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Lore of the Corps

Lawyering in the Empire of the Shah: A Brief History of Judge Advocates in Iran

Fred L. Borch
Regimental Historian & Archivist

Given current relations with the government of Iran, it is easy to forget that American military personnel once had close ties with Tehran and that more than a few judge advocates (JAs) had rewarding tours of duty in the Empire of the Shah.

While U.S. Army personnel first arrived in Iran in September 1942 (to help train and organize the Iranian Army during World War II), the U.S. Army Mission to the Imperial Iranian Armed Forces (ARMISH) was officially created by bi-lateral agreement in October 1947. Five years later, the United States and Iran formed a separate Military Assistance Advisory Group-Iran (MAAG). These separate ARMISH and MAAG organizations were merged into a tri-service (Army, Navy, Air Force) ARMISH-MAAG in 1958.

Just when the first Army lawyer arrived in Tehran to provide legal advice to the ARMISH-MAAG is not clear, but it seems likely that JAs were first assigned to the U.S. Army Element, ARMISH-MAAG Iran in 1958, when the tri-service configuration was first adopted. The Army considered the assignment to be an important one, as the “Legal Advisor” was a lieutenant colonel on the ARMISH-MAAG Joint Table of Distribution (JTD). This legal advisor was supported by a second JA, who was a major (MAJ) on the JTD but was most often a JA captain (CPT). Rounding out the Judge Advocate Office at ARMISH-MAAG was a local national civilian paralegal who spoke Farsi and so could also act as a translator, an MOS 71D legal clerk, a U.S. civilian secretary and a local national secretary. The office had three vehicles, and the Iranian Army provided two drivers for them.

The primary mission of the Army lawyers in Tehran was to advise the Imperial Iranian Judiciary Department (IJD), which was headed by an Iranian lieutenant general. This meant advising the IJD on legal education and training. To further this goal, Iranian military lawyers began attending the JA Career Course (today’s Graduate Course) at The Judge Advocate General’s School. The first to study in Charlottesville were Colonel (COL) Mos H. Ekhterai and COL Khajeh-Noori, who attended the Fourteenth Career Class from 1965 to 1966.¹

Advising the IJD also meant assisting the Iranians in “updating Iranian military law or drafting new laws.” At the time, Iranian civil law followed the French (Napoleonic) codal system and Iranian military law had the same codal framework, with one exception: military courts could try civilians for certain offenses against the State, such as bank robbery or drug trafficking. This explains why, in the early 1970s, the JAs in Tehran helped their Iranian counterparts draft “hijacking laws” that were implemented in “Regulations and Laws Section” of the Imperial Iranian Armed Forces.²

While advising IJP was the focus of the Judge Advocate Office in Tehran, the two Army lawyers in country also provided legal advice to the U.S. Army Mission to the Gendarmerie, known by the acronym GENMISH. In addition to these advisor roles, the JAs in Teheran provided more traditional legal advice to the command in the areas of criminal and civil law, claims, contracts, legal assistance, and international law.

There was relatively little to do in the criminal law arena because no courts-martial could be convened; the United States was precluded by its agreements with Iran from holding any judicial proceedings on Iranian soil. Since there was no Status of Forces Agreement (SOFA) with Iran, ARMISH-MAAG and GENMISH personnel were technically subject to Iranian criminal law, and subject to arrest and questioning by local police and judicial officials. Consequently, the JAs in Tehran had to maintain a working relationship with the Iranian Gendarmerie.

The high quality of U.S. personnel assigned for duty in Iran meant that disciplinary incidents were rare. But, when a crime did occur, usually involving a traffic accident, the Iranian authorities would release U.S. personnel from liability under Iranian law only after a civil settlement (involving the payment of money damages) was reached between the aggrieved Iranian and the U.S. offender. As a practical matter, the JAs in Tehran were always able to convince the Iranians to release Americans from detention; these U.S. personnel were quickly put on a military aircraft leaving the country.

¹ THE JUDGE ADVOCATE GENERAL’S SCHOOL, THE JUDGE ADVOCATE GENERAL’S SCHOOL, 1951–1968, at 10 (1968). First Lieutenant Ahmad R. Kheradmand was a student in the Sixteenth Advanced Course from 1967 to 1968 (by which time the name had changed from “Career” to “Advanced”). Major Ali-Akbar Naderian was a student in the 19th Advanced Course from 1970 to 1971. Major Feradood H. Tehrani attended the 21st Advanced

Course from 1972 to 1973. These Iranian officers did not survive the 1979 Revolution; they were executed.

² James J. McGowan, Jr., *SJA Spotlight—Iran*, ARMY LAW., Oct. 1972, at 14, 14.

Civil law issues chiefly involved the interpretation of Air Force and Navy regulations, with which Army lawyers had to be familiar since Airmen and Sailors also were assigned to ARMISH-MAAG.

Claims were a major area of practice. The most important claims arose out of vehicular accidents when Iranian civilians were killed by American drivers. Since the JAs in Iran handled, on average, about nine such vehicular death claims a year, this was no small matter. Moreover, Iranian law provided that the offending U.S. citizen would be detained or prohibited from leaving the country. This so-called “body arrest” would end only upon the satisfactory negotiation of a civil settlement with the victim’s family. The lack of a SOFA meant that there was no international agreement covering the payment of claims filed by local nationals. Therefore, the U.S. Army Claims Service, Europe, which had supervisory authority over Iran, appointed foreign claims commissions empowered to settle claims. The skills of the civilian Farsi-speaking paralegal in the JA office were critical in resolving the vehicular homicide cases. Usually, the family was satisfied with a \$1,000 payment, the maximum settlement that could be authorized by a one-person commission (consisting of a single Army lawyer). A three-man commission, consisting of two JAs and one officer from the command, could settle a wrongful death claim (or other claims) for up to \$5,000.

The JAs in Tehran also paid a number of claims by U.S. personnel for theft of personal property. Apparently “a typical *modus operandi*” was for a thief to visit an American’s home while he and his family were away. The thief then informed the Iranian “maid” that he had come to pick up the refrigerator, television, washing machine, or other item of property “for repair.” The domestic servant, “not having been cautioned otherwise,” let the thief pick up the items, which were never seen again. After an investigation to ensure that the American claimant had not left his property unsecured, or was otherwise at fault, Army lawyers paid these claims.³

There were even claims for maneuver damage. An Army lawyer was the claims officer for Operation Delovar, a joint exercise involving Imperial Iranian forces and a brigade from the 101st Airborne Division. Claims were paid to Iranian landowners for damage to their wheat fields caused by U.S. paratroopers dropping from the sky. While a severe drought in the area made it seem that the claimed damage was “imaginary,” the JA claims officer nonetheless tasked several young 101st Soldiers who had grown up on farms with estimating the yield of the damaged wheat fields. The Farsi-speaking civilian paralegal then went to the local

market and ascertained the price of wheat. The Iranian claims were ultimately settled over tea in a tent.⁴

Contracting law issues were important because the contracting officer for ARMISH-MAAG was the Embassy Contracting Officer. As this embassy employee was not a lawyer, he relied heavily on the JA office for procurement law advice. By 1970, the JA office was reviewing all military contracts to ensure that they were legally sufficient.⁵

For legal assistance, the office usually had one JA who could speak Farsi, which he had learned after spending a year at the Defense Language Institute at the Presidio of Monterey. This language skill was critical because, while the Farsi-speaking local national civilian paralegal drew up the leases used by ARMISH-MAAG personnel to rent homes on the local economy and could help negotiate a settlement to a landlord-tenant dispute, having a Farsi-conversant JA insured that American interests were always well served. Domestic relations, taxation and other legal assistance issues also were part of the workload in the JA office. At the request of the U.S. Embassy, “unofficial” legal assistance also went to U.S. citizens who were not entitled to legal advice because they were not attached to any U.S. government entity; these were most often American women married to Iranians who were trying to flee the country with their children.⁶

Finally, international law questions arose in the interpretation of the 1947 ARMISH and 1950 MAAG agreements, and the application of the privileges enjoyed by ARMISH-MAAG personnel. One of the most difficult issues involved “the meaning and intent of the duty free privilege granted to members of the Mission” in the ARMISH agreement signed in 1947. The Iranian Ministry of Foreign Affairs was concerned about U.S. personnel selling items to Iranians that had been brought into the country without having been subject to customs duties.⁷

Retired JA COL Richard S. “Dick” Hawley, who served two tours in Tehran, had more time in Iran than any other member of the Corps.⁸ Hawley remembers that one morning

³ *Id.*

⁴ E-mail from Colonel (Retired) Richard S. Hawley, to author (1 Feb. 2012, 03:41:00 EST) (on file with author).

⁵ McGowan, *supra* note 2, at 16.

⁶ E-mail from Colonel Hawley, to author, subject: “Your time in Iran” (17 June 2011, 20:08:00) (on file with author).

⁷ McGowan, *supra* note 2, at 16.

⁸ Hawley served in Iran from 1963 to 1965 and from 1968 to 1970. Born on 15 January 1930 at Fort Sill, Oklahoma (his father was a cavalry officer), Hawley grew up on a variety of Army installations in the United States and overseas. He graduated from the University of Michigan in 1952 and, having participated in the Army Reserve Officer Training Corps, was commissioned an infantry second lieutenant. He then deployed to Japan and joined the 1st Cavalry Division. Hawley hoped to see combat, but the Korean War ended before he could get to the Korean peninsula. Returning

in early 1962, COL Kenneth Hodson, then in charge of assignments in the Personnel and Plans Office, asked him: "Do you know where Iran is?" When then-CPT Hawley said that he did, Hodson asked him if he would like to be assigned to the MAAG in Tehran. The result was that CPT Hawley left in the summer of 1962 for the Defense Language Institute in California. After an intensive year learning Farsi, Hawley and his family left for a two-year assignment in the Shah's empire.

From 1963 to 1965, CPT Hawley worked on the Iranian Army's Abassabad compound in Teheran, and lived "on the economy" in the city. Tehran had been the capital of Iran since 1785 and, with some three million inhabitants,⁹ was a dynamic and bustling city. Hawley found a nice place to live. The only drawback was that, in his first tour, he had to bring drinking water from the American Embassy (water in Tehran was not potable until Hawley's second tour) and there was no central heat in the home on either tour (space heaters were needed in the winter, especially when it snowed). But Tehran was an exciting place to live, for the culture and history of Persia (the old name for Iran) was thousands of years old and so there was much to see and do in the city and in the countryside.

Hawley remembered that during both his tours in Iran (he returned to Tehran as a lieutenant colonel from 1968 to 1970), the ARMISH-MAAG Legal Advisor had several unusual, if not unique, roles: he served as Acting Provost Marshal, which meant that Army lawyers had oversight of criminal investigations being conducted by Air Force Office of Special Investigations (the equivalent of the Army's CID), which had agents at the ARMISH-MAAG. Army

lawyers also were called upon to advise the U.S. Embassy, since the ambassador and his staff did not have a legal officer. Informal opinions were the rule, often involving the interpretation of the ARMISH and MAAG agreements.

One of the last JAs to serve in Tehran was then-CPT James J. "Jim" McGowan, Jr., who arrived in Tehran in June 1970 and departed in May 1972. He described Iran "as a land of legendary romance, immortalized in verses of the Persian Poets." Tehran was "a near-modern metropolis with tree-lined streets clogged with automobiles and taxis, traffic circles, shop windows tastefully displayed, impressive public buildings, neon-lighted theater marquees, and double-decker busses."¹⁰ McGowan also remembered that there was "a difference in the basic motivations of the American and Iranian societies." As McGowan saw it, when an Iranian said he would promise to do something "faardah" (tomorrow), this likely meant "sometime within several weeks." And, when the deed was finally done, it would be "with a shrug of his shoulders" and "the time-honored Persian phrase 'Inshallah,' or if 'God wills.'"¹¹ For JAs in the Corps today who have experienced deployments to Afghanistan or Iraq, McGowan's observation will come as no surprise.

Judge advocate assignments to Iran apparently ended in the mid-1970s; the *1975 JAGC Personnel Directory* shows that MAJ Holman J. Barnes, Jr., and CPTs Stanley T. Cichowski and John E. Dorsey were the last Army lawyers to serve in Iran. As for the American presence in the empire of the Shah? The ARMISH-MAAG disappeared with the fall of the Shah and dissolution of Iran's imperial government on 11 February 1979. It seems highly unlikely that JAs will return to serve in Iran anytime soon.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

<https://www.jagcnet.army.mil/8525736A005BE1BE>

to the United States, Hawley was released from active duty and entered the University of Michigan's law school. After graduating in 1956, Hawley successfully passed the Foreign Service examination and joined the State Department. He was the Vice Consul in Genoa, Italy, when he decided to return to active duty. Then-Captain Hawley transferred from the Infantry (Army Reserve) to the Judge Advocate General's Corps in 1958. In addition to his two tours in Iran, then Lieutenant Colonel Hawley served in Vietnam as the Staff Judge Advocate (SJA), 101st Airborne Division, from 1970 to 1971, and in Germany as the SJA, 8th Infantry Division from, 1972 to 1974. He retired as a colonel in 1979 and then worked for Litton Industries in Saudi Arabia for fifteen years. JUDGE ADVOCATE PERSONNEL DIRECTORY (1963); JUDGE ADVOCATE PERSONNEL DIRECTORY (1968); JUDGE ADVOCATE PERSONNEL DIRECTORY (1971); JUDGE ADVOCATE PERSONNEL DIRECTORY (1974); e-mail from Colonel Hawley, to author, subject: "Your bio" (3 Feb. 2012, 22:16:00) (on file with author).

⁹ Today, Tehran has about 7.5 million inhabitants. Iran's population was about thirty million in 1970; today it is more than seventy million. FED. RESEARCH DIV., LIBRARY OF CONG., IRAN: A COUNTRY STUDY 88-89 (Glenn E. Curtis & Eric Hooglund, eds., 2008), available at <http://lcweb2.loc.gov/frd/cs/irtoc.html>.

¹⁰ McGowan, *supra* note 2.

¹¹ *Id.* (The phrase is Arabic in origin.)

The Equal Access to Justice Act: Practical Applications to Government Contract Litigation

Major Shay Stanford*

I. Introduction

The Equal Access to Justice Act (EAJA) awards attorneys' fees and litigation expenses to eligible individuals who are parties to litigation against the Government.¹ An eligible party may receive an award when it does not exceed the size limits set by the Act² and can show it is a "prevailing party," unless the Government's position was "substantially justified," or "special circumstances" make the award unjust.³

This article describes and analyzes these requirements as they apply to government contract litigation. Part I of this article briefly discusses the background and purposes of enacting EAJA and lays out the requirements for eligibility. Part II addresses how courts have interpreted EAJA, focusing on the "prevailing party" requirement, the "substantially justified" standard, and the "special circumstances" exception. Finally, this article describes current contract litigation cases and suggests strategies to successfully litigate against unwarranted applications for fees under EAJA.

A. Background and Purpose of EAJA

The EAJA is a statutory exception to the standard American practice in which prevailing litigants bear the burden of paying their own attorneys' fees.⁴ Congress enacted EAJA as a fee-shifting statute to let private litigants recover certain costs associated with litigation against the Government.⁵ The EAJA addresses the concerns of Congress over access to the courts for individuals and

improvement of government policies.⁶ Congress's intent in promulgating EAJA was to provide a "means to prevent individuals, as well as small business concerns, from being deterred by potential costs of litigation from seeking redress for allegedly unreasonable government action."⁷ Eligibility under EAJA is only the first step in a successful application for costs and attorneys fees. Under EAJA, an eligible party must also meet certain threshold requirements before a court will order reimbursement of their litigation costs.

B. Threshold Requirements

The EAJA provides that attorneys' fees and certain costs associated with litigation, incurred by a "prevailing party" in either an agency or court adjudication against the Government, may be recovered unless the position of the Government is "substantially justified" or unless "special circumstances" make the award unjust.⁸ While EAJA fees may be awarded in many circumstances, this article will focus specifically on the issues that arise during Government contract litigation.

II. Applying EAJA in Contract Litigation

Under the Contract Dispute Act of 1978,⁹ a contractor may file a claim against the Government to resolve a contract dispute.¹⁰ Where a contractor's claim is denied by the Government, the contractor can appeal to either the appropriate Board of Contract Appeals or the Court of Federal Claims.¹¹ Contractors who prevail may then apply for reimbursement of the fees and costs associated with the litigation.¹² The EAJA authorizes Boards of Contract Appeals and the Court of Federal Claims (COFC) to award attorneys' fees and other expenses to a contractor who meets

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¹ 5 U.S.C. § 504 (2006); 28 U.S.C. § 2412 (2006). The Equal Access to Justice Act, as codified in Title 5, applies to agency adjudications, whereas Title 28 applies to court adjudications.

² In general, an eligible party is (a) an individual with a net worth of not more than two million dollars; (b) an organization with a net worth of not more than seven million dollars and not more than 500 employees; (c) a tax exempt organization under § 501(c)(3) of the Internal Revenue Code; or (d) a cooperative association as defined in § 15(a) of the Agricultural Marketing Act. 5 U.S.C. § 504(b)(1); 28 U.S.C. § 2412(d)(2).

³ 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412 (d)(1)(A).

⁴ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (discussing Congress's authority to expressly authorize fee-shifting statutes as an exception to the American Rule); see generally Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. REV. 717 (2010).

⁵ Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325-30 (1980).

⁶ *Comm'r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 164 n.14 (1990) (quoting H.R. REP. NO. 96-1418, at 12 (1980)). "[T]he Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." *Id.* at 10.

⁷ *PCI/RCI v. United States*, 37 Fed. Cl. 785, 788 (1997) (citations omitted).

⁸ 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412 (d)(1)(A).

⁹ 41 U.S.C. §§ 601-613 (2006).

¹⁰ *Id.*; Pub. L. No. 95-563, 92 Stat. 2389 (effective Nov. 1, 1978) (enacted to "provide for the resolution of claims and disputes relating to Government contracts").

¹¹ 41 U.S.C. §§ 601-613.

¹² 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412 (d)(1)(A).

the threshold requirements.¹³ Although EAJA fees are often awarded,¹⁴ the Government can successfully defend against unwarranted applications for EAJA fees by taking corrective action or by maintaining a reasonable position throughout litigation. Whether a contractor is a “prevailing party” for purposes of EAJA has been an area of much litigation.¹⁵

A. The Prevailing Party Standard

Under EAJA, a contractor seeking to recover costs and attorneys’ fees must be “a prevailing party” in the litigation.¹⁶ Traditionally, courts used the “catalyst theory,” which defined a “prevailing party” as one that “succeed[s] on any significant issue in litigation which achieves some of the benefit sought in bringing suit.”¹⁷ This definition was broadly construed to allow a contractor to claim “prevailing party” status even where the lawsuit brought about a voluntary change in the Government’s conduct.¹⁸ However, the “catalyst theory” was specifically rejected by the Supreme Court.¹⁹

I. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources—Rejecting the “Catalyst Theory”*

In *Buckhannon*, the Supreme Court rejected the “catalyst theory” as a basis for finding prevailing party status and awarding attorneys’ fees under the Federal Housing Amendments Act (42 U.S.C. § 3613(c)(2)) and Americans with Disabilities Act (42 U.S.C. § 12205).²⁰ The Court explained that the “catalyst theory” would allow a plaintiff to be considered a “prevailing party” if it achieved the desired result from the defendant’s voluntary change in

conduct without a “judicially sanctioned change in the parties’ legal relationship.”²¹ In rejecting this theory, the Supreme Court stated that “a defendant’s voluntary change in conduct although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.”²² Thus, an award of attorney’s fees is not authorized “without a corresponding alteration in the legal relationship of the parties.”²³ The Court held that “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorneys’ fees.”²⁴ The Court’s rationale in *Buckhannon* was subsequently applied to the EAJA fee-shifting provisions in contract litigation.²⁵

2. Applying *Buckhannon* to EAJA

The first case to apply *Buckhannon* during contract litigation was *Brickwood Contractors v. United States*. In *Brickwood*, the contractor filed a bid protest in the COFC regarding a Navy procurement for repairs to elevated water storage tanks.²⁶ In response to this protest, the Navy took corrective action and ultimately awarded Brickwood the contract.²⁷ Subsequently, the *Brickwood* contractor filed an

²¹ *Id.* at 605.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 604 (citing *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

²⁵ *Brickwood Contr., Inc. v. United States*, 288 F. 3d 1371 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003); *Rice Servs., Inc. v. United States*, 405 F.3d. 1017, 1018–19 (Fed. Cir. 2005); *Rebecca Ryan*, 75 Fed. Cl. 769 (2007); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F. 3d 934 (Fed. Cir. 2007).

²⁶ *Brickwood*, 288 F.3d at 1373, *cert. denied*, 537 U.S. 1106 (2003). The Navy initially issued an invitation for Bids (IFB) to repair elevated water storage tanks, and subsequently issued amendments to the solicitation adding three options to the base requirements, which related to removing contamination from the tanks. After the Navy received five Bids, which included the base bid plus options, Brickwood was identified as the lowest bidder. However, as a result of further testing, the Navy determined that there was no evidence of contamination, and announced that the bids on the options would be excluded from the final evaluation. After evaluating the price without the options, Brickwood was no longer the lowest bidder. The Navy again amended the solicitation, this time converting it from an IFB to a Request for Proposals (RFP), as the Navy intended to negotiate with the bidders. Brickwood filed a bid protest seeking to enjoin the Navy from converting the IFB to an RFP and to direct the Navy to award the contract to Brickwood. *Id.*

²⁷ *Id.* at 1371. After a hearing on Brickwood’s request for a temporary restraining order (TRO) but prior to any court decision, the Navy filed a Motion to Dismiss based on their voluntary cancellation of the solicitation. The Navy stated that “[a]fter further consideration of both the circumstances surrounding the solicitation and the governing FAR provisions, and in light of the Court’s comments at the TRO hearing, the Navy has cancelled the solicitation and plans to re-solicit using a new IFB.” The Navy’s Motion to Dismiss was granted without reaching the merits of the case. The next day, Brickwood filed a second bid protest,

¹³ Pub. L. No. 96-481, 94 Stat. 2321 (effective Oct. 1, 1981), *amended by* Pub L. No. 99-88 (aug. 5, 1985), Pub. L. No. 99-80, 99 Stat. 183 (Aug. 5, 1985).

¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-HEHS-98-58R, EQUAL ACCESS TO JUSTICE ACT: ITS USE IN SELECTED AGENCIES (1998). Agencies were required to report data on EAJA claims to the Administrative Conference of the United States from fiscal years 1982 through 1994. *Id.* at 4.

¹⁵ *Id.* at 14.

¹⁶ *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

¹⁷ *Id.* at 433 (citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1978)).

¹⁸ *Id.* (“This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the [] court to determine what fee is ‘reasonable.’”); *see also* *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Hum. Servs.*, 532 U.S. 598, 610 (2001), *cert. denied*, 537 U.S. 1106 (2003) (“[W]e hold that the ‘catalyst theory’ is not a permissible basis for the award of attorneys fees . . .”).

¹⁹ *Buckhannon*, 532 U.S. at 610.

²⁰ *Id.* at 601.

application for attorneys' fees under EAJA to recover costs associated with its bid protest. In holding the Navy liable, the COFC applied the catalyst theory, finding Brickwood a "prevailing party" because it had "succeeded on a significant issue in the litigation that resulted in a benefit" to the contractor.²⁸ The court explained that to be a prevailing party one does not have to gain a final judgment following a full trial on the merits; rather it is enough that a suit is a causal, necessary, or substantial factor in obtaining the requested result.²⁹

On appeal, the Court of Appeals for the Federal Circuit reversed the COFC, holding that the term "prevailing party" as used in the EAJA has the same meaning as in other fee-shifting statutes and that the "catalyst theory" relied on by the court had been specifically rejected by the Supreme Court in *Buckhannon*.³⁰ The Federal Circuit noted that in *Brickwood*, the Government voluntarily took corrective action by cancelling the solicitation, which moved the issue from the purview of the court.³¹ Thus, even though the contractor ultimately prevailed on the issue, the contractor could not be a "prevailing party" for purposes of receiving attorneys' fees under EAJA.³² Prevailing party status under EAJA requires a judicial resolution of the matter in dispute rather than voluntary corrective action taken by the Government as a result of the contractor's claim. Furthermore, not even every judicial resolution will be enough to convey "prevailing party" status on a contractor.

