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998).

<sup>64</sup> See UCMJ art. 58(b) (2002).

<sup>65</sup> See *id.* arts. 18, 20 (1951) (current version at arts. 19 and 20 (2002)); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶¶ 26c(1), (2) and 126j, k (1951) [hereinafter 1951 *MCM*]. The original drafters of the UCMJ specifically commented, “The accused is not to be excused from his assigned duties so that he may perform hard labor, the very purpose of the sentence being to exact work of a laborious nature from him during such time as may be available after he has completed his other tasks.” HISTORY, PREPARATION AND PROCESSING, MANUAL FOR COURTS-MARTIAL, UNITED STATES 186 (Colonel Charles E. Decker ed., 1951). The drafters provide no description, however, of what specific types of activities constitute hard labor.

<sup>66</sup> 1951 *MCM*, *supra* note 65, ¶ 126k.

<sup>67</sup> Paragraph 126k of the 1969 *MCM* states:

Hard labor without confinement will not be adjudged in excess of three months. A summary court-martial will not adjudge hard labor without confinement in excess of 45 days. It may be adjudged only in the cases of enlisted members. Hard labor without confinement, adjudged as punishment by courts-martial, shall be performed in addition to other duties which fall to the enlisted person; and no enlisted member shall be excused or relieved from any military duty for the purpose of performing it. A sentence imposing hard labor without confinement shall be considered satisfied when the enlisted member shall have performed hard labor during available time in addition to performing his military duties. Normally, the immediate commanding officer of the accused will designate the amount and character of the labor to be performed. The daily performance of the designated hard labor before or after routine duties are completed satisfies the sentence whether the particular daily assignment requires one, two, or more hours. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he is properly entitled.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 126k (1969) (rev.).

<sup>68</sup> It appears that the drafters removed the discussion when the *RCM* were added in 1984. The provision, however, can arguably be considered incorporated into the current *MCM*. The availability of hard labor without confinement was not removed as a possible punishment, nor was it limited or changed in any way in the more recent versions of the *MCM*. See generally *MCM*, *supra* note 3, R.C.M. 1003(b)(6) (containing a far less detailed discussion of hard labor).

This earlier guidance establishes the following: (1) The accused is *not* to be excused or relieved from *any* military duty to serve his sentence; (2) hard labor shall be performed *in addition to* other duties; (3) hard labor will be performed *before or after* routine duties; (4) there is no daily time limit on the amount of hard labor to be performed. This early guidance provides a baseline for analysis.

The current Discussion to RCM 1003(b)(6) lacks the more complete guidance of the earlier descriptions. It states the following:

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused shall be permitted to take leave or liberty to which entitled.<sup>69</sup>

The discussion empowers the accused's immediate commander to determine the "character of the labor to be performed."<sup>70</sup> The discussion also implies the accused must perform hard labor on a daily basis.<sup>71</sup> The discussion, however, lacks guidance as to the intensity, time (duration), and type of punishment the commander should or even may impose.<sup>72</sup>

As noted earlier, a sentence "must amount to punishment; otherwise it is not only irregular but of no effect."<sup>73</sup> Like the *MCM*, the legislative history lacks specific guidance on implementation. In the only recorded congressional discussion of hard labor, three congressmen and COL Dinsmore, the Army representative on the committee, said:

*Mr. Gavin:* "Hard labor without confinement in excess of 45 days," what do you mean by hard labor?

*Mr. Larkin:* Hard labor I think generally is construed to mean work while in confinement.

*Mr. Gavin:* Well, what kinds of work?

*Mr. Larkin:* What kind of work is performed usually, Colonel, do you know?

*Colonel Dinsmore:* Trimming lawns, picking up garbage, digging ditches maybe—

*Mr. Rivers:* Captain of the head.

*Colonel Dinsmore:* Improving the roads around posts, general police work—just the ordinary run of housekeeping, Mr. Gavin.

*Mr. Gavin:* What about this rock-pile business with a certain cadence; that is, a certain number of blows per minute, and so forth?

*Colonel Dinsmore:* Never heard of it, sir. I know as a matter of general information that that has been used by the civil authorities sometimes. I do not say that we have not done it. I know of no case where we have.<sup>74</sup>

This brief exchange arguably left the members of Congress with the misconception that hard labor, with the possible exception of the reference to ditch digging, is little more than what is today considered extra duty.<sup>75</sup> The "ordinary run of housekeeping" tasks COL Dinsmore described in 1949 are a far cry from arduous, physical labor. Ditch digging is hard labor. At a minimum, COL Dinsmore's testimony shows that hard labor—ditch digging and possibly rock breaking—was still the custom of the service in the Army as late as the early 1950s.<sup>76</sup>

Over time, the non-physically taxing nature of the specific tasks commanders ordered as "hard labor" has diminished the punishment's intended punitive impact. This has not gone unnoticed. In 1971, a committee appointed by then Chief of Staff of the Army General William C. Westmoreland to study the effectiveness of the administration of military justice noted, "The

<sup>69</sup> *Id.* R.C.M. 1003(b)(6) discussion. The commander, as the leave and pass approval authority, determines, in an administrative capacity, to what leave or liberty a Soldier is entitled. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES (31 July 2003) [hereinafter AR 600-8-10]

<sup>70</sup> *MCM*, *supra* note 3, R.C.M. 1003(b)(6) discussion. Hard labor without confinement becomes an accused's place of duty for at least some portion of the duty day. It is the immediate commander who decides what that duty of hard labor without confinement entails.

<sup>71</sup> *See id.*

<sup>72</sup> *Id.* *See also* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001) (containing no discussion of hard labor); AR 27-10, *supra* note 3 (lacking guidance on hard labor).

<sup>73</sup> WINTHROP, *supra* note 6, at 400.

<sup>74</sup> H.R. REP. NO. 491, 81st Cong., 1st Sess. 1 (1949), *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 440 (1985).

<sup>75</sup> There is nothing in the congressional record to support or refute the notion that rock-breaking was so customary a punishment that its existence could be assumed.

<sup>76</sup> *See generally* H.R. REP. NO. 491.

'hard labor' portion of the sentence to confinement at hard labor is meaningless as far as stockade prisoners are concerned. The performance of meaningful hard labor in post stockades would have the distinctively desirable effect of making the prisoner remember his time spent in the stockade and instilling in him a strong desire never to return."<sup>77</sup> The committee recommended that "consideration be given to requiring meaningful hard labor in Army stockades for those persons sentenced to confinement at hard labor."<sup>78</sup> Unfortunately, the committee failed to both describe the specific nature of the problem and include any written recommendations in their report.

The failure of both the *MCM* and *AR 27-10* to delineate specific tasks permissible under a sentence to hard labor without confinement potentially makes determination of a sentence unnecessarily difficult for both members and military judges. Colonel Winthrop noted that "[h]ard labor, being a severe penalty, must be expressed in terms in the sentence, or it cannot be administered."<sup>79</sup> While this counters the current guidance that the immediate commander determines the nature of the punishment, it reinforces the punishment's uniqueness and the need for clear guidance for its lawful and effective implementation.<sup>80</sup>

The military judge gives panel members the following guidance about hard labor:

This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.<sup>81</sup>

Beyond the critical language describing hard labor as "in addition to other military duties which would normally be assigned," the instruction lacks specific guidance for the accused's immediate commander to follow.<sup>82</sup>

Correctional Custody Units/Facilities (CCU/CCF) provide illustrative guidance for crafting a workable definition for the *MCM* and *AR 27-10*. A workable definition is the foundation for a clear sentencing instruction. One of the most severe forms of nonjudicial punishment, the CCU/CCF serves to punish minor offenses without stigmatizing the offender with a court-martial conviction.<sup>83</sup> The U.S. Marine Corps' (USMC) Camp Lejeune CCU's mission is to "correct the attitudes and motivate awardees through hard work, intensive training, and positive leadership, thereby enabling them to return to their units and perform duties in an honorable and dependable manner."<sup>84</sup> While the Department of the Army (DA) authorizes confinement at a CCU/CCF in *AR 27-10*,<sup>85</sup> due to a lack of operational CCU/CCF's, some installations have withheld the authority to impose correctional custody as nonjudicial punishment.<sup>86</sup>

The CCUs put "awardees"<sup>87</sup> to work at hard labor.<sup>88</sup> U.S. Marine Corps policy states that awardees will, as a minimum, "be gainfully employed at least seven hours per day, five days per week, to include Sundays and holidays."<sup>89</sup> For example, at the USMC's Camp Lejeune CCU, awardees perform forty hours of hard labor a week.<sup>90</sup> Hard labor at the Camp Lejeune

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<sup>77</sup> MAJOR GENERAL S. H. MATHESON, CHAIRMAN, REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF STAFF, U.S. ARMY, BY THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE 53-54 (1971).

<sup>78</sup> *Id.* at 59.

<sup>79</sup> WINTHROP, *supra* note 6.

<sup>80</sup> *MCM*, *supra* note 3, R.C.M. 1003(b)(7) (2002) (stating, in pertinent part, "The court-martial shall not specify the hard labor to be performed").

<sup>81</sup> BENCHBOOK, *supra* note 12, at 62.1.

<sup>82</sup> The Discussion to RCM 1003(b)(7), contains no guidance provided for Soldiers sentenced to confinement at hard labor. *MCM*, *supra* note 3, R.C.M. 1003(b)(7).

<sup>83</sup> Command briefing, Correctional Custody Unit, Stone Bay Rifle Range, Camp Lejeune, NC, slide 5 (2002) [hereinafter CCU Briefing].

<sup>84</sup> *Id.* at slide 4.

<sup>85</sup> *AR 27-10*, *supra* note 3, para. 3-19b(1).

<sup>86</sup> See, e.g., *FB 27-10*, *supra* note 9, para. 2-3 (prohibiting correctional custody as a punishment). But see FORT CAMPBELL REG. 190-6, FORT CAMPBELL CORRECTIONAL CUSTODY FACILITY (4 Sept. 2001). The Fort Campbell CCF was reestablished by then-Installation and Division CSM Clifford West for the purpose of rehabilitating select Soldiers. See West Interview, *supra* note 4.

<sup>87</sup> Confinées at the CCUs are referred to as "awardees." Telephone Interview with Marine Corps Chief Warrant Officer Two (CW2) Martin Herman, Officer-in-Charge, Camp Lejeune Correctional Custody Unit, Camp Lejeune, North Carolina (Dec. 17, 2002) [hereinafter Herman Interview].

<sup>88</sup> U.S. MARINE CORPS, ORDER P1640.4C, CORRECTIONAL CUSTODY MANUAL 1-3 (9 Mar. 1999) [hereinafter MCO P1640.4C].

<sup>89</sup> *Id.* at 5-6.

<sup>90</sup> CCU Briefing, *supra* note 83, at slide 13.

CCU includes work at the “rock pile.”<sup>91</sup> At the “rock pile,” awardees literally break big rocks into little rocks.<sup>92</sup> The USMC then uses those rocks for area beautification, such as building and replacing walkways.<sup>93</sup> The CCU leadership takes a proactive approach towards potential overuse of the rock pile. They limit awardee labor on the rock pile to one day per week as a matter of policy.<sup>94</sup> In addition to the rock pile, CCU awardees are routinely required to perform other obviously physical tasks, including filling sandbags, maintaining the installation’s large number of nature trails, and conducting general area beautification.<sup>95</sup>

While the CCU leadership avoids mass punishment, the awardees are required to perform a “hell of a lot of” physical training (PT).<sup>96</sup> This is considered part of the week’s worth of hard labor, which would seem to blur the line between punishment and training.<sup>97</sup> The stated goal is to have every awardee meet his respective services’ physical fitness test requirements. Thus, the underlying purpose is rehabilitative, not punitive.<sup>98</sup> As part of the PT program, awardees routinely participate in “log drills.”<sup>99</sup> Log drill exercises use fourteen to eighteen foot long telephone poles that are six to eight inches in diameter and weigh between 300 - 400 pounds, with approximately fifty pounds of weight per awardee.<sup>100</sup> There are only six authorized log drill exercises, including the two-arm push-up, the straddle jump, and the forward bender.<sup>101</sup> While the Navy’s Safety Center warns that log drills are inherently dangerous and that failure to adhere to the proper procedures can result in serious injury or death, they remain a part of the CCU awardees’ rigorous PT program. Although the CCU example provides a useful illustration of potentially permissible forms of hard labor, the *MCM* explicitly prohibits the court from specifying the hard labor to be performed.<sup>102</sup> This makes it incumbent upon JAs to convey these standards to supported commanders.

Military courts have rarely addressed what constitutes permissible hard labor.<sup>103</sup> The Court of Military Appeals (COMA)<sup>104</sup> first discussed the 1949 congressional language<sup>105</sup> in *United States v. Bayhand*.<sup>106</sup> In determining the legality of certain orders, the court briefly discussed the punishment the accused refused to perform, the misconduct that gave rise to the charged offenses. The court described the labor the accused was ordered to perform as including working “with picks and shovels; . . . chang[ing] the course of an old ditch; the nature of the work requir[ing him] to stand in mud and water which reached half way up on [his] boots.”<sup>107</sup> The second work detail the court described involved “a regular work detail in the rock quarry . . . [where] the work was such that it reasonably could be considered as hard labor. The noncommissioned

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<sup>91</sup> *Id.* at slide 17.

<sup>92</sup> Herman Interview, *supra* note 87.

<sup>93</sup> *Id.*

<sup>94</sup> This policy arises from the fact that hard labor is not a specifically authorized nonjudicial punishment, but is instead incident to confinement at a CCU. Additionally, the CCU’s mission is rehabilitative, not punitive. *See supra* note 83. *See also* UCMJ art. 15 (2002), MCO P1640.4C, *supra* note 88.

<sup>95</sup> Herman Interview, *supra* note 87. Much of the area beautification is identical to traditional Army concepts of extra duty. *See supra* note 3.

<sup>96</sup> Herman Interview, *supra* note 87.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* The CCU at Camp Lejune, at the time of the interview, had awardees from the Navy, Air Force, and Marine Corps.

<sup>99</sup> Naval Safety Center, High Risk Training Division, *Log Drills*, available at <http://www.safetycenter.navy.mil/ashore/highrisktraining/downloads/logdrills.doc> (last visited Dec. 15, 2004).

<sup>100</sup> *Id.*

<sup>101</sup> U.S. DEP’T OF THE NAVY, U.S. MARINE CORPS, FLEET MARINE FORCE REFERENCE PUB. 0-1B, MCRP 3-02A, MARINE PHYSICAL READINESS TRAINING FOR COMBAT 3-30 (20 Jan. 1998).

<sup>102</sup> Rules for Court-Martial 1003(b)(7) states, in pertinent part, that “[t]he court-martial shall not specify the hard labor to be performed.” *MCM, supra* note 3, R.C.M. 1003(b)(7). This provision directly contravenes Colonel Winthrop’s early admonition that the terms of hard labor must be expressed in the sentence itself for it to be properly administered. *See WINTHROP, supra* note 6, at 421.

<sup>103</sup> In response to a request for clarification from a panel, one military judge defined hard labor as “fatigue drills” to include “filling, emptying, and refilling sandbags.” E-mail from CPT Brian Battles, Chief of Justice, Office of the Staff Judge Advocate, Fort Jackson, S.C., to the author (12 Dec. 2002) (on file with author).

<sup>104</sup> In 1994, the COMA was renamed the Court of Appeals for the Armed Forces (CAAF).

<sup>105</sup> *See supra* note 79.

<sup>106</sup> *United States v. Bayhand*, 21 C.M.R. 84, 89 (C.M.A. 1956).

<sup>107</sup> *Id.* at 87.

officer in charge ordered the accused to carry heavy rocks to a rockpile and assist in the loading of a wheelbarrow.”<sup>108</sup> The court did not discuss the appropriateness or inappropriateness of this punishment in the opinion. The court found the orders illegal because Bayhand was in pretrial confinement, not yet having been sentenced, and, “[t]o permit military authorities to commingle sentenced and unsentenced prisoners, and deal with them equally, would indeed require an unsentenced prisoner to serve a sentence before conviction.”<sup>109</sup> The court did not comment on the lawfulness of the underlying tasks the sentenced Soldiers were being required to perform.

In *United States v. Palmiter*, the court again incidentally addressed the issue of hard labor while analyzing whether a violation of Article 13, UCMJ, had occurred.<sup>110</sup> The court commented that “[t]he problem . . . is that the ‘hard labor’ as envisioned by Congress in 1949 and by the early military writers, is no longer being performed . . . .”<sup>111</sup> The court went on to quote the congressional committee’s specific discussion of “rock breaking,” but does not elaborate further as to the permissible scope of the sentence itself.<sup>112</sup>

### **Guidance for Implementation – Developing a FITT Plan?**

The physical nature of hard labor without confinement allows commanders to employ the same principles used to establish a balanced PT program when they determine the nature and scope of tasks to be performed as part of a sentence to hard labor.<sup>113</sup> The commander must consider four elements, called the “FITT factors,” when developing a PT program: frequency, intensity, time, and type (FITT).<sup>114</sup> These factors are readily applicable to developing a plan for executing a sentence to hard labor without confinement. Instead of frequency of exercise, frequency is how often (*e.g.*, daily, weekly) the convicted Soldier performs hard labor. Intensity is used to measure whether that Soldier is truly working or simply loafing. The third factor, duration, is the number of hours of each day’s labor. Finally, the type of exercise performed becomes the type of physical task assigned (*i.e.*, filling sandbags, moving rocks, digging foxholes).<sup>115</sup> As with any training event, a risk assessment must precede execution of the punishment.<sup>116</sup>

### **Executing a FITT Plan**

Hard labor must be a daily requirement for the duration of the sentence. For example, a convicted Soldier sentenced to ninety days of hard labor without confinement, who begins execution of that portion of his sentence on 15 July, should perform hard labor every day until the end of the day on 13 September of that same year. Commanders should grant breaks in confinement sparingly.<sup>117</sup>

Determining the appropriate intensity of the punishment is the most difficult component. Early physical mechanisms provided an objective metric for assessing how “hard” someone was working.<sup>118</sup> Objective measurements for the given task, clearly articulated in advance, are the simplest metric.<sup>119</sup> Such metrics include having the accused fill a specific number of

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<sup>108</sup> *Id.* at 765.

<sup>109</sup> *Id.* at 771.

<sup>110</sup> *United States v. Palmiter*, 20 M.J. 90 (1985).

<sup>111</sup> *Id.* at 94. The *Palmiter* court commented on the historical notions of hard labor incident to a discussion of whether or not commingling pretrial and sentenced confinees for a labor pool amounted to a violation of Article 13, UCMJ. *Id.* at 93-95.

<sup>112</sup> *Id.* at 94 (citations omitted).

<sup>113</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING paras. 1-4 through 1-7 (1 Oct. 1998).

<sup>114</sup> *Id.*

<sup>115</sup> These tasks should never be of the same type of labor done by Soldiers during the duty day. E-mail from COL (Ret.) Peter Brownback, former military judge, to author (19 Jan. 2003) (on file with author) [hereinafter Brownback E-mail]. Colonel Brownback served as a military judge for a number of years. See also AR 27-10, *supra* note 3 (defining certain restrictions on nonjudicially imposed extra duty).

<sup>116</sup> See generally U.S. ARMY SAFETY CENTER, LEADER’S GUIDE TO FORCE PROTECTION THROUGH RISK MANAGEMENT (1 Oct. 1995).

<sup>117</sup> U.S. DEP’T OF ARMY, REG. 633-30, MILITARY SENTENCES TO CONFINEMENT paras. 2b and 5b (28 Feb. 1989) defines “inoperative time” and identifies when events interrupt the execution of a sentence to hard labor without confinement. Despite the regulation’s applicability to sentences to confinement, which, by definition, do not include hard labor without confinement, the regulation provides specific guidance on hard labor without confinement on the issue of inoperative time.

<sup>118</sup> See *supra* note 21.

<sup>119</sup> The challenge for the commander is to make the metric relative to the individual Soldier’s physical and mental capabilities and stamina, while ensuring it remains sufficiently arduous.

sandbags within a given time period (*e.g.*, twenty sandbags per hour) or producing a certain poundage or volume of crushed rock for area beautification (*i.e.*, four wheelbarrows full per day). While the type of punishment will dictate the metric used to gauge intensity, a proper risk assessment will ensure a balance between the arduous nature of the punishment, its punitive effect, its productive value, and mitigation of the probability of injury.

Time is measured by the duration (*e.g.*, hours) the Soldier is required to work each day. The eight-hour workday rule does not apply.<sup>120</sup> The absence of a *per se* limitation on the length of the workday strengthens the argument that it is within the commander's discretionary authority to make a convicted Soldier's primary place of duty execution his sentence. Thus, as a practical matter, the length of each day's punishment may vary from convicted Soldier to convicted Soldier; the length of a given convicted Soldier's duty day will depend on whether the command intends to initiate administrative separation proceedings.<sup>121</sup> It logically follows that those Soldiers being retained on active duty continue their "normal" duties and perform hard labor in addition to those military occupational specialty (MOS)-specific duties. Conversely, those Soldiers being separated need not maintain MOS proficiency and can focus on the performance of hard labor to the exclusion of what would, absent the conviction and sentence, be their "normal" duties.

First, Soldiers serving a sentence of hard labor without confinement do so only as a result of a court-martial conviction, and these sentences were historically accompanied by a reduction in grade.<sup>122</sup> Anecdotal evidence indicates this is still true. By virtue of the conviction and the reduction, if any, the convicted Soldier's "normally assigned duties" necessarily change.<sup>123</sup> Other possible reasons for a change in duties include that the Soldier may have lost his security clearance and with it his MOS qualifications.<sup>124</sup> The change in duties for a Soldier in a leadership position prior to his conviction will be even greater. Loss of confidence in a Soldier's leadership abilities due to misconduct all but guarantees removal of that convicted Soldier from the leadership position and an accompanying change in that Soldier's normally assigned duties.<sup>125</sup>

Second, it is more likely than not that a Soldier convicted at court-martial and sentenced to hard labor without confinement will not be retained on active duty after punishment is complete.<sup>126</sup> The command's desire to administratively separate or, in the rare case, retain the Soldier should also help define the length of each day's execution of the punishment. The duties normally assigned to a Soldier reduced in rank or being administratively separated from the Army, or both, should not be the same as for a Soldier being rehabilitated and retained.<sup>127</sup>

In any unit, a Soldier's immediate commander defines that Soldier's duties. This fundamental precept of military organizations does not change for Soldiers convicted at a court-martial; a convicted Soldier's immediate commander defines that convicted Soldier's duties. The convicted Soldier's duties will almost always change from what they were pre-conviction. In some cases, a conviction mandates a much narrower scope of unit duties, however, it is still the commander who defines those duties. If the Soldier is being administratively separated from the Army, the commander must be

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<sup>120</sup> See *supra* note 35.

<sup>121</sup> At least one senior current military judge disagrees with this premise, asserting that neither factor should impact the length of each day's punishment. This is based on the belief that, as a legal matter, commanders are not empowered to make execution of the sentence to hard labor without confinement the convicted Soldier's primary place of duty. E-mail from COL Ted Dixon, Chief Circuit Judge, Fourth Judicial Circuit (May 3, 2004) (on file with author) [hereinafter COL Dixon E-mail]. Explicitly delineating the ability to make sentence execution the Soldier's primary place of duty would mitigate this concern.

<sup>122</sup> The court-martial sentence of an enlisted Soldier in a pay grade above E1 to hard labor without confinement automatically reduces that Soldier to the grade of E1. UCMJ art. 58a (2002). *But see* AR 27-10, *supra* note 3, para. 5-28e, prohibiting such automatic reductions in the Army and limiting them to cases in which a punitive discharge or greater than six months confinement were adjudged.

<sup>123</sup> For example, a SSG (E6), reduced to Private (E1), and sentenced to ninety days of hard labor is not going to be performing the normally assigned duties of an E6, which would likely include squad or section leader or tank commander. While the execution of the hard labor cannot begin until the convening authority takes action, the reduction in grade takes effect fourteen days after the sentence is adjudged. UCMJ art. 57. The Discussion to RCM 1113(a) lists the exceptions of those sentences which may be carried out prior to their being ordered executed by the convening authority; hard labor without confinement is not an enumerated exception. MCM, *supra* note 3, R.C.M. 1113(a) discussion.

<sup>124</sup> See generally U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM (9 Sept. 1988). See also U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (15 July 2004). For example, Soldiers in the ADA military occupational specialties (14-series) require a security clearance, as do Signal Corps Soldiers (31-series), and Military Intelligence Soldiers (96, 97, and 98-series).

<sup>125</sup> See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-17 (13 May 2002). In all likelihood, this change of duty positions will have occurred prior to the court-martial. The conviction makes restoration to the prior leadership position highly unlikely.

<sup>126</sup> Of the thirty-five summary courts-martial referenced in note 14, *supra*, thirty-four of the thirty-five Soldiers were administratively separated from the Army. The majority of these offenses were Article 112a, UCMJ offenses, and all most all of them were personal use of controlled substances.

<sup>127</sup> West Interview, *supra* note 4.

empowered to make that Soldier's primary duty the execution of his sentence to hard labor.<sup>128</sup> The specific prohibition against this was deleted nearly twenty years ago.<sup>129</sup> Furthermore, the limited discussion in the *MCM* of this topic focuses on not allowing a Soldier to use performance of hard labor to "get out" of other regular duties—that is to say, *if* there are other duties, they must be performed *in addition to* the hard labor.<sup>130</sup> The Discussion states, in pertinent part, that performance of the sentence to hard labor without confinement "does not excuse or relieve a person from performing regular duties."<sup>131</sup> Most importantly, however, is the next sentence: "Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed."<sup>132</sup> This is especially true in cases where the Soldier's conviction prevents him from accomplishing his MOS-specific duties.

The convicted Soldier is still a Soldier, and he can be required to participate in unit PT and other unit-wide formations and events (*e.g.*, changes of command, etc.). Those exceptions notwithstanding, the command can order him to begin his hard labor immediately following PT, personal hygiene and breakfast.<sup>133</sup> In the rare instance where the Soldier is retained, it is possible that the time of execution (although not the frequency, intensity or type of task) may practically differ, as the commander may likely have determined that the Soldier should first complete a normal duty day, in a position commensurate with the Soldier's rank and MOS, before performing his hard labor. While the hours of a Soldier being retained and executing hard labor without confinement may therefore be more similar to those of a Soldier performing extra duty (*e.g.*, both conducted at the end of the "normal" duty day, 1700), the type of tasks the Soldier is required to complete (*e.g.*, lawn mowing versus trench digging) should remain distinct.

Commanders and their JAs have difficulty determining the specific type of hard labor to be performed. Legally permissible hard labor should include rock breaking for purposes of area beautification.<sup>134</sup> It also includes strictly punitive tasks such as repetitively filling and emptying sandbags.<sup>135</sup> A commander can require a Soldier sentenced to hard labor without confinement to move large piles of dirt or heavy rocks for no purpose other than to keep the Soldier working.<sup>136</sup> Similarly, the commander can have the Soldier dig fighting positions, whether done for the sole punitive purpose of having the Soldier fill them back in or for more permanent use in an installation's dedicated training area.<sup>137</sup> The commander can also increase the arduous nature of the punishment by limiting the resources available to the Soldier, for example, requiring him to dig fence post holes with his issued entrenching tool rather than with a post-hole digger. Regardless of the task selected, hard labor should *never* default to those routine extra duty tasks Soldiers perform as a result of nonjudicial punishment.

The FITT provides the commander and his advising JA a useful framework for developing and assessing a plan to execute a sentence to hard labor without confinement. The frequency is driven strictly by the calendar. Start on day one and finish once the adjudged number of days has been served, sparingly making adjustments for Soldier-driven interruptions. The commander's and supervising noncommissioned officer's subjective observation must be balanced against their objective assessment of the actual execution and the Soldier's measurable level of productivity in order determine the intensity of the hard labor. The punishment's time will be determined by the command's end state of rehabilitation and retention or separation. Finally, the command's needs (*e.g.*, gravel for a new sidewalk) and intent (whether the labor will be strictly punitive, productive, or a combination of both) will influence the commander's determination of the type of punishment imposed.<sup>138</sup>

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<sup>128</sup> At least one current senior military judge does not believe a commander is currently legally authorized to determine that a Soldier will perform no military duties for ninety days and that a Soldier's duty day will consist solely or principally of performing hard labor without confinement. COL Dixon E-mail, *supra* note 121.

<sup>129</sup> See *supra* note 74 and accompanying text.

<sup>130</sup> See *supra* note 75 and accompanying text.

<sup>131</sup> *MCM*, *supra* note 3, R.C.M. 1003(b)(6) (Discussion).

<sup>132</sup> *Id.*

<sup>133</sup> A meal-ready-to-eat (MRE) and an adequate supply of water meets the requirements for each of the Soldier's daily meals. A MRE meets the nutritional standards established by the U.S. Army Surgeon General. U.S. DEP'T OF ARMY, REG. 40-25, NUTRITION STANDARDS AND EDUCATION para. 2.2 (15 June 2001).

<sup>134</sup> One option is to have those Soldiers serving sentences to hard labor without confinement break the rocks to line the sidewalks and have the extra duty personnel paint them. Brownback E-mail, *supra* note 115.

