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Articles

An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes

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The Inspector General System

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Note from the Field

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CLE News

Current Materials of Interest

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An Army of Suspects:¹ The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes

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Introduction

The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991.² "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from members of the active duty and reserve forces."³ What was then called the "DOD DNA Registry,"⁴

a program within the Armed Forces Institute of pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment.⁵

As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains,"⁶ contained the DNA of approximately 3.2 million service members.⁷ According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory."⁸ The direction to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ).⁹ If convicted at court-martial for the offense of violating a lawful general order, the service member carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.¹⁰

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1. See Jean E. McEwen, *DNA Databanks*, in *GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC AGE* 231, 236 (Mark Rothstein ed., 1997) ("[A] population-wide DNA data bank could fundamentally alter the relationship between individuals and the state, essentially turning us into a nation of suspects."), cited in D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 *CORNELL J.L. & PUB. POL'Y* 455, 457 & n.8 (2001). This article was originally written to meet the requirements for a Master of Laws degree at George Washington University, specifically, a class entitled, "Anatomy of a Homicide."
 2. *Mayfield v. Dalton*, 901 F. Supp. 300, 302 (D. Haw. 1995), *vacated as moot*, 109 F.3d 1423 (9th Cir. 1997); see also Sarah Gill, *The Military's DNA Registry: An Analysis of Current Law and a Proposal for Safeguards*, 44 *NAVAL L. REV.* 175, 183-84 (1997). Ms. Gill's article contains excellent research on the early Department of Defense memoranda that established the DNA Registry.
 3. *Mayfield*, 901 F. Supp. at 302.
 4. Notices, Department of Defense (DOD) Department of the Army (DA), Privacy Act of 1974; Add a System of Records, 60 Fed. Reg. 31,287 (June 14, 1995).
 5. *Id.*; see Memorandum and Policy Statement, Deputy Secretary of Defense, subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (16 Dec. 1991) [hereinafter 1991 Registry Memo].
 6. Notices, Department of Defense (DOD) Department of the Army (DA), Privacy Act of 1974; System of Records, 62 Fed. Reg. 51,835 (Oct. 3, 1997).
 7. Tranette Ledford, *Law Expands Access to Military DNA*, *ARMY TIMES*, Dec. 16, 2002, available at <http://www.armytimes.com> [hereinafter Ledford, *Law Expands Access*].
 8. U.S. DEP'T OF DEFENSE, DIR. 5154.24, ARMED FORCES INSTITUTE OF PATHOLOGY para 3.4.3.2 (28 Oct. 1996) [hereinafter DOD DIR. 5154.24, 1996 version], *cancelled and superseded* by U.S. DEP'T OF DEFENSE, DIR. 5154.24, ARMED FORCES INSTITUTE OF PATHOLOGY (3 Oct. 2001) [hereinafter DOD DIR. 5154.24, 2001 version].
 9. UCMJ art. 92 (2002).
 10. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. IV, ¶ 92e(1) (2002) [hereinafter MCM]. The less serious offense of failing to follow a lawful order other than a general order carries a maximum punishment of a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id.* para. 92e(2).

As its name suggests, the DNA Repository was initially conceived solely to identify the remains of service members. However, a small entry in the huge 2003 National Defense Authorization Act, “signed by President Bush on December 2, 2002, overrides Pentagon policy that the DNA samples be used almost solely to identify troops killed in combat,”¹¹ and allows access to the Repository for law enforcement purposes.¹² The provision reads:

§ 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes

(a) Compliance with a court order.

(1) Subject to paragraph (2), if a valid order of a Federal court (or military judge) so requires, an element of the Department of Defense that maintains a repository of DNA samples for the purpose of identification of human remains *shall make available*, for the purpose specified in subsection (b), such DNA samples on such terms and conditions as such court (or military judge) directs.

(2) A DNA sample with respect to an individual shall be provided under paragraph (1) in a manner that does not compromise the ability of the Department of Defense to maintain a sample with respect to that individual for the purpose of identification of human remains.

(b) Covered purpose. *The purpose referred to in subsection (a) is the purpose of an investigation or prosecution of a felony, or any sexual offense, for which no other source of DNA information is reasonably available.*

(c) Definition. In this section, the term “DNA sample” has the meaning given such term in section 1565(c) of this title.¹³

The 2002 law, proposed by Rep. John Culberson, R-Texas, passed with no debate. It followed the January, 2002 rape of a soldier at Fort Hood, Texas by a fellow soldier, Specialist (SPC) Christopher Reyes.¹⁴ The law is in addition to the military’s statutory requirement, similar to that of every state and the District of Columbia,¹⁵ for collection of DNA samples from those soldiers who are convicted of certain offenses by military court-martial, which are furnished to the Director of the Federal Bureau of Investigation for inclusion in the Combined DNA Index System (CODIS).¹⁶ The collection of samples under this statute is not in issue in this article.¹⁷

Does the 2002 change pass constitutional muster? Does a commander violate the Fourth Amendment’s ban against unreasonable searches and seizures when he requires a service member to provide a DNA sample that can later be used as evidence against him in a criminal prosecution, absent a warrant, probable cause, or even individualized suspicion that he has committed a crime?

This article first describes *Reyes* and how it led to the 2002 law. Second, this article examines the permissible uses of DNA samples in the repository before the passage of the 2002 amendment—and whether the change represents a significant difference from the regulations that existed before the statute. A Pentagon spokesman recently claimed that the new bill was merely “a codification of a longstanding policy.”¹⁸ Third and finally, this article analyzes the constitutionality of the repository under the “special needs” exception to the warrant and probable cause requirements of the Fourth Amendment to the Constitution in light of the recent Supreme Court decisions in *City of Indianapolis v. Edmond*¹⁹ and *Ferguson v. City of Charleston*,²⁰ and lower court cases examining the constitution-

11. Ledford, *Law Expands Access*, *supra* note 7, at 1.

12. 10 U.S.C. § 1565a (LEXIS 2003).

13. *Id.* § 1565a (emphasis added). “DNA sample” is defined as “a tissue, fluid or other bodily sample of an individual on which a DNA analysis can be carried out.” *Id.* § 1565(c).

14. Ledford, *Law Expands Access*, *supra* note 7, at 1. The author was the Senior Defense Counsel at Fort Hood at the time of SPC Reyes’ case, and was involved in supervising SPC Reyes’ defense. The factual discussion of his offenses is compiled from contemporaneous news reports. None of the information resulted from the author’s professional involvement in the case.

15. See Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 771-72 (1999), cited in John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 132 & n.91 (2000).

16. 10 U.S.C. § 1565(a).

17. However, this collection regime is also subject to challenge under the Fourth Amendment. See *United States v. Miles*, 228 F. Supp. 2d 1130 (E.D. Cal. 2002); see also *infra* nn.187-95 and accompanying text.

18. Ledford, *Law Expands Access*, *supra* note 7, at 2.

19. 531 U.S. 32 (2000).

ality of other DNA databanks both before and after those critical decisions.

Expanding access to the repository for law enforcement purposes is troublesome. As one editorial writer stated, “America’s service members and convicted felons now have something in common—they’re the only U.S. citizens whose DNA data can be used without consent [or probable cause] in police investigations.”²¹ Nonetheless, this article concludes that because both the primary purpose of the repository and the actual purpose served by the Repository remains the identification of fallen service members, the expanded access in itself does not invalidate its constitutionality.

A cautionary note is in order, however. If the DOD Repository becomes routinely accessed for law enforcement purposes such that its law enforcement use overtakes its remains identification use, the repository slips into unconstitutional territory. Should this occur, the “special needs exception” to the warrant and probable cause requirements of the Fourth Amendment will no longer justify these mandatory, suspicionless searches, because the actual purpose served by the repository would then cease to be divorced from general, ordinary, or normal law enforcement.

The Reyes Case²²

On Easter Sunday, 31 March 2002, Specialist (SPC) Christopher Reyes was a twenty-one year-old soldier assigned to the Army’s 1st Cavalry Division at sprawling Fort Hood, Texas.²³ Located in Killeen, Texas, between Dallas and Austin,²⁴ Fort

Hood is home to more than 40,000 soldiers; including soldiers and family members living on and off post, it supports a population of over 100,000 people.²⁵

On that Easter Sunday, SPC Reyes and two friends from his unit, SPC Vance Rogers and Private First Class (PFC) Gregory Payton, spent the day drinking. Sometime that night, they decided to take a drive into the city of Killeen to look for drugs. The soldiers carried several handguns; SPC Rogers was so drunk he had passed out.²⁶

At about 2330., the men spotted twenty-year old Eric DeSean Davis, “an aspiring rap musician”²⁷ and father of three who had married a soldier just four days before. Specialist Reyes got out of the vehicle and asked Davis where he could get some drugs. According to PFC Payton, “I didn’t hear no one raise their voice. Then I heard a shot go off.”²⁸ Davis crumpled to the ground, and SPC Reyes said, “I just shot that guy.”²⁹

Private First-Class Payton, who was driving the vehicle, later admitted that he dropped the drunken SPC Rogers off, and that SPC Reyes then said that he “wanted to shoot someone else.”³⁰ By now it was about 0300 on the morning of 1 April. The two drove around Fort Hood, and apparently randomly stopped at the on-post quarters of Sergeant First Class (SFC) Nathan Moreau, his wife, Mary, a kindergarten teacher, and their three children. Both soldiers got out of the car and approached the front door of the dwelling.³¹

Mary Moreau heard the door bell, and she and her husband “went down the hallway. That’s when I noticed the front door was wide open. I yelled at my husband and ran into the kitchen.

20. 532 U.S. 67 (2001).

21. *Revisit Access to DNA*, ARMY TIMES, Dec. 16, 2002, available at <http://www.armytimes.com>.

22. This account is taken from various articles in the *Army Times*, a nationally distributed weekly newspaper, throughout 2002 and early 2003.

23. Tranette Ledford, *One Soldier Charged*, ARMY TIMES, Dec. 16, 2002, at 2, available at <http://www.armytimes.com> [hereinafter Ledford, *One Soldier*].

24. U.S. Dep’t of Army, Fort Hood, Tex. Directorate of Public Works Web Site, *Directorate of Public Works* (Jan. 2, 2003), at <http://www.dpw.hood.army.mil/HTML/TBO/MES/forthood.htm>.

25. U.S. Dep’t of Army, Fort Hood, Tex. Web Site, *III Corps & Fort Hood Statistical Data* (Sept. 30, 2001), at <http://www.hood.army.mil/PAO/Statistics.htm>.

26. Ledford, *One Soldier*, *supra* note 23.

27. *Id.*

28. *Id.*

29. *Id.* Private First Class Payton pled guilty to several offenses based on his involvement in these crimes. A military judge sentenced him to fifteen years of confinement. A pretrial agreement (the military’s version of a plea bargain) limited PFC Payton’s confinement to eight and one-half years. If PFC Payton fully complied with the terms of his pretrial agreement, including testifying truthfully against SPC Reyes, he will serve a maximum of only eight and one-half years, notwithstanding the judge’s sentence. This information about PFC Payton’s pretrial agreement was discussed in open court during his trial. The military also retains a system of parole, for which PFC Payton becomes eligible after serving one-third of his sentence. Specialist Rogers also pled guilty; he received a sentence of nine years of confinement. His pretrial agreement limits his confinement to four years. *Id.* at 4.

30. *Id.* at 2.

31. *Id.*

I saw a man stand up from behind the counter. He pulled two guns out and he shot me twice.”³² Mrs. Moreau “turned, and as she did, both bullets entered her left side [where they remain].” She recalls that she put her hand over the wounds and tried to run. “He chased me outside. As I ran, I fell on the steps and lay down. He shot at my husband but missed him.”³³

Later that morning, both PFC Payton and SPC Rogers turned themselves in and made statements. Specialist Reyes turned himself in on 2 April. As a newspaper account later reported, “Through the course of the investigation, it was discovered that [SPC] Reyes had a tattoo fitting the description” given by a soldier raped in the barracks in January—the letters “CMR” on his chest.³⁴

Three months before the shootings, on 9 January 2002, Private (PVT) Amy Brown was raped and sodomized in her barracks room. She had arrived at Fort Hood for her first assignment less than one week before the rape. Private Brown’s attacker broke into her room wearing a ski mask, gloves, and a cap, locked the door behind him, and told her, “Don’t scream or I’ll cut your throat.”³⁵ The assailant forced PVT Brown to undress while he videotaped her. “I remember him telling me to shut up,” PVT Brown testified. “He covered my mouth and kept telling me to breathe. I tried to fight him off and get to the door. But he grabbed me and threw me to the other side of the room. Then he choked me and kept telling me not to scream or he would slice my throat.”³⁶ He also told PVT Brown that she would see him again.³⁷

Based on SPC Reyes’ tattoo, which the military police (MP) most likely discovered while booking him after his arrest, investigators obtained a search warrant for his barracks room.

There, investigators found a video camera and a videotape labeled “No-no tape,” showing PVT Brown undressing before her rape.³⁸ Investigators also obtained a DNA sample from SPC Reyes, which matched DNA taken from PVT Brown after the rape.³⁹

From 13-16 January 2003, SPC Reyes pled guilty to some offenses and was convicted of others contrary to his pleas. Specialist Reyes stands convicted of the unpremeditated murder of Eric DeSean Davis, the attempted premeditated murders of Mary Moreau and SFC Nathan Moreau, and the rape and sodomy of PVT Brown. He was sentenced to life without parole.⁴⁰

The story does not end there, of course. Largely as a result of PVT Brown’s mother’s complaints to her congressman, Rep. John Culberson, R-Texas sponsored the new statutory provision allowing law enforcement access to the military’s DNA repository. “While police recovered genetic samples during [PVT Brown’s] rape investigation, they were barred by DOD policy from access to Reyes’ DNA data.”⁴¹ According to Rep. Culberson,

The Fort Hood horror story highlighted the need for uniformity and consistency in interpretation and enforcement of the Army’s procedures in providing access to DNA samples If law enforcement had been able to identify a suspect immediately after the rape, it is highly unlikely that this criminal would have been able to hurt anyone else.⁴²

32. Tranette Ledford, *Twice Wounded, Yet ‘Very Fortunate,’* ARMY TIMES, Dec. 16, 2002, available at <http://www.armytimes.com> [hereinafter Ledford, *Twice Wounded*].