3. A Dismissal Order Must Constitute a Material Change in the Legal Relationship of the Parties

In *Rice Services, Inc. v. United States*, the Federal Circuit reversed the COFC's decision to award attorneys' fees under EAJA, holding that the dismissal order entered

contesting the cancellation of the IFB, alleging the Navy's cancellation of the solicitation had violated the FAR, constituted a breach of the implied obligation to treat each bid fairly and honestly, and initiated and improper action. After the court determined that the Navy did not seem to be acting arbitrarily or capriciously in cancelling the bid and moving to award the contract through a new solicitation, Brickwood voluntarily dismissed its second bid protest. The Navy then issued a new solicitation and Brickwood ultimately won the contract. *Id.* at 1374.

²⁸ *Id.* at 1374.

²⁹ *Id.* As the lower court stated, "[a]lthough there was no final judgment on the merits issued . . . the Navy's decision not to convert the IFB to an RFP, but to cancel the original solicitation and resolicit was the product of reconsideration by the government," as a result of plaintiff's bid protest. *Brickwood Contr., Inc., v. United States*, 49 Fed. Cl. 148, 156 (2001).

³⁰ *Brickwood*, 288 F. 3d at 1378. "Our examination of the text and the legislative history of the EAJA leads us to conclude that there is no basis for distinguishing the term 'prevailing party' in the EAJA from other fee-shifting statutes." *Id.*

³¹ *Id.*

³² *Id.*

after the Navy voluntarily and unilaterally gave Rice the relief it sought did not confer "prevailing party" status.³³ The case arose out of a contract awarded to one of seven bidders. The contract was for one year with a one-year option period. Rice filed a bid protest alleging the Navy's award to another contractor was illegal and requesting the court to order a new award and enjoin the Navy from exercising its option to extend the contract with the successful offeror. Soon after Rice filed its protest, the Navy took corrective action, voluntarily deciding to issue a new solicitation. Each of the original bidders agreed to participate in the new competition. The Navy moved to dismiss the case as the protest was moot. The COFC granted the Navy's motion, issued a dismissal order, and ordered the Navy to carry out the new solicitation. Rice then applied for an award of attorneys' fees under EAJA.³⁴

The COFC held that this case was analogous to *Former Employees of Motorola Ceramic Products v. United States*,³⁵ in which the Federal Circuit had held that when a court remands a case to an agency, and does not retain jurisdiction, the order constitutes success on the merits.³⁶ Therefore, the COFC held Rice was a "prevailing party" and granted Rice's application for fees under EAJA. The Federal Circuit disagreed with the COFC and reversed the decision, holding that prevailing party status under *Buckhannon* and *Brickwood* depended upon the existence of the equivalent of an enforceable judgment on the merits or a court-ordered consent decree, neither of which was present in this case.³⁷ The court further held that the dismissal order did not materially affect the legal relationship between the parties because the COFC issued the order after the Navy had voluntarily and unilaterally taken remedial action. The court stated,

Buckhannon does not allow a court to take what would otherwise be a "catalyst theory" case and convert it-through language like that used in paragraph one of the Dismissal Order-into a case where the plaintiff is nevertheless accorded 'prevailing party' status. Were we to hold otherwise, the Court's holding in *Buckhannon* could be easily circumvented by any order "directing" a party to take action.³⁸

³³ *Rice Servs., Inc. v. United States*, 405 F.3d 1017, 1026-27 (Fed.Cir. 2005).

³⁴ *Id.* at 1018-19.

³⁵ 336 F.3d 1360 (Fed. Cir. 2003).

³⁶ *Rice*, 405 F.3d. at 1020.

³⁷ *Id.* at 1025-27.

³⁸ *Id.* at 1027.

The court determined that Rice's claim was the type of "catalyst theory" claim the Supreme Court had rejected in *Buckhannon*, as Rice had achieved its requested relief through a voluntary—rather than judicially-ordered—change in the Navy's conduct. *Rice* and subsequent cases show that corrective action taken by the Government can preclude the award of attorneys' fees under EAJA.³⁹

4. Corrective Action and the Voluntary Cessation Exception

In *Chapman Law Firm Co. v. Greenleaf Construction Co.*, the COFC awarded the protester EAJA fees, as it had in *Rice*. However, this time the COFC entered a judgment that stated there had been an alteration in the legal relationship of the parties in order to leave open the opportunity for the contractors to apply for attorneys' fees under the EAJA.⁴⁰ In *Chapman*, the protestor took issue with the Government's treatment of a negotiated procurement in which small businesses were first considered for the contract, and only if there was inadequate competition would other businesses be considered. Chapman was awarded the contract initially, but the Government decided to terminate for convenience and issue a new competitive solicitation. Chapman filed a bid protest, contesting the termination of its contract, cancellation of the existing solicitation, and issuance of a new solicitation. The incumbent contractor and Greenleaf, a competing offeror for the contract, intervened.⁴¹

In response to the protest, the Government proposed specific corrective action and filed a motion to dismiss. The COFC denied the motion, finding the "proposed corrective action lacked a rational basis and was contrary to law" because it did not include Greenleaf in the small business tier.⁴² The Government renewed its motion to dismiss after indicating "it would proceed with the reevaluation in the manner suggested by the [COFC], including both Chapman

and Greenleaf" in the new competition. The COFC held that this proposed course of action was reasonable.⁴³ Nonetheless, instead of dismissing, the COFC then entered judgment in favor of Chapman and Greenleaf, explicitly finding that the contractors were "instrumental in achieving the final outcome," and that their actions "materially altered the legal relationship among the parties."⁴⁴ In refusing to grant the Government's motion to dismiss, the court noted that such a motion might prevent the contractors from applying for attorneys' fees under the EAJA.

On appeal, the Federal Circuit held that the lower court's "entry of judgment was not only unnecessary, but it was improper."⁴⁵ Under *Buckhannon*, to justify an award of attorney's fees, "there must be an actual, court-ordered alteration in the legal relationship in the parties in the form of an entry of judgment or a consent decree."⁴⁶ But "[w]hen during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed."⁴⁷ The lower court was not allowed to consider the award of fees under EAJA when deciding whether to dismiss, as the COFC had improperly done.⁴⁸

The court noted that the Supreme Court had recognized a "voluntary cessation exception" to this rule: the Government's voluntary cessation of the challenged conduct does not require dismissal of the case if there is a reasonable expectation that the conduct will reoccur.⁴⁹ However, the court held that this exception does not apply when there is "clearly no 'reasonable expectation' that the alleged violation will recur and 'interim relief or events have completely and irrevocably eradicated the effects of the

[T]he order stated: In this circumstance . . . further action by the Court is not required or justified . . . and it is **ORDERED** that: (1) The remedial action described and promised in defendant's submission shall be undertaken; . . . (3) Plaintiff's complaint shall be DISMISSED, without prejudice to the assertion of any new protest action addressed to the remedial action in progress.

Id. (citing the Dismissal Order).

³⁹ *Id.*; see also *Ryan v. United States*, 75 Fed. Cl. 769, 776 (2007) (holding that dismissal of a bid protest on the grounds that the claim was moot under circumstances where the contract awardee was decertified from the HUBZone program pursuant to a unilateral request on remand to the Small Business Administration did not render Ryan a "prevailing party" for purposes of awarding attorneys' fees under EAJA).

⁴⁰ 490 F. 3d 934, 938 (Fed. Cir. 2007).

⁴¹ *Id.*

⁴² *Id.* at 937.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 939.

⁴⁶ *Id.* (citing *Brickwood Contr., Inc. v. United States*, 288 F. 3d 1371 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003)).

⁴⁷ *Id.* (citing *Northeast Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)). Although the court did not explicitly say so in *Chapman*, this doctrine is jurisdictional in nature; when the Government takes the necessary corrective action, the issue may become moot, so that the court lacks jurisdiction to continue with the case and enter judgment. See *Northeast Fla. Chapter*, 508 U.S. at 661–62 (discussing the rule, and the "voluntary cessation" exception to that rule, in terms of jurisdictional mootness).

⁴⁸ *Chapman*, 490 F.3d at 939–40.

⁴⁹ *Id.* (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); see also *Heartland By-Prods., Inc., v. United States*, 568 F.3d 1360, 1368 (Fed. Cir. 2009) (a defendant's voluntary cessation of a challenged practice does not deprive the court of jurisdiction "unless subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur") (quoting *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000))).

alleged violation.”⁵⁰ In this case, the Federal Circuit held that the COFC was required to assume that the Government would carry out the corrective action in good faith, because “[g]overnment officials are presumed to act in good faith, and it requires well-nigh irrefragable proof to induce a court to abandon the presumption of good faith.”⁵¹ Furthermore, the COFC had held that the corrective action was reasonable. Accordingly, the Federal Circuit held that the COFC should have dismissed the case.⁵² *Greenleaf* suggests there may be a predisposition toward finding “prevailing party” status for eligible litigants (at least at the trial court level) and highlights the importance of solid Government strategies for litigating unwarranted applications for fees under EAJA.

As these cases show, the Government can moot prevailing party status by taking prompt corrective action. Furthermore, under EAJA, even if a litigant is considered a “prevailing party,” an award of attorneys’ fees is not permitted if the Government shows that its position is “substantially justified” or “special circumstances” would make an award unjust.⁵³

B. When the Government’s Position is Substantially Justified

The Government may defend against unwarranted applications for fees under EAJA if its position in the litigation is “substantially justified.”⁵⁴ The Equal Access to Justice Act does not define the term “substantial justification”; thus its meaning was the subject of various interpretations before the Supreme Court provided guidance in the seminal case, *Pierce v. Underwood*.⁵⁵

I. *Pierce v. Underwood*

Pierce involved the Secretary of Housing and Urban Development’s decision not to implement an “operating subsidy” program that had been authorized by a federal

statute.⁵⁶ The statute “was intended to provide payments to owners of government-subsidized apartment buildings to offset rising utility expenses and property taxes.”⁵⁷ A nationwide class of tenants residing in government-subsidized housing challenged the Secretary’s decision, arguing the mandatory language in the statute required the Secretary to implement the program.⁵⁸ The District Court agreed with the plaintiffs and awarded attorneys’ fees after finding that the position taken by Secretary was not “substantially justified” within the meaning of EAJA.⁵⁹ The Supreme Court affirmed that holding.⁶⁰

In so holding, the Supreme Court held that “[t]he statutory phrase ‘substantially justified’ means justified to a degree that could satisfy a reasonable person.”⁶¹ Even though a position taken is not correct, it can still be substantially justified “if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.”⁶² The Government bears the burden of proving that its position was substantially justified.⁶³ The trial court’s determination on whether the Government has met its burden is reviewed for abuse of discretion.⁶⁴

⁵⁶ *Id.* The “operating subsidy” program was “authorized by § 212 of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, formerly codified at 12 U.S.C. §§ 1715z-1(f)(3) and (g) (1970 ed., Supp. IV).” *Id.* at 555.

⁵⁷ *Id.*

⁵⁸ *Id.* *Pierce* was filed in the U.S. District Court for the District of Columbia. However, when *Pierce* was filed, the Secretary was already appealing several adverse decisions from various plaintiffs in nine different Federal District Courts. *Id.*

⁵⁹ *Id.* Before considering the issues in *Pierce*, the Supreme Court consolidated various cases that were pending appeal on the same issue and then granted the Secretary’s petition for writs of certiorari to review those decisions. *Id.* at 556 (citing *Sub Non. Hills v. Cooperative Servs., Inc.*, 429 U.S. 892 (1976), *Dubose v. Harris*, 82 F.R.D. 582, 584 (Conn. 1979), *Ross v. Comty. Servs., Inc.*, 544 F.2d 514 (CA4 1976), and *Abrams v. Hills*, 547 F.2d 1062 (CA9 1976), *vacated sub nom. Pierce v. Ross*, 455 U.S. 1010 (1982)). “Before any other Court of Appeals reached a decision on the issue, and before [the Supreme Court] could review the merits, a newly appointed Secretary settled in most of the cases.” *Pierce*, 487 U.S. at 556. *Pierce* was then transferred for administration of the settlement. *Id.* In settling the case, the newly appointed Secretary “agreed to pay into a settlement fund \$60 million for distribution to owners of subsidized housing or to tenants whose rents had been increased because subsidies had not been paid.” *Id.* While the settlement was pending, Congress passed EAJA and the District Court granted respondent’s motion for an award of attorney’s fees. *Id.* at 557.

⁶⁰ *Id.* at 570–71.

⁶¹ *Pierce*, 487 U.S. at 565.

⁶² *Id.* at 566 n.2.

⁶³ *Covington v. Dep’t of Health & Hum. Servs.*, 818 F.2d 838, 839 (Fed. Cir. 1987).

⁶⁴ *Pierce*, 487 U.S. at 559.

⁵⁰ *Id.* at 940 (citing *Davis*, 440 U.S. at 631 (1979)).

⁵¹ *Id.* (citing *T&M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999) (internal quotations and citation omitted)).

⁵² *Id.*

⁵³ 5 U.S.C. § 504(a)(1) (2006); 28 U.S.C. § 2412(d)(1)(A) (2006).

⁵⁴ *See Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (explaining the 1985 amendment to EAJA “clarified that, when assessing whether to award attorney fees incurred by a party who has successfully challenged a governmental action in a particular court, the entirety of the conduct of the government is to be viewed, including the action or inaction by the agency prior to litigation”).

⁵⁵ 487 U.S. 552 (1988).

Subsequently, some courts have applied a three-part test to determine whether the Government met its burden. The Government must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.⁶⁵ *Pierce* established that the reasonableness determination is applied not just to the Government's position in the litigation but also to its pre-litigation position.⁶⁶ Although the analysis necessitates a review of the merits decision, *Pierce* makes clear the distinction between a position taken by the Government that is wrong and a position taken by the Government that is unreasonable.⁶⁷ A merits analysis differs from one under EAJA, because under EAJA, the court does not consider the current state of the law, but what the Government was substantially justified in believing the law to have been at the time of action.⁶⁸ In addition, even if the Government's position is not substantially justified, fees under EAJA "may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings."⁶⁹ Thus a loss on the merits does not automatically mean EAJA fees are an appropriate award.⁷⁰ Courts must analyze all the pertinent facts to determine why the Government position failed in court.⁷¹ To

⁶⁵ *Tchemkou v. Mukasey*, 517 F.3d 506, 509 (7th Cir. 2008); *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993); *Sierra Club v. Sec'y of the Army*, 820 F.2d 513, 517 (1st Cir. 1987); *Deja-Vu-Lynnwood, Inc. v. United States*, 21 Fed. Appx. 691, 692 (9th Cir. Oct. 26, 2001). However, the Fifth Circuit has not adopted the test, and simply requires "reasonableness, as defined by *Pierce*" (i.e., whether a reasonable person would consider the position justified). *Davidson v. Veneman*, 317 F.3d 503, 506 n.1 (5th Cir. 2003). The Federal Circuit does not appear to have addressed this test, whether to adopt or reject it.

⁶⁶ 28 U.S.C. 2412(d)(2)(D) (2006) (defining "position of the United States" to include the Government's position, not only "in the civil action," but its "action or failure to act . . . upon which the civil litigation is based"); *Chiu v. United States*, 948 F.2d 711 (Fed.Cir. 1991); see also *Doty v. United States*, 71 F.3d 384, 386 (Fed. Cir. 1995) (defining the position of the government in an EAJA claim analysis as "the government's position throughout the dispute, including not only its litigation position but also the agency's administrative position"). The Government may be able to overcome its unreasonable position before litigation by taking a reasonable position during litigation that "outweigh[s] its prelitigation conduct," so that the court finds its overall conduct was reasonable. *Baldi Bros. Constructors v. United States*, 52 Fed. Cl. 78, 82 (2002).

⁶⁷ *Pierce*, 487 U.S. at 568; see also Gregory C. Fisk, *The Essentials of the Equal Access to Justice Act: Court Awards for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1 (Fall 1995) (providing an extensive discussion of how courts have treated this issue).

⁶⁸ *Sharp v. United States*, 91 Fed. Cl. 798, 802 (2010) (citing *Bowey v. West*, 218 F.3d 1373, 1377 (Fed.Cir.2000)) ("[S]ubstantial justification is measured, not against the case law existing at the time the EAJA motion is denied, but rather, against the case law that was prevailing at the time the government adopted its position.").

⁶⁹ 28 U.S.C. 2412(d)(2)(D).

⁷⁰ *Pierce*, 487 U.S. 559 ("Conceivably, the Government could take a position that is not substantially justified yet win, even more likely, it could take a position that is substantially justified, yet lose.").

prevail on the issue of substantial justification, the Government must put forth a solid argument of reasonableness in law and fact throughout the dispute. Recent decisions involving contract appeals illustrate this.

2. Application in Government Contract Appeals

In *Information International Associates, Inc. v. United States*, a contractor successfully brought suit against the United States seeking reformation of its contract on grounds of a unilateral mistake in the final bid. The contractor applied for attorneys' fees under EAJA, claiming the Government's position was not substantially justified.⁷²

Information International involved a request for proposal from the United States Air Force "for 'labor and supplies to man and manage' libraries, located on five Air Force Bases."⁷³ After receiving responses, the contracting officer (KO) determined that two firms had submitted technically acceptable offers and requested both firms submit Final Price Proposals. The KO checked the plaintiff's calculations, comparing them against the other firm's proposed prices, but did not compare the initial proposed prices to the final proposed prices. The KO apparently did not recognize that the plaintiff's total price reflected a decrease. The KO next "created abstracts to compare Plaintiff's and [the other competing firm's] Final Price Proposals."⁷⁴ The plaintiff's Final Proposal was 3.6% lower than the other firm's; the plaintiff was awarded the contract.

After performance had begun, the plaintiff identified an error in the Final Price Proposal—the salary of a library assistant had been erroneously omitted from all five years. After the plaintiff was unable to resolve the issue with the KO, the plaintiff filed a claim for an equitable adjustment, to pay the wages omitted from the Final Price Proposal. The plaintiff argued that its unilateral mistake was known or should have been known by the KO. The Government argued, and the court agreed, that section 14.407-1 of the Federal Acquisition Regulation (FAR), which requires KOs to "examine all bids for mistakes," did *not* require the KO to compare the initial and final price proposals from the winning bidder (doing which might have led the KO to spot the error).⁷⁵ In deciding for the plaintiffs on the merits of the case, the court nonetheless found that the KO "should have

⁷¹ *Sharp*, 91 Fed. Cl. at 803; see also *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005).

⁷² *Informational Int'l Assocs. v. United States*, 75 Fed. Cl. 656, 657 (2007).

⁷³ *Informational Int'l Assocs. v. United States*, 74 Fed. Cl. 192, 195 (2006).

⁷⁴ *Id.*

⁷⁵ *Id.* at 205 (citing C.F.R. § 14.407-1 (2005)).

been alerted to a possible error” by other documents, so that the plaintiffs were entitled to reformation of the contract.⁷⁶

On consideration of the EAJA claim, the court held that the Government’s position in opposing reformation of the contract on the grounds of a unilateral mistake was “substantially justified.” Specifically, it held that the practical steps that would have alerted the Government to the error (comparing the initial and final price proposals, in toto or line by line) were not required by the FAR. Thus, the Government was “substantially justified” in not taking these steps and in not spotting the error. The court did not award attorneys’ fees.⁷⁷

Similarly, in *Metric Construction Co., Inc. v. United States*, the COFC denied the plaintiff’s application for EAJA fees even though the plaintiff prevailed on the merits, because the Government showed its position during the dispute was substantially justified.⁷⁸ *Metric* involved a dispute over the construction of a Deployable Medical Services Warehouse at an Air Force Base.⁷⁹ The United States Army Corps of Engineers required Metric to repair damage and install a new roof after the warehouse constructed by Metric developed serious leaks. Metric submitted a certified claim for \$2,173,091.85 to the Corps for costs, but never received a final decision from the KO. Metric then filed suit for an equitable adjustment to the contract, alleging that the Corps’ specifications for the steel underlying the roof were defective, and that Metric had detrimentally relied on misrepresentations by the Corps.⁸⁰ The court denied a defense motion for summary judgment, because factual disputes existed about the Corps’ design and specifications. After trial on the merits, the court awarded Metric an equitable adjustment of only \$1,323,214.20.⁸¹

Metric then filed an EAJA application, asserting “that both the Corps’ failure to issue a final decision on Metric’s claim, and the Government’s litigation position in the subject matter, lacked substantial justification.”⁸²

⁷⁶ *Id.* at 206.

⁷⁷ *Info. Int’l Assocs.*, 75 Fed. Cl. at 659. The court also held that the total comparison, even if made, might not have alerted the contracting office (KO) to the error under the circumstances of the case.

⁷⁸ 83 Fed. Cl. 446, 447 (2008).

⁷⁹ *Id.* at 447. Metric’s contract was for construction of a warehouse at Hill Air Force Base in Utah.

⁸⁰ *Id.* Metric claimed they were entitled to relief based on three theories: “breach of contract, constructive change/extra work, and breach of implied warranty.” *Id.*

⁸¹ *Id.* (citing *Metric Constr. Co., v. United States*, 80 Fed. Cl. 178, 196 (2008)). The trial on the merits dealt primarily with the “factual disputes related to the Corps’ design of structural steel underlying the roof and the issue of whether the Corps’ design specifications and communications with Metric . . . misrepresented information critical to proper roof installation.” *Id.*

In analyzing the EAJA claim, the court examined the Government’s pre-litigation conduct and litigation position under the totality of the circumstances.⁸³ In doing so, the court divided the case into three parts: “the Corps’ treatment of Metric’s certified claim for \$2,173,091.85; the Government’s litigation of plaintiff’s suit through the time of the court’s decision on defendant’s motion for summary judgment, and finally, the Government’s conduct throughout trial activities.”⁸⁴

The court concluded that failure of the KO to issue a final decision was not an unreasonable position but was substantially justified, because it was a common occurrence provided for by statute.⁸⁵ It also concluded that the Corps’ denial of the claim (by inaction) was reasonable because the claim “presented factual issues of considerable complexity...which could just as easily have pointed to liability on the part of the contractor, as to liability on the part of the government.”⁸⁶ Likewise, while the Government did not prevail on summary judgment, the court found that it was a “close question,” and “the government’s position had a reasonable basis in both fact and law.”⁸⁷ On the subject of defective specifications, the court reasoned that “‘Metric had presented very weak evidence...but that the evidence [was] more than colorable [and thus good enough to defeat summary judgment].’”⁸⁸ On the subject of misrepresentation, the court found that it had to resolve issues not only of what the Corps had said, but how Metric had interpreted it, and the Corps had argued from precedent that required the contractor to inquire into ambiguous instructions before proceeding with construction.⁸⁹ Thus, “the government’s

⁸² *Id.* at 449. Metric also alleged that “the defendant’s response brief [to the EAJA claim], ‘falls woefully short of satisfying the government’s burden of establishing that its overall litigation position was substantially justified.’” *Id.*

⁸³ *Id.* The totality of the circumstances, as to the government’s pre-litigation conduct, is an examination of the agency’s consideration of the claim. The court stated this analysis requires a “focus on the circumstances pertinent to the position taken by the government on the issue on which the claimant prevailed, such as the state of the law at the time the position was taken.” *Id.* (citing *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003)). Likewise, as to the government’s litigation position, courts examine the totality of the circumstances of the prosecution of the case. *Metric*, 83 Fed. Cl. at 449. “In the end, the court must exercise its discretion and judgment in determining whether the government’s overall position was reasonable. *Id.* (citing *Chiu v. United States*, 948 F.2d at 715 (Fed. Cir. 1991)).

⁸⁴ *Id.* at 450.

⁸⁵ *Id.* at 450–51. The court noted that, under the statute, a failure of a KO to issue a final decision on a claim within the time limit would be deemed a denial, and that contractors routinely filed suit “as a matter of course” in such cases. *Id.*

⁸⁶ *Id.* at 451.