<sup>135</sup> *But see* West Interview, *supra* note 4. Command Sergeant Major West argued that requiring Soldiers to do a physical task simply to have them (or anyone else) undo it later is degrading itself, and serves no other purpose other than perpetuating the accused's agony.

<sup>136</sup> *But see id.*

<sup>137</sup> *But see* Brownback E-mail, *supra* note 115 (arguing that having Soldiers dig foxholes as part of or for a specific unit training event is something Soldiers are supposed to do; having Soldiers dig foxholes on ranges used by the entire installation is "a much better use" of a convicted Soldier's labor).

<sup>138</sup> Appendix C contains one special court-martial convening authority's guidance for execution of sentences to hard labor without confinement.

## Practical Definitions

The current language in the *MCM*, *AR 27-10*, and the *Military Judges' Benchbook* fails to clearly define hard labor. The Discussion to RCM 1003(b)(6) currently reads:

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.<sup>139</sup>

The Discussion fails, at a minimum, to address: (1) whether or not the punishment must include productive labor; (2) whether its completion is time or task dependent; and, (3) whether it can become a Soldier's "place of duty." It should be changed to read:

Hard labor without confinement need not be performed in addition to other regular duties; it may be designated by the imposing commander as the Soldier's primary place of duty. The imposing commander will designate the amount and character of the labor. The labor to be performed need not be productive labor and the commander will determine whether its daily completion is time or task dependent. Upon completion of the daily assignment, the accused should be permitted to take liberty to which entitled. No hard labor may be imposed that constitutes cruel or unusual punishment, a punishment not sanctioned by the customs of the Service, is a duty normally intended as an honor, or constitutes a safety or health hazard to the accused. See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

In attempting to clarify the language of potentially overlapping punishments, the definitions of extra duty and fatigue duty must also be amended. The *MCM* defines "extra duties" as those that:

[I]nvolve the performance of duties in addition to those normally assigned to the person undergoing punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by the customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grade or position.

Although the *MCM* fails to define either hard labor or fatigue duties, *AR 27-10* does closely follow the language of the *MCM* in defining extra duty:

(5) *Extra duties.* Extra duties may be required to be performed at anytime and, within the duration of the punishment, for any length of time. No extra duty may be imposed that—

(a) Constitutes cruel or unusual punishment or a punishment not sanctioned by the customs of the Service; for example, using the offender as a personal servant.

(b) Is a duty normally intended as an honor, such as assignment to a guard of honor.

(c) Is required to be performed in a ridiculous or unnecessarily degrading manner; for example, an order to clean a barracks floor with a toothbrush.

(d) Constitutes a safety or health hazard to the offender, or

(e) Would demean the Soldier's position as a NCO or specialist (*AR 600-20*).<sup>140</sup>

While no change is necessary to the *MCM*, the *AR 27-10* definition of extra duty should include the statement, "Fatigue duties may be imposed as extra duties."

An amended, *AR 27-10* should also include a definition for fatigue duty. The definition for fatigue duties should be included immediately after the definition for extra duties in paragraph 3-19 and be defined as:

<sup>139</sup> *MCM*, *supra* note 3, R.C.M. 1003(b)(6).

<sup>140</sup> *AR 27-10*, *supra* note 3, para. 3-19b(5).

(6) *Fatigue Duties*. Fatigue Duties may be required to be performed at anytime and, within the duration of the punishment, for any length of time. All prohibitions in paragraph (5)(a)-(d), above, apply. Punishments—

(a) May require hard, physical labor; for example, manual ditch digging or preparation of fighting positions,

(b) Are not required to involve productive work.

(c) May not include routine physical fitness training events, and

(d) May be executed in conjunction with Soldiers executing sentences to hard labor without confinement as a result of a court-martial.

Once the *MCM* and *AR 27-10* are amended, the *Military Judges' Benchbook* instruction should be amended to reflect the ability to require execution of a sentence to hard labor without confinement as the accused's primary duty. Currently, the *Military Judges' Benchbook* states:

This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to or to the exclusion of other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.<sup>141</sup>

Changes to the *Military Judges' Benchbook* necessitate the following changes to the worksheet in the *MCM*.<sup>142</sup>

To perform hard labor without confinement for \_\_\_\_\_ (days) (months) [circle one] (in addition to)(to the exclusion of) [circle one]all regularly assigned military duties.

A change to the *MCM* will ensure the immediate commander and supporting JA can appropriately distinguish between hard labor, extra duty, and fatigue duty. The recommended changes will assist the commander and advising JA in the proper execution of extra duties.

### **Collateral Attacks on the Nature of the Hard Labor**

A Soldier required to perform hard labor without confinement has a limited arsenal with which he can attack the nature of the hard labor he is required to perform.<sup>143</sup> Judicial options are virtually nonexistent, and administrative options are unlikely to bring any relief.<sup>144</sup>

Hard labor without confinement cannot begin until the convening authority takes action.<sup>145</sup> Consequently, requesting a post-trial Article 39(a) session to raise an allegation of unlawful punishment before a military trial judge is impossible.<sup>146</sup> Therefore, the accused cannot challenge, in his post-trial clemency submissions, the nature of punishment he has not yet begun.<sup>147</sup> Once the convening authority takes action, the military trial judge's jurisdiction is lost. Unless and until a superior authority directs a post-trial hearing, the accused cannot return to the court originally exercising jurisdiction.<sup>148</sup>

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<sup>141</sup> BENCHBOOK, *supra* note 12, at ch. 2, § V, para. 2-5-22.

<sup>142</sup> *MCM*, *supra* note 3, app. 11.

<sup>143</sup> For example, a monetary damage claim in federal district court for cruel and unusual punishment is barred by the *Feres* doctrine. *United States v. Kinsh*, 54 M.J. 641, 646 (Army Ct. Crim. App. 2000) (citing *Feres v. United States*, 340 U.S. 135 (1950)).

<sup>144</sup> Note that a proposed change being considered by Office of the Judge Advocate General, Criminal Law Division, is to provide judicial oversight of charges from preferral (versus referral) through receipt by the Army Court of Criminal Appeals, rather than at authentication. Such a change may provide greater oversight of the implementation of these sentences.

<sup>145</sup> *MCM*, *supra* note 3, R.C.M. 1113(a). Another proposed change being considered by Office of The Judge Advocate General Criminal Law Division, is that all sentences involving a deprivation of liberty take effect immediately, as sentences to confinement currently do. This change would keep the case under the military trial judge's jurisdiction, providing additional oversight of the implementation of these sentences. See *infra* note 146. Any discussion as to the inherent benefits of such timely imposition, however, is beyond the scope of this article.

<sup>146</sup> The military judge loses the authority to convene a post-trial session once the record is authenticated. Rule for Court-Martial 1102(d) states, in pertinent part, that the convening authority "may direct a post-trial session any time before the convening authority takes initial action on the case" pursuant to RCM 1107. *MCM*, *supra* note 3, R.C.M. 1102(d).

<sup>147</sup> Rule for Court-Martial 1105 allows the accused to submit "any matters" that "may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Since this happens prior to action, and the hard labor is not executed until after action, this routine "second bite at the apple" is closed as a means of raising the issue of the nature of the hard labor. *Id.* R.C.M. 1105.

<sup>148</sup> *Id.* R.C.M. 1102. See also *id.* R.C.M. 1201(b)(4); R.C.M. 1203(c)(2); *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

Cases in which hard labor without confinement is adjudged are not normally subject to review by the Court of Criminal Appeals (CCA).<sup>149</sup> Although GCM cases are reviewed by the Office of the Judge Advocate General,<sup>150</sup> and can be forwarded to the Army Court of Criminal Appeals (ACCA),<sup>151</sup> the ability to set aside the sentence is largely nullified by the fact that the sentence will likely have already been executed.<sup>152</sup> Relief at that point in time would be meaningless. The appellate courts, if they have jurisdiction, may require exhaustion of all administrative remedies prior to consideration of any appeal on the issue.<sup>153</sup>

The nature of the hard labor is an administrative decision.<sup>154</sup> Since the immediate commander, in a nonjudicial capacity, determines such punishment, Article 138 may be the most appropriate forum for requesting redress and the most effective method for gaining timely relief.<sup>155</sup> Article 138, UCMJ, Complaints of Wrongs, provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.<sup>156</sup>

Thus, Article 138, UCMJ, potentially returns to the convening authority jurisdiction lost when he took initial action. Article 138 specifically excludes certain actions from potential resolution under its procedures.<sup>157</sup> Although “matters relating to courts-martial” are listed as the first specific example of those matters inappropriate for resolution under Article 138, that arguably applies only to those matters where review is “specifically provided by the UCMJ” or by “a court authorized by the UCMJ” or a “military judge or military magistrate.”<sup>158</sup> None of those appellate options exist for an accused to challenge the nature of his hard labor without confinement.

The likelihood of success through such a request for redress is low if the commander implemented his plan with the advice of his servicing JA. The staff judge advocate (SJA) who advises the convening authority on the Article 138 complaint will likely be the same supervising SJA whose trial counsel originally advised the commander on the nature of the punishment now in question. Nonetheless, it remains an immediately available tool.

A second immediately available form of potential relief would be a complaint to the inspector general (IG).<sup>159</sup> Again, however, this procedure faces the same hurdle as the Article 138 complaint—the SJA who advises the IG will be the same supervising SJA whose counsel advised the commander on the nature of the punishment to be implemented.

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<sup>149</sup> MCM, *supra* note 3, R.C.M. 1201(a). Hard labor without confinement is rarely accompanied by the punitive discharge or confinement that would trigger the requirement for referral to the Army Court of Criminal Appeals.

<sup>150</sup> *Id.* R.C.M. 1201(b)(1).

<sup>151</sup> *Id.* R.C.M. 1203(b).

<sup>152</sup> Given the ninety-day maximum on hard labor without confinement and the time it takes TJAG to review a record of trial, a case in which hard labor without confinement is adjudged is unlikely to ever be reviewed, thus making the claim moot.

<sup>153</sup> *See United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993) (holding that, where a case was not ripe for review under Article 67(a), UCMJ, but was in fact reviewable; although Article 55, UCMJ, prohibits cruel and unusual punishment, absent unusual or egregious circumstances, the petitioner must seek administrative relief prior to invoking judicial intervention).

<sup>154</sup> The commander’s discretion to determine the nature of the hard labor meets the requirements under AR 27-10, para. 20-4e, requiring “a discretionary act” by the commanding officer that is, *inter alia*, “in violation of law or regulation” or “arbitrary, capricious, or an abuse of discretion.” Thus, an accused might be able to raise an Eighth Amendment claim under Article 138, UCMJ.

<sup>155</sup> *See MCM, supra* note 3, R.C.M. 1003(b)(6) (defining the commander as the authority for determining the nature of the hard labor).

<sup>156</sup> UCMJ art. 138 (2002). Although AR 27-10 specifically includes “[m]atters relating to courts-martial” as those actions for which Article 138 is inappropriate, that example assumes that review “is provided specifically by the UCMJ” or is “otherwise reviewable by a court authorized by the UCMJ or by a military judge or military magistrate.” AR 27-10, *supra* note 3, para. 20-5.

<sup>157</sup> AR 27-10, *supra* note 3, para. 20-5.

<sup>158</sup> *Id.* para. 20-5a(1).

<sup>159</sup> *See generally* U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 2002).

Complaints under Article 138 and to the IG have logistical roadblocks that must be overcome by the Soldier. The Soldier must either draft his request for redress while exhausted, late at night, following the conclusion of the day's labor, or have a commander who is willing to allow him to cease execution of his sentence in order to challenge that very punishment. Making a complaint to the IG or to the Soldier's congressman carries with it similar burdens. The IG, generally being physically located on the installation, can respond quickly; a congressional complaint, although required to be completed in a timely manner, is not nearly as expeditious. The accused runs the risk that his complaint will be mooted by the completion of the sentence. There is no requirement that the imposing commander suspend execution of the sentence while awaiting IG resolution.

Extraordinary writs cannot be used to appeal the nature of the hard labor imposed. The All Writs Act<sup>160</sup> is to be used only in exceptional cases where there is a clear abuse of discretion or usurpation of judicial authority.<sup>161</sup> Extraordinary writs are "to confine inferior courts" to the lawful exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so.<sup>162</sup> The Court of Appeals for the Armed Forces (CAAF) is confined to "the review of specified sentences imposed by courts-martial."<sup>163</sup> The nature of the hard labor is a commander's decision, not a judicial one. It is an executive action within the commander's purview and not a finding or sentence over which the court can exercise jurisdiction.

Other avenues of judicial review are equally limited. Application for relief under Article 69, UCMJ, is limited to those cases in which the case has been finally reviewed by The Judge Advocate General, but not the Army Court of Criminal Appeals.<sup>164</sup> Furthermore, such relief is limited to findings in special or summary courts-martial only.<sup>165</sup> Even if the Soldier can clear all of those hurdles, the timeliness of any relief would likely be mooted, as a 90-day sentence cap almost guarantees that the punishment will have since been completed.<sup>166</sup>

### Lessons Learned

Interviews with Soldiers sentenced to hard labor without confinement reveal what commanders both fear and hate about these sentences—that "it's no more a deterrent than extra duty is" because Soldiers are "doing the same thing extra duty personnel are doing."<sup>167</sup> Time is a serious component of the hardness of hard labor. One Soldier commented, "extra duty personnel have a set task—when they finish, they're done. I have a set time; it doesn't matter how fast or slow I go, I just have to keep working. The time is the worst thing about [hard labor]."<sup>168</sup> While the comment reinforces the punitive nature of the time component of the FITT, it also highlights the need for the command to closely monitor the intensity component. The commander must carefully select the NCO who supervises a Soldier executing a sentence to hard labor without confinement.<sup>169</sup> Supervision by an NCO who was previously junior to the now-reduced convicted Soldier will likely result in

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<sup>160</sup> The All Writs Act, states:

- (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law.
- (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1651(a) (2000).

<sup>161</sup> *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957). The nature of the punishment is reserved exclusively to the commander, is an administrative decision, and thus, by definition, cannot be a usurpation of judicial authority.

<sup>162</sup> *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964).

<sup>163</sup> *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (holding that since the court-martial cannot define the specifics of the hard labor to be executed, the nature of that punishment is beyond the jurisdiction of the court where the court-martial was final and the accused was able to seek relief through administrative channels). *See also* *United States v. Bevilacqua*, 39 C.M.R. 10, 11 (C.M.A. 1968) (holding the court's power to review is expressly conditioned by the provisions of Article 67). *But see* *United States v. Kinsch*, 54 M.J. 641, 645 (Army Ct. Crim. App. 2000) (holding that although cruel and unusual punishments are not part of the adjudged/approved sentence, they are not collateral matters outside of the court's jurisdiction as defined by Article 66(c), UCMJ, where the case is before the court on direct appeal and not by extraordinary writ); *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000) (holding that Article 66(c), UCMJ, bestows jurisdiction on the service courts to consider constitutional claims of cruel and unusual post-trial treatment in cases properly referred to them, but only in so much as those claims are considered as part of the court's determination of sentence appropriateness).

<sup>164</sup> AR 27-10, *supra* note 3, para. 14-1a.

<sup>165</sup> *Id.*

<sup>166</sup> It would seem logical that a Soldier, if challenging the nature of the hard labor he was being required to then execute, would seek immediate rather than eventual, post-execution relief.

<sup>167</sup> Bruce Interview, *supra* note 33.

<sup>168</sup> *Id.*

either vengeful extremism or an abundance of “slack” as the punishment is executed.<sup>170</sup> Either situation is unacceptable. Careful selection of the supervising NCO is critical to effective execution of the sentence.

Confinement at the Army’s Regional Confinement Facilities (RCF) has been met with mixed reviews. Fort Bliss commanders routinely found, and complained loudly to their trial counsel, that most Soldiers returning from the RCFs bragged about the “vacation” they had “sleeping and shooting hoops.”<sup>171</sup> As a result, commanders lost faith in both the punitive and deterrent value of sentences to confinement at the RCFs. When the perceived limited deterrent value was coupled with a cost-benefit analysis of the funds and personnel associated with confining a Soldier, commanders became increasingly motivated to mitigate sentences to confinement.<sup>172</sup> The convening authority for a summary court-martial can mitigate a sentence of thirty days confinement to thirty days of hard labor without confinement.<sup>173</sup> By mitigating sentences, commanders were able to minimize costs as well as impact on unit training and readiness while ensuring that the punishment was truly punitive. Given the commander’s control over execution of sentences to hard labor without confinement, commanders felt that the end state of punishment prior to separation, or punishment with a view towards rehabilitation, was actually accomplished when they controlled the nature of the punishment.<sup>174</sup> Mitigation gave commanders a tool to avoid courts-martial awarding Soldiers “RCF vacations.”

### **Making Little Rocks Out of This Big Rock**

History, as outlined at the beginning of this article, supports the requiring of arduous physical labor as an element of executing a sentence to hard labor without confinement.<sup>175</sup> There is no requirement that such labor be productive labor; it can be labor for punishment’s sake. Once imposed, a court-martial sentence to hard labor without confinement should be strictly enforced. Relaxed enforcement of these punishments is indicative of and, arguably produces, lax unit discipline, thus vitiating its effect throughout the military justice system.<sup>176</sup> The *MCM* explicitly reserves to commanders the authority to determine the nature of the punishment. In order to equip commanders with legally sufficient programs capable of withstanding administrative attack, JAs can use the same the FITT principles that guide the development of unit physical fitness programs. The FITT factors provide commanders and JAs the structure for determining and assessing the specifics of legally sufficient punishment. Where commanders have well-planned, resourced, and consistent programs for implementing sentences of hard labor without confinement, Soldiers *can* be made to work—and work long and hard. In the end, breaking rocks in the hot sun can be done and the law can win.

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<sup>169</sup> West Interview, *supra* note 4. Command Sergeant Major West was adamant that skilled individuals needed to supervise hard labor without confinement. Any NCO pulled away from his routine duties to supervise an accused is hurting both the unit and the Soldiers that NCO normally supervises. Command Sergeant Major West is very skeptical of NCOs who volunteer for this duty. His experience shows these tend to be individuals who take perverse pleasure from another’s agony, and this greatly increases the risk of turning punishment into abuse. Command Sergeant Major West believes that is why correctional confinement units/facilities (CCU/CCFs) went away across the Army.

<sup>170</sup> *Id.*

<sup>171</sup> Interview with Captain Darwin Strickland, 11th Brigade Trial Counsel, Office of the Staff Judge Advocate, Fort Bliss, Texas (Apr. 10, 2002) [hereinafter Strickland Interview].

<sup>172</sup> Fort Bliss is a remote installation. The Department of the Army routinely assigns Soldiers from Fort Bliss sentenced to confinement to destinations as distant as Charleston, S.C., Quantico, Va., Fort Sill, Okla., or Fort Lewis, Wash. None of these RCFs are within driving distance and all require the expenditure of a significant amount of a unit’s Operation and Maintenance funds to execute a sentence to confinement. The average cost of execution was close to \$3000 per confinee (notes on file with author).

<sup>173</sup> Rule for Court-Martial 1107(d)(1) does not necessarily support the proposition that a summary court-martial convening authority can mitigate a sentence of thirty days confinement to thirty days of hard labor without confinement. See AR 27-10, *supra* note 3, para. 3-26a(1). A mitigation of a sentence involving a deprivation of liberty (*e.g.*, confinement) to a sentence involving an equal number of days (quantity) but no deprivation of liberty (quality) is permissible. See also *MCM*, *supra* note 3, R.C.M. 1003(b) (listing punishments in apparent, although not explicit, order of severity, from least to most severe).

<sup>174</sup> See Strickland Interview, *supra* note 171.

<sup>175</sup> See *supra* notes 13-37 and accompanying text.

<sup>176</sup> F. GRANVILLE MUNSON & WALTER H.E. JAEGER, UNITED STATES ARMY OFFICERS’ HANDBOOK OF MILITARY LAW AND COURT-MARTIAL PROCEDURE (ARMY OFFICERS’ BLUE BOOK) 10 (1942).

## Appendix A

	<b>COURTS-MARTIAL</b>	<b>NONJUDICIAL PUNISHMENT</b>	<b>ADMINISTRATIVE ACTIONS</b>
<b>LIBERTY</b>	Death Confinement <sup>177</sup> Restriction	Restriction House arrest <sup>178</sup> Correctional Custody	Revocation of pass privileges <sup>179</sup>
<b>DISCHARGE</b>	Dismissal <sup>180</sup> Dishonorable Discharge Bad Conduct Discharge	None	Other than Honorable General Honorable Unqualified
<b>PHYSICAL</b>	Hard labor without confinement (includes fatigue duty)	Extra duty (includes fatigue duty)	None
<b>FINANCIAL</b>	Total forfeitures Fine Reduction to E1 <sup>181</sup>	Limited Forfeitures Reduction <sup>182</sup>	Recoupment <sup>183</sup> Administrative fee <sup>184</sup> Administrative reduction <sup>185</sup>
<b>OTHER</b>	Reprimand/Admonition	Reprimand/Admonition	Reprimand/Admonition

*Figure 1*

<sup>177</sup> Ranging from one day to life without parole. *See generally* MCM, *supra* note 3, R.C.M. 1003(b)(7).

<sup>178</sup> Only in cases of commissioned and warrant officers when imposed by a general officer or the general court-martial convening authority. AR 27-10, *supra* note 3, tbl. 3-1.

<sup>179</sup> The commander, as the leave and pass approval authority, determines, in an administrative capacity, to what leave or liberty a Soldier is entitled. AR 600-8-10, *supra* note 69, para. 2-1d. *But see* Major Mark Johnson, *TCAP Tip of the Day: Pretrial Restraint and Recent Cases* (undated) (arguing that any restriction normally associated with merely “pulling pass privileges” may fall into the category of more than mere “conditions on liberty,” and may constitute restriction in lieu of arrest) (on file with author).

<sup>180</sup> Only in the cases of commissioned officers, commissioned warrant officers, cadets, and midshipmen and only at a GCM. MCM, *supra* note 3, R.C.M. 1003(b)(8)(A).

<sup>181</sup> Often referred to as “the fine that keeps on giving” (or taking, as the case may be).

<sup>182</sup> Reductions are limited by two factors—the rank of the officer imposing punishment and the rank of the Soldier being punished. *See generally* AR 27-10, *supra* note 3, para. 3-19b(6).

<sup>183</sup> *See* U.S. DEP’T. OF ARMY, REG. 37-104-4, MILITARY PAY AND ALLOWANCES POLICIES AND PROCEDURES-ACTIVE COMPONENT para. 31-2 (30 Sept. 1994). *See generally* U.S. DEP’T. OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY SERVICE OBLIGATIONS (18 Apr 1994); U.S. DEP’T. OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (29 June 2002).

<sup>184</sup> For example, in cases of shoplifting, the Army and Air Force Exchange Service charges a \$200 administrative fee.

<sup>185</sup> *See generally* U.S. DEP’T. OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS (20 Jan. 2004).

## Appendix B

### Venn Diagram Illustrating Interplay Between Levels of Punishment

#### Financial Punishment

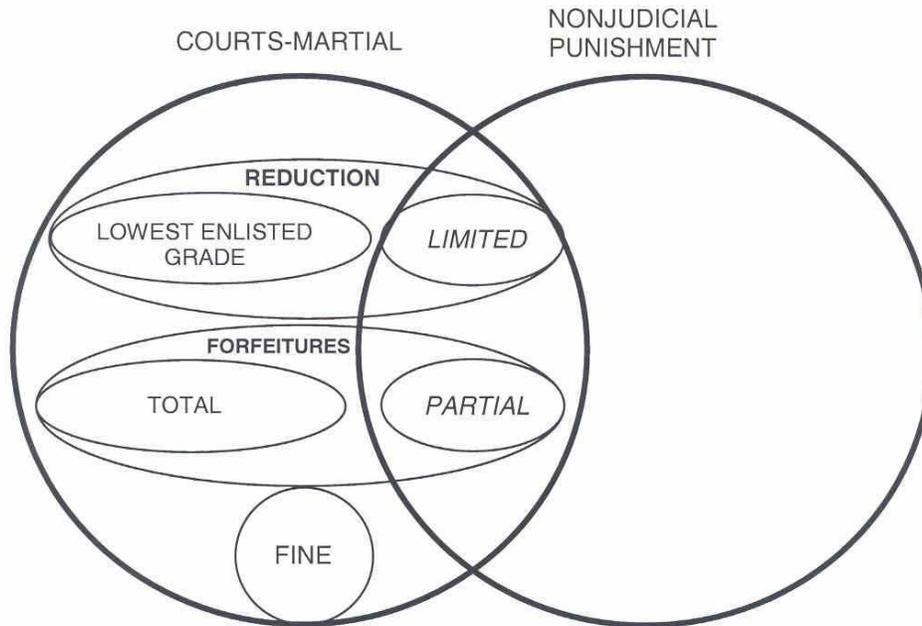
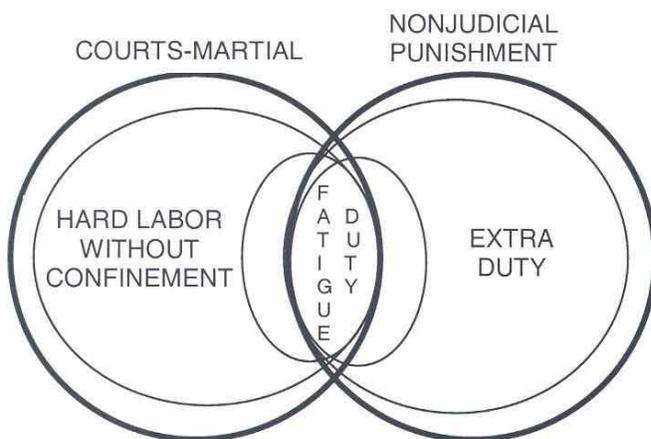


Figure 2

In Figure 2, all financial forms of punishment available to a commander administering nonjudicial punishment are available to the military judge or panel at a general court-martial.

#### Physical Punishment



In Figure 3, both courts-martial and NJP are represented by a distinct circle showing both mutually exclusive punishments (hard labor without confinement and extra duty, respectively) and the overlapping subset of available punishment (fatigue duty).

Figure 3

## Appendix C

### Sample Major Subordinate Command Guidance

#### MEMORANDUM FOR DISTRIBUTION

SUBJECT: Executing Sentences to Hard Labor Without Confinement

1. The Uniform Code of Military Justice allows for hard labor without confinement to be adjudicated as a form of punishment at courts-martial but it does not define this punishment.
2. All Soldiers who fall under the Special Court-Martial Convening Authority of XX Brigade who have been convicted by a court martial and sentenced to serve hard labor as their punishment (or part of their punishment), and who are being processed for administrative separation, will do the following:
  - Physical, manual labor in support of operations that will be executed 7 days a week, until their punishment is completed. Examples include: filling sand bags; digging ditches, building field fortifications, conducting range road repairs, constructing unit training sites, etc.
  - The standard for intensity (number of sandbags filled, depth and length of fortifications, etc.) will be determined by the immediate commander and reassessed at least every 48 hours.
  - Hours of execution are as follows:
    - Weekdays, except Thursdays – 0900 hours to 2100 hours\*
    - Thursdays and Saturdays – 0700 hours to 2100 hours\*
    - Sundays – 1300 hours to 2100 hours\*\*End time is a NET time. If the day's mission/task has not been completed to standard, the detail's schedule may extend beyond 2100 hours but Soldiers will get a minimum of six hours of rest before the next day of hard labor begins.
  - With the exception of those Soldiers identified in paragraph 9, below, Soldiers serving hard labor will not participate in normal unit training or activities other than PT.
  - Soldiers will be allowed 30 minutes for the noon meal and one hour for the evening meal. The MRE is a suitable noontime / evening meal to avoid loss of time due to troop transportation if the work site is more than 15 minutes (driving or walking) from the nearest dining facility (DFAC).
  - The uniform for Soldiers serving hard labor is: LCV with canteens and first aid bandage; BDUs; black leather gloves; reflective vest, D-handle shovel, mattock, and soft cap. Soldiers serving hard labor will report daily in the basic uniform and with their ruck-sack containing the following items: entrenching tool, field jacket, wet weather gear, overshoes, sun-wind-dust goggles, extra socks, and balaclava. The NCOIC may adjust the uniform, as necessary.
  - Where feasible, Soldiers serving hard labor will be marched to the hard labor site, carrying the implements required to execute the mission and their rucksacks.
  - Hard labor details will be supervised by a noncommissioned officer (NCO) and will be that NCO's place of duty.
3. The Brigade Command Sergeant Major (CSM) has overall responsibility for planning and executing hard labor details. Subordinate units will submit recommendations for details to the CSM for consideration and scheduling. The CSM will designate units to provide an NCO(s) to supervise the hard labor detail on a rotational basis. The CSM will direct the Brigade S-3 to task subordinate units to provide equipment (*i.e.*, vehicle support) that may be necessary for task execution or direct the Brigade S-4 to procure equipment and supplies required for task execution.
4. The NCO(s) supervising the hard labor detail will:
  - Hold the hard labor detail's initial daily formation in front of the Brigade Headquarters IAW the times specified in paragraph 2.
  - Render a morning accountability report and an end of day status report to the Brigade CSM or SDO.
  - Conduct a risk assessment of all details to ensure the health of detailed Soldiers is safeguarded. Consideration must be given to ensure: sufficient water is available and Soldiers remain hydrated; uniforms are adjusted as workload and the temperature/weather varies; a medical support plan is developed so the detail can obtain emergency care if necessary; and appropriate safety gear (*i.e.*, Kevlar) is used when tasks merit it.
5. The unit detailed to provide the supervising NCO(s) will also provide vehicle, mess and medical support, as required, to execute missions tasked to the detail.