33. *Id.*

34. Ledford, *One Soldier*, *supra* note 23, at 3.

35. *Id.*

36. Tranette Ledford, *Fort Hood Soldier Gets Life for Crime Spree*, ARMY TIMES, Jan. 27, 2003, at 2, available at <http://www.armytimes.com/archivepaper.php?f=0ARMYPAPER-1502441.php>.

37. Ledford, *One Soldier*, *supra* note 23, at 3.

38. Tranette Ledford, “*He Shot Me*,” ARMY TIMES, June 24, 2002, at 2, available at <http://www.armytimes.com>.

39. *Id.*

40. United States v. Reyes (Headquarters, Fort Hood, Texas 16 Jan. 2003) (U.S. Dep’t of Army, DA Form 4430-R, Department of the Army Report of Result of Trial (Oct. 1985)). The prosecution never sought the death penalty in SPC Reyes’s case; the list of death-qualifying aggravating factors in the Manual for Courts-Martial (MCM) suggests that it would not have been appropriate. See MCM, *supra* note 10, R.C.M. 1004(c).

41. Ledford, *Law Expands Access*, *supra* note 7, at 1. Specialist Reyes was not a suspect until after the Davis and Moreau shootings. In fact, it was not initially known whether any soldier was responsible for PVT Brown’s rape. Private Brown’s family also reportedly pushed for an examination of the tattoos of all Fort Hood soldiers, despite the lack of any evidence that a soldier was involved in the rape. The Office of the Staff Judge Advocate, III Corps, wisely advised investigators against conducting this search, which may well have been unconstitutional. *Id.*; see MCM, *supra* note 10, MIL. R. EVID. 315.

**Permissible Uses of the DNA Repository Before
10 U.S.C. § 1565a**

Is the 2002 law really new? Or is it really, as the Pentagon claimed, the codification of a long-standing policy? The answer lies somewhere between these two positions. Before the enactment of § 1565a, no statutory provision defined the permissible limits of access to the DNA Repository. Instead, various entries in the Federal Register, memoranda from the Deputy Secretary of Defense and the Assistant Secretary of Defense (Health Affairs),⁴³ and DOD directives defined the limits. As one law review article stated,

In 1991 the Deputy Secretary of Defense authorized the Assistant Secretary of Defense for Health Affairs to facilitate the creation of a DNA registry. In 1993, the Assistant Secretary of Defense for Health Affairs issued a detailed policy for the implementation, organization, and administration for the DOD Registry.⁴⁴

Both of the documents referred to above were memoranda—documents not generally distributed to the public.⁴⁵

The first entry in the Federal Register was published in 1993. It gave notice that the Department of the Army was adding a system of records, namely “a blood smear that can be used for DNA typing to identify human remains.”⁴⁶ This entry said nothing more about the permissible uses of the Repository.⁴⁷

In 1995, the Army gave notice that the “DOD DNA Registry” was established.⁴⁸ The only listed purpose for the Registry was “the identification of human remains.”⁴⁹ This entry also gave notice that the DOD would maintain the samples for seventy-five years and then destroy them.⁵⁰ Although not mentioned in the Federal Register notice, the January 1993 memorandum referred to above that set forth the policy for administration of the Repository stated that, “in extraordinary cases, when no reasonable alternative means of obtaining a specimen for DNA profile analysis is available, a request for access to the DOD Registry . . . shall be routed through the appropriate Secretary of the Military Department or his designee, for approval by the Assistant Secretary of Defense for Health Affairs.”⁵¹

A lawsuit by two service members challenged the 1993-1995 version of the DOD Repository and its attendant policies in court. In *Mayfield v. Dalton*, two marines refused an order to provide specimens for the DNA repository, and both were charged with violating an order from a superior commissioned officer.⁵² In their federal court challenge, the marines alleged that the taking of their DNA without their consent violated the Fourth Amendment.⁵³

The court in *Mayfield* first noted that, although a request for a specimen for purposes other than the identification of remains was possible, “no such request from this program has ever been approved, though it is unclear how many, if any, such requests have been made.”⁵⁴ Further, the plaintiffs conceded “that the military’s stated purpose for the DNA Repository—remains identification—is a benign one. But they argue that the military

42. Ledford, *Law Expands Access*, *supra* note 7, at 1-2. Even though it was PVT Brown’s family who pushed for the expanded DNA access, such access would not have prevented their daughter’s rape—it could only conceivably have helped to prevent the subsequent shootings. The family members of those victims apparently did not complain to Rep. Culberson. *Id.*

43. *See Gill*, *supra* note 2, at 184 and accompanying notes.

44. *Id.*

45. *See* 1991 Repository Memo, *supra* note 5; Memorandum and Policy Statement, Assistant Secretary of Defense (Health Affairs), to Secretaries of the Military Departments, subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (5 Jan. 1993) [hereinafter 1993 Repository Memo].

46. 58 Fed. Reg. 29,207, 29,208 (May 19, 1993).

47. *See generally* Privacy Act of 1974, 5 U.S.C. § 552a (2000).

48. Notices, Department of Defense (DOD) Department of the Army (DA), Privacy Act of 1974; Add a System of Records, 60 Fed. Reg. 31,287 (June 14, 1995).

49. *Id.* at 31,288.

50. *Id.*

51. Gill, *supra* note 2, at 185 (quoting 1993 Repository Memo, *supra* note 45).

52. *Mayfield v. Dalton*, 901 F. Supp. 300, 302 (D. Haw. 1995), *vacated as moot*, 109 F.3d 1423 (9th Cir. 1997). The military trial judge initially dismissed the charges, holding that the regulations underlying the DNA repository were not punitive and thus could not serve as the basis for a violation of an order charge. The Marine Corps appealed that decision. The intermediate military appellate court, however, reversed the trial judge’s decision. *See United States v. Vlacovsky*, No. 9500919, 1995 CCA LEXIS 471, at *2 (N-M. Ct. Crim. App. Oct. 25, 1995) (unpublished), *cited in Gill*, *supra* note 2, at 191 & nn.101-02.

53. *Mayfield*, 901 F. Supp. at 303.

could, at some point in the future, use the DNA samples for some less innocuous purpose”⁵⁵ As prescient as the plaintiffs’ claims now appear, the *Mayfield* court found that, at the time of their suit,

the blood and tissue samples at issue are not to be used as evidence against Plaintiffs, but only as a means of identifying their remains should they be killed in action with the Marine Corps. . . . Plaintiffs have presented no evidence that the military has used or disclosed or has any plans to use or disclose, information gleaned from the DNA samples for any purpose other than remains identification. A challenge to such hypothetical future use, or misuse, as the case may be, of the samples in the DNA registry does not present a justiciable cause or controversy.⁵⁶

The court’s analysis of the plaintiffs’ Fourth Amendment claim is muddy. Although the court cited two of the Supreme Court’s leading cases on the special needs doctrine,⁵⁷ discussed further in part III of this article, the court does not squarely rest its decision on that doctrine, and never mentions the term “special need.”⁵⁸ The court instead performs a straight Fourth Amendment balancing test to conclude that the mandatory provision of DNA samples is a reasonable search.⁵⁹ The court balanced the government’s interest against the intrusion into the plaintiff’s privacy interests and held:

The military has demonstrated a compelling interest in both its need to account internally for the fate of its service members and in

ensuring the peace of mind of their next of kin and dependents in time of war. The court further finds that when measured against this interest, the minimal intrusion presented by the taking of blood samples and oral swabs for the military’s DNA registry, though undoubtedly a “seizure,” is not an unreasonable seizure and thus not prohibited by the Constitution.⁶⁰

While plaintiffs’ appeal to the Ninth Circuit was pending, a court-martial convicted them of failing to obey a lawful order.⁶¹ Subsequently, both plaintiffs were “honorably separated from active duty without ever having given any blood or tissue samples.”⁶² As a result, the court determined that the plaintiffs’ challenge was moot, vacated the lower court’s decision, and remanded the case to the district court with instructions to dismiss the case as moot.⁶³

In its decision, however, the Ninth Circuit noted that “in the intervening time between the district court judgment and oral argument . . . the military changed the repository in ways that appear to respond to some of plaintiffs-appellants’ main concerns.”⁶⁴ The changes included shortening the length of time samples were retained from seventy-five to fifty years, and permitting the destruction of samples upon the donor’s request after separation from the military.⁶⁵

Most important for purposes of this article, the military clarified the “permissible uses” of the samples. This particular clarification read as follows:

54. *Id.* at 302.

55. *Id.* at 304.

56. *Id.* at 303-04 (citation omitted).

57. *Id.* at 303 (discussing *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602 (1989); *Nat’l Treas. Employees Union v. Von Raab*, 489 U.S. 656 (1989)).

58. *Id.*

59. See *infra* notes 166-195 and accompanying text (concerning more recent court decisions concluding that the constitutionality of DNA databanks must be analyzed under the “special needs” test, and not by a simple balancing test). The *Mayfield* court’s opinion could have (and perhaps should have) more clearly rested on a “special need.” See *id.*

60. *Mayfield*, 901 F. Supp. at 304.

61. Gill, *supra* note 2, at 192 and accompanying notes. Both were sentenced to minimal punishments, a reprimand, and restriction to the marine base for one week. *Id.*

62. *Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997).

63. *Id.* at 1427.

64. *Id.* at 1425.

65. *Id.* at 1425-26 & n.1 (quoting Memorandum and Policy Statement, Assistant Secretary of Defense for Health Affairs, subject: Policy Refinements for the Armed Forces Repository of Specimen Samples for the Identification of Remains (2 Apr. 1996)); see also DOD DIR. 5154.24, 1996 version, *supra* note 8, para 3.5.1 (setting forth the same uses), cancelled and superceded by DOD DIR. 5154.24, 2001 version, *supra* note 8 (which does not set forth any uses for the Repository other than remains identification).

3. Permissible uses. Authority to permit the use of any specimen sample in the repository for any purpose other than remains identification is further clarified. [The prior policy] limited use of specimen samples to remains identification (exclusive of internal, quality assurance purposes), but did not prohibit the use under other circumstances in “extraordinary cases” when “no reasonable alternative means of obtaining a specimen for DNA profile analysis is available: and when the request is approved by the [Assistant Secretary of Defense for Health Affairs]. To date no consensual exception request has been approved. This policy limits “extraordinary cases” to cases in which a use other than remains identification is compelled by other applicable law. Consequently, permissible uses of specimen samples are limited to the following purposes:

- a. identification of human remains;
- b. internal quality assurance activities to validate processes for collection, maintenance and analysis of samples;
- c. a purpose for which the donor of the sample (or surviving next-of-kin) provides consent; or
- d. as compelled by other applicable law in a case in which all of the following conditions are present:
 - (1) the responsible DOD official has received a proper judicial order or judicial authorization;
 - (2) the specimen is needed for the investigation or prosecution of a

crime punishable by one year or more of confinement;

(3) no reasonable alternative means for obtaining a specimen for DNA profile analysis is available; and

(4) the use is approved by the [Assistant Secretary of Defense, Health Affairs] after consultation with the DOD General Counsel.⁶⁶

This and the other “refinements” adopted in 1996 were “designed to reaffirm DOD’s longstanding commitment to, and strengthen procedures for, privacy protections concerning the specimens and any DNA analysis that may be performed” on them.⁶⁷ The law enforcement use “refined” in 1996 remains unchanged, despite the passage of 10 U.S.C. § 1565a in 2002, as of the latest Federal Register posting on 23 March 2003.⁶⁸

Comparing the permissible law enforcement use of DNA samples before and after the passage of the 2002 law reveals that much of the new statute is indeed codification of longstanding policy, with two exceptions. First, while the old policy limits access for “investigation or prosecution of crimes punishable by one year or more in confinement,” (changed to “a felony” in the statute), the statute also permits access for “any sexual offense.”⁶⁹

This is new, but does it actually broaden permissible access to the DNA Repository? The answer is that it does not. Access is not limited to nonconsensual sexual offenses. The military continues to criminalize (and prosecute, although normally not as the primary offense) many consensual sexual offenses including adultery,⁷⁰ consensual oral and anal sodomy,⁷¹ and indecent acts,⁷² which include sex involving more than two people or sex in places where the participants are “reasonably likely” to be viewed by those other than the participants—even if no third party actually views the acts.⁷³ In addition, the military routinely prosecutes consensual sexual offenses involving trainees and drill sergeants—usually as a violation of a lawful general regulation⁷⁴ and fraternization.⁷⁵ Finally, conspiracy to

66. DOD DIR. 5154.24, 2001 version, *supra* note 8 (emphasis added); *see also* 62 Fed. Reg. 51,835, 51,836 (Oct. 3, 1997) (publishing notice of the new law enforcement use of the DNA samples maintained in the repository). This use was also published twice without change in the Federal Register. Notices, Department of Defense (DOD), Department of the Army (DA), Privacy Act of 1974; System of Records, 63 Fed. Reg. 10,205, 10,207 (Mar. 2, 1998); Notices, Department of Defense (DOD), Department of the Army (DA), Privacy Act of 1974; System of Records, 68 Fed. Reg. 14,954, 14,955 (Mar. 27, 2003) (publishing the same regulation again without change, despite passage of the new law).

67. *Mayfield*, 109 F.3d at 1426 n.1.

68. 68 Fed. Reg. at 14,955.

69. *See id.*; *cf.* 10 U.S.C.S. § 1565a (LEXIS 2003).

70. MCM, *supra* note 10, pt. IV, ¶ 62.

71. *Id.* ¶ 51.

72. *Id.* ¶ 90.

commit any consensual offense,⁷⁶ aiding and abetting any consensual sexual offense,⁷⁷ attempting to commit any consensual sexual offense,⁷⁸ and solicitation of any consensual sexual offense⁷⁹ are also prohibited by military law.