⁸⁷ *Id.* (citing *Metric*, 73 Fed. Cl. at 613).

⁸⁸ *Id.* (citing *Metric*, 73 Fed. Cl. at 614).

⁸⁹ *Id.* at 452.

summary judgment position, although unsuccessful, was substantially justified by both fact and law.”⁹⁰

Finally, the court analyzed the Government’s arguments during the trial proceedings.

Although defendant’s primary theory of the case did not prevail at trial, defendant was able to present evidence that was relevant and supportive of its arguments. In essence, if defendant could show that the design specification of the underlying steel was not defective, then Metric’s failure to provide a functioning roof would be, absent any misrepresentation by the government, entirely Metric’s responsibility. Unfortunately for the defendant’s case, plaintiff’s witnesses were persuasive and proved that the design specifications were defective.⁹¹

The court concluded that a trial on the merits was required in order to determine whether or not plaintiff would prevail on its claim. The Government’s position in litigating the claim was substantially justified because under the facts of this case, plaintiff’s success on the merits was not a foregone conclusion. After reviewing the totality of the circumstances, the court found “it was reasonable for the government to have litigated the dispute to its conclusion.”⁹² Furthermore, “the government’s position made sense at all times during this dispute because close questions of fact precluded an easy victory for either side.”⁹³ Accordingly, the plaintiff’s application for attorneys’ fees was denied.⁹⁴

Although *International Associates* and *Metric* were filed in the Court of Federal Claims, the Armed Services Boards of Contract Appeals will apply the same analysis to determine whether the Government’s position is substantially justified. In *Environmental Safety Consultants, Inc.*, a contractor had succeeded on the merits and filed for attorneys’ fees and costs under EAJA.⁹⁵ The Board concluded that “with respect to ‘the action or failure to act by the agency upon which the adversary adjudication is based’⁹⁶ . . . the final decision [by the KO] represented a good faith effort to analyze the issues as they were known to

the government at the time, not unjustifiable agency action forcing litigation,” and refused to award fees and costs.⁹⁷

Environmental Safety Consultants involved a contract for sludge removal, disposal, and cleaning services for two lagoons at the Naval Air Development Center in Pennsylvania. The contractor alleged that it incurred unexpected costs because the sludge contained more suspended solids than the contract had specified, and sued for an equitable adjustment of the contract. In finding for the contractor on the merits, the Board determined there was an unexpected change in the physical characteristics of the sludge at the lagoons, and that the Government should have disclosed the presence of certain compounds. The Board did not find bad faith or abuse of discretion on the part of the Government, and instead found that the Government had spent considerable time trying to assist the contractor in its performance of the contract. In finding for the Government on the EAJA claim, the Board found that the Government was reasonable in evaluating the evidence and the applicable law.

While *Metric*, *International Associates*, and *Environmental Safety Consultants* all serve as examples of cases where EAJA fees were denied outright, sometimes a court will only partially deny relief. For example, if a contractor has multiple claims but is only successful on some, courts will reduce the award accordingly.

3. Multiple Claims May Require a Reduced Award

In *Cems Inc. v. Untied States*, the court awarded attorneys’ fees under EAJA to a government contractor who prevailed on a claim of equitable adjustment. However, the award was reduced to twenty-five percent of the amount claimed by the contractor because the Government was substantially justified on most of the issues presented. The court found that only a quarter of the effort in litigating the claim resulted from unjustified Government action, the Government had to pay only one quarter of the fees and costs.⁹⁸ In *Precision Pine & Timber, Inc. v. United States*, the contractor sued, attempting to secure a finding that it was not in breach of its contracts. The Government counterclaimed for damages for breach. The Government prevailed on its counterclaim, but recovered only forty-two percent of the amount it sought. The court found that a substantial portion of the Government’s case was not

⁹⁰ *Id.*

⁹¹ *Id.* at 453.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 454–55.

⁹⁵ 07-2 BCA ¶ 33652, ASBCA No. 47498 (2007).

⁹⁶ *Id.* (quoting 5 U.S.C. § 504(b)(1)(E) (2006)).

⁹⁷ *Id.* (citing *Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 159 n.7 (1990)).

⁹⁸ 65 Fed. Cl. 473, 484–85 (2005). The court specifically rejected any mechanical formula based on “number of issues presented” or “number of pages dedicated to briefing each issue,” but instead sought to determine the total effort by examining the entire record before it.

justified, and awarded the contractor fifty-eight percent of the fees and costs of defending against this counterclaim.⁹⁹

While a justified Government position throughout the dispute is considered a defense to a claim of attorneys' fees under EAJA, courts also have discretion to preclude an award where "special circumstances" make an award unjust. Although this exception is rarely used by courts, it has been used to preclude an award even when the Government position is not substantially justified.

C. When Special Circumstances Preclude Payment

1. Conduct of the Parties and Equitable Considerations

In *Oguachuba v. Immigration & Naturalization Service*, the Court of Appeals for the Second Circuit held that the plaintiff's misconduct constituted "special circumstances" rendering an award of attorneys' fees unjust, even though the Government's actions were not substantially justified.¹⁰⁰ The court examined the House Report accompanying EAJA, which "explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by prevailing parties."¹⁰¹ The "special circumstances exception" was enacted as a 'safety valve' which "helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts."¹⁰² It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

In *Oguachuba*, the plaintiff was a serial violator of United States immigration laws. He prevailed on a petition for habeas corpus after being detained for over six months by the United States Immigration and Naturalization Service. After finally being deported, he sued for attorneys' fees in the habeas corpus case under EAJA. Applying equitable principles, the court stated that it must view the application under EAJA in light of all the circumstances, and was not limited to scrutiny of the claim on which the applicant prevailed. While *Oguachuba* "prevailed in his petition for writ of habeas corpus, he would not have been incarcerated in the first place but for his notorious and repeated violations of United States Immigration Law."¹⁰³ *Oguachuba* represents a clear case for denial of fees under

the "special circumstances exception," because, as the court stated, "*Oguachuba* [was] without clean hands."¹⁰⁴

2. Application in Government Contract Appeals

In *Appeal of Insul-Glas, Inc.*, as in *Oguachuba*, the Board of Contract Appeals held that special circumstances would make an award unjust because the contractor was "without clean hands." *Insul-Glas* involved the appeal of a termination for default on a contract for "the replacement of windows at the United States Federal Building and Courthouse in Kalamazoo, Michigan."¹⁰⁵ On appeal, the Board found that the Government "had not met the high standards required for imposition of the drastic sanction of default termination" and converted the termination into "one for the convenience of the Government." However, because "*Insul-Glas* shared the blame for the situation which precipitated the termination," the Board exercised its "equitable powers to deny the contractor the administrative costs to which it would have been entitled under a termination for convenience."¹⁰⁶ The Board called *Insul-Glas's* administration of the contract "as bumbling and deficient as [the Government's]," stating "the record amply supports a finding of special circumstances."¹⁰⁷

In other cases, courts have reduced EAJA fees when a contractor acts unreasonably in litigating a case, whether failing to accept a reasonable offer from the Government to settle the case, or failing to recognize the actual award would exceed the contractor's claim.¹⁰⁸

Although the conduct of the parties is one factor to consider, other considerations may constitute "special circumstances" and preclude an award under EAJA.

¹⁰⁴ *Id.*

¹⁰⁵ *Appeal of Insul-Glas, Inc.*, GSBCA No. 8223, 89-3 BCA ¶ 22223 (1984).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* The court also found the Government's conduct and litigation positions to be substantially justified, and noted other cases in which substantial justification alone was sufficient to deny attorney's fees to a contractor when it succeeded in converting a termination for default into a termination for cause.

¹⁰⁸ *Application Under Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21049 ("The tender and refusal of a settlement offer may be probative of the reasonableness of attorney's fees and other expenses incurred after the applicant has declined to accept a settlement."); *Application under Equal Access to Justice Act of Sage Const. Co.*, ASBCA No. 34284, 92-1 BCA 24493 (noting that, after rejecting settlement offer, plaintiffs spent \$14,000 in legal fees and expenses to obtain an additional \$2700 of recovery, and refusing to award fees for this portion of the litigation).

⁹⁹ *Precision Pine & Timber, Inc., v. United States*, 83 Fed. Cl. 544, 554-55 (2008).

¹⁰⁰ *Ogachuba v. I.N.S.*, 706 F.2d 93, 98 (2d Cir. 1983).

¹⁰¹ *Id.*

¹⁰² *Id.* (quoting H.R. REP. NO. 1418, 96th Cong., 2d Sess. at 11), *reprinted in* 1980 U.S.C.C.A.N., 2953, 4984, 4990).

¹⁰³ *Id.* at 99.

3. Other Considerations

In *Laboratory Supply Corporation of America v. United States*, the United States Claims Court held that the time constraints placed on the Government from a suit to enjoin agency action were considered a “special circumstances” making an award unjust.¹⁰⁹ The contract was for supplying food packaging trays and plastic packaging film to the Navy. A contractor whose bid had been rejected as nonresponsive sued to prevent the Government from awarding the contract to anyone else. Because the object of the suit was “to enjoin the Navy from purchasing needed supplies from anyone other than [the] plaintiff[, i]t was essential that the case be decided rapidly.” Government counsel in Washington, D.C., consulting with Navy personnel in Honolulu, Hawaii, filed its responses at a breakneck pace, while trying to persuade personnel in Washington and Hawaii to change their positions.

Although the contractor prevailed, the court held that time pressures on the Government were “special circumstances” which made an award of fees under EAJA unjust. The court stated, “declaratory judgment/injunctive cases are by definition fast-paced cases that virtually force the Government into litigation before its litigation counsel know the full story.”¹¹⁰ Furthermore, “courts have consistently looked to time factors to determine whether or not a litigation position is justified.”¹¹¹

D. Strategies to Preclude Fee Shifting

1. Corrective Action

Litigators in contract disputes may only adopt a case after some action taken by the agency brings the case to their attention. A prompt analysis of the facts should indicate whether corrective action is necessary. Although the decision whether to litigate a claim should not be based on whether EAJA fees will be awarded post-litigation, the same considerations regarding reasonable Government action remain a consistent theme. If the action taken by the agency was unreasonable, then prompt action should be taken to correct the deficiency before litigation ensues. Courts and

¹⁰⁹ *Lab. Supply Corp. of America v. United States*, 5 Cl. Ct. 28, 29 (1984). Note that this case was decided while the “substantial justification” test applied only to the Government’s conduct during litigation, and not the agency’s action beforehand; as discussed above, the Government’s prelitigation conduct is now also tested for substantial justification.

¹¹⁰ *Id.* at 33.

¹¹¹ *Id.* (citing *Greenburg v. United States*, 1 Ct. Cl. 406, 408 (1983); *Clark v. United States*, 2 Ct. Cl. 194, 197 (1983); *Hill v. United States*, 3 Ct. Cl. 428, 430 (1983); *Gould v. United States*, 3 Ct. Cl. 693, 696 (1983); *Ellis v. United States*, 711 F.2d 1571, 1576 (Fed. Cir. 1983)). The court also found that the contractor’s own negligence “was the cause of the confusion that led to the need for the filing of the case,” and this too supported its decision to deny the award based on “special circumstances.” *Id.*

boards will scrutinize the Government’s position in defending its case under the totality of circumstances, considering the conduct of the parties, the merits of the case, and consistency with agency policy and judicial precedent. They will examine the entire record to determine whether the Government’s actions or inaction were reasonable. Other relevant factors may also be considered, such as whether “the government dragged its feet, [or] speedily cooperated in resolving the litigation,”¹¹² and whether the Government “departed from established policy in such a way as to single out a particular private party.”¹¹³ Furthermore, courts and boards will examine rejected settlement offers to determine the reasonableness of the Government’s litigation position.¹¹⁴

2. Negotiated Settlement

The Government may also choose to resolve a dispute by offering to settle the claim. Reasonable offers that are rejected by contractors have been held to preclude an award of EAJA fees. In *Decker & Co.*, the Government attempted to settle a claim for 9,500 deutschemarks (DM). The contractor refused and brought suit for 17,720 DM. The Armed Services Board of Contract Appeals ultimately awarded 9,500 DM because the contractor failed to support the higher figure. The Board also denied fees and costs under EAJA, stating that “[i]f appellant had accepted the Government’s offer instead of insisting before the Board on recovery of the full amount of its claim, this litigation would not have gone forward and the expenses would not have been incurred.”¹¹⁵ Likewise, in *Freedom NY, Inc.*, the Board of Contract Appeals reduced the EAJA award of fees and expenses incurred after the contractor rejected two very favorable settlement offers and continued the litigation.¹¹⁶

III. Conclusion

Practitioners involved in litigating contract disputes must keep good administrative records in order to justify their actions or inactions at every stage of litigation. Based on the myriad of cases involving EAJA claims with courts and boards, the actions of all personnel involved, from the contracting officer to the legal counsel, will be scrutinized

¹¹² *Essex Electro Eng’rs, Inc. v. United States*, 757 F.2d 247, 253 (Fed. Cir. 1985).

¹¹³ *Id.* at 254.

¹¹⁴ See *Decker & Co.*, ASBCA No. 38238, 92-2 BCA ¶ 24815; *Freedom NY, Inc.*, ASBCA No. 55466, 09-1 BCA ¶ 34031; *AST Anlagen und Sanierungstechnik GmbH*, ASBCA No. 42118, 93-3 BCA ¶ 25, 979; *Charles G. Williams Constr., Inc.*, 93-3 BCA at 128,914; *Sage Constr. Co.*, ASBCA No. 34284, 92-1 BCA ¶ 24, 493).

¹¹⁵ *Decker*, 92-2 BCA ¶ 24815.

¹¹⁶ *Freedom NY*, 09-1 BCA ¶ 34031.

for reasonableness at every stage. Since the burden is on the Government to show their actions or inactions are reasonably justified under the circumstances, thorough documentation could be essential in defending against a claim under EAJA. Although the possibility of losing an

EAJA claim should not dictate whether to litigate a claim on the merits, understanding how courts and boards determine who is a prevailing party and when the Government position is justified can only serve to inform the decision-maker before embarking on time-consuming litigation.

Spice, Bath Salts, Salvia Divinorum, and Huffing: A Judge Advocate's Guide to Disposing of Designer Drug Cases in the Military

Major Catherine L. Brantley*

Trying to get some relaxation, [Specialist Bryan Rodebush] sat on a balcony in Waikiki, Hawaii, and took five hits off a small pipe packed with a drug called spice. He stepped back inside, dozed off on the couch beside his girlfriend Ola Peyton, and then—as if in a trance—he beat Peyton senseless and nearly pushed her off the 11th floor balcony. He was charged with attempted murder.¹

I. Introduction

Servicemembers are dying, engaging in heinous criminal acts, and adversely affecting military readiness while under the influence of designer drugs.² Until recently, judge advocates found themselves without the tools, policies, and laws necessary to successfully combat and prosecute servicemembers who were seeking and getting a legal “high” from designer drugs. Several states, the federal government and, in particular, the Department of Defense (DoD) recognize the dangers associated with the use of designer drugs and have taken drastic action to combat this rising epidemic.

Servicemembers in search of a new high have had easy access to these designer drugs, since they can purchase the substances in local stores, order them on the Internet, or find the ingredients in common household chemicals. This ease of access is a contributing factor to the epidemic. Several stores are selling these types of products and marketing them as incense “not intended for human consumption” as a ploy to escape regulation by the Federal Drug Administration (FDA).³ Military commanders are committed to combating

this craze and have focused on this problem by creating policies, campaigns and crime-tip websites to deter the use of designer drugs.⁴ Each branch of the military has a similar policy reflecting its approach to dealing with designer drugs.

Additionally, the Division of Forensic Toxicology, Armed Forces Medical Examiner System (AFMES) and the U.S. Army Criminal Investigation Laboratory (USACIL) now have the ability to test for the illegal compounds found in spice, bath salts, and other designer drugs.⁵ This article will show that the recent changes in the law and new developments within the DoD provide judge advocates with the resources necessary to aggressively prosecute or administratively dispose of cases involving designer drugs. A sample charge sheet, a local command policy memorandum, and a charging decision matrix are included to assist trial counsel with the case disposition decision.

II. Defining Spice, Bath Salts, Salvia, and Huffing

Designer drugs are becoming increasingly popular within the ranks of each military branch.⁶ Before adding any type of designer drug charge to a charge sheet, trial counsel should be familiar with the chemical composition of the alleged designer drug and its effects. Doing so will assist the trial counsel in identifying specific violations of applicable

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¹ Joe Gould, *Legal High Becomes Horrible Dream*, ARMY TIMES (Oct. 2, 2010), available at <http://www.armytimes.com/news/2010/10/SATURDAY-army-spice-became-horrible-dream-roudebush-100210w/>.

² A designer drug is a drug produced by a minor modification in the chemical structure of an existing drug, resulting in a new substance with similar pharmacologic effects, especially one created to achieve the same effect as a controlled or illegal drug. *Designer Drug*, DICTIONARY.COM, <http://dictionary.reference.com/browse/designer+drug> (last visited Apr. 26, 2012).

³ See Major Andrew Flor, *Spice—“I Want a New Drug.”* ARMY LAW., July 2010, at 23; see also Colonel Timothy Lyons, Chief, Div. of Forensic Toxicology, Office of the Armed Forces Med. Examiner, *Spice Presentation* (Dec. 1, 2011) [hereinafter Lyons AFME Spice Presentation] (on file with author).

⁴ See Eric Slavin, *Navy Begins New Anti-Spice Campaign*, STARS & STRIPES (Nov. 3, 2011), available at <http://www.stripes.com/news/pacific/japan/navy-begins-new-anti-spice-campaign-1.159606>; Joe Gould, *Army Targets Designer Drugs, Bans Spice*, ARMY TIMES (Aug. 27, 2011), available at <http://www.armytimes.com/news/2011/08/army-targets-designer-drugs-bans-spice-082711w/>; Travis J. Tritten, *Marine Corps Opens Crime-Tips Website to Combat Use of Spice*, STARS & STRIPES (March 10, 2011), available at <http://www.stripes.com/news/marine-corps/marine-corps-opens-crime-tips-website-to-combat-use-of-spice-1.137197>.

⁵ See Lyons, AFME Spice Presentation, *supra* note 3.

⁶ The Armed Forces Medical Examiner Service Synthetic Cannabinoid Testing Summary from March 2011 through March 2012 revealed the following statistics: within the Army, 580 of 672 reported cases yielded a positive result (86%); within the Air Force, 201 of 370 reported cases yielded a positive result (54%); within the Marine Corps, 146 out of 244 reported cases yielded a positive result (60%); within the Navy, 217 out of 345 cases yielded a positive result (63%); within the Coast Guard, 4 out of 4 reported cases yielded a positive result (100%). These statistics represent samples that were seized and submitted where spice use and/or possession was suspected. E-mail from Colonel Timothy Lyons, Chief, Div. of Forensic Toxicology, Armed Forces Med. Examiner Office, to author (May 7, 2012, 07:32:00 EST) (on file with author).

regulations and command policies, and further assist them with effectively explaining the offense to panel members and the military judge. Furthermore, the effects of the drugs are relevant to prove the accused's intended purpose for their particular use or possession of the illicit substance, i.e., to get "high" as opposed to use as an incense to make their quarters smell better.⁷

A. Spice

Spice is a green leafy substance that resembles marijuana.⁸ It produces euphoria, psychosis, respiratory problems, and low blood pressure; however, lower doses usually result in calming sensations.⁹ Spice is comprised of a combination of different plant materials. To avoid criminal liability, manufacturers are continuously altering the chemical makeup of spice, to allow the distribution of other types of legal cannabinoids that produce the same or similar high.¹⁰

B. Bath Salts

Bath salts, or designer cathinones, are synthetic stimulants found in numerous retail products.¹¹ These should not be mistaken for the traditional bath salts commonly used while bathing.¹² They are marketed as such to avoid being classified as illegal.¹³ Bath salts are sold in small plastic or foil packaging most often in white, off-white, or yellow

⁷ Knowledge of the effects of a specific designer drug is one of the essential proof elements required in proving violations of current policy memorandums. See UCMJ arts. 80, 92, 134 (2012).

⁸ Spice is a mixture of herbs and spices sprayed with synthetic cannabinoids, similar to the compounds found in Tetrahydrocannabinol (THC), the main ingredient in marijuana. Spice is marketed and sold in small metallic packaging under numerous brand names, including, but not limited to, K2, Spike 99, Spice Gold, Spice Silver, Spice Diamond Dream, and Blaze. U.S. DRUG ENFORCEMENT ADMIN., DRUG FACT SHEET: K2 OR SPICE, http://www.justice.gov/dea/pubs/abuse_data_sheets/K2_spice.pdf (last visited Mar. 10, 2012). See also Flor, *supra* note 3, at 23; Lyons, AFME Spice Presentation, *supra* note 3. Spice is also marketed and sold as a legal alternative to marijuana. Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11,075, 11076 (Mar. 1, 2011).

⁹ Lyons, AFME Spice Presentation, *supra* note 3.

¹⁰ *Id.*

¹¹ U.S. DRUG ENFORCEMENT ADMIN., DRUG FACT SHEET: BATH SALTS OR DESIGNER CATHINONES (SYNTHETIC STIMULANTS), http://www.justice.gov/dea/pubs/abuse/drug_data_sheets/Bath_Salts.pdf (last visited Mar. 10, 2012) [hereinafter BATH SALT FACT SHEET].

¹² Matt McMillen, *Why 'Bath Salts' Are Dangerous, Though Not Illegal in All States*, WEBMD, <http://www.webmd.com/mental-health/features/bath-salts-drug-dangers> (last visited Mar. 10, 2012).

¹³ *Id.* See also Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,372 (Oct. 21, 2011) (Bath salts are sold as a legal alternative to cocaine, methylenedioxymethamphetamine (MDMA), and methamphetamine.).

powder form, or in some cases as a tablet or capsule.¹⁴ They have similar effects as cocaine, acid, amphetamines, and ecstasy.¹⁵ Side effects include, but are not limited to, paranoia, seizures, panic attacks, suicidal gestures, rapid heart rate, and an impaired perception of reality.¹⁶ It is normally ingested by snorting, but can also be taken orally, smoked, or put in a solution and injected intravenously.¹⁷

C. Salvia Divinorum (Salvia)

Salvia is a green, leafy perennial herb in the mint family, often used by the Mazatec Indians during rituals and healing.¹⁸ Salvia is being increasingly used for its hallucinogenic effects. The use of salvia can disrupt sensory and cognitive functions, which may in turn result in serious injury or death.¹⁹

D. Huffing

Huffing is the practice of purposefully inhaling chemical vapors to reach and achieve a euphoric mental and

¹⁴ BATH SALT FACT SHEET, *supra* note 11.

¹⁵ *Id.* Acid is the most common name for lysergic acid (LSD) and ecstasy is the common name for MDMA. *Id.*

¹⁶ Bath salt effects have also been allegedly tied to human cannibalism attacks. See Katherine Cooney, *Cannibal Alert: Another Face Chewer Surfaces in Louisiana*, TIME.COM (Jun. 8, 2012), available at <http://newsfeed.time.com/2012/06/08/zombie-alert-another-face-chewer-surfaces-in-louisiana/?iid=nf-category-mostpop1> (man bites off a piece of another man's face during a domestic dispute, while allegedly high on bath salts); see also Howard Portnoy, *Latest Naked Zombie on Bath Salts Threatens to Eat Arresting Police Officers*, EXAMINER.COM (Jul. 5, 2012), available at <http://www.examiner.com/article/latest-naked-zombie-on-bath-salts-threatens-to-eat-arresting-police-officers>. See also Veronica Rocha, *Man on Bath Salts Attacks Woman with Shovel, Glendale Police Say*, L.A. TIMES (Jun. 22, 2012), available at <http://latimesblogs.latimes.com/lanow/2012/06/man-eats-bath-salts-attacks-elderly-woman-with-shovel-police-say.html> (elderly woman asks man to stop swinging a shovel at birds; man then swings and strikes woman in the head with the shovel while high on bath salts).