6. The brigade paralegal NCOIC will provide unit commanders and the Brigade CSM the names of Soldiers who have been sentenced to serve hard labor and the dates hard labor should begin and end. The Brigade CSM will notify the Soldier's 1SG when hard labor is scheduled to begin. *Only I may excuse a Soldier from a day of hard labor once punishment begins.* Except upon my determination that there is good cause for excusal, excusal from a hard labor detail for a day will result in the Soldier not receiving credit as having served hard labor on that day. The Soldier will execute the number of days of hard labor specified by the court, even if those days are not consecutive.
7. Soldiers executing hard labor will not be subjected to ridicule, humiliation, hazing, or other forms of degrading treatment.
8. Hard labor is not the same as extra duty allowed as punishment under the various levels of non-judicial punishment (Article 15s).
9. Commanders will make a determination, prior to execution of the sentence to hard labor without confinement, as to whether or not the Soldier will be retained. For those Soldiers who will be retained on active duty once their sentence is complete, their hours will be adjusted by their immediate commander, on a case-by-case basis, to allow for completion of normal unit duties prior to daily completion of hard labor.

# The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice

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## Introduction

The U.S. Army is on the cusp of its most significant reorganization since the early 1940s.<sup>1</sup> The Army Transformation Plan seeks to reorganize the Army into what is currently being called the Future Force and was previously referred to as the Objective Force.<sup>2</sup> The very structures upon which the Army is based—brigades and divisions—will be realigned, reorganized, and reconstituted into units quixotically (and temporarily) called Units of Action (UAs), Units of Maneuver, and Units of Employment.<sup>3</sup> This massive reorganization effectively shifts the focus of the Army from divisions to brigade-plus sized maneuver elements in an effort to create a more “strategically responsive, precision maneuver force, dominant across the range of military operations.”<sup>4</sup> Each of these UAs will be centered on the Future Combat System, an armored wheeled vehicle weighing between sixteen to eighteen tons.<sup>5</sup> The first UA equipped with the Future Combat System is due to be fielded in 2012.<sup>6</sup> The precursors to the Future Forces are the Stryker Brigades and the Brigade Combat Teams (BCTs) currently operating in Iraq.

The movement to the Future Forces has forced the Judge Advocate General’s Corps (JAGC) to adapt accordingly. As such, the JAGC has proposed moving to brigade-centric legal operations. Each brigade-sized element will include a judge advocate (JA) major and captain, and internal paralegal support. Anticipating these Army-wide developments, the 1st Cavalry Division (ICD) deployed to Iraq in five brigade-sized units or BCTs. Each BCT was essentially a maneuver brigade with organic indirect fires and logistical support.<sup>7</sup> The division staff judge advocate (SJA) deployed two JAs in direct support of each BCT—a Brigade Operational Law Team (BOLT).

The practice of law in a deployed BCT is unique. The purpose of this article is to provide the Army JA community with a survey of the legal issues in the Iraq theater of operations. This article focuses on deployment-specific issues that BCT JAs frequently encountered and will likely encounter in the future. Particular emphasis is given to Operation Iraqi Freedom (OIF) fragmentary orders (FRAGOs),<sup>8</sup> policy letters, and other official guidance.<sup>9</sup>

## Operational Law

Operational law is one of the mainstays of the BCT practice. Operational law<sup>10</sup> encompasses all legal issues related to the rules of engagement (ROE), mosque operations, and detention operations. As of 1 December 2004, the current ROE for OIF was V Corps 1003V Annex E to Operations Order Final Victory.<sup>11</sup> It is imperative that the BOLT become intimately

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<sup>1</sup> HEADQUARTERS, UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND, THE ARMY FUTURE FORCE: DECISIVE 21ST CENTURY LANDPOWER (2003) [hereinafter THE ARMY FUTURE FORCE].

<sup>2</sup> Peter A. Wilson et al., *An Alternative Future Force: Building a Better Army*, PARAMETERS, Winter 2003-2004, at 19.

<sup>3</sup> *Id.* at 20.

<sup>4</sup> THE ARMY FUTURE FORCE, *supra* note 1, at 2.

<sup>5</sup> Wilson, *supra* note 2, at 19.

<sup>6</sup> *Id.*

<sup>7</sup> This comment is based on the author’s recent professional experiences while deployed to Iraq from 8 March 2004 through the date of this article, 1 December 2004 [hereinafter Professional Experiences].

<sup>8</sup> A fragmentary order “provides timely changes of existing orders to subordinate and supporting commanders while providing notification to higher and adjacent commands.” U.S. DEP’T OF ARMY, FIELD MANUAL 101-5, 1-71 STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

<sup>9</sup> All cited FRAGOs are maintained on the U.S. Army Secure Internet Protocol Routing network (SIPR) at the 1st Cavalry Division, which requires a secret security clearance for access. Though the FRAGOs are maintained on a classified system, not all FRAGOs are classified. Portions of FRAGOs which have been quoted are unclassified. There is no classified material contained in this article.

<sup>10</sup> U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES 60 (30 Sept. 1996) (defining operational law as “[t]he application of domestic, international, and foreign law to the planning for, training for, and deployment of US military forces in peacetime and wartime environments”).

<sup>11</sup> The current unclassified ROE card is as follows:

familiar with this document. These ROE have been in effect virtually unchanged since the outset of OIF.<sup>12</sup> Many FRAGOs have been released which clarify, but do not change the ROE. The clarifications concern mosques,<sup>13</sup> protected property,<sup>14</sup> curfews,<sup>15</sup> traffic control points (TCP),<sup>16</sup> indirect fires,<sup>17</sup> convoy operations,<sup>18</sup> riot control measures,<sup>19</sup> and detention

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**NOTHING ON THIS CARD PREVENTS YOU FROM USING DEADLY FORCE TO DEFEND YOURSELF.**

**Enemy military and paramilitary forces may be attacked subject to the following instructions:**

- Positive Identification (PID) is required prior to engagement. PID is “reasonable certainty” that your target is a legitimate military target. If no PID, contact your next higher commander for decision.
- Do not engage anyone who has surrendered or cannot fight due to sickness or wounds.
- Do not target or strike any of the following except in self-defense to protect yourself, your unit, friendly forces, and designated persons or property under your control. Civilians, hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites.
- Do not fire into civilian populated areas or buildings unless the hostile force is using them for hostile purposes or if necessary for your self-defense.
- Minimize collateral damage.

**You may use force, including deadly force, to defend yourself from persons who commit or are about to commit hostile acts against you. You may use the same level of force to protect the following:**

- Your unit, and other friendly forces (including Iraqi police and security forces)
- Enemy prisoners of war and detainees
- Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape
- Designated organizations and/or property, such as personnel of the Red Cross/ Red Crescent, UN, and US/UN supported organizations.

**Warning before firing**

You may, time permitting; give a warning in a loud clear voice:

**KIFF- ARMICK** (Stop or I’ll shoot)

**ERMY SE-LA-HAK** (Drop your weapon)

**You may detain civilians if they interfere with mission accomplishment, possess important information, or if required for self-defense.**

- Treat all persons and their property with respect and dignity.
- Iraqi security forces and police are authorized to carry weapons.

**Necessary force, including deadly force, is authorized for the protection of some types of property including the following:**

- Public utilities
- Hospitals and public health facilities
- Electric and Oil infrastructure
- Coalition and captured enemy weapons and ammunition
- Financial institutions
- Other mission essential property designated by your commander.

**REMEMBER**

- Attack only hostile forces and military targets.
- Avoid fratricide—be aware of nearby units and Iraqi police and security forces.
- Spare civilians and civilian property, if possible.
- Do not loot or steal.
- Conduct yourself with dignity and honor.
- Comply with the Law of War. If you see a violation, report it.

**YOU ALWAYS HAVE THE RIGHT TO USE NECESSARY FORCE, INCLUDING DEADLY FORCE, TO PROTECT YOURSELF AND OTHERS.**

These ROE will remain in effect until your commander orders you to transition to different ROE.

HEADQUARTERS, V CORPS, OPERATIONS ORDER FINAL VICTORY 1003V, ANNEX E, RULES OF ENGAGEMENT (19 Mar. 2003).

<sup>12</sup> The only change to 1003V is contained in both HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 581 TO OPOD 04-01 (6 Apr. 2003) and HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 586 TO OPOD 04-0136 (7 Apr. 2003).

<sup>13</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 308, REEMPHASIS OF CURRENT 1003V COMBAT ROE, PROTECTION OF CERTAIN DESIGNATED PROPERTY, AND MOSQUE OPERATIONS, TO OPOD 03-036 (6 July 2003) [hereinafter CJTF7 FRAGO 308]; HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 865, REEMPHASIS OF CURRENT 1003V COMBAT ROE, PROTECTION OF CERTAIN DESIGNATED PROPERTY, AND MOSQUE OPERATIONS, TO OPOD 03-036 (21 Sept. 2003) [hereinafter CJTF7 FRAGO 865].

<sup>14</sup> CJTF7 FRAGO 308, *supra* note 13; CJTF7 FRAGO 865, *supra* note 13; HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 546 TO OPOD 04-01(31 Mar. 2004); HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 684 TO OPOD 04-01 (25 Apr. 2004) [hereinafter CJTF7 FRAGO 684].

<sup>15</sup> HEADQUARTERS, 1ST ARMORED DIVISION, FRAGMENTARY ORDER 465A TO OPOD 03-215 (11 Aug. 2003).

<sup>16</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 507 MOD 1 TO FRAGMENTARY ORDER 200 (25 Mar. 2004) (providing ROE clarification for convoys and tactical control points) [hereinafter CJTF7 FRAGO 507 MOD 1].

<sup>17</sup> CJTF7 FRAGO 684, *supra* note 14; HEADQUARTERS, 1ST ARMORED DIVISION, FRAGMENTARY ORDER 700A TO OPOD 03-215 (9 Oct. 2003) (providing ROE clarification for indirect fires); HEADQUARTERS, 1ST CAVALRY DIVISION FRAGMENTARY ORDER 97 TO OPOD 03-52 (14 Apr. 2004) (providing ROE clarification for indirect fires); *see also* UNITED STATES CENTRAL COMMAND, OPERATIONAL PLAN 1003V COLLATERAL DAMAGE

operations.<sup>20</sup> Clearly the dearth of FRAGOs complicates every operational law issue. The key, however, is to first understand which FRAGOs are applicable and to what extent each FRAGO applies. As new FRAGOs are issued, they will often either expressly or implicitly override or nullify provisions of previous FRAGOs.<sup>21</sup>

After understanding the applicable rules, it is critical to maintain competence with future FRAGOs. There are several methods to accomplish this. One method is to read the FRAGOs as they are issued. The BCT training and operations (S-3) section will issue FRAGOs on a daily basis, which will be sent out in a group e-mail or posted to a common network folder. A second method to track new FRAGOs is to develop a topically organized database of the FRAGOs as they are issued. The ICD Operations Law Team (DOLT) developed an excellent FRAGO database, which was periodically updated throughout the deployment. The database can be downloaded and searched using keywords. Furthermore, the database can be linked to the FRAGO, so that when a user finds an applicable FRAGO, he can click on the title to display the FRAGO. A final method of tracking FRAGOs is to read daily FRAGO summaries, which are often produced by division headquarters. The ICD DOLT e-mailed a summary of all FRAGOs and significant activities (SIGACTs) to all the division judge advocates.<sup>22</sup>

Operational law questions arise in one of two ways: in conjunction with the planning process or as events or incidents arise during day-to-day operations. There is considerable SJA involvement in the planning process, which allows issues to be addressed as they arise.<sup>23</sup> Thus, JAs must not only understand the issues, but also to be able to recognize issues as they arise and work to achieve the commander's intent within legal boundaries. More often than not, however, operational law issues arise without warning.<sup>24</sup> In all cases, the key to operational law is the ability to understand the applicable rules and apply them in a manner consistent with the law and the commander's intent.

## Administrative Law

Administrative law issues in a deployed environment are interesting and, often times, unusual and constitute of a huge portion of a deployed BCT's legal practice.

### Investigations

Investigations are a constant presence in a deployed environment, from commander's inquires to formal *Army Regulation 15-6*.<sup>25</sup> Investigations are often required for typical administrative matters; for instance, line of duty

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ESTIMATION POLICY AND METHODOLOGY (8 Mar. 2003) (stating its purpose, to "provide the commander with a process to estimate and mitigate unintended, unnecessary damage to non-combatant persons, property, or the environment in the conduct of combat operations").

<sup>18</sup> CJTF7 FRAGO 507 MOD 1, *supra* note 16.

<sup>19</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 929 TO OPOD 03-036 (3 Oct. 2003) (providing ROE clarification on the use of riot control means); HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 1150 (outlining use of lethal and non-lethal force in coalition detention facilities) to OPOD 03-036 (28 Nov. 2003) [hereinafter CJTF7 FRAGO 1150].

<sup>20</sup> CJTF7 FRAGO 1150, *supra* note 19; HEADQUARTERS, 1ST CAVALRY DIVISION, APPREHENSION AND DETENTION OPERATIONS STANDARD OPERATING PROCEDURE, VERSION 8 (undated, last modified 9 Oct. 2004); HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 749 TO OPOD 03-036 (24 Aug. 2003); HEADQUARTERS, HEADQUARTERS, V CORPS, FRAGMENTARY ORDER 081M to OPOD 0303-343 (24 Mar. 2003).

<sup>21</sup> Soon after the transfer of authority (TOA) from the 1st Armored Division to the 1st Cavalry Division, there was a discussion concerning how to alleviate the problem of thousands of FRAGOs from numerous organizations. A primary issue during this discussion was the applicability of the FRAGOs after the TOA. Professional Experiences, *supra* note 7. Unfortunately, this issue remains unresolved. One solution discussed within the ICD, holding tremendous promise, was the reissuing of all necessary FRAGOs into a single large FRAGO. This base document was to contain FRAGOs relating to every aspect of division operations in the area of operations (AO). Professional Experiences, *supra* note 7. This document was never drafted, but it would have simplified operational law issues since research could start with this document and move forward, alleviating the need to have a working understanding of the thousands of FRAGOs that exist when a unit assumes authority.

<sup>22</sup> *Id.* at DOLT Section.

<sup>23</sup> For example, the BCT Commander wanted to get illicit weapons off the street. The planners decided that Commander's Emergency Response Program (CERP) funds would be used to conduct a weapons buy-back program, without regard for the fact that CERP funds are specifically prohibited to be used for weapons buy-back. HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 087 (29 June 2004). Planners identified the prohibition during the initial stage of the operation and, ultimately, an alternative course of action was taken that satisfied the commander's intent. Professional Experiences, *supra* note 7.

<sup>24</sup> For example, a BCT Battle Captain approaches a JA and asks: "Tower B just saw someone fire a mortar at the Camp, can we engage the guy?" In this example, the issue is easy to recognize; however, often the issue cannot be identified until after the event has occurred. For example, the Battle Captain, appearing a great deal more relaxed, asks: "We just had a truck full of militia fighters drive by Tower E. What should we have done?" Or, a unit returning from patrol reports that kids threw rocks at them, and they did not know how to respond. These events provide excellent opportunities for the legal office to inject itself into nightly battle update briefings (BUBs) providing ROE clarification.

<sup>25</sup> U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

investigations,<sup>26</sup> summary courts martial,<sup>27</sup> and reports of survey.<sup>28</sup> Investigations are also required for alleged law of war violations,<sup>29</sup> fratricide,<sup>30</sup> vehicle accidents,<sup>31</sup> and various serious incidents—to include all negligent discharges<sup>32</sup> and detainee death.<sup>33</sup>

A JA's initial duty is to advise the command when to initiate an investigation and what type of investigation is appropriate. Next, the JA must brief the investigating officer (IO) on the nature of the IO's duties. These initial stages, seemingly unproblematic, can hide numerous legal issues. Chief among these issues are investigations following serious incidents and the command's definition of serious incident. In an effort to keep issues "in house," commanders are often very creative in their definition of a serious incident.<sup>34</sup> Further, there have been numerous incidents where units failed to initiate investigations into U.S.-caused traffic accidents resulting in a local national's death.<sup>35</sup>

Most issues regarding investigations, however, involve shootings of civilians and normally arise after the investigation has been completed. Virtually all units will have incidents in which Soldiers mistakenly shoot a civilian. The frequency of these incidents is directly related to the size of the unit, the size of the area of operation (AO), the operational tempo, and training of the Soldiers. In the vast majority of these incidents, the Soldiers have acted entirely within the bounds of the ROE and applicable FRAGOs.<sup>36</sup>

Often, however, investigations appear as if the command is attempting to conceal the incident.<sup>37</sup> Soldiers are concerned that their legitimate actions will be second guessed and that they will face disciplinary action.<sup>38</sup> To counter this perception, during briefings JAs should emphasize the inherently permissible nature of the ROE. During the first briefing, it is imperative for JAs to impart the importance of cooperating with the investigating officer and providing truthful responses.<sup>39</sup> Soldiers are often relieved to find that the JAs are not out to "get them."

Additionally, commands frequently initiate safety investigations,<sup>40</sup> mandated by Army safety regulations.<sup>41</sup> While division and higher commands will generally permanently assign a full-time safety officer, each subordinate unit will assign a

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<sup>26</sup> U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (15 Apr. 2004).

<sup>27</sup> U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-21 (6 Sept. 2002) [hereinafter AR 27-10].

<sup>28</sup> U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 June 2002).

<sup>29</sup> HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 48 (reporting suspected law of war violations) (16 June 2004); HEADQUARTERS, 1ST CAVALRY DIVISION, FRAGMENTARY ORDER 326 TO OPORD 03-52 (29 June 2004).

<sup>30</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 493 TO OPORD 04-01 (25 Mar. 2004) (covering reporting and investigation requirements for serious incidents) [hereinafter CJTF7 FRAGO 493].

<sup>31</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 394 TO OPORD 04-01 (7 Mar. 2004) (outlining accident reporting and investigation procedures).

<sup>32</sup> HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 154 (pertaining to serious incident reporting procedures) (27 July 2004) [hereinafter MFI FRAGO 154]; HEADQUARTERS, MULTINATIONAL CORPS IRAQ, FRAGMENTARY ORDER 427 TO OPORD 04-01 (pertaining to serious incident reporting procedures) (31 July 2004) [hereinafter MFI FRAGO 427]; 1ST CAVALRY DIVISION, FRAGMENTARY ORDER 421 TO OPORD 03-52 (1 Aug. 2004) [hereinafter 1CD FRAGO 421].

<sup>33</sup> HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 57 (20 June 2004) (outlining investigating and reporting procedures for detainee deaths); MFI FRAGO 154, *supra* note 32; MFI FRAGO 427, *supra* note 32; 1CD FRAGO 421, *supra* note 32.

<sup>34</sup> For example, the division commanding general retained jurisdiction for officer misconduct in 1CD. A battalion commander, however, decided to handle an officer's negligent discharge of a .50 *inside* the camp through "green tab channels," or command channels. Professional Experiences, *supra* note 7.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* For example: every recount of the incident is exactly the same; tiny portions of different statements conflict with one another; or, a private suddenly becomes an expert in the ROE and is able to recite passages almost verbatim.

<sup>38</sup> *Id.*

<sup>39</sup> See generally AR 15-6, *supra* note 25.

<sup>40</sup> See CJTF7 FRAGO 493, *supra* note 30.

<sup>41</sup> U.S. DEP'T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION REPORTING AND RECORD KEEPING (3 Oct. 2000); U.S. DEP'T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS (1 Nov. 1994); HEADQUARTERS, CENTRAL COMMAND, REG. 385-1, SAFETY (11 Sept. 2000); UNITED STATES ARMY SAFETY PROGRAM, ACCIDENT INVESTIGATION AND REPORTING PROCEDURES HANDBOOK (undated); HEADQUARTERS, V CORPS, SAFETY STANDARD OPERATING PROCEDURE (1 Aug. 2001).

staff officer to fulfill the roll of a safety officer as an extra duty.<sup>42</sup> Judge advocates should anticipate working closely with the safety officer, particularly after negligent discharges of weapons by service members.

### *Fiscal*

The deployed BCT fosters a rich fiscal environment. From 3 April 2004 through 3 September 2004, the 5th BCT disbursed \$13.4 million and committed an additional \$6.4 million for 239 civil military operations (CMO) projects.<sup>43</sup> Additionally, ICD secured \$35 million for sewer projects and \$25 million for a landfill through their relationship with the Coalition Provisional Authority (CPA) and their Project Management Office.

### *Working with Sources Other Than the Commander's Emergency Response Program (CERP)*

By way of example of a JAs involvement with fiscal issues and non-traditional JA roles, it is worthwhile to relate my personal experience with "the boneyard." The boneyard is a scrap yard located along the southern boundary of Baghdad, which contained approximately 600,000 square meters of metal scrap.<sup>44</sup> The boneyard consisted primarily of captured enemy tracked vehicles and bridging elements, ships, cars, and trucks that were consolidated by the U.S. government around November 2003.

Due to security concerns, the 5th BCT wanted to relocate the yard. The coalition camp in the area received numerous mortars from this area and believed that the yard was being used to mask the movement of insurgents and supplies. Further, it appeared that the boneyard, largely unguarded, was a rich source of improvised explosive device components. The 5th BCT tried on two occasions to move the boneyard. On both occasions, however, the Baghdad Mayoralty, the Amanant, stopped the movement of the yard.<sup>45</sup>

Acting on behalf of a request from the Al Rashid District Council,<sup>46</sup> on 6 May 2004, the 5th BCT negotiated a deal to sell the boneyard for an estimated \$2.9 million.<sup>47</sup> Two days later, the CPA instructed the 5th BCT to stop the sale because the yard had been "given" to the city government of Baghdad, the Amanant. Thereafter, JAs began discussions with CPA attorneys regarding ownership of the scrap.<sup>48</sup> This attorneys never resolved the issue; rather, the CG intervened and reached a resolution with a senior CPA administrator.<sup>49</sup>

On 25 May 2004 the Amanant attempted, and failed, to sell the yard. On 28 May 2004, the CPA requested that 5th BCT continue with the original sale (with the profits going to the Amanant rather than Al Rashid District Council). The JAs again drafted a contract of sale for the Mayor's signature. The Amanant balked, however, after learning the contractor would not pay a large cash payment upfront. As of 7 October 2004, the boneyard has not been relocated.

In addition to illustrating the complex and unusual nature of fiscal issues that frequently arise in a deployed environment, this example illustrates a few more important points. The first is JAs constant interaction with local nationals. The BOLT

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<sup>42</sup> Professional Experiences, *supra* note 7.

<sup>43</sup> 5th BCT Staff, Headquarters, 1st Cavalry Division, 3d Infantry Division, Pre Deployment Site Survey Briefing to the 3d Infantry Division Command Group (15 Sept. 2004).

<sup>44</sup> This equates to 40,000 to 90,000 tons of scrap, worth approximately \$10 to 12 million (roughly \$3 to 4 million after costs) based upon quality of scrap and scrap prices as of 1 May 2004.

<sup>45</sup> Professional Experiences, *supra* note 7.

<sup>46</sup> In Baghdad, a number of District and Neighborhood Councils were established by the CPA to better facilitate communication between coalition forces and the people of Baghdad. *See generally* Slide Presentation, Roles and Responsibilities for the NACs, DACs, and CAC (31 May 2004). The District Advisory Council (DAC) was established to provide advice to the district commander on district community projects and their priorities and to provide advice and prioritize issues for the district. The Neighborhood Councils (NCs) (formerly Neighborhood Advisory Councils) provide advice to the local commander on local community projects. Neighborhood councils identify community issues and forward them to the DAC. They are responsive to their neighborhood constituents and coordinate with non-governmental organizations (NGOs) for local projects.

<sup>47</sup> Professional Experiences, *supra* note 7.

<sup>48</sup> *Id.* This incident also raises issues concerning ownership of captured enemy property. United States ownership claims were based upon a combination of the following: Message, 181518Z Apr 03, Headquarters, United States Central Command, subject: Disposition of Captured Enemy Equipment (declaring all captured enemy property to be property of the United States); Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land art. 23(g) (18 Oct. 1907); AR 27-10, *supra* note 27, paras. 396, 406; S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003).

<sup>49</sup> Memorandum, Mr. Leslie A. Dean, Baghdad Central Regional Coordinator, CPA, to Mr. Hadi Faisal, Vice Mayor of Baghdad, subject: Permission to Sell Hulk Vehicles and Scrap (21 Apr. 2004) (on file with author).

will have nearly daily exposure to local nationals in one capacity or another.<sup>50</sup> The sale of the boneyard required negotiations with two different levels of government officials. Further, the sale involved working with numerous Iraqi contractors, security guards, and translators. Additionally, the sale involved approximately a dozen convoys outside coalition facilities to the boneyard, the CPA headquarters, and the Amanant.

Another important issue is the terse relationship between the BCT and the Amanant, and the BCT and the CPA. The general view of the CPA (and now of the State Department) is that the staffers are out of touch with what's going on in Baghdad.<sup>51</sup> In an effort to lessen this tension, the ICD established the governance support team (GST), permanently located at the U.S. Embassy. The GST acts in two capacities. First, as a large (twenty to thirty person) liaison office between the line units and the State Department and their Iraqi counterparts. Second, as subject matter experts in government reconstruction projects. Each GST member is a subject matter expert in a particular field—solid waste, water, education, sewage, engineering, and governance. This is a valuable resource and serves an important role.

The tension in the relationship between the BCT and Amanant derives from a power struggle. The Amanant is a traditionally powerful organization. The mayor holds a ministerial level office. The Amanant's drive to consolidate power is motivated largely by the corruption that riddles the organization.<sup>52</sup> For example, when the Amanant finally decided on the contractor for the boneyard, it was a company owned by a relative of the mayor's secretary.<sup>53</sup>

### *CERP Money*

Of the millions spent on CMO projects during OIF I, OIF II, and Operation Enduring Freedom, virtually every penny has come from CERP funds.<sup>54</sup> This program, initially designated the brigade commander's discretionary fund,<sup>55</sup> was designed to provide tactical commanders the flexibility to immediately influence reconstruction efforts in their AO.<sup>56</sup> This program was initially funded with millions of dollars the coalition forces seized from Baathist coffers.<sup>57</sup> As the 3d Infantry rolled through Baghdad, Soldiers found caches of U.S. dollars.<sup>58</sup> This money, combined with other ill-gotten gains, funded the initial reconstruction efforts in Iraq. As noted by the former Staff Judge Advocate of the First Armored Division, the handling of these funds was transparent and documented.<sup>59</sup> Under presidential direction, the Department of Defense (DOD) coordinated with the Office of Management and Budget and the Departments of State and Treasury to establish procedures to govern the

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<sup>50</sup> Professional Experiences, *supra* note 7.

<sup>51</sup> See generally William Langewiesche, *Welcome to the Green Zone*, ATLANTIC MONTHLY (Nov. 2004); Professional Experiences, *supra* note 7.

<sup>52</sup> Professional Experiences, *supra* note 7. On 14 June 2004, the Vice Mayor of Baghdad, Mr. Hadi Faisal, was arrested for corruption based in large part on the investigative work done by a 5th BCT Civil Affairs officer.

<sup>53</sup> *Id.* The issue of corruption is ever present. Some argue that corruption is cultural and the United States should not try to impose "Western" values upon this common practice; others assert that corruption is not a cultural norm in Iraq. See generally Abduljabbar Mandeel, *Corruption in Iraq*, IRAQI PRESS, available at <http://www.iraqpress.org/english.asp?fname=ipenglish\00rdata\9911.htm> (last visited Nov. 3, 2004); Press Release, Coalition Provisional Authority, Commission on Public Integrity to Combat Government Corruption (Jan. 31, 2004), available at [http://www.cpa-iraq.org/pressreleases/20040131\\_IJC\\_integrity\\_PR.html](http://www.cpa-iraq.org/pressreleases/20040131_IJC_integrity_PR.html) (last visited Dec. 13, 2004). Corruption in Iraq, as in most other societies, is virtually always conducted in secret. If corruption were a cultural norm, the practice would not be relegated to shadowy back rooms and mysterious envelopes of money. Iraqis are adamant about the need to eradicate corruption. Professional Experiences, *supra* note 7. Furthermore, Articles 47 and 55 of the Law of Administration for the State of Iraq for the Transitional Period prohibit corruption in regards to members of the Higher Judicial Council and Government Council respectively. LAW OF ADMINISTRATION FOR HIGHER JUDICIAL COUNCIL AND GOVERNMENT COUNCIL arts. 47 and 55 (8 Mar. 2004), available at <http://www.cpa-iraq.org/government/TAL.html> (last visited Dec. 13, 2004). Similarly, the Provisional Administrative Law for the City of Baghdad prohibits individuals from serving on the council who have been convicted of a crime of moral turpitude. PROVISIONAL ADMINISTRATIVE LAW FOR THE CITY OF BAGHDAD para. 2.06 (6 June 2004). Finally, the *1969 Iraqi Penal Code*, prohibits bribery of government officials. IRAQI PENAL CODE, para. 307 (July 19, 1969).