The previous policies, however, already covered all of these offenses. Of the consensual sexual offenses listed above, only adultery limited the maximum punishment to no more than one year of confinement.⁸⁰ As such, it was covered by the previous policies, which permitted access for investigation and prosecution of crimes punishable by one year or more of confinement. Section 1565a continues to cover this offense, albeit in a different manner. While adultery may not be a “felony,” usually defined as any offense with a maximum punishment of more than one year of confinement,⁸¹ it is a “sexual offense.”⁸²

The second and more significant difference between the old policy and the new statute is that the statute makes access to the DNA Repository *mandatory* upon receipt of a “valid order” of a federal court or military judge.⁸³ The previous policies (and the latest policy published in the Federal Register on 23 March 2003) still required approval by the Assistant Secretary of Defense for Health Affairs as one of four required conditions for access, suggesting that access was permissive even after the receipt of a “proper judicial order.”⁸⁴ This leads to the conclusion that the statute was intended to eliminate any discretion on the part of military officials, so long as the request for disclosure meets the basic requirements for access.

What other reasons are there to codify what was already substantially DOD policy? A cynical answer points to the publicity that surrounded Rep. Culberson’s amendment. Legally, however, there is at least one obvious reason to codify the policy. Now, instead of allowing DOD officials to change what had been mere “policy” by memorandum or notice in the Federal Register, now only Congress can effect change. Not only

does the statute wrest both the responsibility and authority for changes and “refinements” away from the DOD, but congressional action is probably less likely than change by policy memorandum or notice. As already stated, the amendment also clarifies to military officials that access to the Repository is mandatory and not discretionary if a request meets the statutory prerequisites.

Is the DNA Repository Constitutional in Light of Its Access for Law Enforcement Purposes?

Is the mandatory suspicionless provision of samples for the DNA Repository—including for access for certain law enforcement purposes mandated by the 2002 statute—a violation of the Fourth Amendment? The answer to this question lies in the “special needs” exception to the warrant and probable cause requirements. This section is divided into four parts: (1) an overview of the special needs exception up to the Supreme Court’s decisions in *Edmond* and *Ferguson*; (2) a discussion of the impact of *Edmond* and *Ferguson* on special needs analysis; (3) an analysis of other DNA databank cases both before and after *Edmond* and *Ferguson*; and (4) an application of these principles to the military’s DNA Repository.

Overview of the Special Needs Exception

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

73. *United States v. Izquierdo*, 51 M.J. 421 (1999) (sexual acts are indecent when they are committed openly and notoriously, including acts performed in such a place and under such circumstances that they are reasonably likely to be seen by others).

74. MCM, *supra* note 10, ¶ 16.

75. *Id.* ¶ 83.

76. *Id.* ¶ 5.

77. *Id.* ¶ 77.

78. *Id.* ¶ 80.

79. *Id.* ¶ 105.

80. *Id.* ¶ 62(e) (limiting maximum confinement for adultery to one year).

81. BLACK’S LAW DICTIONARY 633 (7th ed. 1999).

82. 10 U.S.C.S. § 1565a (LEXIS 2003).

83. *Id.*

84. DOD DIR. 5154.24, 1996 version, *supra* note 8, para. 3.5.1.4.1.

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸⁵

The collection of blood or other tissue samples by the federal government is a search under the Fourth Amendment.⁸⁶ Accordingly, these searches must be reasonable to avoid the warrant requirement. As the Supreme Court stated,

What is reasonable, of course, “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” Thus, the permissibility of a particular practice “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”⁸⁷

In most criminal cases, courts strike the balance in favor of the warrant and probable cause requirements, the satisfaction of which make a search “reasonable.”⁸⁸ There are exceptions to these requirements, however, “when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’”⁸⁹ Put another way, “[I]f there [is] a proper governmental purpose other than law enforcement, there [is] a ‘special need,’ and the Fourth Amendment then require[s] the familiar balancing between that interest and the individual’s privacy interest.”⁹⁰

The special needs doctrine originated in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.*,⁹¹ a school search case. “T.L.O. was a student at a New Jersey public school when she was caught smoking in the restroom. A teacher at the school brought T.L.O. to the school principal who searched her purse without a warrant. The search uncovered cigarettes, marijuana, rolling paper, and other drug paraphernalia.”⁹² The Supreme Court upheld the search, even in the absence of a warrant, based on the reasonableness of the search under all of the circumstances.⁹³ Justice Blackmun concurred, explaining, “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”⁹⁴

Following *T.L.O.*, the Supreme Court adopted Justice Blackmun’s “special needs” terminology in *O’Connor v. Ortega*,⁹⁵ which authorized a public employer’s warrantless search of a public employee’s workplace when there was some individualized suspicion of work-related misconduct, and in *Griffin v. Wisconsin*,⁹⁶ which authorized the warrantless search of a probationer’s home, also based on individualized suspicion. The Supreme Court subsequently expanded the special needs exception to include suspicionless searches in *Skinner v. Railway Labor Executives Association*⁹⁷ and *National Treasury Employees Union v. Von Raab*,⁹⁸ both decided on the same day.

Skinner upheld regulations of the Federal Railway Administration that mandated the warrantless, suspicionless, mandatory

85. U. S. CONST. amend. IV.

86. *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (holding that the compelled intrusion into the body for blood to analyze for alcohol content is a Fourth Amendment search; *see also* *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 616-17 (1989) (holding that a breathalyzer test is also a Fourth Amendment search) (citing *California v. Trombetta*, 467 U.S. 479, 481 (1984)).

87. *Skinner*, 489 U.S. at 619 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

88. *Id.*

89. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

90. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.17 (2001).

91. 469 U.S. 325 (1985).

92. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 262 (2000) (footnotes omitted). Mr. Dodson’s article provides an excellent overview of the special needs cases up to the time of the article’s publication.

93. *T.L.O.*, 469 U.S. at 343.

94. *Id.* at 351 (Blackmun, J., concurring).

95. 480 U.S. 709 (1987).

96. 483 U.S. 868 (1987).

97. 489 U.S. 602 (1989).

98. 489 U.S. 656 (1989).

blood and urine testing of a defined category of railroad employees “engaged in safety sensitive tasks.”⁹⁹ The regulations concerned mandatory testing of employees involved in certain serious train accidents, as well as the discretionary breath and urine testing of railroad employees who violated certain safety rules, such as “noncompliance with a signal and excessive speeding.”¹⁰⁰ In *Skinner*, the compelling government interest that rose to a legitimate special need was regulating the conduct of railroad employees “engaged in safety-sensitive tasks.”¹⁰¹ Applying the balancing test—that is, the nature of the intrusion on the employees’ Fourth Amendment interests against the government’s legitimate interests—the Court found that the regulations in question “suppl[ied] an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol.”¹⁰²

Rejecting a requirement of individualized suspicion, the Court found that

a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.¹⁰³

Significantly, the employer used results of the suspicionless tests for administrative sanctions against the employee, including dismissal, but did not use them “to assist in the prosecution of employees.”¹⁰⁴ In fact, the Court reserved the question of

whether “routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext or otherwise impugn the administrative nature of the . . . program.”¹⁰⁵

Von Raab also approved warrantless, suspicionless drug screening urinalyses of certain federal employees who applied for or occupied specific positions in the U.S. Customs Service. The approved testing positions were: (1) those positions with “direct involvement in drug interdiction or enforcement of related laws;” and (2) those positions which required employees to carry firearms.¹⁰⁶ *Von Raab* reiterated that “the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer.”¹⁰⁷ The Court recognized, nonetheless, that the government had a “compelling interest in ensuring the front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment,”¹⁰⁸ and also a substantial interest in “deter[ring] drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions.”¹⁰⁹ These interests, apart from normal law enforcement, rose to a legitimate “special need” that justified “departure from the ordinary warrant and probable cause requirements”¹¹⁰ and led to the Court’s conclusion that the searches were reasonable. The fact that the test results were not “turned over to any other agency, including criminal prosecutors, without the employee’s written consent” was crucial to the Court’s decision that the searches were reasonable.¹¹¹

The Supreme Court also approved suspicionless urinalysis testing of schoolchildren, an issue T.L.O. left open, under the special needs exception in two cases, *Vernonia School District 47J v. Acton*, which concerned student athletes,¹¹² and *Board of*

99. *Skinner*, 489 U.S. at 620.

100. *Id.* at 611.

101. *Id.* at 620.

102. *Id.* at 629.

103. *Id.* at 624.

104. *Id.* at 621.

105. *Id.* at 621 n.5.

106. *Nat’l Treas. Employees Union v. Von Raab*, 489 U.S. 656, 660 (1989).

107. *Id.* at 665.

108. *Id.* at 670.

109. *Id.* at 666.

110. *Id.*

111. *Id.* at 663.

112. 515 U.S. 646 (1995).

Education of Independent School District No. 92 v. Earls, which concerned students engaged in extracurricular activities.¹¹³ The special need justifying these searches was deterring drug use by schoolchildren, and in particular, deterring drug use in the categories of students subjected to the testing.¹¹⁴ In both cases, the Court emphasized the limited uses of positive urinalysis results; neither school district intended to disclose the test results to law enforcement officials.¹¹⁵

Limiting Special Needs—Edmond and Ferguson

Against what seemed to be an ever-expanding exception to the Fourth Amendment under the rubric of “special needs” came the Supreme Court’s two decisions in *City of Indianapolis v. Edmond*¹¹⁶ and *Ferguson v. City of Charleston*,¹¹⁷ both of which significantly limited the doctrine. After these cases, suspicionless searches violate the Fourth Amendment when the primary or immediate purpose of the search is not divorced from normal, ordinary, or general law enforcement purposes, even though the ultimate purpose of the searches may be benign.

In *Edmond*, the Court considered “the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.”¹¹⁸ The Court distinguished prior constitutional suspicionless searches, including special needs searches: “In none of these cases . . . did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal

wrongdoing.”¹¹⁹ Passing constitutional muster before *Edmond* were “brief, suspicionless seizures of motorists at fixed Border Patrol checkpoints designed to intercept illegal aliens,”¹²⁰ “a sobriety checkpoint aimed at removing drunk drivers from the road,”¹²¹ and hypothetically, “a similar type of roadblock with the purpose of verifying drivers’ licenses and vehicle registrations.”¹²² “[W]hat principally distinguishes these checkpoints from those we have previously approved is their primary purpose.”¹²³

In *Edmond*, all parties agreed that the primary purpose of the checkpoint was interdicting narcotics, but the city argued that other checkpoints also had the “ultimate purpose of arresting those suspected of committing crimes.”¹²⁴ The Court squarely rejected this argument. “Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”¹²⁵

The City also argued that the checkpoint program was “justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations.”¹²⁶ The Court also rejected this argument. “If this were the case . . . , law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose”¹²⁷ This “purpose inquiry . . . is to be conducted only at the programmatic level and is not an invita-

113. 536 U.S. 822 (2002).

114. *Vernonia*, 515 U.S. at 661; *Earls*, 536 U.S. at 836.

115. In *Vernonia*, “the results of the tests [were] disclosed only to a limited class of school personnel who have a need to know; and they [were] not turned over to law enforcement authorities or used for any internal disciplinary function.” *Vernonia*, 515 U.S. at 658. In *Earls*, the “test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences.” *Earls*, 536 U.S. at 833.

116. 531 U.S. 32 (2000).

117. 532 U.S. 67 (2001).

118. *Edmond*, 531 U.S. at 34.

119. *Id.* at 38.

120. *Id.* at 37 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

121. *Id.* (citing *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990)).

122. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)).

123. *Id.* at 40.

124. *Edmond*, 531 U.S. at 42.

125. *Id.*

126. *Id.* at 46.

127. *Id.*

tion to probe the minds of individual officers acting at the scene.”¹²⁸

As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.¹²⁹

Ferguson followed *Edmond*, and further refined the “primary purpose” rule. In addition, *Ferguson* faced the issue of a true “mixed motive” purpose, distinguishing the ultimate purpose, which may be a legitimate special need, from the “immediate purpose, which, if designed to obtain evidence . . . that would be turned over to police and that could be admissible in subsequent criminal prosecutions,” violates the Fourth Amendment.¹³⁰

At issue in *Ferguson* was the “constitutionality of a state hospital’s performance of a diagnostic test to obtain evidence of a patient’s criminal conduct for law enforcement purposes”¹³¹ Concerned about cocaine use by pregnant patients, a public hospital in Charleston, South Carolina “began to order drug screens to be performed on urine samples from maternity patients who were suspected of using cocaine.”¹³² Although at first, the hospital merely used positive results for counseling and treatment, the hospital soon offered its “cooperation in prosecuting mothers whose children tested positive for drugs at birth.”¹³³ The county solicitor took the lead in developing the

hospital policy. If a woman in labor tested positive for drugs, “the police were to be notified without delay and the patient promptly arrested.”¹³⁴ If a pregnant woman not yet in labor tested positive, “the police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor.”¹³⁵

A jury ruled in favor of the city. On appeal, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed under the special needs exception. According to the Fourth Circuit, the drug screens were for “medical purposes wholly independent of an intent to aid law enforcement efforts . . . and [thus] the interest in curtailing the pregnancy complications and medical costs associated with maternal cocaine use outweighed . . . a minimal intrusion on the patients.”¹³⁶

The Supreme Court reversed. This case was unlike the Court’s prior special needs cases approving drug testing, because in those cases, the “nature of the ‘special need’ . . . advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement.”¹³⁷ In contrast, “the central and indispensable feature of [Charleston’s] policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”¹³⁸

The City argued that its “ultimate purpose[,] . . . protecting the health of both the mother and child[,] is a beneficent one.”¹³⁹ This did not assuage the Court, which would “not simply accept the State’s invocation of a ‘special need.’ Instead, we [carry] out a ‘close review’ of the scheme at issue before concluding” whether the need at issue is special.¹⁴⁰ In carrying out this “close review,” the Court looks to the “programmatic purpose,” and considers “all the available evidence to deter-

128. *Id.* at 48 (citation omitted).

129. *Id.* at 47.

130. *Ferguson v. City of Charleston*, 532 U.S. 67, 69, 86 (2001).

131. *Id.* at 69.

132. *Id.* at 70.

133. *Id.*

134. *Id.* at 72.

135. *Id.*

136. *Id.* at 75.

137. *Id.* at 79.

138. *Id.* at 80.

139. *Id.* at 81.