¹⁷ BATH SALT FACT SHEET, *supra* note 11; see also JoNel Aleccia, *Woman Loses Arm to Flesh Eating Bacteria from Bath Salts*, MSNBC.COM, http://vitals.msnbc.msn.com/_news/2012/01/15/10159359-woman-loses-arm-to-flesh-eating-bacteria-from-bath-salts (last visited Mar. 10, 2012) (woman loses arm after injecting bath salts into her arm intravenously).

¹⁸ U.S. DRUG ENFORCEMENT AGENCY, SALVIA DIVINORUM AND SALVINORIN A (2010), available at http://www.justice.gov/dea/concern/salvia_divinorum.html [hereinafter SALVIA FACT SHEET]. The Mazatec Indians are primarily located in Oaxaca, Mexico. They are Roman Catholics who believe widely in witchcraft. *Mazatec*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/371210/Mazatec> (last visited Mar. 10, 2012).

¹⁹ SALVIA FACT SHEET, *supra* note 18. Other common names for salvia include Maria Pastora, Sage of the Seers, Diviner's Sage, Salvia, Sally-D, and Magic Mint. *Id.*

physical state.²⁰ The effects of huffing mimic alcohol intoxication, such as drunkenness, slurred speech, nausea, hallucinations, and belligerence.²¹ Inhalants exist in most households and include aerosols and gases, and are commonly referred to as “whippets.”²²

III. Laws, Regulations, and Policy

Before deciding how to charge these types of cases, judge advocates must be cognizant of the current status of the laws, regulations, and policies pertaining to designer drugs and their applicability to their particular branch of service. In addition to federal law, each branch of the military has published regulations and policy memorandums addressing designer drugs.

A. Federal Law

Currently, spice and bath salts are the only designer drugs criminalized by federal statute.²³ The Drug Enforcement Agency (DEA) Administrator initially exercised his lawful authority to temporarily place these designer drugs on the CSA.²⁴ On 1 March 2011, the DEA added five synthetic cannabinoids²⁵ frequently found in

“spice” to Schedule I of the Controlled Substance Act (CSA).²⁶ Additionally, on 21 October 2011, the DEA temporarily placed three synthetic cathinones²⁷ commonly found in “bath salts” on Schedule I of the CSA.

The Administrator exercised this authority after determining that such action was necessary to avoid an imminent hazard to public safety.²⁸ In response to this phenomenon, on 9 July 2012, President Barack Obama signed into law, the Food and Drug Administration Safety and Innovation Act. This Act encompasses the Synthetic Drug Abuse Prevention Act of 2012, which permanently added additional spice, bath salts, and other synthetic drug chemical compounds to the CSA.²⁹ Criminal, civil, and administrative penalties may be imposed against anyone who manufactures, distributes, possesses, imports, or exports

²⁰ NAT'L DRUG INTELLIGENCE CTR., INTELLIGENCE BRIEF: HUFFING, THE ABUSE OF INHALANTS (2001), available at <http://www.justice.gov/ndic/pubs07/708/index.htm>.

²¹ *Id.*

²² The most common class of inhalants is categorized as volatile solvents, such as gasoline, nail polish, glue, felt-tip markers, and correction fluid. *Id.* A “whippet” is slang for inhaling nitrous oxide out of a canister. *Slang for Inhalants*, INHALANT.ORG, <http://www.inhalant.org/inhalant/slang.php> (last visited Mar. 6, 2012).

²³ Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 1152, 126 Stat. 993 (2012). *Bill Summary and Status*, THE LIBRARY OF CONGRESS—THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03187>. See also Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11075, 11076 (Mar. 1, 2011); see also Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011).

²⁴ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (amended § 201, 21 U.S.C. § 811 (1970)) (giving the Attorney General the authority to temporarily place a substance into Schedule I of the Controlled Substance Act for one year without regard to the requirements of 21 U.S.C. § 811(b), if he finds that such action is necessary to avoid imminent hazard to the public safety; the Attorney General could extend the temporary scheduling up to an additional six months); see also Judicial Administration, 28 C.F.R. § 0.100 (2010) (explaining the Attorney General has delegated his authority to the Administrator of the Drug Enforcement Agency). The Synthetic Drug Abuse Prevention Act of 2012 now gives the DEA Administrator the authority to temporarily place a substance on Schedule I for two years with the authority to extend the scheduling up to an additional one year. Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 1153, 126 Stat. 993 (2012). *Bill Summary and Status*, THE LIBRARY OF CONGRESS—THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03187>.

²⁵ The five synthetic cannabinoids are 1-pentyl-3-(1-naphthoyl)indole (JWH-018), 1-butyl-3-(1-naphthoyl)indole (JWH-073), 1-[2-(4-morphol

inyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1-dimethylloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue. Schedules of Controlled Substances: Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11,075 (Mar. 1, 2011) (to be codified at 21 C.F.R. pt. 1308.11).

²⁶ LISA N. SACCO & KRISTIN M. FINKLEA, CONG. RES. SERV., 7-5700, SYNTHETIC DRUGS: OVERVIEW AND ISSUES FOR CONGRESS 3-4 (2011), available at <http://www.fas.org/sfp/crs/misc/R42066.pdf>.

²⁷ The three synthetic cathinones are 4-methyl-Nmethylcathinone (mephedrone), 3,4-methylenedioxy-N-methylcathinone (methylenone), and 3,4-methylenedioxypropylvalerone (MDPV). Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011) (to be codified at 21 C.F.R. § 1308.11).

²⁸ See Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011); see also Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011).

²⁹ Effective 9 July 2012, ten additional synthetic cannabinoids were added to the CSA. They are: 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497); 5-(1,1-dimethylloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP-47,497 C8-homolog); 1-pentyl-3-(1-naphthoyl)indole (JWH-018 and AM678); 1-butyl-3-(1-naphthoyl)indole (JWH-073); 1-hexyl-3-(1-naphthoyl)indole (JWH-019); 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200); 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH-250); 1-pentyl-3-[1-(4-methoxynaphthoyl)indole (JWH-081); 1-pentyl-3-(4-methyl-1-naphthoyl)indole (JWH-122); 1-pentyl-3-(4-chloro-1-naphthoyl)indole (JWH-398); 1-(5-fluoropen-tyl)-3-(1-naphthoyl)indole (AM2201); 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole (AM694); 1-pentyl-3-[(4-methoxy)-benzoyl]indole (SR-19 and RCS-4); 1-cyclohexylethyl-3-(2-methoxyphenylacetyl)indole (SR-18 and RCS-8); and 1-pentyl-3-(2-chlorophenylacetyl)indole (JWH-203). Further, effective 9 July 2012, eleven additional synthetic cathinones and amphetamines, were added to the CSA. They are: 4-methylmethcathinone (Mephedrone); 3,4-methylenedioxypropylvalerone (MDPV); 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E); 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D); 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C); 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2 C-I); 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2); 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4); 2-(2,5-Dimethoxyphenyl)ethanamine (2C-H); 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N); 2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P). Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 1152, 126 Stat. 933 (2012). *Bill Summary and Status*, THE LIBRARY OF CONGRESS—THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03187>.

one of the aforementioned cathinones or synthetic cannabinoids.

B. Army

A major revision to Army Regulation (AR) 600-85 was released in 2009.³⁰ Among the major changes was an expansion on the prohibition of the *use* of several substances for purposes of inducing excitement, intoxication, or stupefaction of the central nervous system.³¹ Army Regulation 600-85 specifically bans the use of controlled substance analogues (designer drugs); chemicals, propellants, or inhalants (used in huffing); and naturally occurring substances, including salvia.³² Violations of this regulation are only applicable to those who use—*not* possess—the illicit substances.

On 29 May 2012, the Secretary of the Army issued an Army-wide punitive directive (Army Directive 2012-14) prohibiting the use, possession, manufacturing, distribution, importation, and exportation of controlled substance analogues, including those found in spice and bath salts.³³ It also prohibits the introduction of these substances onto an installation, vehicle, vessel, or aircraft, under the control of the Army. This directive expands the prohibitions listed in the SECARMY's previous policy letter on prohibited substances, dated 10 February 2011, which only prohibited the *use and possession* of synthetic cannabis and other tetrahydrocannabinol (THC) variants.³⁴ The former policy letter did not address or punish the use or possession of any other designer drugs, only spice.³⁵ Army Directive 2012-14 is to be rescinded upon publication of the impending revised AR 600-85.

Until AR 600-85 is updated, Army judge advocates should ensure commanders at their respective installations implement local command policy letters that make the use,

³⁰ U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (RAR, 2 Dec. 2009) [hereinafter AR 600-85].

³¹ *Id.* para. 4-2(p).

³² *Id.* Army Regulation (AR) 600-85 also prohibits the use of dietary supplements banned by the U.S. Food and Drug Administration. There is also a prohibition on prescription or over-the-counter medication when used in a manner contrary to their intended medical purpose or in excess of the prescribed dosage amount. *Id.*

³³ U.S. DEP'T OF ARMY, DIR. 2012-14, PROHIBITED SUBSTANCES (CONTROLLED SUBSTANCE ANALOGUES) (29 May 2012), available at [http://pubsod1.acsap.hqda.pentagon.mil/drug_testing/Army%20Directive%20201214%20\(Prohibited%20Substances\(Controlled%20Substance%20Analogues\).pdf](http://pubsod1.acsap.hqda.pentagon.mil/drug_testing/Army%20Directive%20201214%20(Prohibited%20Substances(Controlled%20Substance%20Analogues).pdf)

³⁴ Memorandum from The Sec'y of the Army to Principal Officials of Headquarters, Dep't. of the Army et al., subject: Prohibited Substances (Spice in Variations) (Feb. 10, 2011), available at http://www.acsap.army.mil/Pdf/Sec_Army%20Prohibited_Substances-Spice_in_Variations-Memo.pdf.

³⁵ *Id.*

possession, distribution, exportation, and importation of designer drugs punitive.³⁶ Doing so will close loopholes that currently exist within the Army and provide judge advocates with additional charging options.

C. Air Force

Air Force Instruction 44-121 is similar to AR 600-85 in that it prohibits the *use* of any controlled substance analogues and intoxicating substances (“other than the lawful use of alcohol and tobacco products”)—which would include bath salts and spice—salvia, and inhalants used for huffing.³⁷ This instruction differs from AR 600-85, in that it also prohibits the *possession* of the aforementioned substances if done with the intent of altering mood or function.³⁸

The Secretary of the Air Force has not published a separate service-wide prohibition on the use or possession of designer drugs. However, several subordinate Air Force commands have issued punitive policies regarding designer drugs.³⁹

D. Navy and Marine Corps

In the Navy and Marine Corps, Secretary of the Navy Instruction 5300.28E is one of the primary sources

³⁶ See, e.g., Policy Letter #6, Headquarters, U.S. Forces Korea, subject: United States Forces Korea Command Policy Letter #6, Prohibited Substances (17 Oct. 2011) [hereinafter Policy Letter #6], available at http://www.usfk.mil/usfk/Uploads/140/USFK_PL6_Prohibited_Substances.pdf; see also Policy Memorandum 11-10, Headquarters, U.S. Army Pacific, subject: USARPAC Policy on Prohibiting the Use, Possession, Distribution, and Purchase of Intoxicating Substances—Policy Memorandum 11-10 (4 May 2011) (This policy supersedes Policy Memo 10-17 dated 8 July 10); see also Headquarters, Reg'l Command (South) Combined Joint Task Force—10, Gen. Order No. 1 (13 Nov. 2010).

³⁷ U.S. DEP'T OF AIR FORCE, SEC'Y OF AIR FORCE, INSTR. 44-121, ALCOHOL AND DRUG ABUSE PREVENTION AND TREATMENT (ADAPT) PROGRAM para. 3.2.3 (11 Apr. 2011) [hereinafter SEC'Y OF AIR FORCE, INSTR. 44-121]. See also U.S. DEP'T OF AIR FORCE, SEC'Y OF AIR FORCE, INSTR. 44-120, MILITARY DRUG REDUCTION PROGRAM para. 1.1.6 (3 Jan. 2011) [hereinafter SEC'Y OF AIR FORCE, INSTR. 44-120].

³⁸ SEC'Y OF AIR FORCE, INSTR. 44-121, *supra* note 37; SEC'Y OF AIR FORCE, INSTR. 44-120, *supra* note 37.

³⁹ The Commander, Air Force District of Washington, published a punitive general order prohibiting the use of salvia and spice, applicable to military members assigned to the Air Force District of Washington. Memorandum from Commander, Headquarters Air Force Dist. of Washington to All Members Assigned or Attached to the Air Force Dist. of Washington, subject: General Order Prohibiting the Use, Possession or Distribution of Salvia and Spice (June 9, 2010). The Commander of the Air Force Special Operations Command (AFSOC) instituted a punitive policy prohibiting the use of designer drugs and other intoxicants used to achieve a psychoactive affect. This policy applies to everyone assigned to AFSOC. Memorandum from Commander, Air Force Special Operations Command to all AFSOC Personnel, subject: General Order Prohibiting the Use of Intoxicating Substances (Jan. 29, 2010).

addressing the prohibitions on designer drugs.⁴⁰ On 23 May 2011, this instruction was expanded to punish not only the use, but also the possession, distribution, manufacturing, importation, and exportation of designer drugs.⁴¹ The other service regulations are not as broad. This instruction further prohibits using chemical inhalants and propellants for illicit purposes, other than what the product is intended for, such as huffing.⁴²

Many subordinate Navy and Marine Commanders have also implemented local policy letters prohibiting the use and possession of designer drugs. One particularly noteworthy policy letter requires Sailors and Marines to sign a statement of understanding that acknowledges use, possession, and distribution of spice and salvia are prohibited.⁴³

E. Coast Guard

Unlike the other service regulations and instructions, the applicable Coast Guard Regulation, Personnel Manual, COMDTINST M1000.6 A, prohibits only the use and possession of drugs listed in the CSA.⁴⁴ As a result, the Coast Guard Commandant published additional guidance on designer drugs in ALCOAST 605/10.⁴⁵ This guidance is a general order applicable to all Coast Guard members. The order prohibits the wrongful *use and possession* of controlled substances and certain non-controlled substances which pose significant risks to the safety, readiness, discipline, morale, and health of Coast Guard members.⁴⁶

⁴⁰ U.S. DEP'T OF NAVY, SEC'Y OF NAVY, INSTR. 5300.28E, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL (23 May 2011) [hereinafter SECNAVINST 5300.28E].

⁴¹ *Id.* at 4–5.

⁴² *Id.* See also Naval Administrative Message 108/10, 251705Z Mar 10, Chief of Nav. Ops., subject: Drug Abuse Zero Tolerance Policy and Prohibition on Possession of Certain Substances (lawful general order applicable to all uniformed personnel in the Navy that prohibits the wrongful use and possession of controlled substances, controlled substance analogues, salvia, and common items abused by huffing).

⁴³ U.S. DEP'T OF NAVY, NAVAL CONSTR. BATTALION CTR. & TWENTIETH SEABEE READINESS GROUP, INSTR. 5830.1, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL (2 Feb. 2009).

⁴⁴ U.S. DEP'T OF TRANSP., U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL (14 May 2002).

⁴⁵ Message, 222045Z Dec 10, U.S. Coast Guard Commandant, subject: General Order Prohibiting Wrongful Use and Possession of Certain Non-Controlled Substances.

⁴⁶ The non-controlled substances prohibited by this order include control substance analogues (e.g., bath salts), products that contain synthetic cannabinoid compounds (e.g., spice), and natural substances (e.g., salvia), chemicals used as inhalants (e.g., huffing), propellants, and/or prescribed or over-the-counter drugs when used in a manner contrary to their intended medical purpose or in excess of the prescribed dosage. *Id.*

IV. The Charging Decision

Normally, drug offenses in the military are prosecuted under Article 112a, UCMJ, which is tied to the CSA. Services have attempted to devise a method to criminalize and deter the use and possession of designer drugs not subject to Article 112a. After the background overview of the applicable laws and policies in the previous part, this article next turns to guidance on how to charge cases involving designer drugs.

Assume the following scenario to assist with evaluating the charging decision: During a random command-directed barracks room inspection, the First Sergeant (1SG) enters the room of Sergeant (SGT) Smith and finds a “green, leafy substance” lying on his nightstand. After being properly advised of his Article 31 rights,⁴⁷ SGT Smith says, “It is spice, but I didn’t plan on smoking it. I only planned on burning it as an incense to make my room smell better.” Subsequent to this statement, the commander contacts a Criminal Investigation Command (CID) agent who seizes the substance in the room and sends it to the USACIL for testing.

A. Article 112a, UCMJ

Charges may be preferred against a servicemember pursuant to Article 112a in cases involving the use, possession, manufacture, or distribution of substances listed in Schedules I through V of the CSA.⁴⁸ Thus, if USACIL subsequently determines that the substance found in SGT Smith’s room contained one of the illegal spice compounds prohibited by the CSA, the proper charge would be a violation of Article 112a. The trial counsel should specifically identify the illegal chemical on the charge sheet, not just “spice,” and charge SGT Smith with one specification of possession. Sample specifications for this type of offense are located in Charge III, Specifications 1-5, of Appendix A of this article.

Now assume that during the health and welfare inspection described above, the 1SG discovers a substance resembling bath salts instead of the green, leafy substance in SGT Smith’s room. If USACIL determined that the substance found contains one of the synthetic cathinones listed on the CSA, the appropriate charge would also be a violation of Article 112a. Sample specifications for this type of offense are located in Charge III, Specifications 6-8, of Appendix A of this article.

⁴⁷ UCMJ art. 31 (2012).

⁴⁸ *Id.* art. 112a.

During trial, the trial counsel should also remember to ask the military judge to take judicial notice of the prohibited spice or bath salt chemical compound charged as being a Schedule I controlled substance, as defined in the CSA.⁴⁹ Failure to do so may result in legally and factually insufficient evidence to support convictions under Article 112a.⁵⁰

Although the ability to use Article 112a to charge spice and bath salt cases is a recent development, trial counsel have been successful in prosecuting these types of cases. For example, in December 2011, an Army specialist was convicted at a general court-martial for wrongfully possessing spice and wrongfully introducing spice onto a U.S. Army installation in violation of Article 112a.⁵¹

B. Article 92, UCMJ

The charging decision changes if the substances identified in the hypothetical above are returned from USACIL and do not contain any chemical compound listed in the CSA. Article 112a is not available at that point; however, Article 92 may be.

Pursuant to Article 92, servicemembers who violate or fail to obey any lawful general order or regulation may be punished. Accordingly, preferring charges under this article is encouraged when servicemembers use or possess designer drugs in violation of a local command policy or service regulation and when the chemical composition of the designer drug is not listed in the CSA.

Article 92 is not an automatic catchall. In order to achieve a conviction under Article 92, trial counsel must be able to produce evidence proving the otherwise legal substance was used or possessed for the purpose of altering the servicemember's mood or function or to get high. It is not enough for a policy letter or regulation to simply state that the use or possession of spice, bath salts, and salvia is prohibited.⁵² In order to ensure successful prosecution, the policy or regulation must contain an "objective and clearly

understood standard of criminality."⁵³ In *United States v. Cochran*, the Navy-Marine Court of Criminal Appeals (NMCCA) upheld a conviction under a Navy policy that prohibited

the unlawful use . . . of controlled substance analogues (designer drugs), natural substances (e.g., fungi, excretions), chemicals (e.g., chemicals wrongfully used as inhalants), propellants, and/or prescribed or over-the-counter drugs . . . with the intent to induce intoxication or excitement, or stupefaction of the central nervous system[.]⁵⁴

The court found that this language gave the accused sufficient notice of what conduct was prohibited, and that the phrase "with the intent to induce intoxication or excitement, or stupefaction . . ." showed that a criminal intent was required. The court found that the Department of the Navy had a sufficient legitimate interest in prohibiting this conduct, and that the limiting words in the policy ("unlawful" and "with the intent to induce . . .") ensured that the policy did not improperly infringe on the user's liberty interest.⁵⁵

However, in *United States v. Swinford* (an Army court-martial held in Okinawa in 2010), the trial judge, relying on *Cochran*, dismissed an Article 92 charge based on a command policy that prohibited the use of "the intoxicating substance SPICE."⁵⁶ The policy letter also prohibited "possessing, purchasing, attempting to purchase, accepting shipment of, attempting to ship, or distributing SPICE." The military judge found that "there was nothing in the policy letter which would inform an ordinary, reasonable Soldier . . . what spice is, other than that it is an intoxicating substance."⁵⁷ The judge also ruled that "the modifier 'intoxicating' does not save the policy from being deemed void for vagueness," since alcohol and caffeine in sufficient concentrations would also qualify as intoxicating, which could bring about absurd results.⁵⁸

⁴⁹ *United States v. Bradley*, 68 M.J. 556, 667 (A. Ct. Crim. App. 2009).

⁵⁰ *United States v. Chmiel*, No. S29582, 1998 WL 743504, at *1 (A.F. Ct. Crim. App. Oct. 6, 1998).

⁵¹ The court-martial occurred as a result of the U.S. Army Criminal Investigation Division (CID) discovering a substantial amount of spice in the Soldier's vehicle, which he had driven onto a military installation. He was sentenced to nine months of confinement, total forfeitures, and a bad-conduct discharge. *United States v. Halcom*, No. 20111105 (19th Expeditionary Sustainment Command, Camp Carroll, South Korea, Dec. 8, 2011).

⁵² See *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III, at 1, 3) (Feb. 23, 2010)).

⁵³ *United States v. Peszynski*, 40 M.J. 874, 878 (N.M.C.M.R. 1994) (citing *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)).

⁵⁴ *United States v. Cochran*, 60 M.J. 632, 633, 635 (N-M. Ct. Crim. App. 2004).

⁵⁵ *Id.* at 635.

⁵⁶ *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Def.'s Motion to Dismiss, at 1 (Feb. 23, 2010)).

⁵⁷ *Id.*

⁵⁸ *Id.* at 8 (citing *United States v. Forbes*, 806 F. Supp. 232 (D. Colo. 1992)); see also *United States v. Cochran*, 60 M.J. 632 (N-M. Ct. Crim. App. 2004).

Thus, to be enforced, an order against designer drugs and inhalants must definitely indicate what substances are being prohibited. This is important for judge advocates to remember if they are tasked to draft or review command policy letters prohibiting spice, bath salts, and other designer drugs, as they are being marketed and sold under various names and compositions for a variety of benign uses. Local policy letters should contain language that objectively defines the substance so the presence or lack of a prohibited substance can be verified by a reasonable person.⁵⁹ The policy letter in Appendix B contains specific paragraphs describing the prohibited substances by chemical composition and effects. Thus, it is more likely to survive the “void for vagueness” test referenced in *Swinford*.⁶⁰

Some command policy letters and regulations, like the Navy instruction in *Cochrane*, include language that prohibits the use and possession of substances *intended* to alter a person’s mood or mental faculties.⁶¹ The Navy-Marine court’s language in that case and the trial judge’s holding in *Swinford* suggests that such language is important in making the orders enforceable in court. This “intent” language requires the trial counsel to offer evidence to prove the possessor’s intent. A servicemember who sniffs glue because he likes the smell has not committed a criminal offense under such an order; one who does so in order to get high may be charged with violating Article 92. Thus, in the hypothetical presented above, because SGT Smith stated he merely intended to use the green, leafy substance as incense, the government will be forced to prove otherwise, since the lab results revealed that the substance was not one of the illegal compounds listed on the CSA, and therefore not chargeable under 112a. Corroborating evidence may include an admission by the accused that he smoked spice to get high, or statements of others who saw him ingest the substance.

The successful prosecution of designer drugs under Article 92 depends solely on two things: the evidence and the wording of the prohibitions in the applicable regulations and policies. The NMCCA has upheld an Article 92 “spice” conviction, based primarily on physical evidence and witness testimony identifying the prohibited substance spice as identified and described in the applicable command

policy letter.⁶² Specifically, in *United States v. Caldwell*, the NMCCA held, “[w]e are convinced beyond a reasonable doubt from the foil packages found in the appellant’s single-occupant barracks room, the tobacco residue in that same trashcan, the observations by the duty personnel of the group in the abandoned chow hall, the physical evidence taken from the chow hall, and the testimony of an investigator with experience in identifying illicit substances, that the appellant did possess spice.”⁶³ For a sample specification of an Article 92 violation, see Charge II of Appendix A.