<sup>54</sup> Professional Experiences, *supra* note 7. At the end of the fiscal year, ICD secured a significant amount of Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) funds. See generally Message, 222048Z Mar 03, Headquarters, Department of Defense, subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) Activities (classified). The OHDACA funds are used with much greater frequency in the Afghanistan theater of operations. Professional Experiences, *supra* note 7.

<sup>55</sup> HEADQUARTERS, V CORPS FRAGMENTARY ORDER 107M TO V CORPS OPERATIONS ORDER FINAL VICTORY (7 May 2003) (outlining the commander's discretionary recovery program).

<sup>56</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 89 TO COMBINED JOINT TASK FORCE 7, OPERATIONS ORDER (OPORD) 03-036 (19 June 2003) (providing for the CERP, formerly the brigade commander's discretionary fund)).

<sup>57</sup> Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 3 (providing an excellent discussion of the background and current uses of the CERP).

<sup>58</sup> *Id.* (citing David Zucchini, Troops Find Baghdad Stash: \$650 Million—Little-noticed Cottages Hold Boxes of Cash, SAN FRANCISCO CHRON., Apr. 19, 2003, at A-10).

<sup>59</sup> *Id.*

handling and expenditure of these monies.<sup>60</sup> The procedures within the *Federal Acquisition Regulation* do not apply to the expenditure of CERP funds.<sup>61</sup>

This initial source of funds was later supplemented with nearly \$20 billion in monies contained in the Developmental Fund for Iraq (DFI).<sup>62</sup> The DFI was established by the CPA as a repository for the vast majority of Iraq's oil revenue.<sup>63</sup> The CPA was given control over this fund with the mandate from the United Nations to use the fund for the "humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civil administration, and for other purposes benefiting the people of Iraq."<sup>64</sup> Transparency was demanded in regards to these funds as well.<sup>65</sup>

The frequency of JA interaction cannot be overstated. Every request for CERP money will cross the desk of a BCT JA. Therefore, it is critical that JAs have an intimate understanding of the FRAGOs governing CERP.<sup>66</sup> Headquarters, Multinational Forces Iraq, Fragmentary Order 87, Commander's Emergency Response Program Guidance for Using Appropriated Funds, prohibits expending appropriated CERP in the following circumstances:

- payment of rewards;
- direct or indirect benefit of coalition forces;
- entertainment of the Iraqi people;
- weapon's buyback programs;
- the purchase of firearms or ammunition;
- the removal of captured enemy ammunition or unexploded ordnance;
- duplicating services available through the Iraqi municipal governments;
- to provide support to private businesses or individuals (except to repair damage caused by coalition forces and not compensable as a claim); and
- payment of salaries or pensions to the Iraqi civil work force if already paid directly by Iraqi ministries or local governments.<sup>67</sup>

Aside from these limitations, the permissible uses of CERP funds are numerous and varied. Permissible uses include the following:

- water and sanitation infrastructure;
- food production and distribution;
- agriculture;
- electrical power generation and distribution;
- healthcare;
- education;
- telecommunications;
- economic, financial, management improvements;
- transportation;
- rule of law and governance;
- irrigation;
- civic clean-up activities;
- civic support vehicles;
- repair to civic or cultural facilities; and

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<sup>60</sup> *Id.* (citing Memorandum, The President of the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003)).

<sup>61</sup> See Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215.

<sup>62</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 1268, CERP PROGRAM UPDATE DFI, APPROPRIATED AND SEIZED, TO HEADQUARTERS, COMBINED JOINT TASK FORCE 7 OPERATIONS ORDER 03-036 (22 Dec. 2003).

<sup>63</sup> COALITION PROVISIONAL AUTHORITY, REG. NO. 2, DEVELOPMENT FUND FOR IRAQ (15 June 2003) [hereinafter DEVELOPMENT FUND FOR IRAQ].

<sup>64</sup> S.C. Res. 1483, U.N. SCOR, 57th Sess., 4761st mtg., para. 14, U.N. Doc. S/RES/1483 (2003). See also DEVELOPMENT FUND FOR IRAQ, *supra* note 63.

<sup>65</sup> *Id.* ("the Development Fund for Iraq shall be used in a transparent manner"). Some are currently questioning the true transparency in the expenditure of these funds. See, e.g., Christopher Cooper & Greg Jaffe, *Audit Splits U.S. and U.N.*, WALL ST. J., Sept. 17, 2004, at A4.

<sup>66</sup> See HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 87, COMMANDER'S EMERGENCY RESPONSE PROGRAM GUIDANCE FOR USING APPROPRIATED FUNDS, (29 June 2004) [hereinafter MFI FRAGO 87].

<sup>67</sup> *Id.*

- other humanitarian or reconstruction projects.<sup>68</sup>

Clearly, the CERP provides wide latitude for commanders to act quickly to address a multitude of humanitarian and reconstruction issues. With a source of funding this easy to use and with so few restrictions, it is easy for commanders to be very aggressive in their interpretation of the CERP provisions. Such has consistently been the case with the rewards provisions of the CERP.

When the CERP was funded strictly with DFI and seized assets, the CERP funds could be used to pay for rewards for information or non-lethal assistance leading to the capture of designated targets and promoting a safe and secure environment.<sup>69</sup> This language was used to justify very liberal rewards programs at various BCTs that looked suspiciously like weapons buyback programs.<sup>70</sup> This issue is largely rendered moot by the unambiguous rules governing appropriated CERP.<sup>71</sup>

### *Rewards Programs*

Currently there are two rewards programs in effect in the Iraqi theater of operations. Rewards for Justice is a rewards program administered by the Department of State and designed to pay large rewards for very high value targets—\$25 million for Saddam Hussein.<sup>72</sup>

The OIF Rewards program is the more commonly used rewards program.<sup>73</sup> This program allows for the payment of rewards for information and assistance that benefits either an OCONUS operation or activity of the armed forces against terrorism or, force protection of the Armed Forces.<sup>74</sup> This program can provide rewards for the capture of individuals wanted by the coalition.<sup>75</sup> Within the ICD, the current approval authority for rewards is the division SJA.<sup>76</sup>

### *Ethics*

All ethics rules apply with equal force in a deployed environment.<sup>77</sup> It is sometimes difficult to impart this concept to clients operating in a “combat mode.” Ethics issues are few and far between, and they most often involve the prohibitions on gifts and rules on solicitations.

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<sup>68</sup> *Id.*

<sup>69</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 250, AMENDMENT TO THE COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) FORMERLY THE BRIGADE COMMANDER’S DISCRETIONARY FUND, TO OPERATIONS ORDER 03-036 (1 July 2003).

<sup>70</sup> The stated purpose of the rewards program was to authorize the use of rewards for information or other non-lethal assistance that leads to the capture of selected individuals, categories of weapons that appear on a list approved by USCENTCOM, and documents related to WMD and terrorism. HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 250, AMENDMENT TO THE COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) FORMERLY THE BRIGADE COMMANDER’S DISCRETIONARY FUND, TO OPERATIONS ORDER 03-036 (1 July 2003). “Buyback” program is not easily defined. As executed in Haiti, Panama, and Somalia, a buyback program was evidenced by the following indices: (1) a strategic plan implemented on a nation-wide scale; (2) designed to remove explosives *and* firearms; (3) at, or near, market price. *See generally* CENTER FOR LAW AND MILITARY OPERATIONS, LESSONS LEARNED FOR JUDGE ADVOCATES: LAW AND MILITARY OPERATIONS IN HAITI: 1994-1995 74 (11 Dec. 1995); CENTER FOR LAW AND MILITARY OPERATIONS, citing Operation Uphold Democracy, Initial Impressions: Haiti D-20 to D+120, Volume II, at 49 (Apr. 1995). As noted in Haiti, the intention was simple: “getting firearms and explosives off the street and out of the countryside.” *See* CENTER FOR LAW AND MILITARY OPERATIONS, LESSONS LEARNED FOR JUDGE ADVOCATES: LAW AND MILITARY OPERATIONS IN HAITI: 1994-1995 72 (11 Dec. 1995).

<sup>71</sup> MFI FRAGO 87, *supra* note 66.

<sup>72</sup> *See* Rewards for Justice, *The Rewards Program*, at <http://www.rewardsforjustice.net> (last visited Dec. 13, 2004) (outlining the mission and history of the State Department rewards program); *see also* Message, 151330Z Mar 03, Headquarters, United States Central Command, subject: DOD Rewards Program in CENTCOM AOR.

<sup>73</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 368, OIF REWARDS PROGRAM IMPLEMENTATION, TO OPORD 03-036 (10 July 2003) [hereinafter CJTF7 FRAGO 368]; Message, 030555Z Jul 03, Headquarters, United States Central Command, subject: CFC Rewards Program in USCENTCOM AOR (revised).

<sup>74</sup> CJTF7 FRAGO 368, *supra* note 73.

<sup>75</sup> *Id.*; *see also* Information Paper, Headquarters, Combined Joint Task Force 7, subject: CJTF-7 Rewards Program (6 July 2003).

<sup>76</sup> HEADQUARTERS, 1ST CAVALRY DIVISION, FRAGMENTARY ORDER 360 TO OPORD 03-52 (10 July 2003).

<sup>77</sup> *See generally* U.S. DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635, § 2635.101 (1 Jan. 99) *as amended* by 64 Fed. Reg. 2421-2422 (14 Jan. 1999) and 64 Fed. Reg. 13063-13064 (17 Mar. 1999) (“The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.”).

Gifts given by prohibited sources and as a result of the recipient's official position are prohibited.<sup>78</sup> A prohibited source is defined as any person who is seeking an official action by the recipient's agency; does business or seeks to do business with the recipient's agency; conducts activities regulated by the recipient's agency; has interests which may be substantially affected by performance or nonperformance of the recipient's official duties; or is an organization whose majority is comprised of the above described individuals.<sup>79</sup> There are a number of exceptions,<sup>80</sup> though arguably only a few exceptions apply in a deployed environment.<sup>81</sup> The most notable is the general exception for gifts with a market value of less than \$20.<sup>82</sup> Deploying units may also encounter situations in which the Foreign Gifts and Decorations Act is applicable.<sup>83</sup> The act allows federal employees to accept gifts from foreign governments or multinational organizations when accepted in accordance with its provisions.<sup>84</sup>

In a deployed environment, virtually every Soldier who deals with a local national on a regular or substantial basis is dealing with somebody who has an interest in doing business with the Army. If not a business interest, then surely they have interests that are directly affected by the performance of the Soldier's duties. Commanders, civil affairs, S-5s, and PSYOP are the individuals most likely to be recipients of gifts.<sup>85</sup> It is important to track gifts to ensure they are properly accepted or properly disposed of.<sup>86</sup>

Gifts from foreign governments are treated differently than gifts from private individuals or organizations.<sup>87</sup> Furthermore, it is important to distinguish between gifts to individuals and gifts to the unit. If the gift is given to the unit, the gift may be accepted under the provisions of *AR 1-100*.<sup>88</sup> Note, however, the difference in treatment where the value of the gift exceeds a fair market value of \$1,000.<sup>89</sup> Gifts given to individuals may be accepted provided the value of the gift does not exceed \$285.<sup>90</sup>

The local government a typical commander interacts with on a daily basis is the neighborhood councils (NC) and district councils (DC). These councils were established by the CPA as a means of enfranchising the people with local representative governments.<sup>91</sup> These councils, however, have little or no experience working with governmental entities. They are simply advisory councils. They have no powers traditionally associated with a sovereign power—or a branch thereof. The Law of Administration for the State of Iraq for the Transitional Period (TAL) does not recognize the DCs and NCs.<sup>92</sup> Thus, gifts from a DC or NC are treated as gifts from a source other than a foreign government.

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<sup>78</sup> 5 C.F.R. § 2635.202.

<sup>79</sup> *Id.* § 2635.203.

<sup>80</sup> *Id.* § 2635.204.

<sup>81</sup> For example, exceptions applying to discounts, awards/honorary degrees, political activities, and social events will rarely apply in a deployed environment.

<sup>82</sup> *Id.*

<sup>83</sup> 5 U.S.C. § 7342 (2000).

<sup>84</sup> *Id.*; see also 5 C.F.R. § 2635.204.

<sup>85</sup> Professional Experiences, *supra* note 7.

<sup>86</sup> 5 C.F.R. § 2635.205.

<sup>87</sup> Compare 5 C.F.R. § 2635, with U.S. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983) [hereinafter AR 1-100].

<sup>88</sup> AR 1-100, *supra* note 87, para. 6b.

<sup>89</sup> *Id.* para. 5(a)(2).

<sup>90</sup> 5 C.F.R. § 2635.

<sup>91</sup> See generally OFFICE OF THE COALITION PROVISIONAL AUTHORITY & UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THE BAGHDAD CITIZEN ADVISORY COUNCIL HANDBOOK (2d ed. 2003), available at [http://www.omarmasry.net/Baghdad\\_city\\_council\\_main\\_english.htm](http://www.omarmasry.net/Baghdad_city_council_main_english.htm) (last visited Dec. 13, 2004).

<sup>92</sup> THE LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (8 Mar. 2004). At Article 56, the TAL expressly recognizes traditional tribal councils—the *Qada'* and *Nahiya* councils. The TAL does not expressly recognize the TAL, however, it does anticipate the assistance of "other relevant councils." *Id.*

## Legal Assistance

It should come as no surprise that legal assistance flourishes in a deployed environment.<sup>93</sup> The issues are varied both in their subject matter and the degree of urgency. Most issues are predictable. Questions concerning domestic relations,<sup>94</sup> *Army Regulation 608-99*,<sup>95</sup> creditor debtor agreements, and the Servicemember's Civil Relief Act<sup>96</sup> are the most common legal assistance issues. Judge advocates must also be prepared to field questions from both commanders and Soldiers concerning family care plans.<sup>97</sup>

## Military Justice

### *Generally*

Military justice operates virtually the same in a deployed environment as it does in garrison. The only substantive differences are the difficulties encountered in organizing a trial—having to make travel and sleeping arrangements for witnesses from multiple camps, communicating with defense counsel over precarious communications networks, and other such issues. Initially during the deployment, 5th BCT thought the size of the caseload was inversely proportional to the operational tempo of the unit.<sup>98</sup> This assessment, however, was false. Crimes occur at all times during the deployment, including times of intense combat activity and during times of relative calm.

By way of example, during the first four months, Headquarters and Headquarters Company (HHC), 5th BCT, did not have a single military justice action. Over the next four months, however, the HHC commander presided over the following military justice actions: summarized Article 15s, company grade Article 15s, field grade Article 15s, summary courts-martial, three special courts-martial, and a general court-martial.<sup>99</sup>

The most common criminal cases involve violations of General Order 1A (GO1A).<sup>100</sup> Alcohol and drugs are readily available though the mail, unscrupulous interpreters, and the International Zone.<sup>101</sup> From the outset, it is imperative that the command establish a policy permitting the search of all persons, vehicles, and bags upon entry to the camp. This is an important practice to enforcing GO1A, but also in ensuring camp security.

In addition to minor disciplinary actions, commands will occasionally utilize the services of Criminal Investigation Command (CID). Currently, Camps Victory and Liberty are the only camps in Baghdad that have organic military police or CID units conducting garrison operations.<sup>102</sup> Proper response in criminal investigations of major crimes is critical to the interests of military justice. On occasion CID would take twenty-four to forty-eight hours to respond to a call for investigation.<sup>103</sup> These delays can be attributed to the operational environment of a combat zone. Therefore, BCTs must be prepared to conduct basic investigatory tasks such as securing a crime scene, collecting evidence, logging evidence, taking photographs, and conducting witness interviews. The trial counsel should serve as the primary point of contact and the link between the BCT and CID. Trial counsels must be prepared to advise all commanders in executing these investigatory tasks while still remaining a disinterested party.

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<sup>93</sup> For example, the only time the British Army Legal Service provides legal assistance is during a deployment. See United Kingdom Ministry of Defense Website, at [www.army.mod.uk](http://www.army.mod.uk) (last visited Dec. 5, 2004).

<sup>94</sup> The issue of proxy marriages comes up with some frequency. Professional Experiences, *supra* note 7. For more information on proxy marriages, see 52 AM. JUR. 2d Marriages § 15 (2004).

<sup>95</sup> U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 Oct. 2003).

<sup>96</sup> Servicemember's Civil Relief Act of 1993, Pub. L. No. 108-189, 117 Stat. 2835 (codified as amended in scattered sections of 50 U.S.C. App.).

<sup>97</sup> See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (13 May 2002).

<sup>98</sup> Professional Experiences, *supra* note 7.

<sup>99</sup> *Id.*

<sup>100</sup> Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000).

<sup>101</sup> The International Zone, formerly known as the Green Zone, is an area about four square miles in central Baghdad near the large swooping bend of the Tigris River. Miles of walls, fences, razor wire, checkpoints and guard towers surround the entire area. Within the Green Zone there are actually a number of small fortified camps; the two largest being the 3rd BCT Forward Operating Base and the CPA Headquarters. The zone also houses the vast majority of the foreign contractors, security companies, and NGOs.

<sup>102</sup> Professional Experiences, *supra* note 7.

<sup>103</sup> *Id.*

General Order 1A is actually the original general order in combination with numerous amendments and partial waivers.<sup>104</sup> This order applies to the following:

All United States military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR *except for* personnel assigned to: Defense Attaché Offices; United States Marine Corps Security Detachments; sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments.<sup>105</sup>

The order contains the following prohibitions and restrictions:

- PRIVATELY OWNED FIREARMS. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.
- ENTRANCE INTO MOSQUE. Entrance into a Mosque or site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation.
- ALCOHOL. Introduction, possession, sale, transfer, manufacture or consumption of any alcoholic beverage.
- DRUGS. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances, or drug paraphernalia. The original prescription label of the prescribing medical facility or authority must accompany prescription drugs.
- PORNOGRAPHY. Introduction, possession, transfer, sale, creation or display of any pornographic or sexually explicit photographs, videotapes, movie, drawing, book, magazine, or similar representations. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets.
- GAMBLING. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service or component regulations.
- ARCHEOLOGICAL ARTIFACTS. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures.
- UNOFFICIAL CURRENCY EXCHANGE. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.
- PETS. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.
- PROSELYTIZING. Proselytizing of any religion, faith or practice.
- WAR TROPHIES.<sup>106</sup>

War trophies are a topic of constant interest for Soldiers and commanders. First, it is important to note the difference between personal war trophies and war trophies for units. Unit historical property is defined as “property which is part of a historical collection of artifacts displayed in a regimental day room, visitor’s center, hall of fame, exhibit area, or other type of display not recognized by a component museum service as a museum.”<sup>107</sup> In order to bring an item out of a country as a piece of unit historical property, the unit must submit a request through Multinational Forces Iraq (MNF-I), CENTCOM, and the Army Center of Military History.<sup>108</sup> Units are limited to one demilitarized weapon or weapons system.<sup>109</sup> Either the MNF-I historian or the SJA must coordinate for such requests.<sup>110</sup>

<sup>104</sup> Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A Waiver (Alcoholic Beverages by SAO personnel in Kuwait and KSA) (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A (BINGO by SAO in KSA) (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A Waiver (Firearms and Ammunition for SAO Personnel) (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A Waiver (Alcoholic Beverages for Soldiers in a Non-operational Status) (11 Apr. 2001); Headquarters, United States Central Command, General Order 1A Amendment and Waiver (Alcoholic Beverages) (30 Nov. 2001); Headquarters, United States Central Command, General Order 1A Waiver and Amendment (1 Dec. 2001); Headquarters, United States Central Command, General Order 1A Waiver (Alcoholic Beverages and DIA Personnel) (21 Mar. 2002); Headquarters, United States Central Command, General Order 1A Waiver (Pets) (10 Sept. 2002); Headquarters, United States Central Command, General Order 1A Amendment (Alcoholic Beverages in Iraq) (9 Aug. 2003).

<sup>105</sup> Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000) (emphasis added).

<sup>106</sup> *Id.*

<sup>107</sup> HEADQUARTERS, MULTINATIONAL FORCE IRAQ, FRAGMENTARY ORDER 259, REMOVAL OF HISTORICAL PROPERTY FROM IRAQ, (31 Aug. 2004).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

War souvenirs for individual Soldiers are treated entirely differently.<sup>111</sup> If a Soldier wishes to retain a war souvenir, he or she must submit the request to a reviewing officer, who may be a company commander or individual in the rank of lieutenant colonel or above.<sup>112</sup> Permissible souvenirs include:

- helmets and head coverings;
- uniforms and uniform items such as insignia and patches;
- canteens, compasses, rucksacks, pouches, and load bearing equipment;
- flags (not otherwise prohibited by 10 USC 4714 and 7216);
- knives and bayonets other than those otherwise prohibited;
- military training manuals, books, and pamphlets;
- posters, placards, and photographs;
- currency of the former regime; or
- other items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation.<sup>113</sup>

Prohibited items include:

- Weapons, including demilitarized and antique weapons;
- unexploded ordinance;
- switchblade knives;
- knives with an automatic blade opener;
- blades that are particularly equipped to be collapsed, telescoped or shortened; or stripped beyond the normal extent required for hunting or sporting; or concealed in other devices, such as walking sticks, umbrellas, or tubes;
- military equipment not designed to be issued to or carried by an individual, including but not limited to, motor vehicles, generators, trailers, aircraft, watercraft, machine tools, radars, and communication equipment;
- former Iraqi regime or Iraqi privately owned articles of a household nature, including but not limited to, silverware, goldware, chinaware, linens, furniture, rugs, fixtures, and electrical appliances;
- any objects of art, science, archeological, religious, national, or historical value. This prohibition does not include military posters, placards and photographs; military maps; or posters of Saddam Hussein;
- any object retained for a commercial or resale purpose;
- any sand, dirt, rocks, stones or gravel;
- any plant material, including but not limited to, live or dried plants, seeds, flowers, fruits, leaves or bulbs;
- any animals (mammals, fish, reptiles and birds), or parts thereof, or insects, or parts thereof, including animals or insects that are alive, dead, or preserved; and
- personal items belonging to military combatants (i.e., dog tags).<sup>114</sup>

This is a command function, but JAs have been tasked with providing legal advice on these procedures.

## Claims

Claims comprise an enormous part of a deployed BCT JA's practice. Normally, one or more JAs will be appointed a member of the Foreign Claims Commission (FCC).<sup>115</sup> This person adjudicates claims filed under the Foreign Claims Act (FCA).<sup>116</sup> While there are numerous other claims authorities,<sup>117</sup> their use is rare in a deployed environment.

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<sup>111</sup> HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 674, WAR SOUVENIRS, TO OPOD 04-01 (Apr. 23, 2004) [hereinafter FRAGO 674]; Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000).

<sup>112</sup> FRAGO 674, *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Foreign Claims Act, 10 U.S.C. § 2734 (2000); U.S. Dep't of Defense, Dir. 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990) (as amended); U.S. Dep't of Army, Reg. 27-20, Claims (1 July 2003) [hereinafter AR 27-20]; U.S. Dep't of Army, Pam. 27-162, Claims Procedures (8 Aug. 2003) [hereinafter DA Pam. 27-162].

<sup>116</sup> 10 U.S.C. § 2734; AR 27-20, *supra* note 115, ch. 10.

<sup>117</sup> *See, e.g.*, Military Claims Act, 10 U.S.C. § 2733, 2738; Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680; Non-Scope Claims Act, 10 U.S.C. § 2737; National Guard Claims Act, 32 U.S.C. § 715; Maritime Claims Settlement Act, 10 U.S.C. §§ 4801–4804, 4806; Federal Claims Collection Act, 31 U.S.C. § 3711; and the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–2653.

*Personnel Claims Act*<sup>118</sup>

In addressing any claim, a claims JA should make two initial determinations. First, is the claimant a proper claimant? Second, is the claim proper? Under the PCA, a proper claimant is most commonly a member of the Active Army.<sup>119</sup> The claimant, however, may also be a member of the U.S. Army Reserve (USAR) or the National Guard (NG) performing inactive-duty training or active service or a civilian employee of Department of the Army (DOA).<sup>120</sup> Some civilians qualify under the PCA, to include some civilian employees of Army, USAR or NG, spouses of Army Soldiers, and surviving family members of Army soldiers.<sup>121</sup> Red Cross employees, foreign military personnel, United Services Organization personnel, and employees of government contractors, including technical representatives, are not proper claimants.<sup>122</sup>

Claims are paid under the PCA where the loss was incurred incident to service.<sup>123</sup> Claims payable under the PCA include: contractor caused losses, damage to personal property, and damage to personal property caused by extraordinary events—fire, flood, hurricane, other unusual occurrences, or by theft or vandalism – whether located on or off a military installation.<sup>124</sup> In a deployed environment, these claims most often arise when property is lost in transit.<sup>125</sup> It is important that the claimant be able to document the lost goods though evidence or testimony.

*Foreign Claims Act*

“The Foreign Claims Act . . . was enacted on 2 January 1942, retroactive to 27 May 1941, the date on which President Roosevelt proclaimed that the threat of a German advance in Western Europe constituted a national emergency for the United States.”<sup>126</sup> The FCA was designed to facilitate good will and friendly relations between the U.S. Armed Forces and host countries.<sup>127</sup> The FCA is widely used in the Iraqi theater. A First Cavalry Division BCT typically averaged twenty to forty new claims per week throughout a one-year deployment.<sup>128</sup>

The most common claimant under the FCA is a “local inhabitant” of the host country.<sup>129</sup> The term “inhabitant” conveys a meaning larger than citizen. It encompasses individuals who live in the country and have assumed a role in the economic and social fabric of the country.<sup>130</sup> Governments and corporations may also be proper claimants.<sup>131</sup>

Claims for “personal injury or death or for damage to or loss of real and personal property; or claims for damage to or loss of real property incident to its use and occupancy by the U.S. Armed Forces and for damage to or loss of personal property bailed to the United States are cognizable.”<sup>132</sup> Such claims, however, *must* arise from the negligent behavior of a member of the armed forces or from a “non-combat activity.”<sup>133</sup> If a local national citizen employed by the U.S. Armed Forces, however, commits the act or omission, the FCA does not allow payment.<sup>134</sup>

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<sup>118</sup> Personnel Claims Act, 31 U.S.C. § 3721; AR 27-20, *supra* note 115, ch. 11.

<sup>119</sup> AR 27-20, *supra* note 115, para. 11-4.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* para. 11-5.

<sup>124</sup> *Id.*

<sup>125</sup> Professional Experiences, *supra* note 7.

<sup>126</sup> DA PAM. 27-162, *supra* note 115, para. 10-1; *see also* Foreign Claims Act, 10 U.S.C. § 2734.

<sup>127</sup> DA PAM. 27-162, *supra* note 115, para. 10-1.

<sup>128</sup> Professional Experiences, *supra* note 7.

<sup>129</sup> DA PAM. 27-162, *supra* note 115, para. 10-2.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* para. 10-3.

<sup>134</sup> *Id.*

Liability based upon the acts or omissions of U.S. Soldiers or civilian employees is compensable where the acts are considered negligent or wrongful.<sup>135</sup> The persons need not be acting within the scope of their employment.<sup>136</sup> In fact, the persons need not even be on duty at the time of the act or omission.<sup>137</sup>

A claim arising from combat activities is not cognizable under the FCA.<sup>138</sup> This point is the greatest cause of consternation when adjudicating claims under the FCA. *Department of the Army Pamphlet 27-162* precludes payment under the FCA where “[d]amages caused by enemy action, or by the U.S. armed services resisting or attacking an enemy or preparing for immediate combat with an enemy . . .”<sup>139</sup> Payment for damages resulting from “[t]raining for combat and the operation of military facilities not directly involved in combat actions” are permitted<sup>140</sup> The combat activities exclusion applies even where war has not been declared.<sup>141</sup>

The combat activities exclusion is a difficult concept to convey to a foreign national and its application often results in inequitable outcomes. A frequent source of claims under the FCA is personal injury and property damage caused by bombings—cluster bombing in particular. These claims are not compensable due to the combat exclusion provision of the FCA.<sup>142</sup> A traffic accident, however, between a foreign national and a U.S. Soldier operating a humvee is likely compensable. Non-compensable claims may be examined as a request for solatia-like payment under the CERP Program.<sup>143</sup>

### *Real Estate Claims*

Real estate claims encompass all claims for compensation for private property that was or is occupied by the United States. These claims are adjudicated by the U.S. Army Corps of Engineers Contingency Real Estate Support Team (CREST).<sup>144</sup> The CREST team is located in the International Zone and handles all real estate claims in the Baghdad AO.