140. *Id.*

mine the relevant primary purpose,” as well as whether the “purpose actually served” by the searches is “ultimately indistinguishable from the general interest in crime control.”¹⁴¹

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of [the hospital’s] policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose. Such an approach is inconsistent with the Fourth Amendment.¹⁴²

A recent law review article highlights an important question that both *Edmond* and *Ferguson* fail to answer:

[N]either *Edmond* nor *Ferguson* reaches the more vexing question of what evidence can be used to infer purpose when the government contends that its immediate purpose in instituting an investigative practice is something other than (or in addition to) pure crime control. The validity of mixed motive programs will be more difficult to ascertain.¹⁴³

DNA Databank Decisions Before and After *Edmond* and *Ferguson*

Courts had decided numerous cases that concerned DNA databanks before *Edmond* and *Ferguson*.¹⁴⁴ Some courts employed the special needs exception to the uphold mandatory extraction of blood or other samples for inclusion in DNA databanks, and others simply performed a traditional Fourth Amendment balancing test to assess the searches’ reasonableness.¹⁴⁵ For example, in the earliest case upholding a state DNA databank, *Jones v. Murray*,¹⁴⁶ the Fourth Circuit, discussed the special needs exception, but did not rely on that exception for its decision to uphold the DNA data bank at issue. Rather, the court performed a straight Fourth Amendment balancing test to determine the reasonableness of the searches at issue.¹⁴⁷

Jones concerned the constitutionality of a Virginia statute that required all convicted felons to submit blood samples for DNA analysis “for the purpose of criminal law enforcement. . . . Six inmates . . . challenged the statute’s constitutionality, contending that it authorizes the involuntary extraction of blood in violation of the Fourth Amendment.”¹⁴⁸ Virginia argued that the testing was justified by the special needs exception, as set forth in *Skinner* and *Von Raab*.¹⁴⁹ While the district court relied on the exception for its decision, the Fourth Circuit declined to apply the special needs exception, instead resting its decision on a “separate category” of cases involving the “Fourth Amendment rights of prison inmates . . . to which the usual per se requirement of probable cause does not apply.”¹⁵⁰ Balancing the “minor intrusion” of the blood sampling process against “the government’s interest in preserving a permanent identification record of convicted felons for resolving past and future crimes,” the court found that the government’s interest outweighed the intrusion of the blood sample.¹⁵¹

141. *Id.* at 81.

142. *Id.* at 83-84 (footnotes omitted).

143. Kaye, *supra* note 1, at 495-96 (footnotes omitted).

144. See Cronan, *supra* note 15, at 142-44; Susan M. Dadio, *Maryland’s DNA Data Base System and Repository: Does It Pass Constitutional Muster?*, 25 U. BALT. L. REV. 47, 53-71 (1995) (discussing pre-*Edmond* cases concerning DNA databanks).

145. See Kaye, *supra* note 1, at n.162 and accompanying text (listing decisions both accepting and rejecting the special needs exception as the appropriate analysis to determine the constitutionality of various DNA databanks).

146. 962 F.2d 302 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992).

147. *Id.* at 304-08.

148. *Id.* at 304.

149. *Id.* at 305-06 (citations omitted).

150. *Id.* at 307 n.2.

151. *Id.* at 307.

Similarly, in *Rise v. Oregon*,¹⁵² the Ninth Circuit upheld a typical scheme requiring those convicted of certain offenses (murder, sexual offenses, or conspiracies or attempts to commit sexual offenses) to provide blood samples to the state Department of Corrections for the state DNA databank.¹⁵³ The plaintiffs argued that the statute violated the Fourth Amendment. The district court upheld the statute, holding that it served a special need other than law enforcement, and was related to penal administration.¹⁵⁴ The Ninth Circuit held that the statute was constitutional “even if its only objective is law enforcement.”¹⁵⁵ The court considered a number of factors, including

the reduced expectations of privacy held by persons convicted of one of the felonies to which [the statute] applies, the blood extractions’ relatively minimal intrusion into these persons’ privacy interests, the public’s incontestable interest in preventing recidivism and identifying and prosecuting murderers and sexual offenders, and the likelihood that the DNA data bank will advance this interest¹⁵⁶

The Ninth Circuit ultimately held that the statute was both reasonable and constitutional under the Fourth Amendment.¹⁵⁷

In contrast to the straight balancing tests performed by the Fourth and Ninth Circuits in *Jones* and *Rise*, respectively, the Second Circuit upheld Connecticut’s DNA collection program (requiring those convicted of specific felonies to provide samples) with a straight application of the special needs exception. In *Roe v. Marcotte*,¹⁵⁸ the court held that the DNA collection program advanced the government’s significant interests in deterring future crimes, as well as in solving past crimes, because of the high rate of recidivism among sexual

offenders.¹⁵⁹ The court held that this significant government interest rose to a special need and outweighed the “minimal intrusion involved.”¹⁶⁰ *Marcotte* found the special needs analysis “more compelling” than the Fourth Circuit’s analysis in *Jones*, which both *Marcotte* and the concurring opinion in *Jones* concluded had a “strikingly truncated view of the Fourth Amendment protections afforded to a convicted felon.”¹⁶¹

Edmond and *Ferguson* significantly changed the landscape surrounding the analysis of the constitutionality of DNA databanks. Of the subsequent cases discussing the impact of *Edmond* and *Ferguson* on the issue of the constitutionality of DNA databanks, all but one upheld the Repository and found it constitutional. Nearly all agree, however, that after *Edmond* and *Ferguson*, the special needs exception, rather than a traditional Fourth Amendment balancing test, controls analysis of the issue.¹⁶²

Many post-*Edmond* and *Ferguson* DNA databank cases faced the issue of the constitutionality of the federally mandated DNA Analysis Backlog Elimination Act of 2000 (DNA Act),¹⁶³ “which requires U.S. probation officers to collect a DNA sample from each individual on supervised release ‘who is, or has been, convicted of a qualifying federal offense.’”¹⁶⁴ The database established by the Act is known by the acronym CODIS. The first three cases to test the constitutionality of the DNA Act after *Edmond* and *Ferguson* continued to perform a straight Fourth Amendment balancing test and did not analyze the impact, if any, of *Edmond* and *Ferguson* on their analysis. All three determined that, under the straight balancing test, the DNA Act was constitutional.¹⁶⁵ The first case to discuss the impact of *Edmond* and *Ferguson* on the analysis of the constitutionality of the DNA Act was *United States v. Reynard*.¹⁶⁶ The parties in *Reynard* agreed that the “sole Fourth Amendment issue in this case [was] whether the ‘special needs exception’ .

152. 59 F.3d 1556 (1995), *cert. denied*, 517 U.S. 1160 (1996).

153. *Id.* at 1558.

154. *Id.* at 1559 (citations omitted).

155. *Id.* (citation omitted).

156. *Id.* at 1562; *see also* *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (adopting the rationale of *Rise* and *Jones* to uphold Colorado’s DNA databank statute).

157. *Id.*

158. 193 F.3d 72 (2d Cir. 1999).

159. *Id.* at 79, 82.

160. *Id.* at 80.

161. *Id.* at 81 (citing *Jones*, 962 F.2d at 311 (Murnaghan, J., concurring in part and dissenting in part)).

162. *See infra* notes 166-195 and accompanying text.

163. 42 U.S.C.S. § 14135 (LEXIS 2003).

164. *United States v. Reynard*, 220 F. Supp. 2d 1142, 1145 (S.D. Cal. 2002) (quoting 42 U.S.C. § 14135a(a)(2) (2000)).

. . . permits the collection of DNA samples from individuals” covered by the DNA Act.¹⁶⁷ After examining *Ferguson*, the court concluded that the Ninth Circuit’s decision in *Rise* was not controlling.¹⁶⁸ The court analyzed the issue by distinguishing the law’s immediate and ultimate purposes,¹⁶⁹ determining that the “immediate purpose” for the DNA Act was “to permit probation officers to fill the CODIS database with the DNA fingerprints of all qualifying” subjects.¹⁷⁰ Beyond this immediate purpose, the court found

at least two purposes that go beyond the normal need for law enforcement. First, the searches contribute to the creation of a more accurate criminal justice system. Second, the searches allow for a more complete DNA database, which will assist law enforcement agencies to solve future crimes that have not yet been committed.¹⁷¹

These purposes, concluded the court, established a special need that outweighed the diminished privacy expectations of the subjects, and made the DNA Act constitutional.¹⁷²

Three other courts analyzing the constitutionality of the DNA Act also found it constitutional under a special needs analysis.¹⁷³ One additional case, *Nicholas v. Goord*,¹⁷⁴ while discussing the constitutionality of a state DNA database instead of the federal DNA Act, nonetheless contains an excellent anal-

ysis of the impact of *Edmond* and *Ferguson* on the analysis of DNA data bank issues, as well as a complete discussion of DNA databank cases that preceded *Edmond* and *Ferguson*. The court first determined that *Edmond* and *Ferguson* “cast doubt on at least one aspect of *Marcotte*’s [the Second Circuit’s pre-*Ferguson* decision on DNA databanks] application of the ‘special needs doctrine’”¹⁷⁵ because it did not undertake a “‘close review’ to determine the primary purpose of the statute This principle represents a departure from *Marcotte*, which engaged in no such review.”¹⁷⁶

Moreover, the court found at least two issues raised by the decisions . . . that significantly affect the analysis of DNA indexing statutes: (1) whether traditional Fourth Amendment balancing is available in the absence of “special needs[;]” and (2) what purposes of a DNA indexing statute are relevant for determining “special needs.”¹⁷⁷

Answering the first question, the court found that *Edmond* and *Ferguson* “allow no room for a classic Fourth Amendment ‘balancing’ analysis except in those cases meeting the ‘special needs’ threshold.”¹⁷⁸ This conclusion “casts doubt on the majority of the cases upholding DNA databanks” before the recent Supreme Court decisions, although the court allowed that it would not necessarily change the outcome of those cases.¹⁷⁹ Answering the second question, the court engaged in the “close review” mandated by *Ferguson* and concluded that “it is beyond question that the primary purpose of the statute is

165. The first case to face the question of the constitutionality of the DNA Act was *Groceman v. Dep’t of Justice*, Civil Action No. 3:01-CV-1619-G, 2002 U.S. Dist. LEXIS 11491, at *10 n.2 (N.D. Tex. June 27, 2002) (considering the special needs doctrine, but finding that “in determining the reasonableness of the search under the [DNA] Act, the balancing approach [of *Jones*, *Rise*, and other courts] . . . is more appropriate because the [DNA] Act more closely resembles the procedures in those states”). *Groceman* did not discuss the impact, if any, of *Edmond* and *Ferguson* on its analysis. The second and third cases, both from Oregon, found *Rise* to be controlling, and also did not discuss the impact of the *Edmond* and *Ferguson* on their analysis. *United States v. Meier*, CR No. 97-72 HA, 2002 U.S. Dist. LEXIS 25755, *11-13 (D. Or. Aug. 6, 2002); *United States v. Lujan*, No. CR No. 98-480-02 HA, 2002 U.S. Dist. LEXIS 25754, *1-13 (D. Or. July 8, 2002).

166. *Reynard*, 220 F. Supp. 2d at 1145.

167. *Id.* at 1165.

168. *Id.* at 1166 n.29.

169. *Id.* at 1167.

170. *Id.*

171. *Id.* at 1168.

172. *Id.*

173. *United States v. Kimler*, No. 02-3097, 2003 U.S. App. LEXIS 13586 (10th Cir. July 7, 2003); *Miller v. United States Parole Comm’n*, 259 F. Supp. 2d 1166 (D. Kan. 2003); *United States v. Sczubelek*, 255 F. Supp. 2d 315 (D. Del. 2003).

174. No. 01 Civ. 7891, 2003 U.S. Dist. LEXIS 1621 (S.D.N.Y. Feb. 6, 2003). *Nicholas* discussed a constitutional challenge to a New York state DNA databank law that is “substantially similar to the federal statute on DNA collection.” *Miller*, 259 F. Supp. 2d at 23 n.38.

175. *Nicholas*, 2003 U.S. Dist. LEXIS 1621, at *30 (criticizing *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999)).

176. *Id.* at *36 (citations omitted).

177. *Id.* at *35.

178. *Id.*

to solve crimes”¹⁸⁰ Whether this reflected a “need beyond the normal need for law enforcement” and thus qualified as a special need was a trickier question. The court reasoned that because the databank would not be used “to investigate past crimes,” but instead was “to maintain information available to solve future crimes,”¹⁸¹ this purpose was not a “‘normal’ or ‘ordinary’ purpose of law enforcement.”¹⁸²

Nicholas did not explain how solving future crimes was not a general purpose of law enforcement as the Supreme Court described in *Ferguson*, *Edmond*, or *Delaware v. Prouse*.¹⁸³ After all, preventing and solving *all* crimes, no matter when committed, is the essential essence of law enforcement, whether normal, ordinary, general, or otherwise. Nor did the court address the many instances police use DNA databanks to solve past crimes (as opposed to future crimes), including both “cold” cases and those for which an innocent person is imprisoned. Finally, the court did not address the fact, apparent to anyone who reads a daily newspaper, that solving crimes using DNA databanks is becoming more and more common every day.¹⁸⁴

Nonetheless, once it determined that solving future crimes was not a normal or ordinary purpose of law enforcement, *Nicholas* had no problem concluding that the governmental interest at issue and the efficacy of the program in meeting that interest outweighed the intrusion into the subject’s privacy interests.¹⁸⁵ Accordingly, the court concluded that, “taking into account all of the factors considered above—the decreased expectation of privacy to be accorded convicted felons who are incarcerated, the minimal intrusiveness of the sampling, and the

extremely strong governmental interest in solving crimes—New York State’s DNA indexing program does not violate the Fourth Amendment.”¹⁸⁶

*United States v. Miles*¹⁸⁷ is the only case to hold that the DNA Act was unconstitutional after *Edmond* and *Ferguson*. Although *Miles* was decided before *Nicholas*, it completely rejects *Nicholas*’s conclusions. The import of *Edmonds* and *Ferguson*, according to *Miles*, is that “the Supreme Court has gone to great lengths to require something more than the assertion of a general law enforcement need to justify a regime of suspicionless searches.”¹⁸⁸ As the Supreme Court mandated in *Ferguson*, *Miles* next examined “all the available evidence,” rather than the “government’s retrospective justifications” for the DNA Act to determine its primary purpose.¹⁸⁹ “Thus, the court examine[d] each of the asserted governmental interests to determine whether such interest is in fact an actual primary purpose of the [DNA Act] and, if so, whether that interest can be distinguished from law enforcement.”¹⁹⁰

First, examining the purported primary purpose of expanding the CODIS database, the court found it “intellectually dishonest to decouple the collection of information for use in CODIS from the law enforcement purpose for which CODIS was created.”¹⁹¹ Second, in response to the government’s asserted interest in advancing the accurate prosecution of crimes, the court found that “[i]f a convicted felon wants to be exonerated of a crime for which he is wrongly accused, he will presumably submit voluntarily to a DNA test It is disingenuous for the government to state that it needs to exonerate people who do not want to be exonerated.”¹⁹²

179. *Id.* at *35-36.