C. Article 134, UCMJ

Refer back to the hypothetical above and continue to assume the substance found in SGT Smith’s room was not listed on the CSA. Additionally, assume that SGT Smith did not make any statements during the search. Lastly, assume SGT Smith made statements to several of his friends that he had Spice in the barracks and was looking forward to smoking it, because it made him feel really good.

If charges under Article 92 and Article 112a are not appropriate, a charge under Article 134 may be. Article 134 criminalizes “all disorders and neglects to the prejudice and good order and discipline . . . all conduct of a nature to bring discredit upon the armed forces and [other] crimes and offenses, not capital. . . .”⁶⁴ A notable case reflecting the nexus between Article 134 and designer drug cases is *United States v. Larry*.⁶⁵

Lance Corporal Larry was a Marine who was convicted at a special court-martial for wrongful possession of Spice with intent to distribute, in violation of Article 134. He was prosecuted before Spice was placed on Schedule I. Accordingly, Larry asserted on appeal that because the word “wrongful” was included in the charge and the fact that the possession of Spice was not illegal or prohibited, the finding of guilty at the trial level was legally insufficient.⁶⁶ The NMCCA determined that the issue was not whether or not the possession of Spice was illegal; rather, it was whether the possession with intent to distribute the substance was prejudicial to good order and discipline, in violation of Article 134.⁶⁷ The trial judge instructed the panel members that “not every possession of a substance with the intent to distribute, constitutes an offense under the UCMJ. . . .

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 4 (citing 5th U.S. Air Force, 18th Wing, Gen. Order No. 3 (13 Mar. 2009), which defines spice as “a mixture of medicinal herbs that causes decreased motor function, loss of concentration, and impairment of short-term memory”; citing U.S. Marine Forces Pacific Order 5355.2 (1 Dec. 2009), which states, “[s]pice, a mixture of medicinal herbs laced with synthetic cannabinoids or cannabinoid mimicking compounds, is known to cause decreased motor function, loss of concentration, and impairment of short-term memory”).

⁶¹ See, e.g., Policy Letter #6, *supra* note 36, at 2. (“[T]he possession of any intoxicating substance described [in the order] is prohibited if done with the intent to alter mood or function.”) (emphasis added).

⁶² *United States v. Caldwell*, 70 M.J. 630, 634–35 (N-M. Ct. Crim. App. 2011).

⁶³ *Id.* at 5.

⁶⁴ UCMJ art. 134 (2012).

⁶⁵ *United States v. Larry*, No. 200900615 (N-M. Ct. Crim. App. May 18, 2010) (unpublished), available at http://www.jag.navy.mil/courts/opinion_archive_2010.htm.

⁶⁶ *Id.* at *2.

⁶⁷ *Id.*

[However,] the government must prove beyond a reasonable doubt that the conduct was prejudicial to good order and discipline” in order to convict the accused of an Article 134 offense.⁶⁸

Based on testimony from a Navy Criminal Investigative Service (NCIS) agent that spice was a “huge problem in the military” and evidence that the appellant had distributed spice in the barracks, on a military installation and to other Marines, the NMCCA held that “a reasonable fact finder could have found beyond a reasonable doubt that the appellant’s wrongful possession of Spice with intent to distribute was prejudicial to good order and discipline in the armed forces.”⁶⁹ *Larry* demonstrates that Article 134 may be the default charge for the prosecution of designer drugs not listed on the CSA, as long as the conduct associated with the use, possession, or distribution of the substance is prejudicial to good order and discipline (or is service discrediting). However, substances that are listed on the CSA—including the synthetic cannabinoids found in spice and the synthetic cathinones found in bath salts—are preempted from prosecution under Article 134.⁷⁰

Huffing cases are also commonly prosecuted under Article 134. In *United States v. Erickson*,⁷¹ the appellant admitted to purchasing cans of nitrous oxide, popularly known as laughing gas, inserting the gas into a balloon and inhaling the fumes which “made [him] feel happy, made [him] laugh. Afterward it gave [him] a really bad headache . . . for about ten seconds.”⁷² Further, the appellant noted that the gas made him “high” and altered his thinking. He was convicted at a special court-martial for wrongfully using nitrous oxide in violation of Article 134.⁷³ On appeal, the Court of Appeals for the Armed Forces (CAAF) upheld the conviction based in part on the accused’s “admission regarding impairment of mental faculties [which] reflected his understanding that he had engaged in conduct that would undermine his capability and readiness to perform military duties—a direct and palpable effect on good order and discipline.”⁷⁴

⁶⁸ *Id.* at *4.

⁶⁹ *Id.* at *3.

⁷⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60.c.(5)(a) (2006) [hereinafter MCM]. “The preemption doctrine prohibits application to Article 134 to conduct covered by Articles 80 through 132.” *Id.* For example, the synthetic cannabinoids found in spice and the synthetic cathinones found in bath salts are covered by Article 112a; therefore, offenses involving these specific chemical substances, if listed on the CSA, may not be charged under Article 134.

⁷¹ *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005).

⁷² *Id.* at 232.

⁷³ *Id.* at 231.

⁷⁴ *Id.* at 232. The court also addressed a defense preemption argument, and held that the absence of nitrous oxide on the lists of substances prohibited by Article 112a in no way precluded an Article 134 charge for using it—

In *United States v. Deserano*,⁷⁵ by contrast, the Air Force Court of Criminal Appeals (AFCCA) reversed a finding of guilty under Article 134 for inhaling nitrous oxide out of a whipped cream can. The court did not hold that this conduct could never violate Article 134, but only that the government had failed to prove that it did in this case. There was no evidence at trial of the harmful effects of inhaling nitrous oxide, or even that the propellant in the cans was in fact nitrous oxide. “Without proof of the identity of the substance the appellant ingested and its potential effects, we are unwilling to make a ‘leap of faith’ to conclude his conduct was a disorder punishable under Article 134(1).”⁷⁶

Thus, if the government charges designer drug or inhalant use under Article 134, trial counsel must meet an extra burden, proving not only what the substance was but that “the substance as defined has adverse physiological effects . . . on the central nervous system [and] lacks healthful effects.”⁷⁷ Counsel must further demonstrate a negative impact on good order and discipline or service discrediting conduct.⁷⁸ A sample specification is provided in Charge IV of Appendix A.

A charge under Article 134 is also proper in situations involving crimes of local application that may be assimilated under the Federal Assimilative Crimes Act (FACA). The FACA permits the adoption of a criminal law in the state where the military installation is located and applies it as though it were federal law.⁷⁹ Several states have enacted legislation criminalizing inhalation of nitrous oxide.⁸⁰ Over half of the states have enacted laws criminalizing the use,

There is nothing on the face of the statute creating Article 112 or in its legislative history suggesting that congress intended to preclude the armed forces from relying on Article 134 to punish wrongful use by military personnel of substances, not covered by Article 112a, capable of producing a mind-altered state.

Id. at 233.

⁷⁵ *United States v. Deserano*, 41 M.J. 678 (C.A.A.F. 1995).

⁷⁶ *Id.* at 682.

⁷⁷ *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III (Feb. 23, 2010)).

⁷⁸ The terminal element of the general article should be alleged on the charge sheet. Failure to include the terminal element in the specification may result in plain error and materially prejudice the accused’s substantial right to notice of the charges against him. *See United States v. Humphries*, 71 M.J. 29 (C.A.A.F. 2012) (citing *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (“The Government must allege every element expressly or by necessary implication, including the terminal element.”)). *See also United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).

⁷⁹ 18 U.S.C. § 13 (2006).

⁸⁰ *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (citing TEX. HEALTH & SAFETY CODE ANN. § 485.031 (Vernon 2001); *id.* § 484.003(b); ARK. CODE ANN. § 5-64-1201 (2001); CAL. PENAL CODE § 381b (West 1999); FLA. STAT. § 877.111 (West 2001); IND. CODE § 35-46-6-3 (2004)).

possession, or distribution of salvia.⁸¹ Accordingly, servicemembers who engage in huffing nitrous oxide or who possess salvia while assigned to an installation located in one of those states may be punished in violation of Article 134, even in the absence of a local policy or regulation prohibiting the misconduct. In such cases, the government need not prove that the conduct was prejudicial to good order and discipline or service discrediting,⁸² but must prove that the place where it happened was under exclusive or concurrent federal jurisdiction.⁸³

D. Article 80, UCMJ

“Any act, done with the specific intent to commit an offense . . . amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.”⁸⁴ A servicemember may be guilty of an attempt if he intends to possess a specific substance but in fact possesses something else—even something completely innocuous, or something the identity of which is left unproven.⁸⁵ The Air Force Court of Military Review has held that a servicemember may be found guilty of attempted possession even if the specific substance is not identified.⁸⁶ However, the military judge in *Swinford* held that “the substance he or she specifically intended to possess must still, itself, be chemically defined” on the charge sheet.⁸⁷ For example, if SGT Smith mistakenly sold what he thought was spice and advertised the sales as spice, but the substance was really oregano, SGT Smith may still be charged with attempt. For an example of how to charge these types of offenses, refer to Charge I in Appendix A of this article.

⁸¹ SALVIA FACT SHEET, *supra* note 18.

⁸² *United States v. Sadler*, 29 M.J. 370, 374 (C.M.A. 1990).

⁸³ *United States v. Irvin*, 21 M.J. 184, 186 (C.M.A. 1986). This proof requirement cannot be “handwaved” but must be met at every trial, with evidence or judicial notice.

⁸⁴ UCMJ art. 80 (2012).

⁸⁵ *United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983).

⁸⁶ *United States v. Guevara*, 26 M.J. 779, 781 (A.F.C.M.R. 1988). The Navy-Marine Court of Criminal Review has further held that an accused can be ignorant of the identity of the substance possessed, yet guilty of actual possession of a controlled substance, if he intended to possess one controlled substance but in fact possessed another. *United States v. Sharar*, 30 M.J. 968, 969 (N.M.C.M.R. 1990) (accused thought he possessed cocaine but in fact possessed heroin). “A lack of knowledge of both the character and precise identity of the substance is a defense. A lack of knowledge of either the character or precise identity of the substance, alone, is not a defense.” *United States v. Fitchett*, No. ACM 28576, 1990 WL 149867, at *1 (A.F.C.M.R. Aug. 17, 1990).

⁸⁷ *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III, at 5 (Feb. 23, 2010)). Although rulings by military judges at the trial court level have no precedential power over one another, this ruling should be followed as it ensures an accused is put on notice of the crimes for which he is charged.

In *United States v. Gonzalez-Chavez*, a Soldier was convicted at a special court-martial of violations of Article 80, when the chemical composition of the substance found in his possession believed to be spice could not be proven.⁸⁸ Charges under Article 80 should be reserved for cases in which evidence exists that the accused intended to possess, use, or distribute a prohibited substance, yet the substance actually possessed is not illegal or its chemical composition is unknown.

V. Challenges for Prosecutors

Even though judge advocates have a wide variety of options available to prosecute designer drug cases, the challenges referenced below depict a few of the roadblocks that prosecutors may face when trying to combat this designer drug epidemic.

The USACIL and the AFMES are capable of testing blood, urine, and substances believed to contain spice or bath salts.⁸⁹ However, in accordance with the AFMES policy, samples will only be tested if they were seized as a result of an open investigation by CID, NCIS, or Air Force Office of Special Investigation (AFOSI).⁹⁰ As a result, designer drugs will not be screened or tested *en masse*, like samples obtained during a routine and random urinalysis.⁹¹ This policy prevents high volumes of testing and was implemented, in part, due to the high costs associated with testing, the chemical substances in each brand of designer drug constantly changing, and the limited resources available to develop new tests for the emerging and varied types of designer drugs. The Navy and the Air Force have implemented new internal policies which permit testing of these substances by contract and service-specific laboratories.⁹² However, random testing is still not allowed

⁸⁸ Private Gonzalez-Chavez was convicted of an attempt to violate a lawful general order by wrongfully possessing what he believed to be spice, an attempt to conspire with another to wrongfully distribute what he believed to be spice, an attempt to wrongfully introduce onto an installation under control of the armed forces approximately 250 grams of what he believed to be spice, and four specifications of attempts to wrongfully distribute what he believed to be spice. He was sentenced to five months of confinement, reduction to the grade of E-1, and a bad-conduct discharge. *United States v. Gonzalez-Chavez*, No. 20110811 (19th Expeditionary Sustainment Command, Camp Carroll, South Korea, Sept. 14, 2011).

⁸⁹ See Lyons, AFME Spice Presentation, *supra* note 3.

⁹⁰ Memorandum from Colonel Timothy Lyons, Chief, Div. of Forensic Toxicology, to DoD Drug Testing Managers et al., subject: Armed Forces Medical Examiner Policy on Spice Testing (7 Feb. 2011) (on file with author).

⁹¹ Lyons, AFME Spice Presentation, *supra* note 3.

⁹² On 12 March 2012, the Navy implemented internal urinalysis testing for synthetic compounds. Under the Navy’s program, commanders, commanding officers, officers-in-charge, or their designated representative must obtain authorization for testing from the Director of the Navy Alcohol and Drug Prevention Office prior to collecting a synthetic compound urine sample and may only conduct testing on Navy personnel. Random testing is not allowed and is limited to member consent, command-directed, unit

by those laboratories at this point. It is also likely that results from civilian drug testing laboratories may not be admissible at trial against a servicemember, but those results may be used to take administrative action against a servicemember who “pops hot” for spice and/or bath salts.⁹³

Additional challenges exist involving spice “use” cases. Specifically, there is not a cut-off score applicable in the testing of spice cases. Ordinarily, in order for a drug to be reported as “positive” in a specimen, the metabolites must reach a certain level, known as a cut-off score. However, spice is reported at the limit of detection, rather than satisfying a minimum cut-off score.⁹⁴ This is problematic when attempting to prove whether or not an accused actually ingested spice or whether the substance entered a person’s body via passive exposure. There has been no passive exposure studies on spice; therefore, even though a lab may detect “spice” in a seized specimen, an expert will not be able provide an opinion as to how the substance entered the specimen.⁹⁵ In turn, the prosecutor will be forced to introduce evidence demonstrating that the accused intentionally ingested the substance. This may be done via an admission by the accused or by someone who witnessed the accused ingest the substance. Otherwise, the accused may have a valid defense negating intentional ingestion.

VI. Mandatory Administrative Separations

The decision to prosecute a case lies solely in the discretion of a commanding officer. However, each branch of military service requires the mandatory initiation of administrative separation proceedings against all servicemembers determined to be illegal drug users. In every branch, except for the Army, illegal drugs are classified as those prohibited by federal and state law, and all other

and/or subunit sweeps. Testing incident to a Navy Criminal Investigative Service or equivalent agency investigation is a separate process not covered under this program. Such samples are sent to the Navy Drug Screening Laboratory in Great Lakes, Illinois, not the Armed Forces Medical Examiner or U.S. Army Criminal Investigation Laboratory. U.S. NAVY, NAVY ALCOHOL AND DRUG ABUSE PREVENTION PROGRAM, SYNTHETIC DRUG URINALYSIS OPERATING GUIDE (4 Apr. 2012). *See also* Naval Administrative Message 082/12, 121420Z Mar 12, Chief of Naval Operations., subject: Implementation of Urinalysis Testing for Synthetic Compounds. The Air Force has contracted with civilian laboratories to conduct spice testing and has even purchased specialized machines that can test for spice at the Air Force Drug Testing Laboratory in Lackland Air Force Base, Texas. For now, the testing is reserved for command-directed urinalysis and unit, dorm, and gate sweeps. Travis J. Tritten, *Air Force to Increase Testing for Spice*, STARS & STRIPES (Mar. 19, 2012), <http://www.stripes.com/news/air-force/air-force-to-increase-testing-for-spice-1.172031>.

⁹³ Major Andrew Flor, *Testing for Spice and Bath Salts*, 31(B)LOG, (Jun. 5, 2012, 8:13 AM), <http://tjaglcs-adc.blogspot.com/2012/06/testing-for-spice-and-bath-salts.html> (citing *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) and *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), supplemented on reconsideration, 52 M.J. 386 (C.A.A.F. 2000)).

⁹⁴ Lyons, AFME Spice Presentation, *supra* note 3.

⁹⁵ *Id.*

designer drugs intended to alter mood or function.⁹⁶ In the Army, mandatory initiation of administrative separation is required only for servicemembers involved with illegal drugs, which can be interpreted to include only those substances listed in the CSA, or prohibited by state law.⁹⁷ Thus, the definition of illegal drugs does not expand to otherwise legal substances (i.e., salvia and substances used in huffing).

VII. Conclusion

When determining how to properly charge designer drug cases, it is important to conduct an initial analysis of the substance and available evidence. Law enforcement should first lawfully seize the substance and send it to USACIL or AMFES to determine if the seized substance is a chemical compound listed on the CSA. If the results confirm a prohibited Schedule I substance, include violations of Article 112a and Article 92.

The laboratories will expedite the request for testing these substances if charges are preferred. Therefore, if time is of the essence, and there is a need to prefer charges before the results are received from the laboratory, the trial counsel has two options. First, the trial counsel may include violations of Article 112a *and* Article 80 on the charge sheet. However, since the generic terms “spice” and “bath salts” are not sufficient for charges under 112a (and Article 80

⁹⁶ *See* U.S. DEP’T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (9 July 2004) (use of the following substances triggers the automatic initiation of administrative separation: any controlled substance on the CSA, steroids, any intoxicating substance, other than alcohol, introduced into the body or the purposes of altering mood or function, improper use of prescription medication); *see also* U.S. MARINE CORPS, ORDER P1700.24B W/CH1, MARINE CORPS PERSONAL SERVICES MANUAL (21 Dec. 2001) (use of the following substances triggers the initiation of automatic administrative separation: controlled substances, abuse of prescribed over-the-counter drug or pharmaceutical compound and/or wrongful use of a chemical as an inhalant); *see also* U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS, INSTR. 5350.4D, NAVY DRUG AND ALCOHOL PREVENTION PROGRAM (4 June 2009) (same triggers as the Air Force); *see also* U.S. DEP’T OF TRANSPORTATION, COMMANDANT, U.S. COAST GUARD, INSTR. M1000.10, COAST GUARD PERSONNEL MANUAL (14 May 2002) (the intentional use of the following substances triggers the automatic initiation of administrative separation: inhalants, glue, and cleaning agents, or over-the-counter or prescription medications to obtain a “high,” contrary to their intended use, and controlled substances).

⁹⁷ AR 600-85, *supra* note 30, para. 1-7(c)(7). The Secretary of the Army recently issued a directive establishing policies for separating and initiating suspension of favorable actions (flags) on Soldiers who engage in alcohol and illegal drug abuse. The directive requires commanders to process for separation (and flag) all Soldiers who are: (1) identified as illegal drug abusers, as defined in AR 600-85; (2) involved in two serious incidents of alcohol-related misconduct within a 12-month period; (3) involved in illegal trafficking, distribution, possession, use or sale of illegal drugs; (4) tested positive for illegal drugs a second time during his/her career; and (5) convicted of driving while intoxicated or driving under the influence a second time during his/her career. Memorandum from The Sec’y of the Army to Principal Officials of Headquarters, Dep’t. of the Army et al., subject: Army Directive 2012-07 (Administrative Processing for Separation of Soldiers for Alcohol or Other Drug Abuse) (Mar. 13, 2012).

charges relating to Article 112a offenses), trial counsel must list each chemical compound that is listed on the CSA on the charge sheet, pertaining to the designer drug that is seized. This will result in a lengthy charge sheet. But, the trial counsel can move to dismiss charges before or even during trial, to reflect the laboratory results once they are received.⁹⁸ Trial counsel should also include Article 92 and Article 134 violations, if evidence exists to support those charges. Until the results of the testing are received, leave all charges on the charge sheet. A second option in time-sensitive cases involves only charging Article 92 and Article 134 violations. Appendix C is a matrix that will assist trial counsel with determining the appropriate charge for cases involving designer drugs.

Even if a commander decided to take administrative action or non-judicial punishment against a servicemember for their involvement with designer drugs, ensure they are initiating mandatory administrative separation actions, in accordance with their applicable service policy or regulation. Judge advocates should utilize the new developments in federal law, command policies, and service regulations to aggressively prosecute or administratively dispose of cases involving designer drugs. The appendices in this article are tools to combat the designer drug epidemic and help commanders restore good order and discipline.

⁹⁸ See MCM, *supra* note 70, R.C.M. 907.

Appendix A

Sample Charges and Specifications Involving Designer Drugs

Purpose: To provide judge advocates with sample charges and specifications for cases involving designer drugs. The sample charges and specifications in this appendix are in line with the hypothetical scenarios presented in Section IV of this article.

Caveat: The charges below were drafted by the author and are only recommendations. The primary resources for model specifications remain the *Military Judge's Benchbook* and the *Manual for Courts-Martial*. The specifications listed in Charges I and III below are not all-inclusive of the additional substances added to the CSA effective 9 July 2012, pursuant to the Synthetic Drug Abuse Prevention Act of 2012.

Charge: I Violation of the UCMJ, Article 80

Specification 1: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to wrongfully possess 1-pentyl-3-(1-naphthoyl)indole (JWH-018), a Schedule I controlled substance; 1-butyl-3-(1-naphthoyl)indole (JWH-073), a Schedule I controlled substance; 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), a Schedule I controlled substance; 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), a Schedule I controlled substance; or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue, a Schedule I controlled substance.⁹⁹

Specification 2: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to wrongfully possess 4-methyl-N-methylcathinone (mephedrone), a Schedule I controlled substance; 3,4-methylenedioxy-N-methylcathinone (methylone), a Schedule I controlled substance; or 3,4-methylenedioxypyrovalerone (MDPV), a Schedule I controlled substance.¹⁰⁰

Specification 3: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to violate a lawful general order, to wit: paragraph 5, USFK Command Policy #6, dated 17 October 2011, by wrongfully possessing a substance that Sergeant (E-5) John A. Smith believed to be a type of "spice," an intoxicating substance capable of inducing excitement, intoxication, or stupefaction of the central nervous system with the intent to use in a manner that would alter mood or function.¹⁰¹

Specification 4: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by wrongfully possessing a type of "spice", a Tetrahydrocannabinol (THC) analogue used as a means to produce excitement, intoxication, and stupefaction of the central nervous system.¹⁰²

Charge: II Violation of the UCMJ, Article 92

Specification 1: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by wrongfully possessing a type of "spice", a

⁹⁹ This is the recommended language for an "attempt to possess spice" specification. The chemicals listed in this specification are only inclusive of the original synthetic spice chemicals placed on Schedule I, by the DEA. All of the new synthetic cannabinoids listed in Schedule I, as of 9 July 2012, should be listed in this specification, if charging before receiving lab results.

¹⁰⁰ This is the recommended language for an "attempt to possess bath salts" specification. The chemicals listed in this specification are only inclusive of the original synthetic bath salt chemicals placed on Schedule I, by the DEA. All of the new synthetic cathinones listed in Schedule I, as of 9 July 2012, should be listed in this specification, if charging before receiving lab results.

¹⁰¹ This is the recommended language for an "attempt to violate a lawful general order, policy or regulation" specification.