### *Solatia*

In certain countries, particularly in parts of Asia, the custom of solatia provides that an appropriate floral, fruit, or token money gift will be made to a victim or the victim’s family for injuries, death, or property damage.<sup>145</sup> Accordingly, when such customs exist, the U.S. military will provide solatia payments to foreign nationals as a result of incidents *involving* U. S. forces personnel or DOD civilian employees.<sup>146</sup> In Arab cultures, sensitivity to insults and slights (real or perceived) can go a long way to winning the acceptance of the local population or saving face. Until recently, the Air Force was the single service claims representative for CENTCOM. The Air Force refused to recognize Iraq as a country in which a tradition of solatia exists.<sup>147</sup> The Army has since assumed single service claims responsibility and, initially, followed the Air Force’s direction. On 26 November 2004, the Department of Defense Office of the General Counsel issued a letter of opinion finding

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> AR 27-20, *supra* note 115, para. 10-2; DA PAM. 27-162, *supra* note 115, para. 10-3.

<sup>139</sup> DA PAM. 27-162, *supra* note 115, para. 10-3.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See infra* notes 145-52 and accompanying text (outlining solatia-like payments).

<sup>144</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD 2-7 (15 Apr. 1999).

<sup>145</sup> DA PAM. 27-162, *supra* note 115, para. 10-10.

<sup>146</sup> *Id.*

<sup>147</sup> *See, e.g.,* Bryant K. Banes, Information Paper, Headquarters, Multinational Force Iraq, subject: Condolence Payments to Iraqi Civilians for Deaths, Injuries and Property Damage (11 June 2004) [hereinafter 11 June 2004 Memorandum]. There are, however, a number of Iraqi civil laws suggesting the propriety of solatia. IRAQ CIVIL LAW NO. 203 (1959) (providing that in the case of killing, death as result of personal harm or harmful acts, the compensation should be paid by the party causing harm to the representative of the victim); IRAQ CIVIL LAW NO. 202 (1959) (providing that any person who harms another, should pay the victim as compensation for damage incurred by the incident in question); IRAQ CIVIL LAW NO. 204 (1959) (outlining need for compensation by the responsible party for all types of assault with damages).

that a custom of “solatia payments [exist] in Afghanistan and Iraq.”<sup>148</sup> Prior to the issuance of this opinion letter, the U.S. military in Iraq was not making true solatia payments, but instead they were making what they termed “solatia-like” or “solatia-type” or “condolence” payments.<sup>149</sup> The guidance held that “[b]rigade-level commanders are authorized to use CERP funds to make solatia-like payments to compensate the families of local citizens killed or seriously injured by U.S. Soldiers.”<sup>150</sup> The 26 November 2004 clearly eliminates the need for such contorted fiscal guidance.

Previously, the use of appropriated funds for solatia-like payments was an issue of debate. On 11 June 2004, MNF-I released an information paper extending authorization to make solatia-like payments with appropriated funds.<sup>151</sup> Further, the information paper stated that “[a]bsent express authorization from the Commander, MNC-I, these payments can be no more than \$2500 for a death, \$1000 for a serious injury, or \$500 for property damage.”<sup>152</sup> It is unclear where these figures come from, or how this finding is justified. The applicable FRAGO states that the purpose of the CERP is to provide humanitarian relief and reconstruction assistance.<sup>153</sup> The FRAGO also notes that appropriated CERP funds may be used to pay for “collateral damage caused by combat operations that are not otherwise compensable because of combat exclusions.”<sup>154</sup> This section is commonly understood to encompass only damage to property not persons, which is supported by paragraph 3.C.8.L that notes that funds cannot provide “support to individuals or private businesses except for repairing damage caused by coalition forces . . . .”<sup>155</sup>

Assuming CERP funds, however, can be used to pay for personal injuries, an issue remains as to whether or not CERP funds can be used to pay for injuries caused by someone other than coalition forces. One might interpret paragraph 3.C.8.L to apply only to damage caused by coalition forces. Further, paying for damages caused by Anti-Iraqi Forces (AIF) raises serious policy issues. This issue requires clarification. Multi-National Forces Iraq recently attempted to clarify this area of fiscal guidance. The new FRAGO reiterated guidance concerning solatia-like payments from FRAGO 87, but expressly excluded any reference to coalition involvement.<sup>156</sup>

The 26 November 2004 memorandum expressly avoids this issue. The memorandum holds that solatia payments “may be made from local operation and maintenance funds.”<sup>157</sup> The memorandum further notes that “in determining whether to make a solatia payment, consideration should be given to . . . whether alternative authorities (e.g., Commanders’ Emergency Response Program) are available; and whether their use, in accordance with applicable law and regulations, might be more appropriate under the circumstances.”<sup>158</sup> Further guidance will undoubtedly be forthcoming, at present, however, the issue of using CERP to fund solatia remains open.

#### *Miscellaneous Claims Notes*

It is imperative that each BCT have at least one paralegal specialist dedicated to claims. The volume and complexity of claims issues cannot be parsed out between multiple persons. Equally important is hiring quality interpreters – preferably two interpreters.<sup>159</sup> While these translators need to be trusted, it is critical to maintain an objective evaluation of each interpreter.<sup>160</sup>

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<sup>148</sup> See On 26 November 2004, the Deputy General Counsel (International Affairs), Department of Defense, Office of the General Counsel, signed a memorandum authorizing the payment of solatia in Iraq and Afghanistan. Memorandum, Mr. Charles A. Allen, Deputy General Counsel (International Affairs), Department of Defense, Office of the General Counsel, to Staff Judge Advocate, U.S. Central Command, subject: Solatia (26 Nov. 2004) [hereinafter 26 November 2004 Memorandum].

<sup>149</sup> See, e.g., 11 June 2004 Memorandum, *supra* note 147.

<sup>150</sup> 1ST ARMORED DIVISION, FRAGMENTARY ORDER 542A TO OPOD 03-215 (Aug. 31, 2003) [hereinafter FRAGO 542A].

<sup>151</sup> 11 June 2004 Memorandum, *supra* note 147.

<sup>152</sup> *Id.*

<sup>153</sup> MFI FRAGO 87, *supra* note 66.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* para. 3.C.8.L.

<sup>156</sup> See FRAGO 542A, *supra* note 150.

<sup>157</sup> See 26 November 2004 Memorandum, *supra* note 148.

<sup>158</sup> *Id.*

<sup>159</sup> Professional Experiences, *supra* note 7.

The 5th BCT claims program is unique in that the BCT frequently interacted with a group of approximately twelve Iraqi attorneys. These attorneys assist clients, who are largely illiterate, by filling out paperwork, answering questions, and presenting evidence in exchange for a small fee—normally ten percent of the claim. The 5th BCT encouraged claimants to seek legal counsel. Their assistance inevitably sped up the application process. Further, when claimants do not have any means of communication, the attorney can help facilitate communication. The 5th BCT's relationships with local national attorneys also afforded leverage for assistance with CMO projects. Finally, the 5th BCT's relationships resulted in local national attorneys volunteering information on insurgent activities or bringing in persons who had such information.<sup>161</sup>

The division OSJA's role in the claims process is critical. The division acts as the higher claims authority; thus, when a claim is beyond the claim limit of a BCT FCC, the claim is forwarded along with a "seven paragraph" memorandum to the division.<sup>162</sup> Furthermore, the division maintains a central database of claims to ensure the same claim is not paid at two different BCTs.

## Other Issues

### *Intelligence Law*

Intelligence law is a very small component of the BCT practice because in nearly all circumstances, the BCT intelligence staff section (S-2) does not run intelligence operations. Furthermore, most intelligence law only governs the collection of intelligence on U.S. persons.<sup>163</sup> Be prepared, however, to address intelligence law issues if, and when, local national workers are screened for operations security (OPSEC) reasons.<sup>164</sup>

Intelligence law issues may arise in regards to *Army Regulation 381-12*.<sup>165</sup> All members of the Army, military and civilian, must be knowledgeable of their responsibilities under this regulation to report Subversion and Espionage Directed Against the United States (SAEDA) incidents.<sup>166</sup> Such events include attempts by unauthorized persons to obtain classified or unclassified information concerning U.S. Army facilities, activities, personnel, technology, or material through questioning, elicitation, trickery, bribery, threats, coercion, blackmail, photography, observation, collection of documents or material, correspondence, or computer hacking.<sup>167</sup> Also, active attempts to encourage military or civilian employees to violate laws, disobey lawful orders or regulations, or disrupt military activities constitute a SAEDA event that requires reporting. Finally, issues may arise concerning the Intelligence Contingency Fund—a funding source for intelligence operations detailed in *Army Regulation 381-141*.<sup>168</sup>

Most people consider OPSEC an intelligence function; however, the proponent for OPSEC is the staff operations officer.<sup>169</sup> The OPSEC regulation, however, demands close coordination with security programs and intelligence staff.<sup>170</sup> Judge advocates should anticipate facilitating communication between the two staff sections and assisting in execution of an OPSEC plan.

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<sup>160</sup> Units and individuals will go out of their way to protect and provide for their interpreter, even in the face of mountains of evidence of misconduct. On more than one occasion, a BCT fired or detained interpreters even as persons within their units protested loudly. In every instance, the fired or detained interpreter was indeed culpable. Professional Experiences, *supra* note 7.

<sup>161</sup> *Id.*

<sup>162</sup> See AR 27-20, *supra* note 115.

<sup>163</sup> See, e.g., Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Dec. 8, 1981); U.S. DEP'T OF DEFENSE, DIR. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec. 1982) (implementing EO 12,333); U.S. DEP'T OF ARMY, REG. 381-10, UNITED STATES ARMY INTELLIGENCE ACTIVITIES (1 July 1984).

<sup>164</sup> Shortly after arriving in theater, the 5th BCT screened over 800 local national workers that worked directly for the BCT. After more than a year of service with the U.S. military, most local nationals had never even been given a preliminary screening. During such screenings, screeners may request to speak with an interpreter who is a U.S. citizen.

<sup>165</sup> U.S. DEP'T OF ARMY, REG. 381-12, SUBVERSION AND ESPIONAGE DIRECTED AGAINST THE UNITED STATES (15 Jan. 1993).

<sup>166</sup> *Id.* (citing NATIONAL SECURITY DECISION, DIR. 197, REPORTING HOSTILE CONTACTS AND SECURITY AWARENESS (1 Nov. 1985)).

<sup>167</sup> *Id.*

<sup>168</sup> U.S. DEP'T OF ARMY, REG. 381-141, INTELLIGENCE CONTINGENCY FUNDS (16 Jan. 2004).

<sup>169</sup> U.S. DEP'T OF ARMY, REG. 530-1, OPERATIONS SECURITY (3 Mar. 1995).

<sup>170</sup> *Id.*

## *Command Policy*

Though not a traditional JA responsibility, writing policy letters and “Sends”<sup>171</sup> messages became a common practice for JAs across the theater. Be prepared to draft policies on the following: cell phone use, internet use, pornography, sexual relations, negligent discharges, and fiscal responsibility.<sup>172</sup>

### **Conclusion**

In short, the BCT practice is diverse, interesting, dynamic, and fully engaging. The diversity of issues, many of which are non-traditional, cannot be overemphasized. More often than not, the JA will provide assistance on the basis of his analytical or writing skills rather than his ability to provide legal analysis. The complexity of issues is further compounded by the independence with which most BCTs operate. The BCT practice is unquestionably complex and challenging; however, it is equally rewarding.

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<sup>171</sup> A “Sends” message is akin to an informal policy letter, addressing both new policies and issues of concern.

<sup>172</sup> It would be advisable to have a number of these policies in place before deployment.

## TJAGLCS Practice Note

### *Tax Law Note*

#### **Update for 2004 Federal Income Tax Returns**

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The Working Families Tax Relief Act of 2004 (WFTRA)<sup>1</sup> and the American Jobs Creation Act of 2004 (AJCA)<sup>2</sup> made changes in federal income tax law that will effect returns for tax year 2004. One change is specifically applicable to military members who have served in a combat zone or qualified hazardous duty area who may have lost their eligibility for the Earned Income Credit because of their service in the combat zone (and resultant lack of earned income). These service members may now elect to include combat zone pay in income to qualify for the Earned Income Tax Credit.<sup>3</sup> Congress also took action to extend several tax benefits, including the educator expense deduction, which had been set to expire in 2003.<sup>4</sup> This note highlights changes that might be relevant or of interest to military taxpayers. Its goal is to inform legal assistance attorneys of updates in tax numerology and changes for the upcoming tax season, as well as provide information to help their clients plan for future tax years. This note generally lists the changes in the order in which they appear on the Form 1040 tax return.

#### **Key Changes for 2004**

##### **Income**

###### *Sale of Personal Residence Acquired in a Like-Kind Exchange—Schedule D, Form 1040*

Taxpayers who convert rental residential real property to a principal residence should be aware that a change in the tax law may limit their ability to exclude gain on the sale of the residence if they obtained the property through a like-kind exchange. Generally, an individual taxpayer can exclude up to \$250,000 on the sale of a home.<sup>5</sup> Those whose filing status is married filing jointly may exclude up to \$500,000.<sup>6</sup> For sales after 22 October 2004, the AJCA does not allow the exclusion if the taxpayer sells the home within five years of acquiring the property through a like-kind exchange.<sup>7</sup>

###### *Expense Limit for Certain Sport Utility Vehicles—Schedule C, Form 1040*

For small business taxpayers who purchased a Hummer or were planning to purchase one, Congress changed the law that allowed vehicles over 6,000 pounds used for business purposes to be entirely depreciated in the year of purchase. Under the AJCA, the first-year depreciation deduction for such vehicles purchased after 22 October 2004 is now limited to \$25,000 (the limit for vehicles purchased before 23 October 2004 was \$100,000).<sup>8</sup> First-year expensing limits for other assets will remain at \$100,000 (adjusted annually for inflation) until 2008.<sup>9</sup> Before the AJCA, this amount was scheduled to revert to \$25,000 in 2006.

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<sup>1</sup> Pub. L. No. 108-311, 118 Stat. 38 (LEXIS 2004).

<sup>2</sup> Pub. L. No. 108-357, 118 Stat. 1418 (LEXIS 2004).

<sup>3</sup> WFTRA § 104 (amending I.R.C. § 32(c)(2)).

<sup>4</sup> *Id.* § 307.

<sup>5</sup> I.R.C. § 121.

<sup>6</sup> *Id.*

<sup>7</sup> AJCA § 840 (amending § 121(d)).

<sup>8</sup> *Id.* § 910 (adding subpara. (6) to I.R.C. § 179(b)).

<sup>9</sup> *Id.* § 201 (amending I.R.C. § 179(b), (c), and (d)).

## Itemized Deductions

### *Sales Tax Deduction—Line 5b, Schedule A, Form 1040*

For their 2004 and 2005 tax returns, individuals will have a choice whether to deduct state and local income taxes or state and local sales taxes on their income tax returns.<sup>10</sup> For residents of states that do not have a state income tax (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming), this is a benefit because it creates a deduction where there was none before. Taxpayers should compare the amounts spent on sales tax, especially when a large purchase was made, to the amount of state income taxes paid. Taxpayers will have the choice of tracking the actual amount of sales tax paid (which means keeping receipts) or using tables provided by the Treasury Department.<sup>11</sup> Taxpayers may also use the Optional State Sales Tax Tables and then add on the sales tax from large purchases, such as for an automobile or boat.<sup>12</sup> I.R.S. Publication 600 will contain the Optional State Sales Tax Tables.<sup>13</sup> Because the AJCA was passed so close to the end of the year, it is not likely that these tables will be available before the tax year 2004 filing season begins in 2005. For residents of states that have an income tax, there is not likely to be a benefit from this change, and these taxpayers will generally be better off deducting state and local income taxes. However, if a state has low income taxes and high sales taxes, then the change may be beneficial. The taxpayer should calculate the deduction both ways to see which is more beneficial.

### *Vehicle Donations, Gifts to Charity—Line 16, Schedule A, Form 1040 (and Form 8283)*

If a taxpayer was considering donating a vehicle to charity and taking as a charitable deduction the fair market value of the vehicle (based on something like the Kelley Blue Book<sup>14</sup>), then he will have to think again. The amount of the allowable charitable deduction will now depend on how the donee organization uses the vehicle. If the charity sells the vehicle without using it or improving it, then the amount of the deduction will be limited to the amount for which the charity actually sold the vehicle.<sup>15</sup> The charitable organization is required to provide an acknowledgment to the taxpayer with the use or sales information.<sup>16</sup> The Treasury Department has not yet promulgated regulations detailing procedures on how the acknowledgment will be provided. Along with the acknowledgment requirement, Congress also created a penalty scheme for fraudulent acknowledgments with respect to donations of motor vehicles, boats, and airplanes.<sup>17</sup>

## Calculating Taxable Income and Tax Payments and Credits

### *Refundable Child Credit and Earned Income Credit for Military Taxpayers Serving in Combat—Lines 67 and 65, Form 1040; Lines 42 and 41, Form 1040A*

Income earned by military members in a combat zone (CZ) or qualified hazardous duty area (QHDA) is generally excluded from gross income.<sup>18</sup> However, to be entitled to the Child Tax Credit (CTC) or the Earned Income Tax Credit (EITC), a taxpayer must have certain levels of earned income.<sup>19</sup> Before the WFTRA, some junior military members who served in a CZ or QHDA were unable to take advantage of these tax credits because all of their pay was excluded from the definition of income for federal tax purposes. These taxpayers would not have a tax liability because of their low income. The WFTRA now makes it possible for service members to elect to include in gross income what they earn in a CZ or QHDA, so that they can qualify for the EITC.<sup>20</sup> Although the election is not applicable to the CTC, the amount of the CTC that is refundable has been increased from ten percent to fifteen percent the amount that exceeds a threshold amount.<sup>21</sup> This means that those who have a CTC amount greater than their tax owed could get a refund up to fifteen percent of the amount by which their 2004 taxable earned income exceeds \$10,750, meaning a larger refund for many taxpayers.

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<sup>10</sup> *Id.* § 501.

<sup>11</sup> *Id.* § 501(a) (amending I.R.C. § 164).

<sup>12</sup> *Id.* § 501.

<sup>13</sup> 2004 Instructions for Schedule A and B (Form 1040), p. A-3, available at [www.irs.gov/formspubs](http://www.irs.gov/formspubs) (last visited Dec. 13, 2004).

<sup>14</sup> Kelley Blue Book, available at [www.kbb.com](http://www.kbb.com) (last visited Dec. 13, 2004).

<sup>15</sup> AJCA § 884 (amending I.R.C. § 170(f)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* § 884(b) (creating I.R.C. § 6720).

<sup>18</sup> I.R.C. § 112.

<sup>19</sup> *Id.* § 32.

## Uniform Definition of a Child

Beginning with tax year 2005, the WFTRA makes uniform the definition of a child.<sup>22</sup> Before the WFTRA, there were different definitions of a child for head of household and dependency determinations, and also for qualification for the dependent care credit, the child tax credit, the earned income credit.

## Extension of Expiring Family Tax Provisions

In the WFTRA, Congress extended several tax provisions into 2005 and beyond.<sup>23</sup> The Child Tax Credit of \$1,000 per child was extended until 2010.<sup>24</sup> The marriage penalty relief in the standard deduction and fifteen percent tax brackets (continuing the standard deduction and tax brackets for married filing jointly couples at twice the amounts for those of single taxpayers) was also continued 2010.<sup>25</sup> The WFTRA continues at current levels and allows for inflation adjustment through 2010 of the ten percent rate tax bracket levels.<sup>26</sup> These are \$14,000 for married filing jointly filers; \$10,000 for heads of household; and \$7,000 for single taxpayers.<sup>27</sup> Finally, current higher Alternative Minimum Tax exemption and phase-out levels were continued through 2005.<sup>28</sup>

## Planning for Tax Year 2005

### Increases in Individual Retirement Arrangement (IRA) and Uniformed Services Thrift Savings Plan (TSP) Contributions Limits

In 2005, the contribution limits for IRAs will increase to \$4,000 per individual.<sup>29</sup> Other contribution limitations still apply, e.g., earned compensation must exceed the amount of IRA contributions. The maximum amount a military taxpayer may contribute to the TSP increases to \$14,000 and 10% of base pay per month (from \$13,000 and nine percent per month for 2004).<sup>30</sup>

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<sup>20</sup> *Id.* § 104.

<sup>21</sup> WFTRA § 102, § 104 (amending I.R.C. 24(d)(1)(B)(i)).

<sup>22</sup> *Id.* § 201.

<sup>23</sup> *Id.* § 101.

<sup>24</sup> *Id.* § 101(a).

<sup>25</sup> *Id.* § 101(b), (c).

<sup>26</sup> *Id.* § 101(d).

<sup>27</sup> I.R.C. § 1(i)(1)(B).

<sup>28</sup> WFTRA § 103(a) (amending I.R.C. § 55(d)(1)).

<sup>29</sup> I.R.C. § 219(b)(1).

<sup>30</sup> *Id.* § 402(g).

## Appendix

There are six different marginal tax brackets for tax year 2004, and they are 10%, 15%, 27%, 30%, 35%, and 38.6%.<sup>31</sup>

a. Married Individuals Filing Joint Returns and Surviving Spouses:

<b>Taxable Income</b>		<b>Marginal Tax Rate</b>
<i>Over</i>	<i>But Not Over</i>	
\$1	14,300	10%
14,300	58,100	\$1,440 + 15% of amount over \$14,300
58,100	117,250	\$8,000 + 25% of amount over \$58,100
117,250	178,650	\$22,787.50 + 28% of amount over \$117,250
178,650	319,100	\$39,979.50 + 33% of amount over \$178,650
319,100		\$86,328 + 35% of amount over \$319,100

b. Unmarried Individuals (other than Surviving Spouses and Heads of Households):

<b>Taxable Income</b>		<b>Marginal Tax Rate</b>
<i>Over</i>	<i>But Not Over</i>	
\$1	7,150	10%
7,150	29,050	\$715 + 15% of amount over \$7,150
29,050	70,350	\$4,000 + 25% of amount over \$29,050
70,350	146,750	\$14,325 + 28% of amount over \$70,350
146,750	319,100	\$35,717 + 33% of amount over \$146,750
319,100		\$92,592.50 + 35% of amount over \$319,100

c. Heads of Households:

<b>Taxable Income</b>		<b>Marginal Tax Rate</b>
<i>Over</i>	<i>But Not Over</i>	
\$1	10,200	10%
10,200	38,900	\$1,020 + 15% of amount over \$10,200
38,900	100,500	\$5,327 + 25% of amount over \$38,900
100,500	162,700	\$20,725 + 28% of amount over \$100,500
162,700	319,100	\$38,141 + 33% of amount over \$162,700
319,100		\$89,753 + 35% of amount over \$319,100

d. Married Individuals Filing Separate Returns:

<b>Taxable Income</b>		<b>Marginal Tax Rate</b>
<i>Over</i>	<i>But Not Over</i>	
\$1	\$7,150	10%
7,150	29,050	\$715 + 15% of amount over \$7,150
29,050	58,625	\$4,000 + 25% of amount over \$29,050
58,625	89,325	\$11,393.75 + 28% of amount over \$58,625
89,325	159,550	\$19,989.75 + 33% of amount over \$89,325
159,550		\$43,164 + 35% of amount over \$159,550

<sup>31</sup> *Id.* § 1(a)-(d), (i)(2); Rev. Proc. 2003-85, 2003-49 I.R.B. 1184.

e. Estates and Trusts:

<b>Taxable Income</b>		<b>Marginal Tax Rate</b>
<i>Over</i>	<i>But Not Over</i>	
\$1	\$1,950	15%
1,950	4,600	\$292.50 + 25% of amount over \$1,950
4,600	7,000	\$955 + 28% of amount over \$4,600
7,000	9,550	\$1,627 + 33% of amount over \$7,000
9,550		\$2,468.50 + 35% of amount over \$9,550

The 2004 Standard Deduction amounts are as follows:<sup>32</sup>

- a. Married filing jointly or qualifying widow(er)—\$9,700.
- b. Single—\$4,850.
- c. Head of household—\$7,150.
- d. Married filing separately—\$4,850.

Reduction of Itemized Deductions.<sup>33</sup> Otherwise allowable itemized deductions are reduced if AGI in 2004 exceeds:

- a. Married filing separately—\$71,350.
- b. All other returns—\$142,700.

2004 Personal Exemptions.<sup>34</sup>

- a. Personal exemption deduction—\$3,100.
- b. 2004 Phase Out Amounts for personal exemptions:<sup>35</sup>

<b><u>Taxpayer</u></b>	<b><u>Begins After</u></b>	<b><u>Fully Phased Out*</u></b>
Married filing jointly	\$214,050	\$336,550
Single	\$142,700	\$265,200
Head of household	\$178,350	\$300,850
Married filing separately	\$107,025	\$168,275

\*Phase-out occurs at rate of 2% for each \$2,500 or part of \$2,500 (\$1,250 in both cases for married filing separately) by which the taxpayer's adjusted gross income exceeds the "Begins After" amount.

<sup>32</sup> I.R.C. § 63(c)(2); Rev. Proc. 2003-85, 2003-49 I.R.B. 1184.

<sup>33</sup> I.R.C. § 68.

<sup>34</sup> *Id.* § 151.

<sup>35</sup> *Id.* § 151(d)(3).

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

**Legitimate Targets of Attack: Considerations When Targeting in a Coalition**  
*Squadron Leader Catherine Wallis, Royal Australia Air Force*

*We need to understand going in the limitations that our coalition partners will place upon themselves and upon us. There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front.<sup>1</sup>*

Recent major U.S. operations, from Kosovo to Iraq, have been conducted in a coalition, and this trend is likely to continue. During these coalition operations, some targeting decisions require the approval of more than one coalition member.<sup>2</sup>

Under the law of war (LOW), legitimate targets are limited to military objectives where the attack is not expected to cause excessive collateral damage in relation to the concrete and direct military advantage anticipated.<sup>3</sup> This legal requirement, however, is capable of more than one reasonable interpretation. In addition, a range of factors may influence whether objectives are considered acceptable targets, regardless of the permissibility of attacking them under international law. When targeting in a coalition, it is important that judge advocates (JAs) understand U.S. obligations and coalition partner obligations in order to avoid differences that would adversely impact the operation.

Unclassified national policy on legitimate targets of attack is not available for most countries. Accordingly, this article highlights the available interpretations of military objectives and the range of factors that influence national targeting decisions. This article therefore does not provide “the answers,” but instead focuses on providing information to assist JAs in asking the right questions. This article concludes by proposing some ways JAs can ensure coalition partner differences are identified and factored into planning.

### Legal Obligations

The starting point for identifying legitimate targets of attack is Protocol I.<sup>4</sup> Although the United States is not a Party to Protocol I,<sup>5</sup> it is bound to certain provisions to the extent Protocol I codifies customary international law.<sup>6</sup> Protocol I, Article 48, provides the following:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>7</sup>

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<sup>1</sup> Lieutenant General Michael Short, USAF, Commander of Allied Air Forces, Southern Europe, Address at the Air Force Association's Air Warfare Symposium (Feb. 25, 2000), quoted in Amnesty International, “Collateral Damage” or Unlawful Killings? *Violations of the Laws of War by NATO During Operation Allied Force* (June 6, 2000), at <http://www.web.amnesty.org/ai.nsf/index/EUR700182000> [hereinafter Amnesty Report].

<sup>2</sup> See James E. Baker, *When Lawyers Advise Presidents in Wartime, Kosovo and the Law of Armed Conflict*, NAVAL WAR C. REV., Winter 2002, available at <http://www.nwc.navy.mil/press/Review/2002/winter/art1-w02.htm> (outlining the target approval process during the Kosovo conflict); e-mail from MAJ Philip Wold, United States Air Force, former Chief, Operations Law, 9 AF/USCENTAF, to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Operations, Center for Law and Military Operations (12 Apr. 2004) [hereinafter Wold e-mail] (providing comments of MAJ Thomas J Cluff USAF, former judge advocate, Combat Plans Division, Combined Air Operations Center, dealing with United Kingdom and Australian targeting policy in Iraq) (on file with CLAMO).

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Article 52, 57, 1125 U.N.T.S. 3 [hereinafter Protocol I].

<sup>4</sup> *Id.*

<sup>5</sup> International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977: *States Parties* (last visited Nov. 1, 2004) [hereinafter States Parties] (listing Stated Parties to Protocol I).

<sup>6</sup> See Major Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143 (2001) (quoting Michael J. Matheson, *Session I: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419, 420 (1987)).

<sup>7</sup> Protocol I, *supra* note 3, art. 48.

Military objective for the purposes of the LOW<sup>8</sup> is defined in Article 52(2), Protocol I.

[M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>9</sup>

Military objectives may be attacked if they meet the following proportionality test set out in Article 57(2)(a)(iii), Protocol I:

[R]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>10</sup>

In addition, there are specific requirements that apply to attacks on certain civilian objects that are being used perfidiously by the enemy.<sup>11</sup>

## Interpretation of Legal Obligations

### *Commentaries*

The International Committee of the Red Cross (ICRC) and Michael Bothe, Professor of Public Law at the Johann Wolfgang Goethe University in Frankfurt, provided commentary on the concept of military objectives, which is a useful starting point for understanding the limits of legitimate targets of attack.<sup>12</sup> The ICRC commentary provides:

It should be noted that the definition is limited to objects but it is clear that members of the armed forces are military objectives.