180. *Id.* at *39.

181. *Id.* at *43.

182. *Id.* at *46.

183. 440 U.S. 648 (1979).

184. See generally The Innocence Project, *DNA News* (Aug. 12, 2003), at www.innocenceproject.org. This Web site states that, as of 5 August 2003, DNA analysis has exonerated 131 people of crimes for which they had been convicted. In each case, DNA analysis conclusively established that the convicted person could not have been the perpetrator of the offense. Thirty-three of the first 123 people exonerated had confessed to the crimes. *Id.*

185. *Nicholas*, 2003 U.S. Dist. LEXIS 1621, at *64. *Nicholas* noted that the privacy interest of a convicted felon “is entitled to much less weight than the privacy interest of an individual who has not [been convicted].” *Id.* at *56.

186. *Id.* at *63-64.

187. 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

188. *Id.* at 1137 (footnote omitted).

189. *Id.* at 1138.

190. *Id.*

191. *Id.* at 1139 n.6.

192. *Id.* at 1139.

In any case, the asserted interest in prosecuting crimes accurately is indistinguishable from the government's basic interest in enforcing the law. Any time the government attempts to solve or prosecute crime, the presumption is that the government's objective is to do so accurately. The accurate prosecution of crime is an inherent and implicit goal of the government's ordinary law enforcement objective.¹⁹³

Finally, as to the government's third asserted interest, reducing recidivism, the court determined that this was "collateral to the law enforcement purpose of the Act Under *Ferguson*, a program of suspicionless searches cannot be justified by its ultimate purpose . . . if its immediate purpose is to gather evidence for use in investigating and prosecuting crimes."¹⁹⁴ Finding no primary purpose "other than its use as a general law enforcement tool," *Miles* held that the DNA Act violated the Fourth Amendment when it required *Miles* "without any individualized suspicion to submit a blood sample."¹⁹⁵

Applying Edmond, Ferguson, and Other DNA Databank Decisions to the DOD Repository

How do *Edmond*, *Ferguson*, and other subsequent decisions discussing the constitutionality of DNA databanks affect the constitutionality of the DOD Repository? A careful reading of these cases suggests that they have fundamentally shifted the ground beneath any pre-*Edmond* analysis. First, *Reynard*, *Nicholas*, and *Miles*, as well as other post-*Edmond* and *Ferguson* cases, establish that one must examine the constitutionality of the Repository using the special needs exception, rather than a traditional Fourth Amendment balancing test. Second, under the special needs exception, allowing access to the Repository for law enforcement purposes clearly makes obtaining samples for the DOD Repository a mixed motive search, most analogous to the search at issue in *Ferguson*, and complicates the question of the Repository's constitutionality.¹⁹⁶

The government's interest in identifying the remains of fallen service members is unquestionably a proper government purpose apart from normal or general law enforcement, and thus qualifies as a special need.¹⁹⁷ The mandatory provision of samples for the express purpose of investigating or prosecuting felonies or any sexual offense is not such a special need, unless one accepts the special need propounded in *Nicholas*—the investigation of future crimes. It is questionable, however, whether the distinction between investigating past and future crimes applies to samples in the DOD Repository when: (1) the samples are not used to expand the CODIS database; (2) there is no issue of recidivism, because the service members must provide samples notwithstanding the lack of any conviction for or suspicion of any crime; (3) there is no need to deter convicted persons from committing further crimes because few if any of the DNA sample donors will have committed any crimes; and (4) although service members may have a diminished expectation of privacy for some purposes,¹⁹⁸ that expectation is not as diminished as it is for the convicted felons against which the government's interests were balanced in *Nicholas* and other cases. If service members who provide samples to the DOD Repository have any diminished expectation of privacy, it will not be the result of a conviction for any offense—the rationale for the diminished expectation of privacy of the subjects of the usual DNA databank.

If *Nicholas*'s rationale does not apply to the DOD Repository because of the differences set forth above, then the constitutionality of the Repository depends on the primary or immediate purpose of the Repository—remains identification or law enforcement. Undertaking the close review of the programmatic purposes of the DOD Repository that *Ferguson* demands leads easily to the conclusion that the Repository was established for—and remains established for—the primary purpose of identifying remains. Moreover, because the DOD has reportedly granted access only once thus far for any purpose other than remains identification,¹⁹⁹ the "purpose actually served" by the Repository is also divorced from general, normal, or ordinary law enforcement. Accordingly, as of this writ-

193. *Id.*

194. *Id.* (citation omitted).

195. *Id.* at 1141.

196. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 79-81 (2001).

197. *But see* Robert Craig Scherer, *Mandatory Genetic Dogtags and the Fourth Amendment: The Need for a New Post-Skinner Test*, 85 GEO L. J. 2007 (1997); *see also* Elizabeth Reiter, *The Department of Defense DNA Repository: Practical Analysis of the Government's Interest and the Potential for Genetic Discrimination*, 47 BUFF. L. REV. 975 (1999). Reiter argues that *Mayfield* addressed the wrong issue. The issue was not "whether the government had a compelling interest in the identification of remains in general," but "whether the DOD has a compelling interest in the identification of remains by DNA analysis when the DNA is obtained through a mandatory collection policy." *Id.* at 1032. The answer to that question, she argues, is "no." *Id.*

198. *See, e.g., MCM, supra* note 10, MIL. R. EVID. 313 (permitting suspicionless inspections of service members, although not for the "primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings").

199. As of July 2003, the Repository has evidently only granted one request for access other than for remains identification. That request was for law enforcement purposes. Jane McHugh, *Military DNA Released to Police for the First Time*, ARMY TIMES, Aug. 4, 2003, at 19 [hereinafter *McHugh*].

ing, the DOD Repository is constitutional, even though access for straightforward law enforcement purposes is permitted.

All of this could change, however. Other than the need to perform a “close review” to determine the “actual purpose served,” the Supreme Court has not provided much guidance in the “mixed motive” area. What happens if a mandatory, suspicionless search regime is set up for a genuine lawful *primary purpose*, but over time, the purpose *actually served* gradually shifts away from the primary purpose and moves toward more general, ordinary, and normal needs of law enforcement? To further complicate matters, what if the “actual purpose served” changes, but the “programmatic purpose” remains benign?

These complications arise because the DOD makes scant use of the Repository for remains identification, particularly for service members killed in combat. For example, “of the 388 deaths which resulted from Operations Desert Shield and Storm, only two cases required DNA analysis in order to complete remains identification—approximately 0.52%. In the other 386 cases, conventional methods of remains identification were sufficient.”²⁰⁰ To be fair, the lack of DNA for remains identification during the Gulf War was one of the reasons for establishing the DNA Repository in the first place.²⁰¹ Further, in times of relative peace, the chance of a service member dying in hostilities “is approximately 1 in 50,000, or 0.002%.”²⁰² Finally, “the chance of a service member dying by accident or homicide during peacetime is 0.05%, one-half of one percent.”²⁰³

With the statutory change, including its mandatory disclosure provision and the publicity surrounding the change, it is possible that the DOD could receive a growing number of federal court orders to access the databank for pure law enforcement purposes. Compared to the relative unlikelihood that DNA in the Repository will actually be used for identification purposes, “the actual necessity for the government to collect and store [a] DNA sample of every service member [for remains identification] may be even more speculative than the possibility” that the sample will be used for investigative or prosecutorial purposes.²⁰⁴

Many (if not most) of these requests could conceivably come from outside the military and could involve non-military

offenses. Other federal and state law enforcement agencies must certainly be aware of the accessibility of the Repository and will almost certainly attempt to use it for their investigative and prosecutorial purposes, for both past and future crimes.²⁰⁵

Should this occur, the “purpose actually served” by the Repository could shift from primarily remains identification to primarily law enforcement, despite the beneficent purpose behind the Repository’s creation, which would still remain the Repository’s “ultimate” purpose. If the actual purpose served by the Repository becomes “ultimately indistinguishable from the general interest in crime control,” there is no longer a legitimate “special need” supporting the mandatory, suspicionless taking of samples from service members for inclusion in the Repository. Any search and seizure of service members’ DNA for the Repository without individualized suspicion—most commonly signaled by both a warrant and probable cause—will violate the Fourth Amendment’s prohibition against unreasonable searches and seizures.

Conclusion

The DOD Repository continues to have a special need apart from general, ordinary, or normal law enforcement as its *primary and immediate purpose*—the identification of remains of fallen service members. As long as that is the case, the mandatory collection of samples for the Repository does not violate the Fourth Amendment. This is true despite the fact that the Repository is accessible for investigative or prosecutorial purposes (and has been accessible for those purposes since shortly after its inception) and, as such, has an *ultimate purpose* that is not separate from general, ordinary, or normal law enforcement.

If the Repository is accessed for law enforcement purposes so often that the *purpose actually served* by the Repository becomes primarily and immediately law enforcement rather than remains identification, it will lose its constitutional legitimacy regardless of the beneficent purpose for which it was founded. The special need justifying the DOD Repository’s establishment in the first place will evaporate, leaving only an unconstitutional search and seizure in its place.

200. Reiter, *supra* note 197, at 992 and accompanying notes (arguing that these numbers do not demonstrate that mandatory DNA collection is a compelling government interest). In fact, argues Reiter, because there is a greater likelihood in times of relative peace that a service member will die in an accident or homicide than in combat, “how would the military’s interest differ from the interests of the population as a whole . . . ? Should the government be allowed to seize DNA of all citizens based on the fact that any citizen might, at some time, die in an accident or at the hands of a murderer?” *Id.* at 990.

201. *See supra* note 3 and accompanying text.

202. Reiter, *supra* note 197, at 989 and accompanying notes.

203. *Id.* at 990.

204. *Id.* at 1033.

205. *See* McHugh, *supra* note 199.

Any Fourth Amendment issues concerning the DOD Repository are vitiated if providing samples ceases to be mandatory. If service members are fully informed of all of the permissible uses of their DNA and give prior consent to the samples' collection, there is no constitutional issue—assuming, of course, that the consent is truly voluntary. If a service member is unwilling to give his informed consent, the DOD could obtain the service member's affirmative waiver of the option to maintain a sample in the Repository.

After all, remains belong to the service member. Why should the decision to provide the DOD with the means to identify those remains through DNA analysis belong to anyone else, particularly when other means such as dental records, fingerprints, and mitochondrial DNA are also available? This is especially true now that the DOD Repository is statutorily open for investigative and prosecutorial purposes. A discussion of the contours and ramifications of an informed consent policy, however, are left for another day.

The Inspector General System

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Introduction

Imagine yourself as the Chief of Administrative Law at the 55th Division. In this capacity, you routinely advise the Inspector General (IG) on family support matters, and occasional ethics issues. Like most other judge advocates (JAs), you have received no formal instruction on the IG system, and have never reviewed *Army Regulation 20-1, Inspector General Activities and Procedures*.² The Division IG calls you at 1630 hours on a Friday. He has just received another complaint from the Chief of Staff's driver. A few weeks ago, the driver complained to the IG that the Chief of Staff directed him to pick up 55th Division Association membership lists and dues from the Brigade S1s during his lunch hour. After that complaint, the Chief of Staff gave the driver a reprimand and sent him back to his former unit. The IG needs your advice quickly. The Chief of Staff was just selected for promotion to Brigadier General and he will leave for his new assignment soon. How should the IG handle the new complaint? What advice will you give the IG?

Before you advise the IG, you must first understand what IGs do, and what they do not do. You must know how IGs develop allegations and how IG records may be used. The purpose of this article is to provide judge advocates with a basic understanding of the IG system.

What Does the IG Do?

The Inspector General (TIG) is assigned to the Office of the Secretary of the Army.³ As directed by the Secretary or the Chief of Staff, TIG inquires into and reports upon the "discipline, efficiency, and economy of the Army."⁴ The Department of the Army Inspector General (DAIG) office primarily accomplishes this mission through the work of three divisions: Inspections, Assistance, and Investigations.⁵

The Inspections Division conducts Army-wide inspections and reports to the Army Chief of Staff. In recent years, the Inspection Division has inspected or reviewed soldier readiness programs, risk management programs, anti-terrorism and force protection, extremist group activities, homosexual conduct policy implementation, and the events that occurred near the village of No Gun Ri during the Korean War.⁶ The Assistance Division provides oversight over all inquiries or investigations concerning non-senior officials (colonel and below), including military whistleblower reprisal investigations. The Investigations Division conducts all IG inquiries and investigations into allegations against senior officials (i.e., promotable colonels, general officers, and senior executive service employees).⁷ Commanders and IGs must report all allegations of impropriety or misconduct against senior officials, including criminal misconduct, to the DAIG Investigations Division within two days of receiving such allegations.⁸

1. Before assignment as Deputy Legal Advisor to The Inspector General, the author was assigned to the Investigations Branch, Administrative Law Division, Office of The Judge Advocate General. Investigations Branch attorneys are co-located with the United States Army Inspector General Agency (DAIG), Investigations Division, and provide advice concerning senior official investigations.

2. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 2002) [hereinafter AR 20-1].

3. 10 U.S.C. § 3014 (2000).