¹⁰² *Id.*

Tetrahydrocannabinol (THC) analogue used as a means to produce excitement, intoxication, and stupefaction of the central nervous system.¹⁰³

Specification 2: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea on or about 1 January 2012, violate a lawful general order, to wit: paragraph 5, USFK Command Policy #6, dated 17 October 2011, by wrongfully possessing a substance that Sergeant (E-5) John A. Smith believed to be a type of “spice,” an intoxicating substance capable of inducing excitement, intoxication, or stupefaction of the central nervous system with the intent to use in a manner that would alter mood or function.¹⁰⁴

Charge: III Violation of the UCMJ, Article 112a¹⁰⁵

Specification 1: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 1-pentyl-3-(1-naphthoyl)indole (JWH-018), a Schedule I controlled substance.¹⁰⁶

Specification 2: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 1-butyl-3-(1-naphthoyl)indole (JWH-073), a Schedule I controlled substance.¹⁰⁷

Specification 3: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), a Schedule I controlled substance.¹⁰⁸

Specification 4: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), a Schedule I controlled substance.¹⁰⁹

Specification 5: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue), a Schedule I controlled substance.¹¹⁰

Specification 6: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 4-methyl-Nmethylcathinone (mephedrone), a Schedule I controlled substance.¹¹¹

¹⁰³ This is the recommended language for “violation of a lawful general order, policy or regulation” specification. Be sure to include to the exact language from the order, policy, or regulation on the charge sheet that defines what spice is and its effects. For example, in this specification, spice is defined as a THC analogue, whose effects may produce excitement, intoxication, and stupefaction of the central nervous system. See Memorandum from the Sec’y of the Army to Principal Officials of Headquarters, Dep’t. of the Army et al., subject: Prohibited Substances (Spice in Variations) (Feb. 10, 2011), available at http://acsap.army.mil/Pdf/Sec_Army%20Prohibited_Substances-Spice_in_Variations-Memo.pdf.

¹⁰⁴ This is the recommended language for “violation of a lawful general order, policy or regulation” specification. Be sure to include to the exact language in the order, policy, or regulation that defines what spice is and its effects. In this specification, spice is defined as an intoxicating substance and its effects are described as capable of inducing excitement, intoxication, or stupefaction of the central nervous system. Additionally, this policy is only punitive if the substance is used with the intent to use in a manner that would alter mood or function. Include this language if required by the order, policy, or regulation. See Policy Letter #6, *supra* note 36.

¹⁰⁵ When drafting Article 112a charges, it is recommended that each synthetic cannabinoid or cathinone be charged in a separate specification, until USACIL or the AFMES confirms the exact chemical composition of the substance. Separating the analogues will minimize error. It is important to check the charges against the statute to ensure the chemical composition is accurately listed on the charge sheet. Once the chemical composition of the substance is confirmed, trial counsel may move to dismiss the specifications reflecting the chemical compositions that are not in the CSA. If the chemical composition of the spice and/or bath salt is known before preferral, only include the chemical compound found on the USACIL or AFMES report that is listed on the CSA. The specifications listed in this charge are only inclusive of the original chemical substances placed on Schedule I by the DEA. All of the synthetic chemical compounds should be listed on the charge sheet if charging an Article 112a charge prior to receiving lab results.

¹⁰⁶ This is the recommended language for one type of illegal synthetic cannabinoid found in spice.

¹⁰⁷ This is the recommended language for a second type of illegal synthetic cannabinoid found in spice.

¹⁰⁸ This is the recommended language for third type of illegal synthetic cannabinoid found in spice.

¹⁰⁹ This is the recommended language for a fourth type of illegal synthetic cannabinoid found in spice.

¹¹⁰ This is the recommended language for a fifth type of illegal synthetic cannabinoid found in spice.

¹¹¹ This is the recommended language for one type of illegal synthetic cathinone found in bath salts.

Appendix B

Sample Designer Drug Policy Letter

Purpose: To provide judge advocates and commanders with an example of a punitive command policy letter that thoroughly addresses the use, possession, distribution, and possession of designer drugs.

Caveat: The policy letter in this appendix was drafted by staff members of the Headquarters, United States Army Pacific Command (USARPAC) and is only applicable to servicemembers assigned to USARPAC and its subordinate commands.

Policy letters meant to be punitive should ensure that the prohibited substance and its effects are clear to an “ordinary and reasonable person.”¹¹⁶ Paragraph 3a of the policy letter in this appendix provides a brief description and the effects of spice and other household goods used in huffing. While this is a good model paragraph, it should be updated to include information on bath salts and salvia, the other two increasingly popular and abused designer drugs.

A policy letter relating to designer drugs should also contain an “objective and clearly understood standard of criminality,”¹¹⁷ similar to the policy letter in this appendix. Paragraph 4 makes clear what substances are prohibited (i.e., certain household chemicals, spice, bath salts, salvia, and their derivatives). This paragraph also specifies the prohibited acts pertaining to the prohibited substances (i.e., possessing, distributing, purchasing, inhaling, etc.). Additionally, this paragraph explains why the acts referenced above that are pertaining to the substances are prohibited, in that they attribute to “the significant risks to health, welfare, and good order and discipline of the force and the associated threat to mission accomplishment and national security. Lastly, paragraph 6 provides appropriate language that makes the policy letter punitive.

There should also be a definite indication of what substance is prohibited and language that objectively defines the substance, so the presence or lack of a prohibited substance can be verified by a “reasonable and ordinary person.”¹¹⁸ The enclosure at the end of the USARPAC policy letter does an excellent job satisfying this requirement. For example, the enclosure provides a list of prohibited substance and chemicals. The enclosure also provides a disclaimer that the list is “non-inclusive” and “provided only as an aid to help Soldiers identify products that contain the substances prohibited under this policy.”

For a more detailed explanation of essential provisions that should be included in a designer drug policy letter, refer to Part IV.B of this article.

¹¹⁶ See *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III (Feb. 23, 2010)).

¹¹⁷ *Id.*

¹¹⁸ See *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Def.’s Motion to Dismiss (Feb. 23, 2010)).



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY, PACIFIC
FORT SHAFTER, HAWAII 96858-5100

APCG

4 May 2011

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: USARPAC Policy on Prohibiting the Use, Possession, Distribution and Purchase of Intoxicating Substances – Policy Memorandum 11-10 (This policy supersedes Policy Memo 10-17 dtd 8 Jul 10)

1. Purpose. The purpose of this memorandum is to prohibit the use, possession, distribution and/or purchase of certain intoxicating/psychoactive substances.
2. Applicability. This order applies to all military personnel assigned or attached to the United States Army, Pacific (USARPAC), or to any subordinate unit or element assigned or attached to USARPAC, and to any mobilized National Guard members or units assigned or attached to USARPAC. Subordinate commands may publish their own policies or supplement this policy as appropriate, consistent with the provisions of this policy.
3. Justification.
 - a. The use of intoxicating/psychoactive substances by military personnel is incompatible with service in USARPAC. Commanders have reported to me a significant increase in the number of USARPAC personnel using substances designed to mimic the psychoactive effects of otherwise illegal drugs. Spice is a common name for a family of prohibited products which contain a mixture of organic plant matter that is laced with synthetic cannabinoids or cannabinoid mimicking compounds that are known to cause a decrease in motor function, loss of concentration, and impairment of short-term memory. Personnel are also improperly abusing otherwise permissible household or over the counter items in such a way as to achieve an intoxicating/psychoactive effect. This intoxicating effect includes becoming high, altering one's mood or function, experiencing a loss of concentration, impairment of short-term memory, or achieving a psychoactive effect.
 - b. The use of substances that create such an effect on the human body directly compromises the readiness, safety, welfare, security and good order and discipline within this command, and constitutes a serious threat to mission accomplishment and national security. Spice and the other substances similar to the ones in the enclosure are not regulated, and any introduction into the human body is potentially dangerous. Additionally, some of the substances listed in the enclosure have been outlawed in some states due to their intoxicating effects on the human body. The people of the

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SUBJECT: USARPAC Policy on Prohibiting the Use of Intoxicating Substances –
Policy Memorandum 11-10

United States have reposed a special trust in the United States Armed Forces. The use of these psychoactive substances betrays that trust and is not conducive to an effective, professional fighting force.

4. Based on the significant risks to health, welfare, and good order and discipline of the force and the associated threat to mission accomplishment and national security, and pursuant to my authority as the Commander, United States Army, Pacific, military personnel assigned or attached to USARPAC, or to any subordinate unit assigned or attached to USARPAC, are hereby prohibited from engaging in the following activities:

a. Inhaling, smoking, chewing, consuming, injecting, inserting, absorbing, or introducing into the body in any form, and by any manner, intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvadoran A*, or the intoxicant "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

b. Possessing intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvadoran A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

c. Possessing, with the intent to distribute, intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvinorin A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

d. Distributing to others, intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvinorin A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

e. Purchasing or attempting to purchase intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvinorin A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

f. Inhaling household chemicals and other chemical inhalants for the purpose of becoming intoxicated, high, altering the mood or function, or achieving a psychoactive effect;

g. Abusing over-the-counter nonprescription medications for the purpose of becoming intoxicated, high, altering the mood or function, or achieving a psychoactive effect;

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SUBJECT: USARPAC Policy on Prohibiting the Use of Intoxicating Substances –
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h. Abusing products marketed as "bath salts" for the purpose of becoming intoxicated, high, altering the mood or function, or achieving a psychoactive effect;

i. This order does not apply to alcohol, caffeine, tobacco, lawfully-used prescribed medications, or over-the-counter medications used according to their stated directions.

5. The enclosure, which is a non-inclusive list of prohibited substances and derivatives, is part of this order.

6. Failure to obey this general order constitutes a violation of Article 92, Uniform Code of Military Justice (UCMJ), and may result in disciplinary or administrative action. These actions include, but are not limited to, trial by military court-martial, nonjudicial punishment under Article 15, UCMJ, reprimand, admonishment, administrative reduction, security clearance revocation, and involuntary separation with an adverse characterization of service attending the discharge.

7. This policy remains in effect until superseded or rescinded.

8. Point of contact for this policy is the USARPAC Staff Judge Advocate's office at (808) 438-9470.

Encl
as



FRANCIS J. WIERCINSKI
Lieutenant General, USA
Commanding

DISTRIBUTION:
A, B

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SUBJECT: USARPAC Policy on Prohibiting the Use of Intoxicating Substances –
Policy Memorandum 11-10

ENCLOSURE

1. Spice, also known as:
 - a. Spice (Gold, Dragon, Diamond, Diamond S, Silver, Pep, or any variant thereof)
 - b. Tribal Warrior
 - c. Smoke XXX (Vanilla, Strawberry, Blueberry, or any variant thereof)
 - d. Genie
 - e. Solar
 - f. Yucatan Fire
 - g. Herbal Incense
 - h. K2
 - i. Skunk
 - j. Zohai (MX, RX, SX, or any variant thereof)
 - k. Nehan
 - l. Tropical Synergy
 - m. Spice Diamond
 - n. AMPED
 - o. Bombay (Black, Blue, Extreme, or any variant thereof)
 - p. Buzz
 - q. Dr. Green Thumb
 - r. Experience Alternatives
 - s. Fire and Ice
 - t. Kratom (Black, Black Label, 15X Extract, Xscape, or any variant thereof)
 - u. Magic Gold
 - v. Mojo
 - w. Mystery
 - x. Power Sceletium
 - y. Pulse
 - z. Serenity Now

2. **Salvia Divinorum: Salvia Divinorum or Salvinorum A; all parts of the plant presently classified botanically as salvia divinorum, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture or preparation of such plant, its seeds or extracts. Salvia Divinorum is also known as:**
 - a. Sage of the Seers
 - b. Diviner's Sage
 - c. Sally-D
 - d. Magic Mint
 - e. Maria Pastora
 - f. Sage Goddess

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- g. Emerald Essence
 - h. La pastora
 - i. The shepherdess
 - j. The leaves of the shepherdess
 - k. Salvia
 - l. Dalvia
3. Any material, compound, mixture or preparation which contains any quantity of the following substances:
- a. HU-210: [(6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c] chromen-1-ol]]
 - b. CP 47,497 and homologues: 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol
 - c. HU-211: (dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol)
 - d. JWH-018: 1-Pentyl-3-(1-naphthoyl)indole
 - e. JWH-073: 1-Butyl-3-(1-naphthoyl)indole
 - f. Cannabinoid(s) or Cannabicyclohexanol(s)
 - g. THC Analogues
 - h. Any Spice derivative or Spice cannabinoid
4. *Mitragyna Speciosa* Korth, also known as:
- a. Kratom
 - b. Thang
 - c. Kakuam
 - d. Ketum
 - e. Biak
5. Blue Lotus, also known as:
- a. Blue Water Lily
 - b. Egyptian Lotus
 - c. Sacred Narcotic Lily of the Nile
6. *Convolvulaceae Argyreia Nervosa*, also known as:
- a. Hawaiian Baby Woodrose
7. Lysergic Acid Amide, also known as:
- a. Morning Glory
8. Amanitas Mushroom

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9. Datura, also known as:
 - a. Jimson Weed
 - b. Devils Apple
 - c. Thorn Apple
 - d. Stinkweed
 - e. Moonflower
 - f. Malpitte
 - g. Toloache

10. Absinthe

11. 5-Methoxy-Dimethyltryptamine (5-Meo-DMT), also known as:
 - a. Powder Mushrooms
 - b. AMT
 - c. Alpha-O
 - d. Bronco
 - e. DMT

12. 4-Methylmethcathinone, also known as:
 - a. Mephedrone
 - b. Devil Tracks

13. Methylenedioxypropylone (MPDV), also known as:
 - a. Vanilla Sky
 - b. Ivory Wave
 - c. Ivory Wave Ultra
 - d. Pure Ivory
 - e. Charge +
 - f. Sextacy
 - g. Blue Silk
 - h. Ivory Snow
 - i. Ocean Burst
 - j. Purple Wave
 - k. Snow Leopard
 - l. Stardust (Star Dust)
 - m. White Dove
 - n. White Knight
 - o. White Lightning
 - p. Blizzard

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14. The list of substances in this enclosure is non-inclusive. Brand names and street names of these substances frequently change and new brand/street names may appear. The brand/street names listed in this enclosure are provided only as an aid to help Soldiers identify products that contain the substances prohibited under this policy. Other substances not listed in this enclosure may also be prohibited provided they meet the requirements stated in this policy memorandum.

Appendix C

Designer Drug Charging Matrix

Purpose: To provide judge advocates with a charging matrix that will provide guidance on how to charge cases involving designer drugs.

Caveat: This matrix was drafted by the author and is only a recommendation. The *Manual for Courts-Martial*, the *Military Judge's Benchbook*, current case law, and the evidence the specific case should be reviewed before making a charging decision. Judge advocates should also consult with their Chief of Military Justice prior to making a charging decision.

| | Article 80 <i>charge if:</i> | Article 92 <i>charge if:</i> | Article 112 <i>charge if:</i> | Article 134 <i>charge if:</i> |
|--|---|--|---|--|
| Spice (green, leafy substance resembling marijuana) | the accused attempted to possess, use, or distribute spice, but in fact possessed something else ¹¹⁹ | the chemical substance is NOT in the CSA <i>and</i> there is a service regulation or command policy letter prohibiting spice or other intoxicating substances | the chemical composition is one of the synthetic cannabinoids listed in the CSA | the chemical composition is NOT one of the synthetic cannabinoids listed in the CSA, <i>and</i> evidence exists that the conduct relating to spice is prejudicial to good order and discipline and/or is service discrediting ¹²⁰ |
| Bath Salts (white, off-white, or yellow powder; tablet; or capsule) | the accused attempted to possess, use, or distribute bath salts, but in fact possessed something else ¹²¹ | the chemical substance is NOT in the CSA <i>and</i> there is a service regulation or command policy letter prohibiting bath salts or other intoxicating substances | the chemical composition is one of the synthetic cathinones listed in the CSA | the chemical composition is NOT one of the synthetic cathinones listed in the CSA, <i>and</i> evidence exists that the conduct relating to bath salts is prejudicial to good order and discipline or is service discrediting ¹²² |
| Salvia (green, leafy herbs) | evidence exists that the accused, through his conduct, attempted to violate a service regulation or policy letter that prohibits salvia or other intoxicating substances | there is a service regulation or command policy letter prohibiting salvia or other intoxicating substances | N/A | evidence exists that the conduct relating to salvia is prejudicial to good order and discipline and/or is service discrediting; or if salvia is prohibited in the state where the military installation is located allowing for assimilation IAW the FACA ¹²³ |
| Huffing (aerosols, gases, nitrates, and other inhalants including glue, nail polish, correction fluid, and felt-tip markers) | evidence exists that the accused, through his conduct, attempted to violate a service regulation or policy letter that prohibits the ingestion of substances, with the intent to alter mood or function | there is a service regulation or command policy letter prohibiting the ingestion of substances, with the intent to alter mood or function | N/A | evidence exists that the conduct relating to huffing is prejudicial to good order and discipline or is service discrediting |

¹¹⁹ Charge a violation of Article 80, unless and until the substance is confirmed to be one of the synthetic cannabinoids listed in the CSA *and* evidence exists that the accused believed the substance was spice.

¹²⁰ If the spice contains one of the synthetic cannabinoids listed in the CSA, then prosecution under Article 134 is preempted by Article 112a.

¹²¹ Charge a violation of Article 80, unless and until the substance is confirmed to be one of the synthetic cathinones listed in the CSA *and* evidence exists that the accused believed the substance was bath salts.

¹²² If the spice contains one of the synthetic cathinones listed on the CSA, then prosecution under Article 134 is preempted by Article 112a.

¹²³ The FACA stands for the Federal Assimilative Crimes Act.

A View from the Bench: Real and Demonstrative Evidence

*Lieutenant Colonel Kwasi L. Hawks**

Introduction

“Show and tell” is a popular practice in classrooms around the world. It commands the interest of the most distractible audience and engages them logically, emotionally, and visually. Show and tell can inspire children’s curiosity about the vibrant world beyond the classroom. It can also be a great metaphor for a legal presentation. It can infuse a trial with what it often lacks, a sense of the real. A well-timed demonstration can convey more than reams of documents or days of argument. This article seeks to describe a broad cross-section of evidence that packs a sensory punch and offer suggestions for its use.

Types of Sensory Evidence

This article divides sensory evidence into three categories.

The first is “real” or substantive evidence. This includes the actual weapon alleged to have been used in the crime, or actual contraband seized, or other items resulting from an event at issue such as “911” tapes, closed circuit television footage, or crime scene photographs.

The second is “hybrid” demonstrative evidence. This is actual evidence that has been altered or assembled in a way to enhance its sensory impact. This includes charts or compilations drawn from large numbers of documents, assembled so as to quickly convey information from a voluminous record.¹ It includes altered photographs or recordings, and evidence of experiments performed to illuminate matters at issue. It also includes maps or diagrams made by a witness with features to describe their testimony, as when a witness sketches an alleged crime scene and writes “W1” and “W2” on the sketch to show where he was at two points in time.

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¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1006 (2008) [hereinafter MCM] (permitting, with sufficient notice, the presentation of summaries of voluminous records).

The third is “pure” demonstrative evidence, admitted solely to help witnesses explain or clarify their testimony.² Such evidence includes look-alike evidence, as when the prosecution believes that a golf club was the assault weapon, but no weapon was ever recovered, so the trial counsel seeks to admit a similar golf club to depict the alleged assault weapon.

This article discusses various forms of demonstrative evidence in courts-martial, how to get them admitted, and when they are best employed.

Nuts and Bolts

The most brilliant exhibit is meaningless if you cannot get it before the factfinder. The wise practitioner focuses first on admitting substantive evidence that has sensory impact. This includes weapons, contraband, photographs, video and audio recordings, and some documents. Real evidence can include courtroom displays such as injuries or body parts that are exhibited to the court.³ A predicate of admissibility for any such real evidence is authentication, which is some proof that the item is what it purports to be.⁴

Weapons and other pieces of evidence taken from a crime scene can be authenticated either by chain of custody evidence or by evidence of distinctive markings.⁵ Distinctive markings or “readily identifiable” evidence is that which a witness recognizes due to a unique characteristic.⁶ The

² United States v. Pope, 69 M.J. 328, 332 (C.A.A.F. 2011) (citing United States v. Heatherly, 21 M.J. 113, 115 n.2 (C.M.A. 1985)).

³ Exhibitions are permissible if relevant under Military Rule of Evidence (MRE) 402 and not inflammatory under MRE 403, upon a showing that the exhibition (1) is relevant, (2) will assist the trier of fact, and (3) is not unduly inflammatory it should be admitted. DAVID SCHLUETER, STEPHEN A. SALZBURG, LEE SCHINASI & EDWARD J. IMWINKELREID, MILITARY EVIDENTIARY FOUNDATIONS § 4-16 (2010).

⁴ Military Rule of Evidence 901(a) allows that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.” MCM, *supra* note 2, MIL. R. EVID. 901(a).

⁵ SCHLUETER ET AL., *supra* note 3, at 153, 155.

⁶ “Distinctive markings” is essentially a form of eyewitness testimony, in which a witness opines that he recognizes the item sought to be admitted. It is a common practice of law enforcement personnel to mark their initials on a handgun so they can testify it is the same handgun they recovered at the

foundation for admitting evidence under the “readily identifiable” theory is (1) the object has a unique characteristic, (2) the witness saw it on an earlier occasion, (3) the witness recognizes the characteristic and identifies the exhibit as the item he saw earlier, and (4) the item is in substantially the same condition as when the witness saw it before.⁷ Evidence that lacks such distinctive characteristics must be admitted through a different method, such as establishing a reliable chain of custody in the handling of this evidence.

Chain of custody evidence is generally required for so-called fungible evidence.⁸ Fungible evidence is that which is fundamentally identical with other examples of the type.⁹ Generally weapons, people, automobiles, and the like are distinctive enough that they can be distinguished by the unaided eye. In contrast, blood, urine and other bodily fluids, most drugs, and other commodities must be preserved by chain of custody evidence, as no witness could testify that he remembers “that” white powder as “the” white powder seized from the accused.¹⁰

Chain of custody evidence establishes that the evidence was collected in some place relevant to the issues before the court and maintained without alteration until it was delivered for forensic examination and court-martial.¹¹ Recent developments in Confrontation Clause jurisprudence have complicated the use of chain of custody evidence, requiring in some instances that individuals who handled and tested the evidence testify in person.¹²

scene. Other distinctive markings include serial numbers or unique defects such as a prominent scratch or crack in an item.

⁷ SCHLUETER ET AL., *supra* note 3, at 153.

⁸ Fungible evidence, such as urine specimens, generally “become[s] admissible and material through a showing of continuous custody which preserves the evidence in an unaltered state.” *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F. 2008) (quoting *United States v. Gonzalez*, 37 M.J. 456, 457 (C.M.A. 1993), *in turn quoting* *United States v. Nault*, 4 M.J. 318, 319 (C.M.A. 1978)).

⁹ Fungible is defined as “of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation; or capable of mutual substitution.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) (Merriam Webster 1981).

¹⁰ SCHLUETER ET AL., *supra* note 3, at 155–56.

¹¹ *Id.* at 155.

¹² Historically, chain of custody documents have been and still are admissible as an exception to the bar against hearsay. *See* MCM, *supra* note 1, MIL. R. EVID. 803(6) (specifically listing “chain of custody documents” as admissible under the business records exception). Testimony from a records custodian that the document was made and maintained in the regular course of business may be sufficient to admit the chain of custody document and permit the factfinder to consider the evidence it described. Evidence from forensic laboratory reports was admissible on the same theory as a business record. *See* *United States v. Longtin*, 7 M.J. 784, 787–88 (A.C.M.R. 1979). Recent developments in treatment of the Sixth Amendment right to confrontation have partly disturbed those conclusions. Essentially, a testimonial hearsay statement is inadmissible unless its maker

Introducing evidence of photographs, videos, and recordings can be a far more straightforward proposition than using fungible evidence. The photograph, video, or recording may function essentially as the ultimate “distinctive marking.” While it may be ideal to have the taker of the photograph present to authenticate it, it is not required.¹³ All that is necessary is testimony establishing the relevance of the scene depicted and an eyewitness who is aware of the scene photographed or taped and can testify that the photograph or recording is accurate.¹⁴

If no witness has personal knowledge of the contents of a video or recording, such evidence can still be admitted if the proponent can establish the functioning of the recording device, including how it was set up, how it is activated, and how the recording media was retrieved and processed.¹⁵ For example, security tape footage from a club may show a homicide witnessed by no one (except the perpetrator who will not testify and the victim who cannot). No witness has personal knowledge of the events, but the recording can still be admitted with the proper foundation.