. . . .

A closer look at the various criteria used reveals that the first refers to objects which, by their ‘nature,’ make an effective contribution to military action. This category comprises all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.

The second criterion is concerned with the ‘location’ of objects. Clearly, there are objects which by their nature have no military function but which, by virtue of their location, make an effective contribution to military action. This may be, for example, a bridge or other construction, or it could also be . . . a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it . . . .

The criterion of ‘purpose’ is concerned with the intended future use of an object, while that of ‘use’ is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or

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<sup>8</sup> Note that “military objective” as a LOW term is different from the Department of Defense (DOD) definition of the term. The DOD defines military objective as “**A derived set of military actions to be taken to implement National Command Authorities guidance in support of national objectives. A military objective defines the results to be achieved by the military and assign tasks to commanders.**” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 307 (12 Apr. 2001, as amended through 7 Oct. 2004) [hereinafter DOD DICTIONARY].

<sup>9</sup> Protocol I, *supra* note 3, art. 52(2). Protocol I applies only to objects situated on land. Protocol I’s definition of military objective, however, is generally believed to be customary international law relating to targets at sea. See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

<sup>10</sup> Protocol I, *supra* note 3, art. 57(2).

<sup>11</sup> Attacks on medical facilities require certain warnings. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 19, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. Attacks on dangerous works require the attack to be the only feasible means, Protocol I, *supra* note 3, art. 56(2). The United States, however, does not agree to the provisions of Art. 56. See John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War*, 15 FLA. J. INT’L L. 481, 509 (2003).

<sup>12</sup> See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 (1987) [hereinafter ICRC COMMENTARY]; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION OF 1949 (1982).

headquarters staff, they become military objectives. It is clear from paragraph 3 that in case of doubt, such places must be presumed to serve civilian purposes.

Other establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function and is of value for the civilian population, but also for the military. In such situations the time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must be expected among the civilian population and the damage which would be caused to civilian objects.

Finally, destruction, capture or neutralization must offer a ‘definite military advantage’ in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.<sup>13</sup>

Bothe provides additional commentary on key phrases of Article 52(2), Protocol I:

Military objectives must make an “effective contribution to military action.” This does not require a direct connection with combat operation . . . Thus a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party’s overall war effort.

. . . .

The term military advantage involves a variety of considerations, including the security of the attacking force. Whether a definite military advantage would result from an attack must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation. It is not necessary that the contribution made by the object to the Party attacked be related to the advantage anticipated by the attacker from the destruction, capture or neutralization of the object.<sup>14</sup>

### Academic Interpretations

Few, if any, nations have published a detailed unclassified analysis of precisely what objects they consider to be military objectives, and under what circumstances. Within the academic community, however, a variety of interpretations have been proposed. A selection of these and their main critiques are set out below in order to illustrate the range of available interpretations of what constitutes a legitimate military objective.

#### *Restrictive Interpretations*

The most restrictive interpretations of legitimate targets derive from a narrow view of what constitutes “an effective contribution to military action” and a “definite military advantage” under Protocol I; requiring the target to be *directly* connected with a *specific* combat operation in order to be legitimate. For example, in relation to targeting bridges, Human Rights Watch stated:

The destruction of bridges that are not central to transportation arteries or have a purely psychological importance does not satisfy the criterion of making an “effective contribution to military action” or offering a “definite military advantage.”<sup>15</sup>

Restrictive interpretations would also consider attacks on objects that contribute to the will of the civilian population by generating support for the conflict, such as broadcasting propaganda through civilian radio and television, outside the scope

<sup>13</sup> ICRC COMMENTARY, *supra* note 12, at 635-36.

<sup>14</sup> BOTHE, *supra* note 12, at 324-25.

<sup>15</sup> William M. Arkin, *Civilian Deaths in the NATO Air Campaign*, HUM. RTS. WATCH, Feb. 2000, available at <http://www.hrw.org/reports/2000/nato/index.htm> [hereinafter HRW Report].

of Article 52(2). After the North Atlantic Treaty Organization's (NATO) attacks on Serbian television and radio in 1999, Human Rights Watch concluded:

While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, neither purpose offers the concrete and direct military advantage necessary to make them a legitimate military target.<sup>16</sup>

In relation to the same incident, Amnesty International stated:

Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" beyond the acceptable bounds of interpretation.<sup>17</sup>

These interpretations have been criticized as not reflecting customary international law or State practice, which it is argued, allow for attacks that produce a psychological or strategic advantage.<sup>18</sup>

#### *Including Psychological Objectives*

Major Jeanne Meyer, U.S. Air Force, judge advocate, argues that attacking objects that affect civilian morale is legitimate and within the scope of Article 52(2), Protocol I, provided that civilians are not targeted.<sup>19</sup>

[T]he United States should openly assert that it continues to consider bending the will of the enemy to be a legitimate goal when applying the force of air power. Furthermore, during times of armed conflict, the United States should continue to strike targets to achieve that goal, consistent with the basic principles of the law of war. Such actions do not repudiate the value or legitimacy of Article 52(2), but instead exercise a valid interpretation of its language consistent with prior customary international law and state practice.<sup>20</sup>

She proposes that appropriate military objectives to meet this goal might include bank accounts, financial institutions, shops, entertainment sites, and government buildings.<sup>21</sup> Marco Sassoli, Professor of International Law at the University of Quebec in Montreal, criticizes this interpretation on the basis that there is no available objective or independent criteria for such attacks that could guarantee a minimum of humanity in armed conflict.<sup>22</sup>

#### *Varying Scope*

Another interpretation is that the scope of what constitutes a military objective is affected by the size and scope of the conflict. That is, in conflicts where the nation is heavily committed to the war effort, economic activities such as transportation, supply sources, and communications used by civilians may become legitimate targets. In peace enforcement operations or humanitarian intervention, however, the number of legitimate targets would be more restricted.<sup>23</sup>

Sassoli believes that the main difficulty with this approach is that there is no definition of these special rules or restrictions and that such an approach abandons the traditional equality of belligerents before the LOW.<sup>24</sup> Horace B. Robertson, Professor of Law (Emeritus) at Duke University, believes the wording of Article 52 rejects this interpretation.<sup>25</sup>

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<sup>16</sup> *Id.* (quoting Letter from Human Rights Watch, to Javier Solana, Secretary-General of the Council of the European Union and High Representative for the Common Foreign and Security Policy (May 13, 1999)).

<sup>17</sup> Amnesty Report, *supra* note 1.

<sup>18</sup> See Meyer, *supra* note 6, at 168-71.

<sup>19</sup> *Id.* at 182.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 181.

<sup>22</sup> MARCO SASSOLI, LEGITIMATE TARGETS OF ATTACK UNDER INTERNATIONAL HUMANITARIAN LAW, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH 5-6 (2003), at <http://www.ihlresearch.org/ihl/pdfs/Session1.pdf>.

<sup>23</sup> See *id.* at 6 (providing examples in support of this viewpoint).

<sup>24</sup> *Id.* at 6.

## *No Practical Restrictions on Targeting Dual-use Objects*

Perhaps the language of Article 52(2) and the proportionality test in Article 57, Protocol I are so subjective as to allow any attack on a dual-use object? Peter Rowe, Professor of Law at University of Lancaster, made the following assessment of the targeting restrictions imposed by Article 52(2), based upon his analysis of NATO's 1999 Kosovo Air campaign:

[T]he reality of the situation is that those objects which military commanders wished to attack, for whatever reasons, were attacked. There is no evidence that the rigors of the limitations imposed on the definition of military objective were applied to attacks against dual purpose objects. In any event, the Protocol is, when it comes to the test, very weak in determining what may or may not be attacked.<sup>26</sup>

Rowe further explains his belief that this problem occurs because military commanders, in good faith, often overestimate the military advantage to be gained from a particular mission, and underestimate the collateral damage.<sup>27</sup> There is some support for this view from Sassoli who acknowledges that:

[i]n practice, it may admittedly be extremely difficult to determine the importance of the military use and of the military advantage in destroying the object, in particular if the military has priority access to all remaining infrastructure.<sup>28</sup>

The ICRC also acknowledges that the provisions are subject to interpretation, but believes that Article 52, Protocol I does set limits on what constitutes a military objective:

[I]t remains the case that the text adopted by the Diplomatic Conference largely relies on the judgment of soldiers who will have to apply these provisions. It is true that there are clear-cut situations where there is no possibility of doubt, but there are also borderline cases where the responsible authorities could hesitate. In such circumstances the general aim of the Protocol should be borne in mind, i.e., the protection of the civilian population. In any case an essential step forward has been taken in that belligerents can no longer arbitrarily and unilaterally declare as a military objective any civilian object, as happened all too often in the past.<sup>29</sup>

### *Interpretation by Courts and Tribunals*

Targeting objects that are not military objectives is a war crime<sup>30</sup> that may be prosecuted in the International Criminal Court (ICC).<sup>31</sup> Although the United States is not a party to the ICC, many coalition partners are parties, and, for those countries, ICC interpretations will be relevant to national targeting decisions. It is therefore important for U.S. JAs to be familiar with the way in which the ICC will function. While no prosecutions have yet been brought before the ICC, an indication of the standard to which a State will be held may be gleaned from the practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>32</sup> In 2000, an ICTY committee reviewed allegations of various violations of international law against the NATO air campaign in the Federal Republic of Yugoslavia for consideration by the prosecutor

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<sup>25</sup> Horace B Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S. A.F. ACAD. J. OF LEGAL STUD. 35, 49-52 (1997-1998).

<sup>26</sup> Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 837 INT'L REV. OF RED CROSS 147 (2000), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwplList124/B98F42CBD37BB2D3C1256B66005E3504>.

<sup>27</sup> *Id.*

<sup>28</sup> SASSOLI, *supra* note 22, at 7.

<sup>29</sup> ICRC COMMENTARY, *supra* note 12, para. 2037.

<sup>30</sup> Protocol I, *supra* note 3, art. 85.

<sup>31</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998), available at <http://www.un.org/law/icc/statute/contents.htm>.

<sup>32</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, annex, art. 8(1) (1993), available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute]. According to the ICTY Statute, the Tribunal has jurisdiction over grave breaches of the Geneva Conventions (Article 2) and other violations of the laws and customs of war (Article 3) committed since 1991 in any part of the former Federal Republic of Yugoslavia (Article 1) by any person regardless of that person's nationality. *Id.* arts. 1-3.

for the ICTY.<sup>33</sup> In the course of reviewing the alleged violations, the committee focused on the following aspects of targeting decisions:<sup>34</sup>

(1) What was the intended objective?

(2) Was the intended objective a military objective? The committee's report (ICTY Report) determined that each target must meet the criteria for military objectives.<sup>35</sup> Thus, it was considered insufficient to determine that, for example, all bridges or all refineries are military objectives; rather, each bridge and refinery must be separately assessed. The ICTY Report, however, recognized the differences of opinion in interpreting military objectives.<sup>36</sup>

The ICTY Report also determined that the media is not a military objective if the effect of the media is merely to foster support for the war effort.<sup>37</sup> If, however, the media is part of the military command, control and communications network, is used to incite crimes, or is the nerve system that keeps a "war-monger in power," it may be a military objective.<sup>38</sup>

(3) What did the attacker (NATO) actually know and what could they have known about potential collateral damage prior to the attack?

(4) Was the proportionality test in Article 57(2)(a)(iii), Protocol I, met on the basis of information available prior to the attack?<sup>39</sup>

(5) When the target was determined post-attack to have been a civilian object, was any person reckless in taking precautionary measures to the degree that would sustain criminal charges? For example, the ICTY Report found that the aircrew and senior leaders involved in the attack that destroyed the Chinese Embassy should not be assigned any responsibility for receiving and relying upon the wrong target or wrong information.<sup>40</sup>

### Legitimate Targets Under U.S. Doctrine

While the United States is not a party to Protocol I, it considers Article 52 to reflect customary international law.<sup>41</sup> In interpreting this obligation, it is clear from doctrine and practice that the United States considers psychological objectives legitimate. Air Force doctrine states "[s]trategic attack builds on the idea that it is possible to directly affect an adversary's sources of strength and will to fight without first having to engage and defeat their military forces."<sup>42</sup>

The U.S. position in relation to objects that financially support the enemy, such as export industry, is less clear. United States doctrine suggests U.S. interpretation of military objectives is slightly broader than Article 52, Protocol I, in this respect, however, several recent statements assert that this is not the case.

The *Air Force Intelligence Targeting Guide*<sup>43</sup> states:

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<sup>33</sup> See ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000), *reprinted in* 39 I.L.M. 1257 (2000) [hereinafter ICTY Report].

<sup>34</sup> See generally *id.*

<sup>35</sup> *Id.* at 1272-73.

<sup>36</sup> *Id.* at 1266-67.

<sup>37</sup> *Id.* at 1270.

<sup>38</sup> *Id.* at 1272-73.

<sup>39</sup> In relation to the impact of an attack on the environment, as an aspect of collateral damage, the ICTY Report concluded that "in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate." *Id.* at 1263.

<sup>40</sup> *Id.* at 1281.

<sup>41</sup> See *supra* note 5 and accompanying text; Michael Matheson, former U.S. Dept. of State Deputy Legal Advisor, Comments at the Sixth Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law: *A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, *reprinted in* 2 AM. U. J. INT'L L. & POL'Y 428 (1988) [hereinafter Matheson comments]; see also ICTY Report, *supra* note 33, at 1269.

<sup>42</sup> U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE DOCUMENT I 40 (17 Nov. 2003).

<sup>43</sup> U.S. DEP'T OF AIR FORCE, PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE (1 Feb. 1998).

[M]ilitary objectives *include* those objects that by their nature, location, purpose, or use make an effective contribution to military action, or whose total or partial destruction, capture, or neutralization offers a definite military advantage. The key factor is *whether the object contributes to the enemy's war fighting or war sustaining capability*.<sup>44</sup>

Similarly, the *Navy Commander's Handbook* also refers to “war fighting or war sustaining capability”<sup>45</sup> rather than Article 52(2)'s language—“contribute to military action.”<sup>46</sup> The 1997 *Navy Annotated Supplement* further states “**This definition is accepted by the United States as declarative of the customary rule.**”<sup>47</sup>

Duke University Law School Professor of Law (Emeritus) Horace B. Robertson, Jr., contends that using the phrase “war sustaining capability” expands the scope of the term military objective to include an export industry that provides the sole or principal financial resource for an enemy.<sup>48</sup> This seems accurate, as the *Navy Annotated Supplement* cites the historical example of the targeting of Confederate raw cotton by Union troops during the Civil War, which was deemed lawful because the cotton revenue financed the majority of Confederate arms and ammunition.<sup>49</sup>

According to the authors of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, however, an object that contributes to “war sustaining capability” rather than “war fighting capability” does not fall within the scope of Article 52(2)'s definition of a military objective.<sup>50</sup> This view seems to be acknowledged in the *Navy Annotated Supplement*, which specifies that the United States does not use the same terminology as Article 52(2).<sup>51</sup> Thus, U.S. doctrine suggests the term military objective is interpreted slightly broader than Article 52(2).

James E. Baker, then Special Assistant to the President and Legal Adviser, however, stated that in 1999 the United States applied “a strict test of military objective, as recognized in customary international law and by those States that have adopted Protocol I of the Geneva Conventions” in Kosovo.<sup>52</sup>

Unlike military doctrine, Baker suggests that economic targets that financially support a regime, but do not make a product that contributes to the military operations, are not considered permissible targets.<sup>53</sup> Further, a recent U.S. Army article on targeting during Operation Iraqi Freedom (OIF) in 2003 stated that the U.S. Army employs the Article 52 definition of a military objective.<sup>54</sup> This disparity may suggest that the doctrine is not reflective of U.S. practice, or perhaps that the alternate wording in the military manuals is not indicative of as significant a difference as Robertson believes.

### Doctrine of Coalition Partners

As may be expected from the range of interpretations suggested by academic commentators, some States may have a view of what constitutes a legitimate target that is different from the view of the United States. The ICTY Committee report described one reason for this:

The answers to these questions are not simple . . . the answers may differ depending on the background and values of the decision maker . . . it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.<sup>55</sup>

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<sup>44</sup> *Id.* para. 1.7.1 (emphasis added).

<sup>45</sup> U.S. DEP'T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 8.1.1 (Oct. 1995).

<sup>46</sup> Protocol I, *supra* note 3, art. 52(2).

<sup>47</sup> U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 8, n.9 (1997) [hereinafter NAVY ANNOTATED SUPPLEMENT].

<sup>48</sup> Robertson, *supra* note 25, at 51.

<sup>49</sup> NAVY ANNOTATED SUPPLEMENT, *supra* note 47, ch. 8, n.11.

<sup>50</sup> See Louise Doswald-Beck, *Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT'L L. 192, 199 (1995).

<sup>51</sup> NAVY ANNOTATED SUPPLEMENT, *supra* note 47, ch. 8.1.1; see Doswald-Beck, *supra* note 50, at 199.

<sup>52</sup> Baker, *supra* note 2, at 9.

<sup>53</sup> *Id.*

<sup>54</sup> LTC James K. Carberry & M. Scott Holcomb, *Target Selection at CFLCC: A Lawyer's Perspective*, FIELD ARTILLERY, March-June 2004, at 40.

Official national statements concerning the interpretation of ‘legitimate military targets’ are scarce, however, and in most cases limited to the declarations made when ratifying Protocol I.

### *Common Declarations Concerning Military Objectives*

A series of declarations<sup>56</sup> to Protocol I relating to the definition of military objective indicate a common understanding among several major coalition partners.<sup>57</sup> These include the following:

a. The military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack: the United Kingdom (U.K.),<sup>58</sup> Canada,<sup>59</sup> Germany,<sup>60</sup> France,<sup>61</sup> and Australia.<sup>62</sup>

b. A specific area of land may be a military objective if, because of its location or other reasons specified in this Article, its total or partial destruction, capture or neutralization in the circumstances ruling at the time offers definite military advantage: U.K.,<sup>63</sup> Canada,<sup>64</sup> Germany,<sup>65</sup> France.<sup>66</sup>

c. The first sentence of paragraph 2, Article 52, prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives: U.K.,<sup>67</sup> Canada,<sup>68</sup> France,<sup>69</sup> Australia.<sup>70</sup>

d. Military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time, and such decisions cannot be judged on the basis of information which has subsequently come to light: Canada,<sup>71</sup> Germany,<sup>72</sup> Australia.<sup>73</sup>

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<sup>55</sup> ICTY Report, *supra* note 33, para. 50.

<sup>56</sup> A declaration is a unilateral statement made by a State when ratifying, acceding or succeeding to a treaty, that specifies the legal effect of certain provisions of the treaty in their application to that State.

<sup>57</sup> Declarations are available online at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52.1> (last visited Nov. 29, 2004).

<sup>58</sup> Letter from Christopher Hulse, HM Ambassador of the United Kingdom, to the Swiss Government, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/0a9e03f0f2ee757cc1256402003fb6d2?OpenDocument> (providing a correct copy of the letter dated 28 Jan. 1998) [hereinafter UK Declarations to Protocol I].

<sup>59</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Canada, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/172ffec04adc80f2c1256402003fb314?OpenDocument> (citing 1125 U.N.T.S. 429 (1979)) [hereinafter Canada Declarations to Protocol I].

<sup>60</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Germany, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/3f4d8706b6b7ea40c1256402003fb3c7?OpenDocument> (citing 1125 U.N.T.S. 429-30 (1979)) [hereinafter Germany Declarations to Protocol I].

<sup>61</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, France, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/d8041036b40ebc44c1256a34004897b2?OpenDocument> [hereinafter France Declarations to Protocol I].

<sup>62</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Australia, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/10312b4e9047086ec1256402003fb253?OpenDocument> (citing 1125 U.N.T.S. 429 (1979)) [hereinafter Australia Declarations to Protocol I].

<sup>63</sup> UK Declarations to Protocol I, *supra* note 58.

<sup>64</sup> Canada Declarations to Protocol I, *supra* note 59.

<sup>65</sup> Germany Declarations to Protocol I, *supra* note 60.

<sup>66</sup> France Declarations to Protocol I, *supra* note 61.

<sup>67</sup> UK Declarations to Protocol I, *supra* note 58.

<sup>68</sup> Canada Declarations to Protocol I, *supra* note 59.

<sup>69</sup> France Declarations to Protocol I, *supra* note 61.

<sup>70</sup> Australia Declarations to Protocol I, *supra* note 62.

<sup>71</sup> Canada Declarations to Protocol I, *supra* note 59.

In addition, some major coalition partners have made unique declarations. The U.K.'s declaration provides the following:

The obligations of Articles 51 through 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.<sup>74</sup>

Germany's declaration states the following: "[t]he Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation."<sup>75</sup>

France provides that "[i]n applying the requirements of Article 51(8) there is no obstacle to employing, in conformity with international law, measures which are considered necessary for protecting the French population from serious, manifest and deliberate violations of the Geneva Conventions and Protocols by the enemy."<sup>76</sup>

Military advantage is further defined in Australia's declaration as involving "a variety of considerations including the security of attacking forces. The term concrete and direct military advantage used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved."<sup>77</sup>

### Other Factors Influencing Target Approval

While States may disagree on what constitutes a legitimate target depending on their interpretation of military objective, other factors may also influence target approval. Judge advocates must be aware of these other factors as they may cause differences in nationally approved target lists.

#### *Other Provisions of Protocol I*

For parties to Protocol I, other provisions may further restrict permissible targets. Notably, this includes the prohibition on attacks that will cause widespread, long-term and severe damage to the natural environment,<sup>78</sup> and the prohibition on targeting works or installations containing dangerous forces, such as dams, dykes and nuclear power stations.<sup>79</sup> As these

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<sup>72</sup> Germany Declarations to Protocol I, *supra* note 60.

<sup>73</sup> Australia Declarations to Protocol I, *supra* note 62.

<sup>74</sup> UK Declarations to Protocol I, *supra* note 58.

<sup>75</sup> Germany Declarations to Protocol I, *supra* note 60.

<sup>76</sup> France Declarations to Protocol I, *supra* note 61.

<sup>77</sup> Australia Declarations to Protocol I, *supra* note 62.

<sup>78</sup> Protocol I, *supra* note 3, art. 55.

<sup>79</sup> *Id.* art. 56. An example of the application of the restriction relating to dangerous forces is contained in an Australian commentary:

Failure to display the emblem does not remove the protection afforded the installation. In exceptional circumstances, the protection ceases if the installation is used in 'regular, significant and direct support of military operations.' In any case, such an attack must be the only feasible way to stop the support, and any such attack would have to be approved by the National Command Authority.

provisions are not considered by the United States to be customary international law,<sup>80</sup> this is a common point of difference between the United States and allies.

### *Intelligence information*

Each coalition partner applies their own intelligence information to a potential target. This assessment forms the factual basis to which the law and policy are applied. Therefore, different intelligence assessments may affect the legitimacy of a target. For example, the function of a particular building or the particular role of an individual in the enemy regime is material to whether a potential target is considered a military objective. Intelligence differences are factors in assessing Time Sensitive Targets (TSTs)<sup>81</sup> as these targets are often identified through intelligence sources that may not be available to coalition partners. Intelligence differences can be reduced through information sharing, but this is often not permissible due to security classifications.

### *Political Considerations*

Some targets may not be politically acceptable to certain coalition partners despite their permissibility under international law:

Popular perceptions of what the law of armed conflict is, or should be, may become self-fulfilling . . . in modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if the people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.<sup>82</sup>

Domestic and international political considerations may be different for each coalition partner.<sup>83</sup> The ways in which political considerations can affect targeting may include: outright prohibitions on certain lawful targets (a no strike list),<sup>84</sup> requirements for approval for national command authority of some target types before engagement,<sup>85</sup> requiring a pilot to visually identify a target, requiring use of precision-guided munitions (PGMs),<sup>86</sup> and the order or rate at which targets are attacked.

### *Mission Objectives*

Target selection is also dependant on the mission objectives. For example, the mission objective was clearly an influence on target choice in Afghanistan:

[D]uring the Afghanistan campaign, U.S. target selection was driven by the consequences of any attack on the reconstruction effort. "Things like transportation infrastructure very often are bona fide legal targets,"

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ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS, DI(AF) AAP 1003, para. 8.6 (2d ed. 2004).

<sup>80</sup> See Matheson comments, *supra* note 41.

<sup>81</sup> A TST is a target requiring immediate response because it poses (or will soon pose) a danger to friendly forces or is a highly lucrative, fleeting target of opportunity. DOD DICTIONARY, *supra* note 8.

<sup>82</sup> THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT xxiv (W. Michael Reisman & Chris T. Antoniou eds., 1st ed. 1994).

<sup>83</sup> See Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 472-79 (2004) (providing examples of U.S. political considerations in application in Kosovo, Afghanistan and Iraq).

<sup>84</sup> *E.g.*, a significant cultural object that is being used perfidiously.

<sup>85</sup> The Australian targeting requirements are a good illustration of this point. "Australia received targets on the US-developed strike lists but assessed them according to Australia's own legal obligations. Several target categories were subject to Australian Ministerial approval before they could be engaged." DEPARTMENT OF DEFENCE (AUSTRALIA), THE WAR IN IRAQ: ADF OPERATIONS IN THE MIDDLE EAST 2003 13 (23 Feb. 2004), available at <http://www.defence.gov.au/publications/lessons.pdf>.

<sup>86</sup> There is a view that States have a legal obligation to use precision guided munitions (PGMs) in order to meet the proportionality test in Art. 57(2)(a)(iii), Protocol I on the basis that: "an operational decision to use gravity-driven weapons when more precise munitions are available can make the attack excessive and unlawful if civilians are killed who would have been spared with the use of more accurate weapons." Hamilton DeSaussure, *Military Objectives*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW (Roy Gutman & David Rieff eds.), available at <http://www.crimesofwar.org/thebook/military-objective.html>; see also Lieutenant Commander Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 137 (2000). This view, however, is not accepted by the United States and is criticized in Danielle L. Infeld, *Precision Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 140-41 (1992) (concluding that the laws of war do not require nations with precision weapons to use them in all circumstances).

explains Brigadier General Charles Dunlap, Air Combat Command's Staff Judge Advocate. "But we look for ways of minimizing that damage because we're always thinking about what's the next step going to be. What are we going to be doing after the conflict is over?"<sup>87</sup>

While mission objectives should be the same across the coalition there may be differences of opinion on how best to ensure target selection meets those objectives.

### **Problematic Target Types**

Given the range of possible interpretations of military objectives and other legal, policy and intelligence considerations, it is unlikely a coalition will agree on all targets. While the problematic targets will differ on each coalition operation, several target types are more prone to differences of opinion.

#### *Bridges and Railways*

States may hold different views of targeting bridges and railways, particularly in relation to those not immediately being used as a supply or advancement route for the military. Some questions concerning the legitimacy of these targets may include the following: (1) Are these targets military objectives from day one of the war? (2) From when could these targets be used to replace supply or advancement routes currently in use? (3) Are these objectives only targets if currently being used?<sup>88</sup>

#### *Television and Radio Stations*

As discussed above, the legitimacy of targeting television and radio stations is largely dependent on the way in which the stations are being used by the enemy<sup>89</sup> and on the State's opinion on whether psychological objectives are military objectives within the scope of Article 52(2), Protocol I.<sup>90</sup> For example, there were reports that France did not agree with the United States that Serbian television was a legitimate target during the 1999 NATO campaign in Kosovo.<sup>91</sup>

#### *Power Generation or Distribution Centers*

There are two reasons for potential differences of opinion relating to dual use power generation or distribution centers. The first is the difficulty of assessing whether these targets make an effective contribution to military action.<sup>92</sup>

The second is whether, as a result of the method in which these targets are often attacked, there is a definite military advantage. The method used to temporarily disable power grids in Serbia in 1999 and the problem that such a situation created in applying Article 52(2) was described by Major Jeanne Meyer:

NATO aircraft dropped small dispensers that opened over the power sources, setting free specially treated wire that intertwined and caused instant short circuits in the electrical system. The weapon cut off power to 70 percent of Yugoslavia, yet the effect was only temporary, with most power returning within a day. Although temporary, the attack effectively brought the war home to the Serbian population—without massive, long-term destruction. Such a short duration of disablement, however, was unlikely to severely affect the Serbian military effort. Arguably, a restrictive interpretation of Article 52(2) would not consider the first strikes to be against legitimate military objectives, as it is unlikely that disruption of electricity for such a short period of time truly provided a military advantage to NATO. These strikes would therefore be illegal.<sup>93</sup>

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<sup>87</sup> Canestaro, *supra* note 83, at 475.

<sup>88</sup> See SASSOLI, *supra* note 22, at 7-8 (discussion).

<sup>89</sup> See ICTY Report, *supra* note 33, para. 55 (providing for communications and control, to incite war crimes, as a mouthpiece for the government).

<sup>90</sup> See HRW Report, *supra* note 15; Meyer, *supra* note 6, at 182; Anthony Dworkin, *Iraqi Television: A Legitimate Target?* (Mar. 27, 2003), at <http://www.crimesofwar.org/special/Iraq/brief-tv.html>.

<sup>91</sup> See Amnesty Report, *supra* note 1.