4. *Id.* § 3020; see also AR 20-1, *supra* note 2, para. 1-4a(1) ("The Inspector General will—Inquire into and periodically report on the discipline, efficiency, economy, morale, training, and readiness throughout the Army, to the Secretary of the Army (SA) and the Chief of Staff, Army (CSA).").

5. U.S. Army Inspector General Agency, *IG Systems*, at http://www.public.ignet.army.mil/IG_systems.htm (last visited Feb. 12, 2003).

6. U.S. Dep't of Army, Inspector General, *No Gun Ri Review* (Jan. 2001), at <http://www.army.mil/nogunri/> (last visited Feb. 5, 2003).

7. With one exception, Investigation Division Reports of Investigation (ROI) are not available for public review in their entirety. An investigation of allegations made against senior Corps of Engineers personnel concerning a Mississippi River construction study is available at the Office of Special Counsel Reading Room. U.S. Dep't of Army, Inspector General, *ROI Case 00-019*, at <http://www.osc.gov/armyroi.htm> (last visited Feb. 12, 2003).

8. AR 20-1, *supra* note 2, para. 8-3i(1) ("As a matter of Army policy, when such allegations are suspected against a senior official . . . , the commander or command shall halt any inquiry or investigation . . . against the senior official and report and all such allegations directly to DAIG's Investigations Division for determination of further action.").

Detailed IGs are assigned to units commanded by general officers. They serve as extensions of their commanders' eyes, ears, voices, and consciences.⁹ They are "confidential advisers and fact-finders to their commander[s]."¹⁰ At the MACOM and subordinate command levels, IGs conduct inquiries and investigations into alleged violations of policy, regulation, and law. They may inquire into allegations of mismanagement, unethical behavior, and fraud.¹¹ The Joint Ethics Regulation (JER) specifically tasks IGs with the investigation of ethics matters.¹²

Complaints made under the Military Whistleblower Protection Act (MWPA)¹³ are also under the jurisdiction of the IG.¹⁴ The MWPA prohibits taking or threatening to take retaliatory personnel actions against soldiers for communicating with members of Congress or IGs. It also prohibits retaliatory actions against soldiers for communications alleging violations of law or regulations made to law enforcement officials, the chain of command, equal opportunity officers, and other designated persons.¹⁵ The DOD has issued guidance implementing the MWPA and tasked the Department of Defense Inspector General (DOD-IG) with the investigation and oversight of all whistleblower allegations.¹⁶ The DOD-IG must approve all reprisal investigation reports.¹⁷ Army guidance concerning the MWPA is found in *Army Regulation 600-20, Army Command Policy*.¹⁸

Under the MWPA, soldiers have the right to allege violations of law or regulation, including sexual harassment and unlawful discrimination, mismanagement, fraud, waste, and

abuse of authority. There is no limit to the number of times a soldier may complain.¹⁹ Some commanders do not understand the extent of the MWPA's protections. In some cases, Army lawyers may have also improperly advised their commanders about the MWPA. If, due to ignorance or poor judgment, a lawyer improperly recommends a retaliatory personnel action, such as a letter of reprimand, the lawyer will be considered a Responsible Management Official.²⁰ Such improper advice may result in a substantiated reprisal allegation against both the commander and the legal advisor. Army lawyers and commanders must understand that adverse actions may not be taken against whistleblowers for making complaints, except for complaints that contain *knowingly* false statements.²¹

What the IG Does Not Do

Army Regulation 20-1 carefully circumscribes the role of the IG. Restrictions on IG duties and activities are designed to reduce conflicts of interest and maintain impartiality. Inspectors general do not make command policy, recommend adverse personnel actions, or do anything that may jeopardize their ability to function as fair and impartial fact-finders.²² Inspectors general are like baseball umpires who call balls and strikes, without concern for the final score of a game.

Army Regulation 20-1 also identifies several specific matters that are generally not appropriate for IG intervention.²³ First, when IGs receive allegations of a criminal nature they

9. *Id.* para. 1-6a.

10. *Id.* para. 1-7.

11. *Id.* para. 8-3a.

12. U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION § 1-413a (Aug. 1993).

13. 10 U.S.C. § 1034 (2000); AR 20-1, *supra* note 2, para. 1-11.

14. The Inspector General (TIG) has withheld the authority to investigate soldier allegations of reprisals to MACOM and higher-level IGs. AR 20-1, *supra* note 2, para. 8-9c.

15. 10 U.S.C. § 1034b ("Prohibition of Retaliatory Personnel Actions—(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing [a protected communication].").

16. U.S. DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION § 5.1 (23 June 2000).

17. *Id.* § 5.1.5; AR 20-1, *supra* note 2, para. 8-9c(5).

18. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 5-8, 5-12 (13 May 2002) [hereinafter AR 600-20].

19. 10 U.S.C. § 1034(b)-(c).

20. U.S. DEP'T OF DEFENSE, INSPECTOR GENERAL GUIDE 7050.6, GUIDE TO INVESTIGATING REPRISAL AND IMPROPER REFERRALS FOR MENTAL HEALTH EVALUATIONS para. 2.5 (6 Feb. 1996). Responsible management officials include "[t]he official(s) who influenced or recommended to the deciding official that he/she take, withhold, or threaten the action." *Id.*

21. AR 600-20, *supra* note 18, para. 5-8d. Some instances of substantiated allegations of reprisal have resulted in letters of reprimand from the Vice Chief of Staff of the Army for senior officials and for their Staff Judge Advocates. A substantiated reprisal allegation may prevent promotion to general officer rank. Interview with Hank Finley, Investigator, U.S. Dep't of Army, Office of the Inspector General, in Arlington, Va. (July 24, 2003)

22. AR 20-1, *supra* note 2, para. 2-6b.

must refer them to the Criminal Investigation Command (CID) or the Provost Marshal.²⁴ Inspectors general normally do not inquire into criminal misconduct. They may, however, inquire into “military offenses,” such as violations of orders and regulations, dereliction of duty, and conduct unbecoming an officer.²⁵ Second, IGs should not intervene in situations that have other means of redress or remedy until the complainant has exhausted all administrative remedies, including appeal procedures.²⁶ In such cases, IG involvement will be limited to a due process review.²⁷ This means that if the complainant received all process provided under applicable law and regulation for the matter, the IG will not review the underlying command or agency determination. The following areas are generally not appropriate for IG intervention: courts-martial, nonjudicial punishment, evaluation reports, involuntary separation actions, reports of survey, reprimands, claims, and complaints made under Article 138, Uniform Code of Military Justice.²⁸ Inspector general intervention is also inappropriate for civilian employee grievances, appeals of adverse employee actions, Equal Employment Opportunity (EEO) complaints, and other matters that affect employment.²⁹ If procedures exist within a regulation or system for correcting errors, improprieties, or injustices, IGs must allow all such procedures to run

their course before intervening. Third, IGs do not normally investigate allegations of professional misconduct made against Army lawyers, whether civilian or military.³⁰ When an IG receives a complaint alleging professional misconduct by an Army lawyer, he will immediately forward the complaint to the DAIG Legal Advisor without taking any action on the matter. After verifying that an allegation of professional responsibility has been made,³¹ the DAIG Legal Advisor will forward the allegation to the senior counsel having jurisdiction over the subject lawyer.³² In some cases, such as allegations of reprisals in violation of the MWPA, the IG investigates and then forwards the results to the appropriate senior counsel for action under professional responsibility regulations. Allegations of professional misconduct involving judge advocates under the supervision of The Judge Advocate General are forwarded to the Standards of Conduct Office (SOCO).³³ The DAIG Legal Advisor does not assess the credibility of allegations before forwarding them to supervisory counsel. The DAIG Legal Advisor also forwards all allegations of mismanagement³⁴ made against supervisory lawyers within the Judge Advocate Legal Service to SOCO.³⁵

23. *Id.* para. 4-4f.

24. *Id.* para. 8-10c(4)(a).

25. *Id.* paras. 4-4f(1)(a), 8-3b.

26. *Id.* para. 4-4f-k.

27. *Id.* para. 4-4f(2).

28. *Id.* para. 4-4j. This list of issues that do not fall with the IG purview because other avenues of redress are available is not exclusive. *Id.*

29. *Id.* para. 4-4k.

30. *Id.* para. 8-3b(5).

31. *Army Regulation 20-1* does not define “professional misconduct” or distinguish it from “personal misconduct,” which may be investigated by an IG. *See generally id.* Supervisory lawyers must report violations of the Army Rules of Professional Conduct and allegations that raise a “substantial question as to a lawyer’s honesty, trustworthiness, or fitness as a lawyer” to the Standards of Conduct Office (SOCO). U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 7-2b (30 Sept. 1996) [hereinafter AR 27-1]. Although it is not a supervisory legal office, the DAIG legal office forwards all allegations that fall within the guidance of AR 27-1 to SOCO. *See id.* para. 7-2b.

32. Senior counsel include the Army General Counsel, The Judge Advocate General, Command Counsel of Army Material Command, and the Chief Counsel of the U.S. Army Corps of Engineers. AR 20-1, *supra* note 2, para. 8-3b(5).

33. *Id.* The DAIG Legal Advisor receives about twenty IG complaints alleging professional misconduct against judge advocates annually. Interview with Janice Teasley, Information Release Specialist, U.S. Dep’t of Army, Office of the Inspector General, in Arlington, Va. (July 15, 2003).

34. *See* AR 27-1, *supra* note 31, para. 8-2a.

Mismanagement involves any action or omission, either intentional or negligent, that adversely affects the efficient and effective delivery of legal services, any misuse of government resources (personnel and material), or any activity contrary to operating principles established by Army regulations or TJAG policy memoranda. Mismanagement does not include mere disagreements over management “styles,” or isolated instances of matters which have their own clear course of appeal and resolutions (for example, an OER or NCOER appeal), or which are purely discretionary (for example, an award recommendation).

Id.

35. AR 20-1, *supra* note 2, para. 8-3b(6).

IG Allegations

The most important aspect of IG investigations that judge advocates must understand is the development of IG allegations. There are no published lists of IG “offenses,” and there are no model specifications for IG allegations. Nonetheless, there are four elements to every IG allegation: (1) identifying the subjects; (2) determining whether the actions were improper; (3) determining what actions the subjects took; and (4) identifying the standard the actions violated.³⁶

The first three elements are simple. The “who” of an IG allegation must be an individual.³⁷ The “chain of command” or the unit cannot be the subject of an IG investigation. Next, the alleged behavior must be improper, but it need not be criminal and no specific intent to violate a standard is required. Simple mistakes or negligence may form the basis of an IG allegation. Moreover, the behavior in question does not need to be stated with the specificity of a charge and specification under the UCMJ. For example, there is no requirement to state the place, date, and time in an IG allegation.³⁸

The “standard” requirement requires more explanation. An IG “standard” is any policy, law, or regulation that Army personnel are required to follow. There are three categories of IG standards: (1) non-punitive violations of regulatory guidance; (2) punitive violations of law (UCMJ, federal, state, and local) and regulation; and (3) violations of established policy and SOP.³⁹ Inspectors general frequently use a variety of non-puni-

tive regulatory guidance from diverse sources as standards. These sources may include the Office of Government Ethics; the DOD; Headquarters, Department of the Army; or local installation regulations. *Army Regulation 600-100*, which requires leaders to treat subordinates with “dignity, respect, fairness, and consistency,” is a good example of nonpunitive regulatory guidance that may serve as an appropriate IG standard.⁴⁰ Violations of law or punitive regulations may also serve as standards, but if adverse action appears certain, an IG office would not usually conduct an inquiry.⁴¹ Because of the IG’s ability to be discreet and maintain confidentiality, commanders often direct IGs to inquire into allegations of a sensitive nature involving leaders, such as improper relationships.⁴² Established policies and SOPs, such as pamphlets, field manuals, and unit policy letters, may serve as IG standards.⁴³ Inspectors general often seek legal advice from their servicing judge advocates when they are developing standards for allegations. Judge advocates must think broadly when advising IGs concerning standards because of the plethora of applicable laws, regulations, and policies.

IG Records

The Inspector General closely controls IG records. This tight control is necessary because the “[u]nauthorized use or release of IG records can seriously compromise the IG’s effectiveness as a trusted adviser to the commander.”⁴⁴ Inspector general records include: reports of inquiry, investigation, or

36. *Id.* para. 4-4c. The regulation summarizes these questions as follows:

- (1) Who?—The complaint involves an individual rather than an organization.
- (2) Improperly?—The subject or suspect is alleged to have committed an improper action.
- (3) Did or did not do what?—There is a behavior being described as improper.
- (4) In violation of what standard?—There is a policy, regulation or law allegedly violated.

Id.

37. Potential subjects include soldiers and Department of the Army civilian employees. They do not include family members, contractors, and other civilians with no Army affiliation. U.S. DEP’T OF ARMY, INSPECTOR GENERAL AGENCY, TRAINING DIVISION IG SCHOOL, THE ASSISTANCE AND INVESTIGATIONS GUIDE § II, para. 2-4c (21 May 2001).

38. *See generally* AR 20-1, *supra* note 2.

39. *Id.* para. 4-4d.

40. U.S. DEP’T OF ARMY, REG. 600-100, ARMY LEADERSHIP para. 2-1a(13) (17 Sept. 1993). For example, a complaint that a commander habitually used profanity while screaming at subordinate soldiers might result in an allegation such as this one: “Captain X improperly failed to treat subordinate soldiers with dignity and respect by screaming profanities at them, in violation of *Army Regulation 600-100, Army Leadership, Paragraph 2a(13)*.”

41. AR 20-1, *supra* note 2, para. 8-3b. If adverse action appears certain, an IG inquiry is not advisable because IG records may not be used for adverse action without TIG approval. The Inspector General may only approve such a use of IG records if a follow-on investigation would be unduly burdensome, futile, or disruptive. *Id.* para. 3-3. If the alleged misconduct is not suitable for investigation by military police or Criminal Investigation Command (CID) personnel, the SJA may recommend an investigation. *See generally* U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

42. Interview with Terry Freeze, Investigator, U.S. Dep’t of Army, Office of the Inspector General, at Arlington, Va. (July 15, 2003). For example, a complaint that a sergeant major hugged one of his junior NCOs might result in an allegation such as this one: “Sergeant Major Y improperly fraternized with a subordinate noncommissioned officer (NCO) by hugging her in violation of *Army Regulation 600-20, Army Command Policy, Paragraph 4-14*.”