To admit such evidence, testimony as to the *technical* operation of the equipment is not necessary, and internal evidence (such as date-time stamps automatically added to photographs and recordings) can help to establish a foundation.¹⁶ However, proponents of this evidence should

is subject to cross-examination at trial. Routine statements regarding unambiguous factual matters are no longer considered non-testimonial by virtue of their simplicity. *See* Captain Daniel I. Stovall, “*Let Cobham Be Here*”: *The Introduction of Drug Testing Reports in Courts-Martial Post Melendez-Diaz*, 67 A.F. L. REV. 153, 173–74 *passim* (2011) (discussing military courts’ application of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2532 (2009) and *Crawford v. Washington*, 541 U.S. 36, 59 (2004), in determining which statements in common reports are “testimonial” and require confrontation). However, not every statement on a chain of custody document is “testimonial” so as to require confrontation. *United States v. Sweeney*, 70 M.J. 296, 304–05 (C.A.A.F. 2011) (holding that a specimen custody document, which certified that lab results were “determined by proper laboratory procedures, and . . . correctly annotated” was testimonial and required confrontation; but that ordinary stamps, signatures, and other notations on chain of custody documents might not be); *Melendez-Diaz*, 129 S. Ct. at 2532 n.1, *cited in* *United States v. Van Valin*, No. ACM 37283, 2010 WL 4068960, at *3 (A.F. Ct. Crim. App. July 26, 2010); Stovall, *supra*, at 168–69.

¹³ *See* *United States v. Richendollar*, 22 M.J. 231 (C.M.A. 1986).

¹⁴ SCHLUETER ET AL., *supra* note 3, at 162; *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001) (“Generally, a photograph is admitted into evidence as ‘a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts. . . .’”) (quoting JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 214 (5th ed. 1999)).

¹⁵ SCHLUETER ET AL., *supra* note 3, at 166; *Harris*, 55 M.J. at 438, 439–40 (upholding “silent witness” theory for admission of videotape when no live witness had observed the scene); *see also* *United States v. Clark*, No. ACM 37494, 2011 WL 6019313, at *3 (A.F. Ct. Crim. App. Aug. 15, 2011).

¹⁶ *Harris*, 55 M.J. at 440 (“Testimony as to the technical operation of the video camera on the day in question was unnecessary, just as testimony from the actual camera operator or an expert in photography is unnecessary in order to admit a photograph.” In that case, a bank employee was able to

pay particular attention to the witness selected to admit this testimony, to ensure the witness has sufficient knowledge to lay the foundation. In a recent trial, the trial counsel attempted to have the 911 operator lay a foundation for the recording equipment that recorded every call she answered. It quickly became apparent that she was unsure of what recording equipment recorded 911 calls, how it worked, the last time it was maintained, or what had been done to retrieve the recorded call and prepare it as an exhibit for the court-martial. Ultimately, the tape was admitted because she remembered the call and could authenticate the contents of the tape from her own knowledge. Do not assume a witness who works with equipment is competent to speak to its function. A bank security guard or bank manager may not be intimately familiar with the capabilities or functioning of automatic teller machines cameras. The Army and Air Force Exchange Service checkout clerk may not know anything about the functioning of the optical scanner for merchandise even though he uses it every day.

Electronic Evidence

Increasingly, text messages, chat room logs, and electronic mail messages comprise significant evidence in courts-martial. While generally viewed as documents and not illustrative exhibits, pictures, texts, and video clips created with mobile devices often qualify these items as sensory exhibits. The grainy nature of the photos or videos taken may also require enhancement of the content.

Authentication of text messages and chats can often be accomplished by a modern variation of the reply letter doctrine. Essentially, courts presume the mail to be reliable. So when a party properly addresses a piece of correspondence, mails it, and in time receives an appropriate reply, the courts will presume the reply came from the intended recipient of the first letter.¹⁷ In the historic reply letter doctrine, evidence that the witness properly addressed a letter to the declarant, that the letter was sent, and that the witness received a reply bearing the name and address of the original addressee established the authenticity of the reply letter. Once authenticated, the reply letter still had to overcome the rules against hearsay to be admissible. Usually it was admitted as an admission by a party opponent.

identify security camera footage based on the date and time shown on the film plus his own knowledge of the bank's procedures, even though he had no technical knowledge of the operability of the camera on the day in question.)

¹⁷ SCHLUETER ET AL., *supra* note 3, at 61; *see also* United States v. Thomas, 33 M.J. 1067, 1069 (A.C.M.R. 1991), *set aside on other grounds*, 36 M.J. 377, 378 (C.M.A. 1992).

In the modern variant of this doctrine, the witness testifies that he sent a text message to a known "address"—generally a telephone number or electronic mail address—and received a reply that was responsive to the original text. Commonly the reply will be unsigned, in which case evidence about the style of writing, the knowledge exhibited in that writing, or the recipient's exclusive dominion over the telephone number or e-mail address can be substituted.¹⁸ Once the author of the reply text is established, the proponent may establish the relevance of photos or other attachments. For example, if in an indecent conduct case, an associate of the accused receives a "picture text" from the accused containing a photograph of a woman's genitals, the proponent could elicit from the associate that the text came from the accused, and elicit from the victim testimony that the photo depicts her body and was taken without her consent.

If the text is not responsive, or counsel seek to establish that a witness received a message, a variant of chain of custody for the outgoing message must be established.¹⁹ A custodian from the e-mail server of the e-mail at issue must testify to the routing of the message, and then introduce the routing records for the servers to establish the message was routed as it appeared. Finally the proponent must establish the alleged author had primary access to the account.²⁰

Common objections to "assertions" made electronically rely on the fact that computer accounts can be hacked, cell phones may be borrowed (or lost), digital files may be unwittingly altered, and that the original writing, photograph, or recording at issue which is essentially a digital file imbedded in an electronic device is not admitted in violation of Military Rule of Evidence (MRE) 1002.²¹ Few published military cases involving authenticity of digital files address these objections. However, it appears

¹⁸ MCM, *supra* note 1, MIL. R. EVID. 901(b)(4); *see also* United States v. Siddiqui, 235 F.3d 1318, 1322–23 (11th Cir. 2000) (e-mail identified by several characteristics, including the author's e-mail address, possession of distinctive knowledge, and nickname); United States v. Worthington, No. 20040396, 2006 WL 6625258, at *3 (A. Ct. Crim. App. 2006) (e-mail identified by address, distinctive slang used by sender, distinctive knowledge held by sender, consistency with a verbal conversation between witness and sender); *but see* State v. Eleck, 23 A.3d 818, 824–25 (Conn. App. 2011) (agreeing with trial court that refused to admit e-mail under "reply letter" doctrine, because outside of the e-mail address, there were no identifying characteristics of the supposed author, such as knowledge particular to the author or other distinctive content, and collecting cases).

¹⁹ SCHLUETER ET AL., *supra* note 3, at 108-13.

²⁰ *Id.* at 109.

²¹ Military Rule of Evidence 1002 requires that to prove the content of a writing, photograph, or recording the original is required unless exception is granted by the rules, the *Manual for Courts-Martial*, or Act of Congress. The next rule, MRE 1003, permits admission of a duplicate as an original unless a genuine question is raised as to the authenticity of the original, or it would be otherwise unfair. MCM, *supra* note 1, MIL. R. EVID. 1002, 1003; Lieutenant Colonel Kenneth R. Sibley, *Mountains or Molehills?*, 36 THE REPORTER (USAF), no. 2, 2009, at 25, available at <http://www.afjag.af.mil/library/>.

under the various provisions of MRE 901, most objections are properly addressed to the weight of the evidence, not its admissibility.²²

Field Trips

Rule for Court-Martial 913c permits the military judge to authorize the court to view or inspect premises or a place or object. The visit must take place in the presence of all parties and members and the court may designate a guide who cannot testify, but may at the direction of the court point out a list of features. Any statement made by the designated escort (guide), any party, any member, or the military judge must be made part of the record.²³ Site visits are rare both by design and in practice.²⁴ At issue is whether the court can be educated about a scene via photographs and diagrams, or is there some unique aspect about the scene that requires the presence of the court-martial. Appellate courts have routinely upheld a trial court's discretion in denying such a request.²⁵ If a site visit is permitted by the court, the conduct of it is in the court's discretion. Generally, the visit occurs during the case of the party requesting the visit.

Hybrid Demonstrative Evidence

Imagine an accused, serving in a finance military occupational specialty, is alleged to have placed a code in the finance profile of nearly 3000 Soldiers in the course of a year. This code created a "micro-allotment" to a fictitious business which siphoned an average of \$50 from each Soldier over the course of a year. The accused set up the fictitious business account and collected nearly \$150,000 before the scheme was detected. The evidence in the case includes nearly a dozen monthly Leave and Earning Statements (LES) for each of approximately 3000 Soldiers, roughly 36,000 documents. As prosecutor, what do you do? Military Rule of Evidence 1006 permits "the contents of voluminous writings, recordings, and photographs which cannot conveniently be examined in court" to "be presented

²² MCM, *supra* note 1, MIL. R. EVID. 901; *see also* United States v. Harris, 55 M.J. 433, 440 (C.A.A.F. 2001).

²³ MCM, *supra* note 1, R.C.M. 913(c)(3).

²⁴ The discussion to Rule for Court-Martial 913c permits such visits only in "extraordinary circumstances." An informal survey of the trial judiciary at JBLM found participation in a single site visit in a combined forty-one years of service as judge advocates.

²⁵ *See* United States v. Wells, No. 9601349, 1998 WL 85571, at *7 (N-M. Ct. Crim. App. Feb. 27, 1998) (defense made no showing that anything "unique to the case" would be accomplished with a crime scene viewing; parties were able to educate the panel by other means); United States v. Cooper, No. 32388 (A.F. Ct. Crim. App. Dec. 31, 1997) (upholding denial of court member's request for a site viewing); United States v. Marvin 24 M.J. 365, 366 (C.M.A. 1987) (upholding denial on relevance grounds, when site visit would serve to establish something already established by uncontroverted testimony).

as a chart, summary, or calculation."²⁶ The proponent must first establish that the underlying documents are admissible.²⁷ In this case, a record custodian for the Defense Finance and Accounting Service (DFAS) would have to lay the foundation for the LES as a business record,²⁸ establish how the 3000 Soldiers were identified,²⁹ and then establish how their records were retrieved and brought to court.³⁰ Then the DFAS custodian or other expert could testify how the summary or calculation was made and what the figures meant.³¹ A key to successfully using a summary is providing ample notice to the court and your opponent of your intent to use the summary and allowing your opponent full access to the summary and the underlying documents on which it's based.³²

Sketch

Similar to testimony about the accuracy of a photograph is the classical demonstrative diagram or sketch. While a photograph is a picture the witness adopts as a form of testimony, the sketch supplants or enhances a verbal description with a pictorial one. The witness testifies that the diagram depicts a certain area or thing, that the witness is familiar with that area or thing, how the witness is familiar with it, and that the diagram is an accurate depiction—just as he does with a photograph.³³

²⁶ MCM, *supra* note 1, MIL. R. EVID. 1006; James Lockhart, *Admissibility of Summaries or Charts of Writings, Recordings, or Photographs under Rule 1006 of Federal Rules of Evidence*, 198 A.L.R. FED. 427 (2004).

²⁷ United States v. Samaniego, 187 F.3d 1222, 1223–24 (10th Cir. 1999). An exception to this rule allows a summary by an *expert* to be based on inadmissible materials. MCM, *supra* note 1, at A22-61 (analysis of RCM 1006); United States v. Reynoso, 66 M.J. 208, 211 (C.A.A.F. 2008).

²⁸ *See* MCM, *supra* note 1, MIL. R. EVID. 803(6). The confrontation concerns cited above are likely not an issue as there is likely to be greater automation in the Defense Finance and Accounting Service assembly of records then in a lab where humans participate in confirmatory tests and return the fungible sample to the prosecution.

²⁹ A likely answer might be, "We conducted a computer search for the micro-allotment code among all records inputted in the office where the accused worked" (or among all Soldiers in the Army).

³⁰ A likely answer might be, "I [custodian] printed the relevant records and gave them to U.S. Army CID agents." Those agents would be available to testify that they had custody of the records.

³¹ A likely answer might be, "I retrieved from each record the amount of military pay diverted as a result of the micro-allotment code, entered it on a spreadsheet, which added the figures to arrive at \$150,286.15."

³² *See* MCM, *supra* note 1, MIL. R. EVID. 1006; *see also* Stephen J. Murphy, III, *Demystifying the Complex Criminal Case at Trial: Lessons for the Courtroom Advocate*, 81 U. DET. MERCY L. REV. 289, 299 (2004).

³³ SCHLUETER ET AL., *supra* note 3, at 136.

The sketch or diagram can be created in the courtroom. To accomplish this, a witness is asked to describe a scene, and counsel or the witness requests permission from the military judge for the witness to make the sketch. If the witness narrates the sketch, counsel must ensure the connection between the narration and the diagram is recorded on the record. The easiest way is for counsel to ask the witness to make particular descriptive marks and then indicate for the record that the witness has complied. (For example: “Mr. Witness, please use this red marker to place a (“B”) on Prosecution Exhibit 3 for Identification where the bed was and a (“T”) where the table was.” [The witness draws on the exhibit as requested.] “The witness did as instructed.”).

A step beyond the exhibitions described earlier and the sketch described above is the demonstration. A demonstration is an in-court depiction of a physical or mechanical process.³⁴ It can be as simple as punches thrown in a fight or as complex as showing an arcane computer program in operation.³⁵ The elements are that the demonstration is relevant to the case, that the demonstration will assist the court members, and that the demonstration is substantially correct.³⁶ The proponent must be prepared to explain why the demonstration is not barred under MRE 403 as unduly prejudicial.³⁷ Significant controversy may attach to the claim that the demonstration is substantially correct.

If the demonstration is to be done by an expert, the parties should litigate the issue in advance of trial. The demonstration may be excluded based on challenges to the credentials of the expert, or a challenge supported by *voir dire* of the expert and the opponent’s expert testimony that the demonstration is flawed.³⁸ If the demonstration is performed by a lay witness, ordinarily any challenge turns on whether the witness actually observed the process demonstrated.³⁹ If the witness observed the process demonstrated and it is susceptible to ready understanding (e.g., a fight), then challenges to the demonstration are essentially credibility challenges best addressed on cross-examination.⁴⁰ Once the witness establishes a foundation, he

generally moves from the witness stand to a place where the factfinder can observe the demonstration. The witness’s movements must be described for the record.⁴¹

A step beyond the demonstration is the result of an out of court experiment. Imagine a prosecution for drug use in violation of Uniform Code of Military Justice, Article 112a. The defense might offer evidence of sabotage, in that some third party placed the drug in his urine sample to cause a false positive. The prosecution might wish offer testimony about an experiment showing that the Gas Chromatography/Mass Spectrometry machines used for urinalysis can distinguish biological metabolites from additives. The demonstration must be performed by an expert witness.⁴² The expert witness must have studied the underlying assertion that is the basis of the experiment upon invitation from a party, in this case any statements of what was added to the urine at what point and in what amount.⁴³ The expert must then design an experiment that substantially replicates the conditions of the hypothesis.⁴⁴ The expert must execute or supervise the experiment⁴⁵ and report its results.⁴⁶ Printouts, photographs, and recordings of the experiment may be presented if they assist the trier of fact in understanding the experiment or its results.⁴⁷

Enhancement

Photographs or recordings may require enhancement to be useful to a factfinder. Grainy video footage may be enhanced to show a license plate clearly, static-laden recordings may be electronically clarified and amplified so the dialogue may be understood, and small photographs can be enlarged for easier viewing. Enhancement that alters a picture or audio or video recording requires an expert foundation and is different from mere enlargement or amplification.⁴⁸

³⁴ *Id.* at 183.

³⁵ See Major Moran, *Prevention of Juror Ennui—Demonstrative Evidence in the Courtroom*, ARMY LAW., June 1998, at 23, 24 (giving the example of a case involving fraudulent documents; the documents can be projected on an overhead projector, and the witness can fill them out so the panel can see).

³⁶ SCHLUETER ET AL., *supra* note 3, at 184.

³⁷ *Id.*; see also MCM, *supra* note 1, MIL. R. EVID. 403.

³⁸ See MCM, *supra* note 1, MIL. R. EVID. 702; see also U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL rules 2.1.6, 3.1 (Jan. 1, 2012).

³⁹ See MCM, *supra* note 1, MIL. R. EVID. 701.

⁴⁰ See *id.* MIL. R. EVID. 611 and 701.

⁴¹ Describing physical motions by witnesses which have evidentiary significance is the responsibility of counsel. For example, if a witness described how the accused pointed a gun at him, counsel might say “the witness extended his right arm, shoulder height, level with the ground, extending his index finger horizontally and thumb vertically, as if pointing a gun.”

⁴² SCHLUETER ET AL., *supra* note 3, at 185; see also MCM, *supra* note 1, MIL. R. EVID. 702.

⁴³ SCHLUETER ET AL., *supra* note 3, at 186.

⁴⁴ *Id.* at 186–87.

⁴⁵ *Id.* at 187.

⁴⁶ *Id.* at 187–88.

⁴⁷ *Id.* at 187–88, see also *United States v. Kaspers*, 47 M.J. 176, 178–79 (C.A.A.F. 1997).

⁴⁸ SCHLUETER ET AL., *supra* note 3, at 169.

The enhancements can include making an image lighter or darker, or making distinct parts of the image more prominent. They may thicken text, filter out graininess, improve contrast, fill in incomplete features in common subjects such as a human face, and correct common optical defects present in photography such as “red-eye.”⁴⁹ To admit an enhanced exhibit, the foundation for the unaltered exhibit must first be established.⁵⁰

Once the foundation for the underlying exhibit is established, an expert in the field of photography, sound engineering, or computer applications to these fields must be offered. The witness then describes the enhancement technology used. The witness must testify that the enhancement process has been verified as reliable by scientific methodology. The witness must further testify that the scientific research has been applied to the software that effected the enhancement in this case. The witness then testifies that he followed the proper procedure in enhancing the exhibit in issue. The witness finally identifies the trial exhibit as the one that was enhanced.⁵¹

Pure Demonstrative Evidence

The final class of exhibits is those described as “pure” demonstrative exhibits, meaning they are intended solely to assist the factfinder in understanding the evidence; they are not summaries, depictions or enhancements of the actual evidence.⁵²

Courts can permit the use of models, like three dimensional diagrams. For a visual aid to be admissible, the witness must need the aid to explain his testimony.⁵³ As with a diagram, the witness must be familiar with both the aid and the item or scene it depicts, and testify that the aid fairly depicts the scene it represents.⁵⁴

In addition to tangible models, computer models and simulations are also permitted at trial.⁵⁵ In the trial of a U.S. Marine Corps officer charged with negligent homicide when his aircraft severed a gondola cable, sending twenty people to their deaths, the defense made and displayed a computer simulation of the flight, to show that his flying was neither negligent nor reckless.⁵⁶ The accused was acquitted.⁵⁷

Similarly, in a prosecution for aggravated assault of a child under the “shaken baby syndrome” theory, the prosecution displayed a computer simulation, showing how the vigorous shaking of an infant can cause intra-cranial bleeding. The foundation for such models varies, but essentially the proponent must establish through expert testimony that a computer model was created after study of a process at issue in the case. The party must then show that the model accurately depicts that process and assists the expert in explaining it.⁵⁸

Substantive evidence is sometimes unavailable. To assist the trier of fact the party may want to use a similar item or “prop” to depict the evidence. The proponent must first show that the original evidence would have been admissible. The proponent must then show the prop is relevant. The military judge must ensure the factfinder is aware the prop is not substantive evidence.⁵⁹ The foundational requirement of relevance is an apt line of attack for “props.”⁶⁰ Parties have admitted common items, such as red plastic party cups to highlight the amount of alcohol a witness is alleged to have consumed in a given evening. An opponent may credibly argue that asking the witness to show the size of cup using his hands or to characterize its volume in ounces is sufficient to inform the panel.

⁴⁹ *Id.* at 168–69.

⁵⁰ *Id.* at 169–70.

⁵¹ *Id.* at 170.

⁵² *Id.* at 139–40.

⁵³ *Id.* at 140.

⁵⁴ *Id.*

⁵⁵ Michael J. Henke, *Admissibility of Computer Generated Animated Reconstructions and Simulations*, 35 TRIAL LAWYERS GUIDE 434 (1991), cited in SCHLUETER ET AL., *supra* note 3, at 141.

⁵⁶ *Jurors Hear the Final Witness in Pilot’s Manslaughter Trial*, DESERET NEWS, <http://www.deseretnews.com/article/683378/Jurors-hear-the-final-witness-in-pilots-manslaughter-trial.html> (Mar. 2, 1999).

⁵⁷ However, he was later convicted of conduct unbecoming an officer for destroying evidence in that case. *United States v. Ashby*, 68 M.J. 108, 112–13 (C.A.A.F. 2009).

⁵⁸ See SCHLUETER ET AL., *supra* note 3, at 142–43.

⁵⁹ *Id.* at 160.

⁶⁰ See *United States v. Pope*, 39 M.J. 328, 332 & n.1 (C.A.A.F. 2011) (holding erroneous the admission of demonstrative evidence—in that case, a bottle of green “detoxification drink”—in part on relevance grounds, and requiring “admissible underlying testimony” to establish the relevance of demonstrative evidence).

Imagine a trial where several witnesses testify at length to a timeline of events leading up to an alleged assault. Further imagine that counsel for the accused sets up a rough timeline (showing only the times, not the testimony) on an easel in the courtroom. The counsel can then place acetate overlays on the timeline for each witness's version of events. As each witness testifies, the counsel dutifully notes the times of common events on a fresh piece of acetate, creating a series of timelines. In argument the counsel lays the various timelines to establish that despite all the various descriptions of the party and assault, no witness contradicts the accused's alibi testimony. The method previews subtle inconsistencies in an opponent's case as it unfolds. It streamlines and organizes key details in lengthy or complex cases. A like method could be used to show consistency among a number of victims in describing where an alleged attacker encountered them. Something similar could be used to contrast a witness's in-court testimony with prior

inconsistent statements. In recording testimony the counsel must be scrupulously faithful to what the witness says, and not let the witness see the previously recorded testimony.

Conclusion

Show and tell is an effective way to break the monotony of preadolescent school days. It is also a proven way to break the monotony of a trial. In the end, trial advocacy requires that complex ideas be communicated quickly and clearly, and the interest of the members be focused where the advocate desires. Rich sensory language is good; exhibitions, demonstrations, and hands-on exhibits are better. A little preparation and inspiration go a long way in making you an effective advocate.

Can Intervention Work?¹

Reviewed by *Captain Brett Warcholak**

Introduction

By now Rory Stewart is a familiar name with Western diplomats, international development types and students of counterinsurgency. His first book, *The Places In Between*, chronicles a leg from Herat to Kabul in his long walk across Central Asia in 2000–2002.² His second book, *The Prince of the Marshes*, recounts his experiences a year later as a governorate coordinator in Southern Iraq under the Coalition Provisional Authority.³ Stewart was briefly in the British Army before joining the Diplomatic Service with posts in Indonesia and Montenegro. After Iraq, he returned to Afghanistan and founded a non-profit organization. More recently, Stewart was Professor and Director of the Carr Center for Human Rights at the Harvard Kennedy School of Government and in 2010 was elected Member of Parliament for the Conservative Party. Having achieved all the classic prerequisites for success in British politics and more, Stewart, who is only thirty-nine, is definitely one to watch.

Despite this whirlwind of high adventure and professional activities, he has managed to co-author a third book, *Can Intervention Work?*, with Gerald Knaus, Harvard fellow and head of the European Stability Initiative research and policy institute. The book tackles the question of what makes some foreign interventions successful and others fail.⁴

Their discussion is not about the moral or legal justifications for foreign intervention but rather practical considerations that limit the international community's power to effect change through foreign intervention. "It is not a question of what we ought to do but what we can: of understanding the limits of Western institutions in the twenty-first century and of giving a credible account of the specific context of a particular intervention."⁵

The book is divided into two essays, one written by Stewart and one by Knaus. Stewart's essay is about what the international community misunderstood about Afghanistan, the consequences thereof, and what lessons can be drawn from these experiences.⁶ Knaus's essay, on the other hand, is about Bosnia, an intervention success story that has been used as a model for other interventions, albeit "a triumph misdescribed and misunderstood."⁷ More on that later.