<sup>92</sup> SASSOLI, *supra* note 22, at 7 (providing discussion of the problems assessing dual-use objects).

<sup>93</sup> Meyer, *supra* note 6, at 178-79 (footnotes omitted).

### *Symbols of the Enemy Regime*

The targeting of symbols of the enemy regime, such as empty royal palaces and statues of Saddam Hussein during OIF,<sup>94</sup> may lead to disagreement, as their lawfulness as a target depends on the State's view of whether psychological objectives are military objectives within the scope of Article 52(2), Protocol I.

### *Civilian (non-uniformed) Enemy Regime Officials*

Some civilian (non-uniformed) regime officials were targeted by the United States during OIF.<sup>95</sup> Whether these individuals are considered military objectives, as opposed to civilians, depends on the intelligence information available to a State about the role of that individual in the conflict.

### *Dangerous Forces—Dams, Dykes and Nuclear Power Stations*

As discussed above, parties to Protocol I may only target dangerous forces in certain specified circumstances.<sup>96</sup> This limitation, however, does not apply to the United States and other States not a party to Protocol I.<sup>97</sup>

### **Effect of Impermissible Targets**

An impermissible target, regardless of the reason, influences a coalition partner's ability to deliver a weapon onto that object, and may also affect the level of permissible support that may be given to U.S. engagement of the target. For example, if the target of an air strike is impermissible, a coalition partner may also be prohibited from refueling strike aircraft, providing airborne early warning and control, approving strike lists or participating in the planning for that particular mission.

### **Strategies for Coalition Targeting**

The targeting process is involved and time-consuming, and JAs have been criticized in the past, somewhat unfairly, for further lengthening the process.<sup>98</sup> Judge advocates can assist by proactively managing coalition targeting issues as early as possible. The best strategy for managing coalition targeting is situation dependent; for example, there is a difference between operating in a targeting cell versus holding a less formal targeting discussion between two coalition attorneys prior to a ground mission.<sup>99</sup>

One possible approach to coalition targeting issues for a JA is:

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<sup>94</sup> See, e.g., BBC News, *UK Forces "Destroy Saddam Statues"* (29 Mar. 2003), available at <http://news.bbc.co.uk/1/hi/uk/2898003.stm> (stating that the statues were destroyed for psychological reasons).

<sup>95</sup> See, e.g., U.S. Department of Defense, *Personality Identification Playing Cards*, at <http://www.defenselink.mil/news/Apr2003/pipc10042003.html> (last visited Mar. 16, 2004) (providing a list of persons wanted by the United States, including some non-uniformed regime officials); Nicole Winfield, *U.S. Military Distributes List of 55 Iraqi Leaders to Pursue, Kill or Capture*, SAN FRANCISCO CHRON., Apr. 11, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/04/11/sports0800EDT0566.DTL>.

<sup>96</sup> Protocol I, *supra* note 3, art. 56(2) (stating that attacks on dangerous works require the attack to be the only feasible means).

<sup>97</sup> See States Parties, *supra* note 5.

<sup>98</sup> See, e.g., Canestaro, *supra* note 83, at 478-79.

<sup>99</sup> An example of the way in which targeting was approached for a ground mission during Operation Enduring Freedom (OEF) was provided by Colonel (COL) Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division. This approach illustrates the need for consultation and the role played by national assessments of intelligence and policy:

[T]he Brits wanted to lay aerial fire on a particular hilltop. Again, they walked me through their intelligence and plan, and I opined no legal objection. At first, I had said no, because we were not sure about what was around that hilltop (concern over collateral damage). But, once we realized the grid location was the same (i.e., we had already done our homework, and realized this was not a new site), we approved the targeting.

E-mail from COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, to SQLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Operations, Center for Law and Military Operations (22 Mar. 2004) (on file with CLAMO).

1. Meet with coalition attorneys as early as possible<sup>100</sup> and develop a good understanding of the issues that affect their targeting decisions: legal position, policy position, target approval level and process.<sup>101</sup>
2. Identify any divergences from the U.S. position, whether legal or policy, and assess to what extent the differences are real rather than perceived. For example, the legal position may be different, but operation specific policy requirements may result in the final outcome being the same for both coalition partners. Are any differences a result of different intelligence information? If so, can differences or approval time be reduced by sharing intelligence? Is sharing intelligence permissible?
3. Know the roles the coalition partners will undertake: are they providing aircraft or ground forces? Are they providing essential support services for an attack? Do they hold any decision-making positions in the headquarters?
4. Understand the impact of identified differences. How long will it take for the coalition partner to assess a target and provide a GO or a NO GO? If a coalition partner does not agree to a target, does this act as veto on that target for the operation<sup>102</sup> or does it result in that partner being excluded from certain actions during an attack on that target?
5. Adopt a strategy to ensure that the differences are properly factored into the planning and execution of missions. For example, through exclusion from missions involving certain target types, establishing alternative target approval chains to avoid placing staff officers in potentially awkward positions, or briefing U.S. plans staff in advance of any potential difficulties or sensitivities.<sup>103</sup>

### Conclusion

Targeting in a coalition can raise additional issues that need to be addressed as early as possible to avoid any adverse impact on the mission. While not providing the answers, this article discussed the available interpretations of military objectives and the range of factors that influence national targeting decisions. By understanding the legal and policy restraints that impact coalition partners, JAs can ensure that any coalition partner differences are identified and factored into planning where appropriate.

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<sup>100</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003) 115 (1 Aug. 2004) (reporting that during OEF and OIF several coalition partners had both deployed legal staff and legal “reach back” capabilities).

<sup>101</sup> For example, at the Combined Air Operations Center during OIF,

[t]he US JAGs assigned to combat plans and strat[egy] had a round table discussion early on with the UK and AUS JAGs concerning each country's ROE and approval authorities for the various types of targets. We also discussed UK and AUS political sensitivities, which helped us to better understand their ROEs. Of course, this also helped develop good working relationships b[efore] OIF began.

Wold e-mail, *supra* note 2.

<sup>102</sup> This was the case for the NATO Kosovo campaign:

With regard to target selection and assignment, NATO officials at the Brussels meeting explained to Amnesty International that under the system that was in use in Operation Allied Force, NATO members were given a bombing assignment by NATO staff but could refuse it on the grounds, for example, that in their view the target was illegitimate or that the attack would otherwise violate international law and possibly their national law. If a target were refused because the assigned country had deemed it unlawful, NATO officials said that they would not reassign the target to another member.

Amnesty Report, *supra* note 1.

<sup>103</sup> Major Cluff, former Judge Advocate, United States Air Force, Combat Plans Division, Combined Air Operations Center, described one solution used during OIF “[b]ecause of their small numbers, they were not as involved in combat plans as we were. We were able to use our knowledge of their ROE to spot/resolve/explain coalition unique targeting concerns to US planners.” Wold e-mail, *supra* note 2.

## Modification of Child Support Orders Under the Uniform Interstate Family Support Act (UIFSA)

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### Introduction

Time may have a serious impact on the adequacy of a child support order. The costs of raising a child, the needs of a child, and the financial circumstances of the parents may all change dramatically over time. A child support order that was once appropriate for an infant may not be appropriate for a teenage child. Consequently, it may be appropriate in some cases to modify a child support order to reflect changing circumstances.

Family law cases are one of the most common types of cases handled by Army legal assistance offices.<sup>1</sup> Due to the mobile nature of military service, the parties in such cases often reside in different states. Therefore, the legal assistance attorney (LAA) must know the applicable state law and be able to advise clients regarding the modification of child support orders in interstate cases. The Uniform Interstate Family Support Act (UIFSA) governs the interstate modification of child support orders.<sup>2</sup> Every state has adopted the UIFSA. Therefore, every child support modification case involving parties who live in different states is governed by the UIFSA.

The purpose of this article is to provide an overview of the interstate child support modification procedures under the UIFSA. This article outlines the rules for determining which state has subject matter jurisdiction to modify an order, the procedures for registering a support order for modification, and the rules for determining which state's laws apply to the interstate modification action. This article is designed for use by the LAA as a reference and a guide for modifying support orders in interstate cases. It includes illustrative cases and examples to aid the LAA in understanding the application of the UIFSA's legal principles.

### Background

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which required states to enact the UIFSA, with its 1996 amendments, by 1 January 1998 as a condition of receiving federal funds.<sup>3</sup> All states responded by enacting the UIFSA by the deadline. A complete listing of every state's UIFSA statutes is located at the appendix to this article.

Prior to the adoption of the UIFSA, the Uniform Reciprocal Enforcement of Support Act (URESA)<sup>4</sup> and the Revised Uniform Reciprocal Enforcement of Support Act (RURESA)<sup>5</sup> governed interstate child support actions.<sup>6</sup> The URESA and the RURESA were created in response to the need for a simple and consistent interstate child support enforcement process. Prior to the URESA in 1950, there was no uniform system for resolving interstate child support matters. Interstate child support issues were governed by state law, which resulted in a complex and difficult system due to the differences in state laws.<sup>7</sup>

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<sup>1</sup> Family Law has consistently been the second largest category of cases handled by Army legal assistance offices. E-mail from Mr. John T. Meixell, Legal Assistance Policy Division, Office of the Judge Advocate General, to author (Mar. 16, 2004) (on file with author). In Fiscal Year 2003, Army legal assistance offices saw 49,638 family law cases, making up 24.7% of all Legal Assistance cases. E-mail from Mr. John T. Meixell, Legal Assistance Policy Division, Office of the Judge Advocate General, to author (Mar. 13, 2004) (on file with author).

<sup>2</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (amended 2001), 9 U.L.A. 255 (Supp. 2001).

<sup>3</sup> Pub. L. No. 104-193, 110 Stat. 2166 (1996) (codified as amended at 42 U.S.C. § 666(f) (2000)).

<sup>4</sup> UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (URESA) (amended 1968), 9 U.L.A. 553 (1987). The 1968 amendments were so extensive that URESA became known as the Revised Uniform Reciprocal Enforcement of Support Act.

<sup>5</sup> REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (RURESA) (1968), 9 U.L.A. 381 (1987).

<sup>6</sup> All states enacted some form of URESA or RURESA. The UIFSA superceded URESA and RURESA when it was enacted by all states.

<sup>7</sup> See OFFICE OF CHILD SUPPORT ENFORCEMENT, INTERSTATE FAMILY SUPPORT: A BENCHMARK, available at <http://ocse.acf.hhs.gov/necsrspub/docs/federal/bbook.htm> (last visited Dec. 14, 2004) [hereinafter INTERSTATE FAMILY SUPPORT BENCHMARK].

Unfortunately, there were numerous problems with the URESA and the RURESAs. The main problem was that both Acts authorized the entry of *de novo* child support orders in cases in which support orders already existed.<sup>8</sup> The URESA and the RURESAs support orders existed independently from other support orders, allowing conflicting support orders governing the same parties and child to exist at the same time in several states. Consequently, there was often disagreement among the parties about the correct amount of child support owed. Furthermore, the URESA and the RURESAs were never truly uniform, because many states modified or omitted certain provisions.<sup>9</sup>

In order to achieve a more efficient interstate child support process, the National Conference of Commissioners on Uniform State Laws (NCCUSL) created the UIFSA in 1992.<sup>10</sup> The UIFSA establishes a priority scheme for the exercise of jurisdiction in order to deal with the inherited multiple order system created by the URESA and the RURESAs and to achieve one controlling order for the prospective enforcement of support. The National Conference of Commissioners on Uniform State Laws amended the UIFSA in 1996 and again in 2001 to clarify and improve certain provisions of the Act.<sup>11</sup> While every state enacted the UIFSA with its 1996 amendments as required by the PRWORA, only a few states have enacted the 2001 amendments to the UIFSA.<sup>12</sup> That is partly because Congress has not required states to enact the 2001 UIFSA amendments.

### Subject Matter Jurisdiction to Modify a Support Order

The first step when dealing with a child support modification issue is to determine where the parties are residing and which court issued the support order. If the parties reside in different states or reside in a state other than that which issued the support order, the next step is to determine which state has subject matter jurisdiction to modify the order.<sup>13</sup> Although states specify the grounds for when it is appropriate to modify a support order, the UIFSA specifies who has authority to modify a support order and where the modification should take place.<sup>14</sup> In fact, the UIFSA has very strict modification jurisdiction rules, and any order issued contrary to such rules will most likely be considered void for lack of subject matter jurisdiction.<sup>15</sup>

Under the UIFSA, only a tribunal with *continuing, exclusive jurisdiction* (CEJ) has authority to modify a child support order.<sup>16</sup> A tribunal has CEJ if it issued the support order and the child, the obligee, or the obligor reside in that state.<sup>17</sup> The concept of CEJ is the cornerstone of the UIFSA's one-order system. As long as a state has CEJ, no other state can modify the

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<sup>8</sup> See RURESAs § 24. See also OFFICE OF CHILD SUPPORT ENFORCEMENT, ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT HANDBOOK (3d ed. 2002), available at <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/> (last visited Dec. 14, 2004) [hereinafter ENFORCEMENT HANDBOOK].

<sup>9</sup> States were free to modify the URESA and the RURESAs because Congress did not require states to enact URESA or RURESAs as a precondition of receiving federal funds as they later did with the UIFSA.

<sup>10</sup> For a history of the events leading up to the replacement of URESA and RURESAs by UIFSA, see UNIF. INTERSTATE FAMILY SUPPORT ACT, 1996 Amendments, Prefatory Note, 9 U.L.A. 235.

<sup>11</sup> See *id.* (providing a history of the events leading up to the 1996 and 2001 amendments to UIFSA).

<sup>12</sup> Currently, only California, Colorado, Illinois, Maine, Nebraska, Texas, Mississippi, Oklahoma, Utah, Washington, and West Virginia have enacted the 2001 amendments to the UIFSA. The 2001 UIFSA amendments are currently pending enactment in Arizona and Kansas. The National Conference of Commissioners on Uniform Laws, *A Few Facts About the Uniform Interstate Family Support Act*, at [http://www/nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-uifsa.asp](http://www/nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uifsa.asp) (last visited Dec. 14, 2004).

<sup>13</sup> It is also important to determine whether the desired action is considered a support modification action subject to the UIFSA's strict modification rules. Some actions are considered support establishment actions, which are subject to less stringent rules. For example, an action seeking a support order when a divorce decree is silent on the issue of support is not considered a support modification action. An action seeking an increase in support when the current order lists the support amount at \$0, however, is considered a support modification action. An action seeking the addition of a provision for health insurance coverage or reimbursement of medical expenses when the current order does not address health care is also considered a support modification action. See ENFORCEMENT HANDBOOK, *supra* note 8, at 356-57.

<sup>14</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 205.

<sup>15</sup> See *State ex rel. Harnes v. Lawrence*, 538 S.E.2d 223, 228 (N.C. Ct. App. 2000) (providing that the North Carolina state court erred in modifying a New Jersey support order where New Jersey retained continuing exclusive jurisdiction over the support order, resulting in vacation of the North Carolina support order).

<sup>16</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 205. The UIFSA defines "tribunal" as a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage. *Id.* § 102. Unlike URESA and RURESAs, which used a court-to-court process, the UIFSA has a much broader scope and recognizes the role of child support agencies and administrative procedures in child support matters. See ENFORCEMENT HANDBOOK, *supra* note 8, at 335. Under the UIFSA, the state designates the tribunal in their state. *Id.* Many states limit the definition of tribunal to the court while other states define tribunal to include both the court and the administrative child support agency. *Id.*

<sup>17</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 205(a).

order.<sup>18</sup> The only exception is if the parties file written consent in the CEJ tribunal to have another state assume CEJ.<sup>19</sup> Filing of consent will divest the issuing tribunal of CEJ.

The following case illustrates support order modification utilizing CEJ under the UIFSA. In *McCarthy v. McCarthy*, an Alabama appeals court reversed a lower court decision modifying a Georgia support order, holding that the Alabama court lacked subject matter jurisdiction to modify the Georgia support order under the UIFSA.<sup>20</sup> The mother and children resided in Alabama and the father resided in Georgia. The Alabama appeals court noted that neither party had filed a written consent with the Georgia court for the Alabama court to assume CEJ. The Alabama appeals court therefore concluded that the Georgia court maintained CEJ to modify the support order, because the father resided in Georgia, and that the Alabama court was required to recognize their jurisdiction.<sup>21</sup>

The courts reached the same result in the following three cases. In the first case, *In re Henderson*, a Texas court dismissed the mother's petition to modify an Oklahoma support order, because the father remained in Oklahoma and had not consented to modification in a Texas court.<sup>22</sup> In the second case, *Office of Child Support Enforcement v. Cook*, an Arkansas court held that it lacked subject matter jurisdiction to modify a Florida support order under the UIFSA, because the mother and her children resided in Florida, and the mother had not consented to modification in Arkansas.<sup>23</sup> Finally, in *Lawlor v. Rasmussen*, a Florida court dismissed a mother's petition to modify a Pennsylvania child support order for lack of subject matter jurisdiction under the UIFSA even though the mother and child had relocated to Florida.<sup>24</sup> The Florida court found that the issuing court in Pennsylvania retained CEJ, because the father remained in Pennsylvania.<sup>25</sup>

It is interesting to note that once a tribunal has CEJ, it may not decline jurisdiction to modify a support order based on forum *non conveniens*.<sup>26</sup> For example, in the case of *Rosen v. Lantis*, a New Mexico court with CEJ held that it lacked authority to transfer modification jurisdiction over a support case to Tennessee, even though the mother and child resided in Tennessee, because the father remained in New Mexico and had not consented to modification in Tennessee.<sup>27</sup>

On the other hand, a tribunal loses CEJ when all the relevant parties no longer reside in the issuing state.<sup>28</sup> If there is no state with CEJ and only one support order, the person seeking modification must register the support order in a state, other than his or her own state, with personal jurisdiction over the other party.<sup>29</sup> It is important to remember that the party petitioning for modification in such a case must be a nonresident of the responding tribunal state.<sup>30</sup> The petitioner must also submit to the personal jurisdiction of the responding tribunal state. Because the responding tribunal state is almost always the state where the respondent resides, this requirement all but eliminates any problems with personal jurisdiction.<sup>31</sup> For example, in *Parry v. Bellinson*, a Connecticut court held that it could modify a New Jersey child support order since none of

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<sup>18</sup> *Id.* § 205(d).

<sup>19</sup> *Id.* § 205(a)(2).

<sup>20</sup> 785 So. 2d 1138, 1140 (Ala. Civ. App. 2000).

<sup>21</sup> *Id.* at 1140.

<sup>22</sup> 982 S.W.2d 566, 567 (Tex. Ct. App. 1998).

<sup>23</sup> 959 S.W.2d 763,765 (Ark. Ct. App. 1998).

<sup>24</sup> 745 So. 2d 561, 565 (Fla. Ct. App. 1999).

<sup>25</sup> *Id.* at 563.

<sup>26</sup> See, e.g., *Rosen v. Lantis*, 938 P.2d 729 (N.M. Ct. App. 1997); *Early v. Early*, 499 S.E.2d 329 (Ga. 1998).

<sup>27</sup> *Rosen*, 938 P.2d at 735.

<sup>28</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 205. Under the 2001 amendments to the UIFSA § 205, the parties may agree in writing for the issuing tribunal to continue to exercise CEJ over its support order even if the parties and the child move away from the issuing state. *Id.* The drafters contemplated such an arrangement when the parties have moved a short distance, continue to have a close affiliation with the issuing tribunal, perhaps through employment, or wish to return to a tribunal familiar with the facts and issues of the case. *Id.*

<sup>29</sup> *Id.* § 611.

<sup>30</sup> *Id.* This requirement is often described by saying that the modification movant, whether obligor or obligee, must "play an away game on the other party's home field." *Id.*

<sup>31</sup> It is important to remember that a tribunal must have personal jurisdiction as well as subject matter jurisdiction in order to modify a support order.

the parties remained in New Jersey, the petitioner father was a resident of New York, and the mother and child were residents of Connecticut.<sup>32</sup>

There are only two exceptions to the nonresident petitioner rule. The first exception is when the parties have filed written consent for another state to exercise CEJ.<sup>33</sup> The second exception is when the parties and the child have all moved from the issuing state and all reside in the same state.<sup>34</sup> In that case, the state where the parties and the child currently reside has CEJ to modify the support order.<sup>35</sup>

It is possible to have more than one state with CEJ if multiple support orders were created under the URESA or the RURESAs prior to enactment of the UIFSA. If there is more than one state with CEJ, the next step is to determine the controlling support order.<sup>36</sup> If one of the states with CEJ is the child's *home state*, the controlling support order will be the one issued by the child's home state.<sup>37</sup> If there is more than one state with CEJ and none of the states is the child's home state, the controlling support order will be the most recent order. In both cases, the state that issued the controlling order will be the only state with CEJ to modify the order.<sup>38</sup> If there are multiple support orders and no CEJ state, however, there is no controlling support order. In that case, instead of filing a modification action the petitioner must file a petition to establish support in a state with jurisdiction over the respondent.<sup>39</sup>

In determining whether a tribunal has CEJ, the UIFSA looks at where the parties are residing at the time the modification request is filed.<sup>40</sup> Residence is a question of fact for the trial court to decide, keeping in mind that the issue is residence and not domicile. A tribunal will not lose CEJ just because the parties are absent between the date the support order was issued and the date the modification request was filed. A tribunal retains CEJ as long as either party or the child returns to reside in the issuing state at the time of filing and as long as the order was not modified during the absence.<sup>41</sup> It is therefore crucial that LAAs ascertain where the parties and the child will be residing on the date the modification request is filed.

Legal Assistance Attorneys must also understand that a temporary absence from the CEJ state for employment purposes will not affect residency in the CEJ state. In the case of *State ex rel. Havlin v. Jamison*, a Missouri court held that they lacked subject matter jurisdiction to modify a Tennessee support order where the father was absent from Tennessee and employed overseas and the mother and children resided in Missouri.<sup>42</sup> The court listed many factors in determining that the father remained a resident of Tennessee despite his overseas employment, including the following: he had personal effects in storage in Tennessee; he had bank accounts in Tennessee; he had a Tennessee driver's license; he was registered to vote in Tennessee; he paid Tennessee income tax; he intended to return to Tennessee after completing his overseas job; and his employment outside of Tennessee was of a temporary nature.<sup>43</sup>

### Registering a Support Order for Modification

Once a party determines which state has subject matter jurisdiction to modify a support order, the party must register the order for modification in that state. The petitioner should use the Registration Statement form published by the Office of

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<sup>32</sup> 1998 Conn. Super. LEXIS 2830 (Conn. Super. Ct. Oct. 3, 1998).

<sup>33</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 611.

<sup>34</sup> *Id.* § 613.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 207.

<sup>37</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 102. The UIFSA incorporates the concept of a child's "home state" using the definition found in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA). *Id.* The UIFSA defines "home state" as the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing a petition for modification. *Id.* If a child is less than 6 months old, the home state is the state in which the child lived from birth. *Id.* A period of temporary absence is counted as part of the six month or other period. *Id.*

<sup>38</sup> *Id.* § 207.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 205(a)(1).

<sup>41</sup> A 2001 amendment to UIFSA § 205(a)(1) substituted the term "is the residence" for the term "remains the residence" in order to clarify the original intent of the drafting committee that any interruption of residence between the date the order is issued and the date the modification request is filed does not affect jurisdiction to modify. *Id.* § 205.

<sup>42</sup> 971 S.W.2d 938 (Mo. App. 1998).

<sup>43</sup> *Id.* at 939.

Management and Budget (OMB) when registering the order.<sup>44</sup> The UIFSA requires the nonresident petitioner to provide specific information and documentation to the responding state tribunal in order to register the order for modification.

First, the petitioner must file a complaint, petition, or comparable pleading alleging the grounds for modification.<sup>45</sup> The petitioner should use the OMB Uniform Support Petition form.<sup>46</sup> Although Section II of the Uniform Support Petition form includes a category which states, “[a] modification is appropriate due to a change in circumstances,” the petitioner should still include evidence supporting the specific basis for the changed circumstances—education bills, medical bills, or wage and earning statements.

Second, the petitioner must submit two copies (one certified) of the support order to be registered.<sup>47</sup> If there are multiple support orders and the controlling order has not been determined, the petitioner must forward each support order so the tribunal may determine the controlling support order.<sup>48</sup> If there are multiple support orders and the controlling order has already been determined, only the controlling order should be registered for modification. The petitioner should use OMB Child Support Enforcement Transmittal #1—Initial Request form.<sup>49</sup> The form includes a section to request registration of the support order for modification and a section to indicate whether the order is the controlling order or the presumed controlling order.<sup>50</sup>

Third, the petitioner must submit a statement indicating the amount of arrears, if any.<sup>51</sup> The Federal Registration Statement form may be used to provide the necessary information regarding arrears. Failure to provide this information may result in dismissal of the modification action. For example, in *Allen v. Allen*, the court found that the petitioner’s failure to allege a specific amount of arrears was a procedural defect requiring the registration to be vacated.<sup>52</sup> Furthermore, in *In re Chapman*, the court stated that the documentary requirements under the UIFSA’s registration provisions were mandatory and petitioner’s failure to submit a statement regarding arrears was a deficiency that precluded registration of the order.<sup>53</sup>

Once the registering tribunal receives the petition for modification and the required documentation, it must register the order and provide specific notice to the nonregistering party. Most significantly, the registering tribunal is required to inform the nonregistering party of the following three things: that they may request a hearing to contest the validity or enforcement of the registered order within a specified number of days after notice (the UIFSA suggests twenty days but states have discretion in setting the number of days); that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and of the amount of any alleged arrearages; and that the registered order is enforceable as of the date of registration in the same manner as an order issued by the registering tribunal.<sup>54</sup>

If the nonregistering party requests a hearing to contest the registered support order within the specified timeframe, the registering tribunal must schedule a hearing and give notice of the hearing to all parties.<sup>55</sup> The nonregistering party has the burden of establishing one of several limited defenses to registration at the hearing. The specified defenses to registration include the following: that the issuing tribunal lacked personal jurisdiction over the contesting party; that the order was obtained by fraud; that the order has been vacated, suspended, or modified by a later order; that the issuing tribunal has

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<sup>44</sup> U.S. Office of Management and Budget, OMB Form 0970-0085, Registration Statement, available at <http://www.acf.hhs.gov/programs/cse/forms> (last visited Dec. 14, 2004).

<sup>45</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 609.

<sup>46</sup> U.S. Office of Management and Budget, OMB Form 0970-0085, Uniform Support Petition, available at <http://www.acf.hhs.gov/programs/cse/forms> (last visited Dec. 14, 2004).

<sup>47</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 602, 609.

<sup>48</sup> *Id.* § 602.

<sup>49</sup> U.S. Office Management and Budget, OMB Form 0970-0085, Child Support Enforcement Transmittal #1—Initial Request, available at <http://www.acf.hhs.gov/programs/cse/forms> (last visited Mar. 22, 2004).

<sup>50</sup> *See id.*

<sup>51</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 602.

<sup>52</sup> No. A-95-1047, 1996 Neb. App. LEXIS 205 (Neb. Ct. App. Sept. 17, 1996).

<sup>53</sup> 973 S.W.2d 346, 348 (Tex. Ct. App. 1998).

<sup>54</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 605.

<sup>55</sup> *Id.* § 606(c).

stayed the order pending appeal; that the alleged controlling order is not in fact the controlling order; or that there is a defense in the registering state to the remedy sought.<sup>56</sup>

For example, in *South Carolina Department of Social Services v. Bess*, the obligor challenged registration of a Florida child support judgment against him in South Carolina, claiming that the issuing tribunal in Florida lacked personal jurisdiction over him because it had failed to properly serve him.<sup>57</sup> The South Carolina appeals court found that the trial court erred in holding that it did not have authority to review the validity of the Florida order.<sup>58</sup>

The nonregistering party is specifically prohibited from raising reduced income and nonpaternity as defenses to registration.<sup>59</sup> For example, in *Villanueva v. Office of the Attorney General of Texas*, the obligor contested registration of an Indiana child support order against him in Texas, asserting that paternity was at issue.<sup>60</sup> The court first noted that nonparentage was not one of the limited defenses to registration listed in the UIFSA.<sup>61</sup> The court then held that the language in the Indiana divorce decree constituted a determination of paternity that must be given full faith and credit by the Texas courts.<sup>62</sup>

If registration is not contested or the nonregistering party does not establish a valid defense to registration, the registering tribunal must issue an order confirming the registered support order.<sup>63</sup> Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the support order with respect to any matter that could have been asserted at the time of registration.<sup>64</sup>

Lastly, LAAs should be aware that a petitioner may obtain assistance from their state support enforcement agency in registering an order for modification in another state.<sup>65</sup> The support enforcement agency must provide the following services to the petitioner: take all steps necessary to enable an appropriate tribunal in the state or another state to obtain jurisdiction over the respondent; request an appropriate tribunal to set a date, time, and place for a hearing; make a reasonable effort to obtain all relevant information, including information as to income and property of the parties; send a copy to the petitioner of any written notice received from the initiating, responding, or registering tribunal; send a copy to the petitioner of any written communication received from the respondent or the respondent's attorney; and notify the petitioner if jurisdiction over the respondent cannot be obtained.<sup>66</sup> The UIFSA also explicitly authorizes petitioners to employ private counsel to represent them in the UIFSA proceedings.<sup>67</sup>

### Choice of Law Under the UIFSA

Once a petitioner registers a support order for modification and the registering tribunal has properly assumed jurisdiction over the parties, the registering tribunal will apply its own law regarding modification.<sup>68</sup> The registering tribunal will apply its threshold for determining whether modification is appropriate and will also apply its support guidelines. For example, if a state conditions modification on a substantial change of circumstances or a numerical standard, such as a twenty-five percent change in the order amount, that standard applies to the registered order.<sup>69</sup>

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<sup>56</sup> *Id.* § 607.