43. A complaint that an NCO held an inspection on a training holiday might result in an allegation such as this one: “Sergeant Z improperly conducted an inspection of his subordinates’ uniforms during a training holiday, in violation of *55th Division Policy Letter #46, Training Holiday Guidance*.”

inspection; testimonies, correspondence, and documents received from witnesses and persons seeking IG assistance; and IG Worldwide Network (IGNET) data processing files.⁴⁵ All IG records are the property of the Secretary of the Army, who has delegated release authority to TIG.⁴⁶ The Inspector General has further delegated records release authority to the Deputy TIG, the DAIG legal advisor, and the deputy legal advisor.⁴⁷ With the exception of inspection records, local IGs may not release IG records, even for official use.⁴⁸ Inspectors general are authorized to release limited information concerning potential allegations, witnesses, and evidence to follow-on investigators without first seeking approval from the DAIG Records Release Office.⁴⁹

Persons within the Department of the Army, such as labor counselors and trial counsel, may obtain IG records for official use only (FOUO) by providing detailed written requests to their local detailed IGs or directly to the DAIG Records Release Office. A FOUO request must clearly state the reasons for the request and the contemplated uses of the IG records.⁵⁰ It is

important to note, however, that “IG records may not be used as the basis for adverse action without authorization from TIG.”⁵¹ A request must state why a follow-on investigation, such as a commander’s inquiry or an investigation conducted under the provisions of *AR 15-6*, would be unduly burdensome, unduly disruptive, or futile.⁵²

Whenever the Army conducts personnel suitability or background screening on individuals selected for promotion or other favorable personnel actions, it reviews IG records databases. The DAIG, CID, Central Clearance Facility (CCF), Total Army Personnel Command (PERSCOM), and other agencies conduct the background screenings. The DAIG screens its databases for the following actions: General Officer nominations, promotions, reassignments,⁵³ and retirements;⁵⁴ promotions to colonel, including judge advocates;⁵⁵ brigade and battalion command assignments; command sergeant major selections; drill sergeant and recruiting duty assignments;⁵⁶ and senior executive service (SES) selections, performance awards, and retirements.⁵⁷

44. AR 20-1, *supra* note 2, para. 3-1b.

45. *Id.* para. 3-1c.

46. *Id.* para. 3-1a.

47. *Id.* para. 3-1e; Memorandum, The Inspector General, U.S. Army, to Deputy Legal Advisor, Legal Advisor, and Deputy The Inspector General, subject: Delegation of Authority (16 Oct. 2002) [hereinafter Delegation Memo] (on file with DAIG legal office).

48. AR 20-1, *supra* note 2, para. 3-6b.

49. *See id.* para. 3-6i.

i. Release of IG records or information to DA investigators: DA investigators include personnel (that is, Investigating Officers, Report of Survey Officers, CID, and MP investigators) performing law enforcement or other investigations under Army regulations and outside IG channels. These personnel are entitled to IG information described below when it is relevant to an authorized investigation. They will not be provided additional information without approval of TIG or higher authority.

(1) An IG may orally brief the investigator on the nature of the allegations or matters the IG office examined, being careful not to be judgmental about the allegations or to reveal any IG findings, opinions, conclusions, or recommendations.

(2) An IG may release documentary evidence that is readily available to any DA investigator and that was not received by the IG in confidence. This includes finance and personnel records, travel vouchers, motel and restaurant receipts, and so forth. “Readily available” includes documents that would be readily available from the source but have been lost, destroyed, retired, or altered after being obtained by the IG.

(3) An IG may identify by name those witnesses who have information relevant to the investigation and explain how they are relevant with a brief oral synopsis of their testimony. Where possible, the IG will not reveal which witness is the complainant Written statements, transcripts, and recorded tapes taken by the IG will not be released.

Id.

50. AR 20-1, *supra* note 2, para. 3-6d. Those requesting IG records should forward their requests to: Records Release Office, SAIG-ZXR, 2511 Jefferson Davis Highway, Arlington, Virginia 22202-3912. *Id.* Requesters may also fax their requests to (703) 607-5865.

51. The Inspector General has not delegated authority to release records for adverse use. *See supra* note 4; Delegation Memo, *supra* note 47.

52. AR 20-1, *supra* note 2, para. 3-3a; *see generally* U.S. DEP’T OF ARMY, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

53. U.S. DEP’T OF DEFENSE, DIR. 1320.4, MILITARY OFFICER ACTIONS REQUIRING APPROVAL OF THE SECRETARY OF DEFENSE OR THE PRESIDENT, OR CONFIRMATION OF THE SENATE (14 Mar. 1995); U.S. DEP’T OF ARMY, ARMY REG. 600-8-29, OFFICER PROMOTIONS para. 1-15b (30 Nov. 1994) [hereinafter AR 600-8-29].

54. Memorandum, Secretary of Defense, to Secretaries of the Army, Navy, and Air Force, Under Secretary of Defense (Personnel & Readiness), General Counsel, and Inspector General, subject: Processing Retirement Applications of Officers in the Grades of O-7 and O-8 (9 Oct. 1998) (on file with author).

55. AR 600-8-29, *supra* note 53, para. 1-15a. *Army Regulation 600-8-29* applies to active duty list promotions only. *See id.* At this time there are no background screening requirements for non-active duty list promotions.

Upon receipt of a request for a background screening, the DAIG reviews its databases for reports containing substantiated or ongoing allegations. The DAIG reviews the reports for accuracy, compliance with agency procedures, verification that the subject was previously notified of the unfavorable information, and legal sufficiency. It then prepares a brief summary, usually one page in length, and forwards it to the requesting agency. If a promotion review board is convened, the General Officer Management Office or the U.S. Army Personnel Command will inform the officer and provide him a copy of the DAIG summary report. The officer may also submit comments or information to the review board.⁵⁸

The DAIG usually processes requests for records for personal use under the Freedom of Information Act (FOIA).⁵⁹ The DAIG may deny Privacy Act requests by the subjects of IG investigations under the Privacy Act's law enforcement exemption.⁶⁰ Records requests from individuals, defense counsel, and legal assistance attorneys, for the purpose of preparing rebuttals to administrative personnel actions, evaluation report appeals, and petitions to the Army Board for Correction of Military Records, are not treated as "for official use only" requests.

These requests are also processed under the FOIA.⁶¹ Records released to complainants and subjects under the FOIA are generally released only in part, after redaction of information under Exemption 7 of the FOIA.⁶²

The Judge Advocate's Role in the IG System

The judge advocate's role in the IG system is growing because of the steadily increasing importance and volume of background screenings, and because of regulatory changes. Summary reports of substantiated allegations forwarded to the U.S. Army Personnel Command (PERSCOM) directly impact the careers of field grade officers and noncommissioned officers. To accommodate new background screening requirements, the IG recently amended the retention periods for IG investigations and inquiries involving non-senior officials from three years to thirty years.⁶³ Substantiated allegations from the early years of a soldier's career will now be available for background screenings decades later, when a soldier is considered for promotion to colonel, command and leadership assignments, drill

56. The DAIG conducts background screening for brigade and battalion command assignments, command sergeant major selections, and drill sergeant and recruiting duty assignments in accordance with PERSCOM policies and agreements between PERSCOM and DAIG. Interview with Lieutenant Colonel John Peeler, Executive Officer, Assistance Division, U.S. Dep't of Army, Office of the Inspector General, at Arlington, Va. (July 15, 2003) [hereinafter Peeler Interview].

57. Memorandum, Assistant Secretary of the Army (Manpower and Reserve Affairs), to Principal Officials of Headquarters, Department of the Army and Major Commands, subject: Adverse Information Screening for Senior Executive Service (3 Oct. 2000) (on file with author).

58. AR 600-8-29, *supra* note 53, para. 8-6. Inspector general records and other derogatory information that is not filed in the Official Military Personnel File are not forwarded to selection boards. The DAIG only provides them to review boards after the review board referral authority determines that "the information is substantiated, relevant, and might reasonably and materially affect a promotion recommendation." *Id.*

59. AR 20-1, *supra* note 2, para. 3-7a.

60. See Privacy Act of 1974, 5 U.S.C. 552a(k)(2), (5) (2000). The Privacy Act permits agency heads to exempt systems of records from the access provisions of the Privacy Act when the system of records consists of investigatory material compiled for law enforcement purposes and investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment and military service. See *id.* The systems notice for Army IG inquiries and investigations exempts materials compiled for law enforcement or for the determination of the suitability for employment and military service from the access provisions of the Privacy Act. If an individual is denied a right, privilege, or benefit, to which he or she would otherwise be entitled, the individual will be granted access to IG materials except those that would reveal the identity of a confidential source. Privacy Act of 1974; System of Records, 67 Fed. Reg. 1447-48 (Jan. 11, 2002).

61. AR 20-1, *supra* note 2, paras. 3-6g, 3-7c.

62. The FOIA exempts the following matters from release:

Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(A) could reasonably be expected to interfere with enforcement proceedings;

...

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) could reasonably be expected to disclose the identity of a confidential source.

5 U.S.C. § 552(b)(7).

63. U.S. DEP'T OF ARMY, REG. 25-400-2, THE MODERN ARMY RECORDKEEPING SYSTEM (MARKS) tbl.9 (1 Oct. 2001) (File Category 20: Assistance, inspections, investigations, and follow-up, File No. 20-1h). The IG only maintains records of unsubstantiated allegations for three years and does not forward these records to PERSCOM for background screening. *Id.*; see Peeler Interview, *supra* note 56.

Conclusion

sergeant duties, or recruiting duties. Along with the increased record retention period, a new requirement for written legal review of IG reports was instituted in April 2001. This requirement applies to all reports of investigation, whether or not the allegations were substantiated, and all reports of investigative inquiry with substantiated allegations.⁶⁴ In addition to ensuring that findings are supported by facts, judge advocates conducting legal reviews must also verify that investigators followed IG procedures during their investigations. In particular, Army lawyers must ensure that allegations are properly drafted, that subjects have been notified and offered an opportunity to comment, that IG offices properly maintain the confidentiality of complainants and witnesses, and that no improper retaliatory actions are taken against complainants.

Army lawyers should also note that they may be required to serve as witnesses in IG investigations. Discussions between SJAs and commanders are often crucial to the resolution of IG complaints against senior officials. Because the Army is the SJA's client, communications between a commander and an SJA may be disclosed to the commander's superiors and to IG investigators appointed by the commander's superiors.⁶⁵ Staff judge advocates may not serve as personal legal advisors to commanders who come under investigation without the approval of The Judge Advocate General.⁶⁶

With this background information in mind, what advice do you give the IG concerning the driver's complaint that the 55th Division Chief of Staff reprimanded him for disloyalty and reassigned him for making a complaint to the IG? Based upon your knowledge of *AR 20-1*, you know that IGs are confidential and impartial fact-finders for their commanders, and that they are able to handle highly sensitive complaints like this one discreetly. You are now able to assist the IG in drafting a four-part IG allegation, using the MWPA as the standard. You realize that the outcome of the investigation could be recorded in an IG database for thirty years, and reported during personnel suitability screenings. You know that neither you nor the SJA should provide personal legal advice to the Chief of Staff because the Army is your client. You are ready to advise the IG. Remembering that the DAIG Investigations Division handles all complaints involving senior officials, and that the Chief of Staff is now promotable to brigadier general, you advise the IG to send the complaint to the Investigations Division at DAIG and take no further action.

64. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES paras. 8-4b(6), c(3) (16 Apr. 2001). The previous version of *AR 20-1* contained no legal review requirements for IG investigations or inquiries. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES paras. 8-4b(6), c(3) (15 Mar. 1994).

65. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.13 (1 May 1992).

66. *AR 27-1*, *supra* note 31, para. 5-2a; *see also* Lieutenant Colonel Craig Meredith, *The Army as Client*, at <https://jagcnet.army.mil/JAGCNETIntranet/Databases/Administrative+Law/professi.nsf> (last visited Feb. 5, 2003) (posted to Administrative Law, Ethics: Attorney Professional Responsibility database Nov. 2002).

Note from the Field

Traveling on Someone Else's Dime, But Not Necessarily Toeing the Agency Line: Recent Changes Highlight Differences in Accepting Travel Expenses from a Non-Government Source When Speaking in an Official—Versus an Unofficial—Capacity

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Introduction

The Department of Defense (DOD) Office of General Counsel, Standards of Conduct Office (SOCO), recently announced that the Joint Federal Travel Regulation (JFTR) and the Joint Travel Regulation (JTR) will no longer be the DOD's implementing authority for the acceptance of gifts of travel, meals, or lodging expenses when employees attend meetings under 31 U.S.C. § 1353 in an *official* capacity. Effective 1 January 2003, the implementing regulations are those issued by the General Services Agency (GSA).¹ The GSA is also amending Chapter 304 of the Federal Travel Regulations (FTR). Finally, the Office of Government Ethics (OGE) recently amended the rules governing the acceptance of travel expenses for government employees to teach, speak, or write about their federal duties in an unofficial capacity. This note discusses these changes and highlights the fundamental differences between accepting travel expenses from non-government sources when speaking in an *official* capacity and in an *unofficial* capacity.