Stewart and Knaus first raise their conceptual piñatas, the prevailing schools on foreign intervention: the "planning school," which "prescribes a clear strategy, metrics, and structure, backed by overwhelming resources" and "the liberal imperialist school," "which emphasizes the importance of decisive, bold, and charismatic leadership" by foreigners.⁸ While these schools differ in their approaches, both overestimate the capabilities of the international community and underestimate local capacity, claim the authors.⁹

On account of these shortcomings and the inherently dangerous, unpredictable, and fluid nature of foreign intervention, Stewart and Knaus instead champion an alternative approach called "principled incrementalism" (Knaus) or "passionate moderation" (Stewart).¹⁰ In their view, success is "dependent on the exact location and nature of the crisis and the capacity of the interveners (which is always limited) and the role of neighbors, the regional context, and local leadership (which is always more influential than is assumed)."¹¹ In order to make success more likely, the authors recommend that would-be interveners "distinguish brutally between the factors they can control, the dangers they can avoid, and the dangers they can neither control nor avoid."¹² While success cannot be guaranteed, Stewart and Knaus recommend developing a thorough understanding of the context prior to intervention and returning power to locals through elections as soon as possible.¹³

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¹ RORY STEWART & GERALD KNAUS, *CAN INTERVENTION WORK?* (2011).

² RORY STEWART, *THE PLACES IN BETWEEN* (2006).

³ RORY STEWART, *THE PRINCE OF THE MARSHES* (2007).

⁴ STEWART & KNAUS, *supra* note 1, at xiii.

⁵ *Id.*

⁶ *See id.* at xvi.

⁷ *Id.*

⁸ *Id.* at xvii–xviii.

⁹ *Id.* at xviii.

¹⁰ *See id.* at xxiv–xxv.

¹¹ *Id.* at xxv.

¹² *Id.*

¹³ *See id.*

The Plane to Kabul

Stewart's essay is more of a hodgepodge of astute observations and historical and personal examples, which is his natural style, than a rigorously structured argument. Stewart first muses on the isolation of foreign workers in Afghanistan from the daily realities of Afghan life, a topic covered in his previous works.¹⁴ Stewart sees this as the underlying reason for the slow pace of progress.¹⁵ Stewart blames their lack of knowledge of local history, culture, and politics on short tour lengths, security restrictions, career structures, educational backgrounds, and simply being foreign.¹⁶ A typical development consultant in Afghanistan today is young, was educated at elite institutions, is optimistic to a fault and expert on abstract theories, but has little knowledge of the Afghan context and few opportunities to experience local life, Stewart writes.¹⁷ He compares today's foreign worker in Afghanistan to past British colonial officers in East India, exemplified by John Lawrence, British Viceroy of India from 1864 to 1869, who had years of extensive language and history training before his first field assignment in Delhi, which lasted an astonishing sixteen years (his second field assignment to the Punjab was another fourteen years).¹⁸ Unlike today, colonial officers like Lawrence came from a system that valued long area studies in preparation for duty and rewarded long experience in-country and in-depth knowledge of local cultures and languages.¹⁹ While Stewart acknowledges the harsh ways of British colonialism,²⁰ he is clearly romantic about the system that created such efficient overlords, some of whom later took up political careers, which served as an important check against badly conceived intervention abroad.²¹ He praises their critical views but points out that even their insight could not avert British defeats in Afghanistan in 1842 and 1879.²²

Stewart recognizes early successes in post-intervention Afghanistan in health, education, finance, and infrastructure, which were made possible by foreign technical expertise and

money or simply by lifting Taliban restrictions.²³ He believes the international community went wrong, however, when it began tinkering with the fundamental structures of Afghan society in order to create a "sustainable solution" in Afghanistan.²⁴ Western leaders and westernized Afghans described the problems of Afghanistan and their solutions in abstract terms, e.g., "rule of law," "governance," "security," and "human rights," according to their Western understanding of what these terms meant.²⁵ Laboring under such concepts, foreigners and Afghan elites overlooked, or saw as woefully deficient, traditional forms of providing security and justice, especially in rural areas, and saw an ungoverned vacuum that had to be filled.²⁶ Despite costly rule of law programs, many Afghans have remained skeptical about the ability of modern institutions to deliver fair justice and continue to prefer traditional means of dispute resolution.²⁷

Stewart also criticizes foreign efforts at the disarmament, demobilization, and reintegration (DDR) of armed groups in Afghanistan and provides examples how DDR has been misused by political rivals, unintentionally benefitting infamous individuals, and worsening the security situation.²⁸ He casts doubt on claims that Afghanistan really poses "a unique threat to global security: a nation that could endanger the very survival of the United States and the global order, not simply one troubling country among many,"²⁹ reminding the reader that British and Russian public figures had made similarly specious threats about Afghanistan during the "Great Game" for control of central Asia in the nineteenth century.³⁰ But, unlike today's officials, those of the nineteenth-century British and Russian Empires had the good sense to refrain from implementing a full scale occupation of the country, he writes.³¹

After his critique of the international community's intervention, Stewart disappointingly offers no positive recommendations for the way forward in Afghanistan. Had he done so, his recommendations would almost have

¹⁴ See, e.g., STEWART, *supra* note 2, at 245–46 (describing friends working in Afghanistan, the background of policy-makers, and their ignorance of Afghan perspectives).

¹⁵ See STEWART & KNAUS, *supra* note 1, at 13.

¹⁶ See *id.*

¹⁷ See *id.* at 18–20.

¹⁸ See *id.* at 22.

¹⁹ See *id.*

²⁰ See *id.* at 66.

²¹ See *id.* at 66–67; see also STEWART, *supra* note 2, at 247 n.59 (comparing Western administrators with colonial officers).

²² See STEWART & KNAUS, *supra* note 1, at 67–68.

²³ *Id.* at 25–27.

²⁴ *Id.* at 27.

²⁵ *Id.* at 34–35. See, e.g., STEWART, *supra* note 3, at 230 (observing on experiences in Iraq, "What was a lived experience for one side was often an abstract concept, learned in a textbook, for the other. Too often, the sophisticated and controversial points that we imagined we were making were experienced by our listeners as sonorous platitudes.").

²⁶ See STEWART & KNAUS, *supra* note 1, at 44–45.

²⁷ See *id.* at 45–46.

²⁸ See *id.* at 47–49.

²⁹ *Id.* at 60.

³⁰ See *id.* at 65–66.

³¹ See *id.* at 67–68.

certainly included a drastic downscaling of the international community's goals for Afghanistan and a reduction of troop levels. Stewart views Afghanistan mostly as a cautionary tale.

Stewart's approach to intervention can be summed up in a few simple maxims: avoid it whenever possible; exhaust alternatives first; and when you absolutely must, proceed with caution and keep objectives realistic.³² Perhaps the most useful, concrete thing that can be done, according to Stewart, is the creation of a stronger corps of regional specialists with deep knowledge of local contexts, who can help set realistic goals for interventions and guide us to them.³³ To this end, Stewart would be in favor of first undoing current institutional preferences for generalists.

Readers will enjoy Stewart's personal stories about the late Richard Holbrooke, former U.S. Special Envoy for Afghanistan and Pakistan, whom Stewart greatly admired, and Stewart's teasingly short comparisons of past British experiences about Afghanistan with the international community's present troubles, as alluded to above. The similarities are indeed uncanny, but Stewart neglects material distinctions. Notwithstanding this minor criticism, Stewart otherwise raises valid points and his appeal for a more cautious approach toward intervention is wholly reasonable.

The Rise and Fall of Liberal Imperialism

Knaus takes a more methodical approach in his essay by comparing the explanatory power of the different schools of intervention to account for events in Bosnia and Herzegovina since the NATO military intervention in Fall 1995.

According to the planning school, success in Bosnia after 1995 was the inevitable result of the bountiful resources, people, and money the international community had devoted to Bosnia.³⁴ In 1996, there were sixty-thousand international

troops in Bosnia, two thousand international police monitors, and more than five billion dollars had been donated for reconstruction—all for a small population under four million.³⁵ As Knaus writes, “this theory holds there is a clear causal relationship between the amount of assistance provided and the stability that ensues.”³⁶ But looking at economic data and troop levels in Bosnia and Afghanistan, Knaus finds no such corresponding decrease in violence.³⁷ Knaus finds more dispositive reasons for the success in Bosnia, namely, that initial strategy was to co-opt local elites rather than fight them, and that international troops entered Bosnia under the terms of the mutually agreed Dayton Accords and took great measures to avoid armed conflict.³⁸ Lessons learned in such a context have little application in Afghanistan and Iraq, both non-permissive environments with no peace agreements.³⁹ For these reasons, Knaus does not agree with planners who believe in universal lessons on state-building that can be applied everywhere.⁴⁰ Only when the context of intervention is analogous to the permissive environment in Bosnia in 1995 should we look back to Bosnia for guidance.⁴¹

Liberal imperialists tend to focus on spoilers, who want to maintain the dismal status quo and stymie the good work of interveners.⁴² For liberal imperialists, the key is to empower foreign interveners with sufficient authority to overcome domestic opposition and overhaul existing institutions.⁴³ Charismatic leadership and bold decisions in the model of Paddy Ashdown, the UN High Representative for Bosnia and Herzegovina from 2002 to 2006, are *de rigueur*.⁴⁴ According to liberal imperialists, progress in Bosnia did not happen until after the so-called Bonn powers were agreed in 1997, which gave the Office of the High Representative (OHR) sweeping powers to impose legislation and fire obstructionist officials.⁴⁵ But Knaus dissolves the claim that the exercise of these powers led to political progress in Bosnia. He notes the peculiar willingness of Bosnians to go along with OHR decisions, considering how it had no arrest powers or prisons as means

³² See *id.* at 77–78.

³³ See *id.* at 79. But cf. STEWART, *supra* note 3, at 398 (writing on Iraq, “We overestimate the power of the United States and its allies. Even critics of the war mistake our capacity. Those who blame stupidity in the administration, the early decision of Bremer, or the failures to win ‘hearts and minds’ share many of the assumptions of the administration itself: namely, that the invasion could succeed if the invaders were competent. Such critics imply that the problem is that we sent the ‘B team.’ And that somewhere else an ‘A team’ exists, or that at least such a team might be created, of ideal nation builders with the qualities of a Machiavellian prince—informed, charismatic, intelligent, flexible, and decisive, supported by their own populations and powerful enough to fundamentally reshape alien societies. But in fact there are no such Machiavellian princes. If they emerged, our societies would not support them; and even if they existed and won support, they would not be able to succeed in Iraq.”).

³⁴ See STEWART & KNAUS, *supra* note 1, at 131.

³⁵ See *id.* at 131–32.

³⁶ *Id.* at 134.

³⁷ See *id.* at 135–37.

³⁸ See *id.* at 137.

³⁹ See *id.*

⁴⁰ See *id.* at 140.

⁴¹ See *id.* at 141.

⁴² See *id.* at 143.

⁴³ See *id.*

⁴⁴ See *id.* at xvii–xviii.

⁴⁵ See *id.* at 142.

to enforce them.⁴⁶ Knaus explains, “the benevolent authoritarian rule of OHR was much preferable to any other political system they had ever experienced, and reminiscent of the relative stability of authoritarian rule under the Yugoslav communist regime.”⁴⁷ Knaus also explains that many OHR dictates were first privately agreed to by local parties who later distanced themselves from them, finding it easier to do so than explain compromises to their electorates.⁴⁸ Based on successes in Bosnia claimed by liberal imperialists, their approaches, “go in hard, avoid early elections, implement drastic reforms in the golden hour,”⁴⁹ were taken to their logical extreme in Iraq by the Coalitional Provisional Authority under Paul Bremer.⁵⁰ Knaus reminds the reader that, unlike in Iraq, major overhauls were not implemented in the early stages of the Bosnia intervention for fear of a nationalist backlash. He argues that the counterproductive effect of liberal imperialist approaches in Iraq proves the point that such approaches are universal.⁵¹

In addition to the “planning school” and “liberal imperialist school,” Knaus introduces the reader to “the futility school and intervention skeptics” and his own “principled incrementalism.”⁵²

Intervention skeptics do not think that Bosnia, with its tenuous peace and simmering rivalries, has been much of a success—let alone an example for larger interventions.⁵³ Like Stewart, Knaus has a healthy pessimism for foreign intervention, but argues that, in regard to Bosnia, a little credit is in order. Knaus rattles off a litany of reasons to believe that Bosnia is a success story: it did not prove to be a quagmire for foreign troops; refugees and minority ethnic groups have largely returned to their homes; free and fair elections have been held; effective border controls are in place; and, most importantly, there has not been a return to violence as it existed prior to intervention.⁵⁴ Ultimately, “Bosnia did not prove unable to live together,”⁵⁵ he writes.

Knaus attributes Bosnia’s successes to slow, cautious, essentially *ad hoc* solutions to its intractable problems. He

highlights in particular the way in which the return of refugees, previously believed impossible, could be accomplished after 2000 through a mix of OHR negotiations, the presence of foreign troops, and the willingness of refugee groups to take advantage of their right of return.⁵⁶ But the return of refugees was not accomplished all at once or according to one paradigm for every area of resettlement: “In practice every progress was the result of bargaining, endless negotiations in the field, weighing risks, and supporting, wherever possible, domestic initiatives. It was a process of principled incrementalism.”⁵⁷ Knaus also credits the U.S. strategy to weaken the Serb entity by strengthening the Bosniak-Croat Federation army, the diplomacy of statesman Carl Bildt, the first High Representative from 1995 to 1997, who supported moderate Serbs and sought to isolate radicals; and especially the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) after it gained traction in 1997.⁵⁸ The ICTY has allowed Bosnians to avoid the contentious infighting that would have inevitably resulted from domestic attempts to prosecute warlords, and it has discredited their nationalist agenda.⁵⁹

In conclusion, Knaus answers the book’s main question in the affirmative, because foreign intervention did work in Bosnia.⁶⁰ Knaus deduces some morals from recent experiences for future use. As the cases of Rwanda and Srebrenica show, “there is a high price, in human, moral, and strategic terms, of not attempting to intervene when this seems within our power in the face of mass atrocities.”⁶¹ Decisions to intervene must be made on a case-by-case basis.⁶² Success depends on the importance of the local and regional context with nation-building “under fire,” such as in Afghanistan and Iraq, posing far different challenges from situations like Bosnia.⁶³ While Knaus deeply doubts the feasibility of intervention “under fire,” he remains optimistic about the chances for success in other contexts.⁶⁴ NATO’s successful, limited military intervention in Libya has justified this optimism.

Bosnia today is indisputably in better shape than it was just prior to intervention. But a more interesting question

⁴⁶ See *id.* at 156.

⁴⁷ *Id.*

⁴⁸ See *id.* at 156–57.

⁴⁹ *Id.* at 157.

⁵⁰ See *id.* at 154.

⁵¹ See *id.* at 157.

⁵² *Id.* at 129–88.

⁵³ See *id.* at 161–63.

⁵⁴ See *id.* at 167–68.

⁵⁵ *Id.* at 167.

⁵⁶ See *id.* at 175–77.

⁵⁷ *Id.* at 178.

⁵⁸ See *id.* at 178–82, 184–86.

⁵⁹ See *id.* 185.

⁶⁰ *Id.* at 188–89.

⁶¹ *Id.* at 189.

⁶² See *id.* at 189–91.

⁶³ See *id.* at 191–92.

⁶⁴ See *id.* at 192.

not fully treated by Knaus is whether its fragile peace would hold without continuous foreign maintenance. There are reasons to doubt so. It has been necessary to keep both the OHR and foreign troops (now the European Military Force (EUFOR)) in Bosnia—over fifteen years after intervention. Actions of Republika Srpska leaders continue to threaten national cohesion.⁶⁵ Only history will tell if Bosnia will be able to stand on its own, will remain an international protectorate or disintegrate along sectarian lines. Although Stewart and Knaus are quick to dismiss Afghanistan and Iraq, the same can be said for these countries as well. Before judging the success of an intervention, it is necessary to take the long view.

Conclusion

For military readers, certain passages of this book, especially overbroad statements about Afghanistan and Iraq, might sound heretical. But these passages permit the authors to develop their positions.⁶⁶ Stewart and Knaus are hardly radical. Their message is simply a call for more conservatism in foreign policy, not isolationism but caution. Decisionmakers contemplating intervention and foreigners working in post-intervention environments would be well advised to read this little book.

⁶⁵ See Valentin Inzko, Speech by the High Representative to the UN Security Council (May 9, 2011) (transcript available at http://www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=46014).

⁶⁶ See STEWART & KNAUS, *supra* note 1, at xiv.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. 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. TJAGLCS CLE Course Schedule (June 2011–September 2012) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

| ATRRS. No. | Course Title | Dates |
|----------------|--|--------------------|
| GENERAL | | |
| | 61st Judge Advocate Officer Graduate Course | 13 Aug – 23 May 13 |
| 5F-F1 | 223d Senior Officer Legal Orientation Course | 27 – 31 Aug 12 |

| NCO ACADEMY COURSES | | |
|----------------------------|------------------------------------|--------------------|
| 512-27D30 | 1st Advanced Leaders Course (Ph 2) | 15 Oct – 20 Nov 12 |
| 512-27D30 | 2d Advanced Leaders Course (Ph 2) | 7 Jan – 12 Feb 13 |
| 512-27D30 | 3d Advanced Leaders Course (Ph 2) | 7 Jan – 12 Feb 13 |
| 512-27D30 | 4th Advanced Leaders Course (Ph 2) | 11 Mar – 16 Apr 13 |
| 512-27D30 | 6th Advanced Leaders Course (Ph 2) | 8 Jul – 13 Aug 13 |

| | | |
|-----------|----------------------------------|--------------------|
| 512-27D40 | 1st Senior Leaders Course (Ph 2) | 15 Oct – 20 Nov 12 |
| 512-27D40 | 2d Senior Leaders Course (Ph 2) | 11 Mar – 16 Apr 13 |
| 512-27D40 | 3d Senior Leaders Course (Ph 2) | 6 May – 11 Jun 13 |
| 512-27D40 | 4th Senior Leaders Course (Ph 2) | 8 Jul – 13 Aug 13 |

ENLISTED COURSES

| | | |
|-----------|----------------------------|-------------------|
| 512-27DC5 | 39th Court Reporter Course | 6 Aug – 21 Sep 12 |
|-----------|----------------------------|-------------------|

ADMINISTRATIVE AND CIVIL LAW

| | | |
|--------|---------------------------------------|----------------|
| 5F-F22 | 65th Law of Federal Employment Course | 20 – 24 Aug 12 |
| 5F-F29 | 30th Federal Litigation Course | 27 – 30 Aug 12 |

CONTRACT AND FISCAL LAW

| | | |
|---------|-------------------------------|----------------|
| 5F-F101 | 12th Procurement Fraud Course | 15 – 17 Aug 12 |
|---------|-------------------------------|----------------|

CRIMINAL LAW

| | | |
|--------|---------------------------------------|----------------|
| 5F-F31 | 18th Military Justice Managers Course | 20 – 24 Aug 12 |
| 5F-F34 | 42d Criminal Law Advocacy Course | 10 – 14 Sep 12 |
| 5F-F34 | 43d Criminal Law Advocacy Course | 17 – 21 Sep 12 |

INTERNATIONAL AND OPERATIONAL LAW

| | | |
|--------|------------------------------------|--------------------|
| 5F-F41 | 8th Intelligence Law Course | 13 – 17 Aug 12 |
| 5F-F47 | 58th Operational Law of War Course | 30 Jul – 10 Aug 12 |
| 5F-F48 | 5th Rule of Law Course | 9 – 13 Jul 12 |

3. Naval Justice School and FY 2011–2012 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

| Naval Justice School Newport, RI | | |
|---|--|--|
| CDP | Course Title | Dates |
| 0257 | Lawyer Course (030) | 30 Jul 12 – 5 Oct 12 |
| 900B | Reserve Legal Assistance (020) | 24 – 28 Sep 12 |
| 961J | Defending Sexual Assault Cases (010) | 13 – 17 Aug 12 |
| 525N | Prosecuting Sexual Assault Cases (01) | 13 – 17 Aug 12 |
| 03TP | Basic Trial Advocacy (020) | 17 – 21 Sep 12 |
| 748A | Law of Naval Operations (020) | 17 – 21 Sep (Norfolk) |
| 0258 (Newport) | Senior Officer (060) Senior Officer (070) | 13 – 17 Aug 12 24 – 28 Sep 12 |
| 2622 (Fleet) | Senior Officer (110) | 10 – 13 Sep 12 (Pensacola) |
| 03RF | Legalman Accession Course (030) | 11 Jun – 24 Aug 12 |
| 07HN | Legalman Paralegal Core (030) | 31 Aug – 20 Dec 12 |
| 932V | Coast Guard Legal Technician Course (010) | 6 – 17 Aug 12 |
| 627S | Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) | 17 – 19 Sep 12 (Pendleton) 19 – 21 Sep 12 (Norfolk) |
| NA | Legal Service Court Reporter (020) | 10 Jul – 5 Oct 12 |
| NA | TC/DC Orientation (020) | 10 – 14 Sep 12 |

| Naval Justice School Detachment Norfolk, VA | | |
|--|-----------------------------|----------------|
| 0376 | Legal Officer Course (090) | 12 – 31 Aug 12 |
| 0379 | Legal Clerk Course (080) | 20 – 31 Aug 12 |
| 3760 | Senior Officer Course (050) | 10 – 14 Sep 12 |

| Naval Justice School Detachment San Diego, CA | | |
|--|-----------------------------|-------------------------|
| 947H | Legal Officer Course (080) | 20 Aug – 7 Sep 12 |
| 947J | Legal Clerk Course (080) | 27 Aug – 7 Sep 12 |
| 3759 | Senior Officer Course (060) | 17 – 21 Sep (Pendleton) |

4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

| Air Force Judge Advocate General School, Maxwell AFB,AL | |
|--|----------------------|
| Course Title | Dates |
| Paralegal Apprentice Course, Class 12-05 | 25 Jun – 15 Aug 2012 |
| Judge Advocate Staff Officer Course, Class 12-C | 9 Jul – 7 Sep 2012 |
| Paralegal Craftsman Course, Class 12-04 | 9 Jul – 23 Aug 2012 |
| Gateway, Class 12-B | 6 – 17 Aug 2012 |
| Environmental Law Course, Class 12-A | 20 – 24 Aug 2012 |
| Will Preparation Paralegal Course, Class 12-C | 21 – 23 Aug 2012 |
| Paralegal Contracts Law Course, Class 12-01 | 27 – 31 Aug 2012 |
| Will Preparation Paralegal Course, Class 12-D | 28 – 30 Aug 2012 |
| Will Preparation Paralegal Course, 12-E | 5 – 7 Sep 2012 |
| Pacific Trial Advocacy Course, Class 12-B | 9 – 13 Sep 2012 |
| Staff Judge Advocate Course, Class 12-B | 10 – 14 Sep 2012 |
| Law Office Management Course, Class 12-B | 10 – 14 Sep |

| | |
|---|------------------|
| Will Preparation Paralegal Course, Class 12-F | 11 – 13 Sep 2012 |
| Will Preparation Paralegal Course, Class 12-G | 17 – 19 Sep 2012 |
| Trial & Defense Advocacy Course, Class 12-B | 17 – 29 Sep 2012 |
| Accident Investigation Course, Class 12-A | 18 – 21 Sep 2012 |

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2013 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2012 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2012 RC On-Site Legal Training Conferences

| Date | Region, LSO & Focus | Location | Supported Units | POCs |
|-------------|--|---------------------------------|------------------------------|---|
| 17 – 19 Aug | Northeast Region 153d LSO Focus: Client Services | Philadelphia, PA (Tentative) | 3d LSO 4th LSO 7th LSO | MAJ Jack F. Barrett john.f.barrett@us.army.mil (215) 665-3391 |

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 6 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 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

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA 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 TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. 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 TJAGSA 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.

4. 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 Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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