<sup>57</sup> 489 S.E.2d 671 (S.C. Ct. App. 1997).

<sup>58</sup> *Id.* at 675.

<sup>59</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 315.

<sup>60</sup> 935 S.W.2d 953 (Tex. Ct. App. 1996).

<sup>61</sup> *Id.* at 956.

<sup>62</sup> *Id.*

<sup>63</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 606(b), 607(c). The comment to § 607 in the 2001 amendments states that, "it seems likely that res judicata requires that both the registering and nonregistering party who fail to register the 'true' controlling order will be estopped from subsequently collaterally attacking the confirmed order on the basis that the unmentioned 'true order should have been confirmed instead.'"

<sup>64</sup> *Id.* § 608.

<sup>65</sup> *Id.* § 307.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 309.

<sup>68</sup> *Id.* § 611(b).

Under the UIFSA, however, the registering tribunal cannot modify any aspect of the support order that would be nonmodifiable in the state that issued the order.<sup>70</sup> The UIFSA makes it clear that the law of the state that issued the order governs the nonmodifiable terms of the order.<sup>71</sup> The most common example of a nonmodifiable term is the duration of the support obligation. For example, the issuing state may have ordered child support through age twenty-one in accordance with its laws. The law of the registering state, however, may specify that the obligation of support terminates at age eighteen. In such a case, the law of the issuing state governs the duration of support and the registering state may not affect the duration of the support through age twenty-one.

The case law has been absolutely consistent in applying this UIFSA choice of law principle. For example, in *Robdau v. Department of Social Services*, a Virginia court denied the father's request to terminate his support obligation in accordance with Virginia law after the child reached the age of eighteen, because New York law required him to provide support until the child was twenty-one.<sup>72</sup> In that case, the father resided in Virginia, and the mother and child continued to reside in New York. The Virginia court clearly articulated the rationale behind the UIFSA choice of law principle when it stated that accepting the father's contention would encourage obligors to move to a state with a lower age requirement for child support to avoid the issuing state's child support order.<sup>73</sup> The court further stated that through such "forum shopping," the parent would be able to control the duration of child support, which would undermine the very purpose of UIFSA.<sup>74</sup>

In *Cooney v. Cooney*, an Oregon court held that it was entitled to reduce the amount of the father's support obligation but lacked the authority to extend the duration of support established by the original Nevada divorce order.<sup>75</sup> The father resided in Tennessee, and the mother and children resided in Oregon. The Oregon court approved the father's request to reduce the amount of his support obligation in accordance with Oregon's child support guidelines based on a reduction in his income.<sup>76</sup> The Oregon court, however, denied the mother's request to extend the duration of the father's support obligation from age eighteen to age twenty-one pursuant to Oregon law.<sup>77</sup>

Further, in *Vancott-Young v. Cummings*, an Ohio court with jurisdiction to modify a New York child support order held that it lacked authority to reduce the duration of the child support obligation established by the New York support order.<sup>78</sup> The Ohio court denied the father's request to reduce the duration of his support obligation from age twenty-one to age eighteen pursuant to Ohio law, despite that the mother and children resided in Ohio.<sup>79</sup>

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<sup>69</sup> Just as states have different guidelines for calculating the amount of child support, they also have various standards for modifying the amount of child support. Most states permit modification when there is a threshold percentage difference (usually ten percent or fifteen percent) between the current support amount and the presumptive child support guideline amount. See ENFORCEMENT HANDBOOK, *supra* note 8, at 317. For example, Maryland allows modification if the guidelines calculation results in a support amount that is at least twenty-five percent higher or lower than the current order. *Id.* Most states also continue to use some variation of the change in circumstances standard for modification. *Id.* at 314-317. Some states allow for modification pursuant to its support guidelines if a requisite time has passed, without the need for a threshold change or a change in circumstances. *Id.* at 318. The support guidelines for each state can be found at <http://www.supportguidelines.com>.

<sup>70</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT 611(c).

<sup>71</sup> *Id.* § 611. The 2001 UIFSA amendments to § 611 make it clear that the duration of the child support obligation should be fixed by the controlling order. Amended § 611(d) provides that "the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support." *Id.* The 2001 UIFSA amendments to § 611 also state that a registering tribunal cannot establish a new support order under its laws after a child has reached the age specified under the duration of support law of the issuing state. *Id.* Amended § 611(d) further provides that "[t]he obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state." *Id.* Some courts have previously held that completion of the obligation to support a child through age eighteen established by the now-completed controlling order did not preclude the imposition of a new obligation thereafter to support the child through age twenty-one or even to age twenty-three if the child was enrolled in higher education. *Id.* The 2001 UIFSA amendments were designed to eliminate such attempts at creating multiple, albeit successive, support obligations. *Id.*

<sup>72</sup> *Robdau v. Dep't of Soc. Servs.*, 543 S.E.2d 602 (Va. App. Ct. 2001).

<sup>73</sup> *Id.* at 605.

<sup>74</sup> *Id.*

<sup>75</sup> 946 P.2d 305, 307 (Ore. App. Ct. 1997).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> No. CA98-09-122, 1999 Ohio App. LEXIS 2342 (Ohio Ct. App. May 24, 1999).

<sup>79</sup> *Id.*

Lastly, it is important for the LAA to understand that the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) does not permit modification of any support period prior to the date of filing the modification request.<sup>80</sup> That is because the FFCCSOA provides that every child support installment becomes a judgment by operation of law as it comes due and is not subject to retroactive modification.<sup>81</sup> Therefore, an obligor requesting modification must file the modification request as soon as possible to avoid paying any arrears that accumulated prior to filing.

### Assumption of CEJ After Modification

After the registering tribunal has modified a support order under the UIFSA, it assumes CEJ over the support order.<sup>82</sup> The new support order consists of the newly modified terms, the nonmodifiable terms of the original order, and any arrearage amounts that accrued before modification. Every state is required to recognize the assumption of CEJ by the registering tribunal, and every state is required to enforce all aspects of the new support order.<sup>83</sup> The UIFSA requires the petitioner for modification to file a certified copy of the new order with the issuing tribunal that had CEJ over the earlier order and with every tribunal in which the petitioner knows the earlier order has been registered.<sup>84</sup> The petitioner is required to file the new order within thirty days of modification.<sup>85</sup>

### Special Evidentiary Provisions Under the UIFSA

The ultimate goal of the UIFSA is the efficient processing of interstate child support cases. To achieve that goal, the UIFSA contains many special rules of evidence and procedure. For example, the physical presence of the petitioner in the responding tribunal is not required.<sup>86</sup> In addition, a party or witness may give testimony by telephone, audiovisual, or other electronic means at a location designated by the tribunal.<sup>87</sup> Furthermore, documents transmitted from one state to another by fax or other means that do not provide an original may not be excluded from evidence based on the means of transmission.<sup>88</sup> Verified and sworn pleadings, affidavits, documents complying with federally mandated forms, and documents incorporated by reference therein are admissible in evidence in another state by a witness or party, so long as they would not otherwise be excluded under the hearsay rule if given in person.<sup>89</sup> Lastly, the UIFSA authorizes state tribunals to communicate with each other in writing, by phone, or other means, in order to obtain information about another state's laws, the legal effect of a judgment, decree, or order, and the status of a proceeding in the state.<sup>90</sup> The UIFSA also authorizes state tribunals to call on each other for assistance in obtaining discovery or in compelling a person to respond to a discovery order.<sup>91</sup>

### Conclusion

The life of a child support order may be very long, seeing a child from infancy through adulthood. During that time, the circumstances of the parties and the needs of the child may dramatically change. Modification of child support orders helps address these changes and can ensure the child support order remains appropriate for the parties and the children throughout the order's duration.

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<sup>80</sup> Pub. L. No. 103-383, 108 Stat. 4063 (codified as amended at 28 U.S.C. § 1738B (2000)).

<sup>81</sup> 42 U.S.C. § 666 (2000).

<sup>82</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT § 611(d) (amended 2001), 9 U.L.A. 235 (Supp. 2001).

<sup>83</sup> *Id.* §§ 610, 612.

<sup>84</sup> *Id.* § 614.

<sup>85</sup> *Id.* Failure to file a certified copy of the new order with the other tribunals does not affect the validity or enforceability of the modified order, but it could result in sanctions against the party. *Id.*

<sup>86</sup> *Id.* § 316(a). This provision was designed to ensure expeditious hearings, with minimal continuances, and to assure that evidence is fully and fairly placed before the decision-maker. *Id.*

<sup>87</sup> *Id.* § 316(f).

<sup>88</sup> *Id.* § 316(e).

<sup>89</sup> *Id.* § 316(b).

<sup>90</sup> *Id.* § 317.

<sup>91</sup> *Id.* § 318.

Family law cases make up a substantial part of the Army Legal Assistance practice, and thus, LAAs must be able to provide competent legal advice to clients regarding the modification of child support orders. Furthermore, because the parties in such cases often reside in different states due to the highly mobile nature of military service, LAAs must understand the special rules applicable to interstate modification cases under the UIFSA. More specifically, LAAs must be able to explain the basic UIFSA modification process to clients, to include where the modification action must be filed, what law will apply to the modification action, and how to register an order for modification or respond to an order registered for modification. Legal assistance attorneys who have a working knowledge of these areas will be able to provide an invaluable service to their clients. Such legal advice can contribute greatly to military readiness and the military mission by improving soldier morale and by giving soldiers some peace of mind so they can better focus on their military duties.

## Appendix

### State UIFSA Statutes<sup>92</sup>

State	Citation
Alabama	ALA. CODE §§ 30-3A-101 to 30-3A-906 (2000).
Alaska	ALASKA STAT. §§ 25.25.010 to 25.25.903 (Michie 2000).
Arizona	1998 ARIZ. SESS. LAWS 25-621 <i>et seq.</i> (2000).
Arkansas	ARK. CODE ANN. §§ 9-17-101 to 9-17-903 (Michie 1999).
California	CAL. FAM. CODE §§ 4900 to 5005 (Deering 2000).
Colorado	COLO. REV. STAT. ANN. §§ 14-5-101 to 14-5-10007 (1999).
Connecticut	CONN. GEN. STAT. ANN. §§ 46b-212 to 46b-214 (1999).
Delaware	DEL. CODE ANN. tit. 13, §§ 601-691 (1999).
District of Columbia	D.C. CODE ANN. §§ 30-341.1 <i>et seq.</i> (2000).
Florida	FLA. STAT. ANN. §§ 88.0011 to 88.9051 (1999).
Georgia	GA. CODE ANN. §§ 19-11-100 to 19-11-191 (2000).
Hawaii	HAW. REV. STAT. §§ 576B-101 to 576B-902 (2000).
Idaho	IDAHO CODE §§ 7-1001 to 7-1087 (2000).
Illinois	750 ILL. COMP. STAT. §§ 22/100 to 22/999 (West 2000).
Indiana	IND. CODE ANN. §§ 31-9-2-13 <i>et seq.</i> (Burns Ind. Code Ann. 2000).
Iowa	IOWA CODE ANN. §§ 252K.101 to 252K.904 (1999).
Kansas	KAN. STAT. ANN. §§ 23-9,101 to 23-9,903 (1999).
Kentucky	KY. REV. STAT. ANN. §§ 407.5101 to 407.5902 (1998).
Louisiana	LA. REV. STAT. ANN. §§ 1301.1 to 1308.2 (West 1999).
Maine	ME. REV. STAT. ANN. tit. 19-A, §§ 2801 to 3401 (West 1999).
Maryland	MD. CODE ANN. FAM. LAW §§ 10-301 to 10-359 (1999).
Massachusetts	MASS. GEN. LAWS ANN. ch. 209D, §§ 1-101 <i>et seq.</i> (LEXIS 2000).
Michigan	MICH. STAT. ANN. §§ 25.223 (101) (LEXIS 1999).
Minnesota	MINN. STAT. ANN. §§ 518C.101 to 518C.902 (1999).
Mississippi	MISS. CODE ANN. §§ 93-25-1 to 93-25-117 (2000).
Missouri	MO. REV. STAT. tit. 30, §§ 454.850 to 454.997 (2000).
Montana	MONT. CODE ANN. §§ 40-5-101 <i>et seq.</i> (1999).
Nebraska	NEB. REV. STAT. ANN. §§ 42-701 to 42-751 (LEXIS 2000).
Nevada	NEV. REV. STAT. §§ 130.0902 to 130.802 (2000).
New Hampshire	N.H. REV. STAT. ANN. §§ 546-B: 1 to 546-B: 60 (1999).
New Jersey	N.J. REV. STAT. §§ 2A: 4-30.24 to 2A: 4-30.124 (2000).
New Mexico	N.M. STAT. ANN. §§ 40-6A-101 to 40-6A-903 (2000).
New York	N.Y. FAM. CT. ACT §§ 580-101 to 580-905 (Consol. 2000).
North Carolina	N.C. GEN. STAT. §§ 52C-1-100 to 52C-9-902 (1999).
North Dakota	N.D. CENT. CODE §§ 14-12.2-01 to 14-12.2-49 (2000).
Ohio	OHIO REV. CODE ANN. §§ 3115.01 to 3115.59 (Anderson 2000).
Oklahoma	OKLA. STAT. tit. 43, §§ 601-100 to 601-901 (1999).
Oregon	OR. REV. STAT. §§ 110.300 to 110.441 (1998).
Pennsylvania	23 PA. CONS. STAT. ANN. §§ 7101 to 7901 (West 1999).
Rhode Island	R.I. GEN. LAWS §§ 15-23.1-101 to 15-23.1-907 (2000).
South Carolina	S.C. CODE ANN. §§ 20-7-965 <i>et seq.</i> (Law Co-op 1999).
South Dakota	S.D. CODIFIED LAWS §§ 25-9B-101 to 25-9B-903 (2000).
Tennessee	TENN. CODE ANN. §§ 36-5-2001 to 36-5-2902 (1999).
Texas	TEX. FAM. CODE ANN. §§ 159.001 to 159.902 (West 2000).
Utah	UTAH CODE ANN. §§ 78-45f-100 to 78-45f-902 (2000).
Vermont	VT. STAT. ANN. tit. 15B, §§ 101 to 904 (2000).
Virginia	VA. CODE ANN. §§ 20-88.32 to 20-88.82 (2000).
Washington	WASH. REV. CODE §§ 26.21.005 to 26.21.916 (2000).
West Virginia	W. VA. CODE §§ 48B-1-101 to 48B-9-903 (2000).
Wisconsin	WIS. STAT. ANN. §§ 769.101 to 769.903 (West 1999).
Wyoming	WYO. STAT. ANN. §§ 20-4-139 to 20-4-194 (2000).
Guam	GUAM CIV. CODE § 5-35 (2000).
Puerto Rico	P.R. LAWS ANN. tit. 8, §§ 541 <i>et seq.</i> (1997).
Virgin Islands	V.I. CODE ANN. tit. 16, §§ 391 <i>et seq.</i> (2000).

<sup>92</sup> See ENFORCEMENT HANDBOOK, *supra* note 8, at exhibit 12-1, 397.

## CLE News

### 1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. 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 non-unit reservists, through the U.S. Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorneys Course 5F-F10

Class Number—155th Contract Attorneys 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, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

### 2. TJAGSA CLE Course Schedule (August 2004 - September 2006)

Course Title	Dates	ATRRS No.
<b>GENERAL</b>		
53d Graduate Course	16 August 04 – 25 May 05	5-27-C22
54th Graduate Course	15 August 05 – 25 May 06	5-27-C22
165th Basic Course	14 September – 7 October 04 (Phase I – Ft. Lee)	5-27-C20
	8 October – 16 December 04 (Phase II – TJAGSA)	5-27-C20
166th Basic Course	4 – 27 January 05 (Phase I – Ft. Lee)	5-27-C20
	28 January – 8 April 05 (Phase II – TJAGSA)	5-27-C20
167th Basic Course	31 May – 23 June 05 (Phase I – Ft. Lee)	5-27-C20
	24 June – 1 September 05 (Phase II – TJAGSA)	5-27-C20

168th Basic Course	13 September – 6 October 05 (Phase I – Ft. Lee)	5-27-C20
	7 October – 15 December 05 (Phase II – TJAGSA)	5-27-C20
169th Basic Course	3 – 26 January (Phase I – Ft. Lee)	5-27-C20
	27 January – 7 April 06 (Phase II – TJAGSA)	5-27-C20
170th Basic Course	30 May – 22 June (Phase I – Ft. Lee)	5-27-C20
	23 June – 31 August (Phase II – TJAGSA)	5-27-C20
171st Basic Course	12 September 06 – TBD (Phase I – Ft. Lee)	5-27-C20
10th Speech Recognition Training	17 – 28 October 05	512-71DC4
16th Court Reporter Course	24 January – 25 March 05	512-27DC5
17th Court Reporter Course	25 April – 24 June 05	512-27DC5
18th Court Reporter Course	1 August – 5 October 05	512-27DC5
19th Court Reporter Course	31 January – 24 March 06	512-27DC5
20th Court Reporter Course	24 April – 23 June 06	512-27DC5
21st Court Reporter Course	31 July – 6 October 06	512-27DC5
6th Court Reporting Symposium	31 October – 4 November 05	512-27DC6
185th Senior Officers Legal Orientation Course	24 – 28 January 05	5F-F1
186th Senior Officers Legal Orientation Course	28 March – 1 April 05	5F-F1
187th Senior Officers Legal Orientation Course	13 – 17 June 05	5F-F1
188th Senior Officers Legal Orientation Course	12 – 16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14 – 18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January – 3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27 – 31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12 – 16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11 – 15 September 06	5F-F1
11th RC General Officers Legal Orientation Course	19 – 21 January 05	5F-F3
12th RC General Officers Legal Orientation Course	25 – 27 January 06	5F-F3
35th Staff Judge Advocate Course	6 – 10 June 05	5F-F52
36th Staff Judge Advocate Course	5 – 9 June 06	5F-F52
8th Staff Judge Advocate Team Leadership Course	6 – 8 June 05	5F-F52S
9th Staff Judge Advocate Team Leadership Course	5 – 7 June 06	5F-F52S
2005 JAOAC (Phase II)	2 – 14 January 05	5F-F55
2006 JAOAC (Phase II)	8 – 20 January 06	5F-F55
36th Methods of Instruction Course	31 May – 3 June 05	5F-F70
37th Methods of Instruction Course	30 May – 2 June 06	5F-F70
2005 JAG Annual CLE Workshop	3 – 7 October 05	5F-JAG
16th Legal Administrators Course	20 – 24 June 05	7A-550A1
17th Legal Administrators Course	19 – 23 June 06	7A-550A1
3d Paralegal SGM Training Symposium	6 – 10 December 2005	512-27D-50
16th Law for Paralegal NCOs Course	28 March – 1 April 05	512-27D/20/30
17th Law for Paralegal NCOs Course	27 – 31 March 06	512-27D/20/30

16th Senior Paralegal NCO Management Course	13 – 17 June 05	512-27D/40/50
9th Chief Paralegal NCO Course	13 – 17 June 05	512-27D- CLNCO
1st 27D BNCOC	21 October – 18 November 04	
2d 27D BNCOC	27 January – 24 February 05	
3d 27D BNCOC	18 March – 14 April 05	
4th 27D BNCOC	20 May – 17 June 05	
5th 27D BNCOC	23 July – 19 August 05	
6th 27D BNCOC	10 September – 9 October 05	
1st 27D ANCOG	10 November – 7 December 04	
2d 27D ANCOG	18 March – 10 April 05	
3d 27D ANCOG	24 July – 16 August 05	
4th 27D ANCOG	17 September – 9 October 05	
12th JA Warrant Officer Basic Course	31 May – 24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May – 23 June 06	7A-270A0
JA Professional Recruiting Seminar	12 – 15 July 05	JARC-181
JA Professional Recruiting Seminar	11 – 14 July 06	JARC-181
6th JA Warrant Officer Advanced Course	11 July – 5 August 05	7A-270A2
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
4th Advanced Federal Labor Relations Course	19 – 21 October 05	5F-F21
59th Federal Labor Relations Course	17 – 21 October 05	5F-F22
56th Legal Assistance Course	16 – 20 May 05	5F-F23
57th Legal Assistance Course	31 October – 4 November 05	5F-F23
58th Legal Assistance Course	15 – 19 May 06	5F-F23
2005 USAREUR Legal Assistance CLE	17 – 21 October 05	5F-F23E
29th Admin Law for Military Installations Course	14 – 18 March 05	5F-F24
30th Admin Law for Military Installations Course	13 – 17 March 06	5F-F24
2005 USAREUR Administrative Law CLE	12 – 16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11 – 14 September 06	5F-F24E
2004 Income Tax Course	13 – 17 December 04	5F-F28
2005 Maxwell AFB Income Tax Course	12 – 16 December 05	5F-F28
2004 USAREUR Income Tax CLE	6 – 10 December 04	5F-F28E
2005 USAREUR Income Tax CLE	5 – 9 December 05	5F-F28E
2005 Hawaii Income Tax CLE	10 – 14 January 05	5F-F28H
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2004 USAREUR Claims Course	29 November – 3 December 04	5F-F26E
2005 USAREUR Claims Course	28 November – 2 December 05	5F-F26E
2005 PACOM Income Tax CLE	3 – 7 January 05	5F-F28P
2006 PACOM Income Tax CLE	9 – 13 June 2006	5F-F28P

23d Federal Litigation Course	1 – 5 August 05	5F-F29
24th Federal Litigation Course	31 July – 4 August 06	5F-F29
3d Ethics Counselors Course	18 – 22 April 05	5F-F202
4th Ethics Counselors Course	17 – 21 April 06	5F-F202
<b>CONTRACT AND FISCAL LAW</b>		
7th Advanced Contract Attorneys Course	20 – 24 March 06	5F-F103
154th Contract Attorneys Course	Not conducted	
155th Contract Attorneys Course	25 July – 5 August 05	5F-F10
156th Contract Attorneys Course	24 July – 4 August 06	5F-F10
5th Contract Litigation Course	21 – 25 March 05	5F-F102
7th Contract Litigation Course	20 – 24 March 06	5F-F102
2004 Government Contract & Fiscal Law Symposium	7 – 10 December 04	5F-F11
2005 Government Contract & Fiscal Law Symposium	6 – 9 December 05	5F-F11
71st Fiscal Law Course	25 – 29 April 05	5F-F12
72d Fiscal Law Course	2 – 6 May 05	5F-F12
73d Fiscal Law Course	24 – 28 October 05	5F-F12
74th Fiscal Law Course	24 – 28 April 06	5F-F12
75th Fiscal Law Course	1 – 5 May 06	5F-F12
1st Operational Contracting Course	28 February – 4 March 05	5F-F13
2d Operational Contracting Course	27 February – 3 March 06	5F-F13
12th Comptrollers Accreditation Course (Hawaii)	26 – 30 January 04	5F-F14
13th Comptrollers Accreditation Course (Fort Monmouth)	14 – 17 June 04	5F-F14
7th Procurement Fraud Course	31 May – 2 June 05	5F-F101
2005 USAREUR Contract & Fiscal Law CLE	29 March – 1 April 05	5F-F15E
2006 USAREUR Contract & Fiscal Law CLE	28 – 31 March 06	5F-F15E
2005 Maxwell AFB Fiscal Law Course	7 – 10 February 05	
2006 Maxwell AFB Fiscal Law Course	6 – 9 February 06	
<b>CRIMINAL LAW</b>		
11th Military Justice Managers Course	22 – 26 August 05	5F-F31
12th Military Justice Managers Course	21 – 25 August 06	5F-F31
48th Military Judge Course	25 April – 13 May 05	5F-F33
49th Military Judge Course	24 April – 12 May 06	5F-F33
23d Criminal Law Advocacy Course	14 – 25 March 05	5F-F34
24th Criminal Law Advocacy Course	12 – 23 September 05	5F-F34
25th Criminal Law Advocacy Course	13 – 17 March 06	5F-F34
26th Criminal Law Advocacy Course	11 – 15 September 06	5F-F34
28th Criminal Law New Developments Course	15 – 19 November 04	5F-F35

29th Criminal Law New Developments Course	14 – 17 November 05	5F-F35
2005 USAREUR Criminal Law CLE	3 – 7 January 05	5F-F35E
2006 USAREUR Criminal Law CLE	9 – 13 January 06	5F-F35E
<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5th Domestic Operational Law Course	24 – 28 October 05	5F-F45
83d Law of War Course	31 January – 04 February 05	5F-F42
84th Law of War Course	11 – 15 July 05	5F-F42
85th Law of War Course	30 January – 3 February 06	5F-F42
86th Law of War Course	10 – 14 July 06	5F-F42
43d Operational Law Course	28 February – 11 March 05	5F-F47
44th Operational Law Course	8 – 19 August 05	5F-F47
45th Operational Law Course	27 February – 10 March 06	5F-F47
46th Operational Law Course	7 – 18 August 06	5F-F47
2004 USAREUR Operational Law Course	29 November – 2 December 05	5F-F47E

### 3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2004 issue of *The Army Lawyer*.

### 4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2005**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 (“2006 JAOAC”). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

## 5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<b><u>Jurisdiction</u></b>	<b><u>Reporting Month</u></b>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year

New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

\* Military Exempt

\*\* Military Must Declare Exemption

For addresses and detailed information, see the September 2004 issue of *The Army Lawyer*.

## Current Materials of Interest

### 1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005)

8 - 9 Jan 05	Charleston, SC 12th/174th LSO	Criminal Law, Administrative and Civil Law	COL Daniel Shearouse (803) 734-1080 Dshearouse@scjd.state.sc.us
8 - 9 Jan 05	Anaheim, CA 63d RRC	Criminal Law, Contract Law	SGM Rocha (714) 229-3700 MAJ Diana Mancia diana.mancia@us.army.mil
29 - 30 Jan 05	Seattle, WA 70th RRC	Criminal Law, International and Operational Law	MAJ Brad Bales (206) 296-9486 (253) 223-8193 (cell) brad.bales@metrokc.gov
4 - 6 Feb 05	San Antonio, TX 90th RRC	Contract Law, Administrative and Civil Law	MAJ Charmaine E. Betty-Singleton (501) 771-8962 (work) (501) 771-8977 (office) charmaine.bettysingleton@us.army.mil
26 - 27 Feb 05	Denver, CO 87th LSO	Criminal Law, International and Operational Law	CPT Bret Heidemann (303) 394-7206 bret.heidemann@us.army.mil
5 - 6 Mar 05	Washington, DC 10th LSO	Contract Law, Administrative and Civil Law	LTC Philip Luci, Jr. (703) 482-5041 pluci@cox.net
11 - 13 Mar 05	Columbus, OH 9th LSO	Criminal Law, International and Operational Law	1LT Matthew Lampke (614) 644-8392 MLampke@ag.state.oh.us
16 - 17 Apr 05	Ayer, MA 94th RRC	International and Operational Law, Administrative and Civil Law	SFC Daryl Jent (978) 784-3933 darly.jent@us.army.mil
23 - 24 Apr 05	Indianapolis, IN INARNG	Contract Law, Administrative and Civil Law	COL George Thompson (317) 247-3491 george.thompson@in.ngb.army.mil
14 - 15 May 05	Nashville, TN 81st RRC	Contract Law, Administrative and Civil Law	CPT Kenneth Biskner (205) 795-1511 kenneth.biskner@us.army.mil
14 - 15 May 05	Rosemont, IL 91st LSO	Administrative and Civil Law, International and Operational Law	CPT Douglas Lee (630) 954-3123 douglas.lee@nationalcity.com
20 - 23 May 05	Kansas City, KS 89th RRC	Criminal Law, Administrative and Civil Law, Claims	MAJ Anna Swallow (800) 892-7266, ext. 1228 (316) 681-1759, ext. 1228 lynette.boyle@us.army.mil

## 2. The Legal Automation Army-Wide Systems XXI—JAGCNet

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

### b. Access to the JAGCNet:

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

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

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

LAAWSXXI@jagc-smtp.army.mil

### c. How to log on to JAGCNet:

- (1) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.
- (2) Follow the link that reads “Enter JAGCNet.”
- (3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.
- (4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.
- (5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

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

(7) Once granted access to JAGCNet, follow step (c), above.

## 3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the September 2004 issue of *The Army Lawyer*.

## 4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

## **5. The Army Law Library Service**

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

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at [Dottie.Evans@hqda.army.mil](mailto:Dottie.Evans@hqda.army.mil).

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By Order of the Secretary of the Army:

**PETER J. SCHOOMAKER**  
*General, United States Army*  
*Chief of Staff*

Official:



SANDRA L. RILEY  
*Administrative Assistant to the*  
*Secretary of the Army*  
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PERIODICALS

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