Acceptance of Travel Expenses to Speak in an Official Capacity

Effective 1 January 2003, Chapter 7, Part W and Chapter 4, Part Q of the JFTR were deleted in their entirety. These provisions implement a statute, 31 U.S.C. § 1353, which controls the

acceptance of gifts of travel, meals, and lodging expenses government-wide.² The new statute permits executive branch employees to accept in-kind payments from non-federal sources on behalf of the government for travel, subsistence, and related expenses to attend meetings and similar functions in an official capacity relating to the employee's official duties.³ The DOD SOCO concluded that the DOD could use the GSA-issued implementing regulation⁴ in lieu of the old JFTR and JTR provisions for two reasons: (1) because 31 U.S.C. § 1353 applies to the entire executive branch; and (2) because the GSA has issued regulations implementing the statutory authority. This announcement coincides with the recent amendment of the GSA's travel regulations. Among other changes, the GSA is revising 41 C.F.R. § 304-3.13 to allow for after-the-fact agency acceptance of *some* payments for travel expenses to meetings from non-federal sources. The final GSA rules apply to payment of expenses from non-federal sources on or after 16 June 2003.⁵

Acceptance of Travel Expenses to Speak in an Unofficial Capacity

Over a year ago, the OGE adopted rules permitting certain employees to accept payments for travel expenses incurred in connection with non-official teaching, speaking, and writing activities that relate to official duties.⁶ This amendment resulted from the decision of *Sanjour v. Environmental Protection Agency*,⁷ in which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), sitting en banc, struck down an OGE regulation barring government employees from receiving compensation, including travel expenses, for their unofficial speeches or writings relating to their official government duties.⁸ The following discussion of *Sanjour* and the amended rule illustrates the difference between official versus unofficial travel expenses paid by non-government sources.

1. See 41 C.F.R. pt. 304 (LEXIS 2003).

2. See 31 U.S.C.S. § 1353 (LEXIS 2003); cf. 31 U.S.C. § 1353 (2000).

3. This rule cannot be used in connection with "promotional vendor training." 41 C.F.R. § 302-2.1.

4. See 41 C.F.R. subpt. 304-1.

5. See Federal Travel Regulation; Payment of Travel Expenses from a Non-Federal Source, 68 Fed. Reg. 12,610 (Mar. 17, 2003); cf. 41 C.F.R. § 304-3.13.

6. See Rules and Regulations, Office of Government Ethics, 5 CFR Part 2635, RIN 3209-AAO4, Standards of Ethical Conduct for Employees of the Executive Branch; Definition of Compensation for Purposes of Prohibition on Acceptance of Compensation in Connection With Certain Teaching, Speaking and Writing Activities, 66 Fed. Reg. 59,673 (Nov. 30, 2001); 5 C.F.R. § 2635.807(a)(2)(iii)(D) (LEXIS 2003).

7. 786 F. Supp. 1033, 1035 (D.D.C. 1992), *aff'd*, *Sanjour v. EPA*, 984 F.2d 434 (D.C. Cir. 1993), *reh'g granted*, *Sanjour v. EPA*, 997 F.2d 1584 (D.C. Cir. 1993), *rev'd en banc*, 56 F.3d 85 (D.C. Cir. 1995), *clarified on remand*, 7 F. Supp. 2d 14 (D.D.C. 1998).

8. The D.C. Circuit's decision was clarified on remand in a 14 April 1998 decision by the United States District Court for the District of Columbia (District Court). See *Sanjour v. EPA*, 7 F. Supp. 2d 14 (D.D.C. 1998).

William Sanjour and Hugh Kaufman were employees of the EPA who, in their unofficial capacity, traveled extensively throughout the United States speaking about—and often criticizing—EPA policy. Because Sanjour and Kaufman traveled to the speaking engagements at their own expense, they relied on travel reimbursement from the private sources to which they spoke. The controversy arose when Sanjour and Kaufman received an invitation from NC WARN, a non-profit environmental health organization, to speak at a public hearing about plans to build a hazardous waste incinerator in Northampton County, North Carolina. Although Sanjour and Kaufman would speak in their private capacity, they would draw on their experience as EPA employees. The ethics regulation in effect at this time prevented Sanjour and Kaufman from accepting the offered travel expenses; as a result, the two did not attend the event.⁹ Sanjour then sued the EPA and the OGE in the U.S. District Court for the District of Columbia (District Court) claiming various constitutional violations. The District Court ultimately construed Sanjour's action as a First Amendment challenge to the OGE regulation.¹⁰

The District Court weighed Sanjour's First Amendment right to free speech against the government's interest as an employer in promoting efficiency of public services. Applying the balancing test enunciated in *Pickering v. Board of Education*,¹¹ the court concluded that "the challenged regulation withstands constitutional attack [because] it is narrowly tailored to meet a legitimate government objective and is not designed to limit First Amendment freedoms."¹² On appeal, a panel of the D.C. Circuit affirmed.¹³ The full D.C. Circuit later agreed to hear the case en banc, however; the court then vacated the decision and granted a rehearing.¹⁴

In *Pickering*, a local school board fired a teacher for writing and publishing a letter criticizing the board's allocation of school funds between education and athletic programs.¹⁵ In analyzing the rights of a government employer to regulate the speech of its employees, the Supreme Court established a balancing test in which courts weigh the government employer's interest in efficiency and effectiveness against the public employee's right to comment on matters of public interest. Under the test, a court must weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁶ Because *Pickering* and its progeny involved disciplinary actions against government employees for their public speech, the *Sanjour* court also relied on the Supreme Court's decision in *United States v. National Treasury Employees Union (NTEU)*,¹⁷ which addressed the acceptance of honoraria by government employees.

In *NTEU*, two employee unions and several civil servants challenged provisions in the Ethics in Government Act that barred federal employees from receiving honoraria for speaking, teaching and writing activities.¹⁸ The Court held that the honorarium ban improperly restricted the employees' speech under the First Amendment. In reaching this decision, the Court noted that public employees do not relinquish their First Amendment rights to comment on matters of public interest by virtue of their government employment. However, the Court noted that the state's interest as an employer in regulating the speech of its employees differed from its interest in regulating the speech of the general citizenry.¹⁹

9. *Sanjour v. EPA*, 786 F. Supp. 1033, 1035 (D.D.C. 1992) (citing 5 C.F.R. § 2636.202 (1988)); *see also* 5 C.F.R. § 2635.807(a)(2) (1994). Specifically, the regulations prohibited employees from accepting compensation, including travel expenses, from non-government sources for teaching, speaking, or writing relating to the employees official duties. *Id.*

10. *Sanjour*, 785 F. Supp. at 1035-36; *see* U.S. CONST. amend. I.

11. 391 U.S. 563 (1968).

12. *Sanjour*, 786 F. Supp. at 1036.

13. *Sanjour v. EPA*, 984 F.2d 434 (D.C. Cir. 1993).

14. *Sanjour v. EPA*, 997 F.2d 1584 (D.C. Cir. 1993).

15. *Pickering*, 391 U.S. at 566.

16. *Id.* at 568.

17. 513 U.S. 454 (1995).

18. 5 U.S.C. app. §§ 101, 501(b) (Supp. 1988).

19. *NTEU*, 513 U.S. at 491.

Applying Pickering and NTEU to the facts in Sanjour

Circuit Judge Wald, writing for the majority of the D.C. Circuit, applied the *Pickering* and *NTEU* tests to the plaintiffs' claim. The court identified the employees' interest as the reimbursement of travel expenses incurred from speaking engagements on matters relating to their official duties. The court also considered the interest of American society in hearing from government employees in "a position to offer the public unique insights into the workings of government generally and their areas of specialization in particular."²⁰ The court weighed these interests against those of the government, specifically,

the threat to the integrity of the government occasioned by employees using their public office for private gain[, such as] government employees selling their labor twice—once to the government as employer, and once, in the form of speech about their employment, to private parties willing to provide travel reimbursement in return.²¹

The court determined that the OGE regulation was both "underinclusive" and "overinclusive," that is, the rule did not squarely fit the government's purported interest in curbing the improper behavior of its employees.²² Specifically, the court found that the government's regulatory scheme did not further its dual compensation concerns, and that the rule burdened more speech than necessary to further the legitimate interests of the government.²³ The court also found that the regulatory scheme restricted anti-government speech. The court reached this conclusion by contrasting the OGE regulation with GSA regulations²⁴ permitting the government to accept payments from non-federal sources for its employees' travel expenses, when the reimbursed travel was to attend meetings, conferences, or symposia in the employees' *official* capacities.²⁵

The court found that the OGE regulatory scheme infringed on "the most fundamental principle of First Amendment jurisprudence that the government may not regulate speech on the ground that it expresses a dissenting viewpoint."²⁶ The court held that the OGE and the GSA regulations "vest essentially unbridled discretion in the agency" to determine whether to allow employees to give speeches, and that such determinations could hinge on "the basis of the viewpoint expressed by the employee."²⁷ It appeared to the court that "employees may receive private reimbursement for travel costs necessary to disseminate their views only by toeing the agency line."²⁸ The court ultimately held that the OGE regulations:

throttle a great deal of speech in the name of curbing government employees' improper enrichment from their public office. Upon careful review, however, we do not think that the government has carried its burden to demonstrate that the regulations advance that interest in a manner justifying the significant burden imposed on First Amendment rights.²⁹

The Amended Rule

As a result of *Sanjour*, the OGE revised its regulations to permit employees to accept travel expenses incurred in connection with non-official teaching, speaking, and writing activities "related to official duties" from non-governmental sources.³⁰ It is important to note that certain covered non-career employees, such as presidential appointees and non-career members of the Senior Executive Service, may not take advantage of this exception.³¹

Although federal employees generally may not receive "compensation from any source other than the government for

20. *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995).

21. *Id.* at 94-95.

22. *Id.* at 95.

23. *Id.* at 97.

24. See 41 C.F.R. subpt. 301-1 (2002).

25. 41 C.F.R. § 304-1.3(a) (1994).

26. *Sanjour*, 56 F.3d. at 96 (citations omitted).

27. *Id.* at 97.

28. *Id.* at 96-97.

29. *Id.* at 99.

30. 5 C.F.R. § 2635.807(a)(2)(iii)(D) (LEXIS 2003).

31. *Id.* § 2636.303(a).

teaching, speaking or writing that relates to the employee's official duties,"³² the *Sanjour* exception defines "compensation" as *not* including "travel expenses, consisting of transportation, lodgings or meals, incurred in connection with the teaching, speaking or writing activity."³³ The amended rule provides four examples illustrating the scope and applicability of the exception.

Of these examples, Example 3 most closely resembles the facts of *Sanjour* because it involves a government employee speaking about his official duties in his private capacity. In this hypothetical, a Federal Trade Commission (FTC) GS-14 attorney, who participated in a merger case as part of his official duties, is invited to speak about the case in his *private* capacity at a conference in New York. The conference sponsors offer to: (1) reimburse the attorney for his travel expenses to New York; and (2) provide him a free trip to San Francisco to compensate him for his time and effort. The subject matter of the lecture clearly relates to the employee's official duties because he is speaking on a matter "assigned [to him] during the previous one-year period."³⁴ Under the amended rule, the attorney may accept the travel expenses to give the speech in New York. The travel expenses to San Francisco, however, are a prohibited form of compensation because they are not connected with any speaking activity. The example notes that if the attorney is a "covered noncareer employee," he would be barred from accepting the travel expenses to both New York and San Francisco.³⁵

Unlike Example 3, the hypothetical in Example 4 deals with an employee speaking at an event in her *official* capacity. In Example 4, an advocacy group dedicated to improving treatments for severe pain asks the National Institutes of Health (NIH) to provide a conference speaker who can discuss recent advances in the agency's research on pain. The group also offers to pay the employee's travel expenses to attend the conference. Because the NIH employee will speak in her official capacity, the NIH may accept the travel expenses—assuming that the payment satisfies the requirements of the GSA regulations governing acceptance of travel.³⁶

Example 1, like Example 3, illustrates how speaking at a function in a private capacity might relate to official duties. In this example, a GS-15 Forest Service employee is invited to speak in her personal capacity about a speed-reading technique she developed in her off-duty time. The organization inviting the employee will be affected by land-management regulation the employee is drafting for the Forest Service. Accordingly, the invitation is related to the employee's official duties because it is extended by an entity having interests "that may be affected substantially by performance or nonperformance of the employee's official duties."³⁷ Thus, the employee may accept travel expenses relating to the speech on speed-reading, but not a speaking fee.

Example 2 is an illustration designed to distinguish between covered and non-covered employees. In this example, a recently appointed cabinet-level official is invited to speak in Aspen, Colorado solely because of her position. The official may not accept an offer to speak because for a "covered noncareer employee," the travel expenses are prohibited compensation.³⁸

Simplified Framework for Analyzing Gifts of Travel

The ethics practitioner may find the following framework helpful in analyzing gifts of travel expenses from non-government sources. First, one must determine whether the employee is a "covered noncareer employee" under 5 C.F.R. § 2636.303(a).³⁹ Next, one must determine whether the employee is speaking in an official capacity, that is, on behalf of the agency. If so, one must then determine whether the employee may accept the gift under 41 C.F.R. § 304-1.⁴⁰ If the employee is speaking in a private or unofficial capacity that is not on behalf of the agency, and the speaking engagement "relates" to the employee's official duties in one of the ways set forth in 5 C.F.R. § 2635.807(a)(2)(i)(A)-(E), the employee may only accept travel related expenses.⁴¹

32. *Id.* § 2635.807(a).

33. *Id.* § 2635.807(a)(2)(iii)(D).

34. *Id.* § 2635.807(a)(2)(i)(E)(1).

35. *Id.*

36. 41 C.F.R. pt. 304 (LEXIS 2003).

37. 5 C.F.R. § 2635.807(a)(2)(i)(C).

38. *Id.* § 2636.303(a).

39. *Id.*

40. 41 C.F.R. § 304-1.

41. 5 C.F.R. § 2635.807(a)(2)(i).

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 3304.

When requesting a reservation, you should know the following:

TJAGLCS School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

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

The JAGLCS 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 (August 2003 - September 2005)

Course Title	Dates	ATRRS No.
GENERAL		
52d Graduate Course	18 August 03 - 27 May 04	(5-27-C22)
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
161st Basic Course	3 June - 27 June 03 (Phase I - Ft. Lee) 27 June - 5 September 03 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)
162d Basic Course	16 September - 10 October 03 (Phase I - Ft. Lee) 17 October - 18 December 03 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)
163d Basic Course	6 - 30 January 04 (Phase I - Ft. Lee) 29 January - 9 April 04 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee) 25 June - 3 September 04 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)
165th Basic Course	14 September - 1 October 04 (Phase I - Ft. Lee) 12 October - 16 December 04 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee) 31 January - 8 April 05 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)

167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGLCS)	(5-27-C20) (5-27-C20)
168th Basic Course	13 September - thru TBD (Phase I- Ft. Lee) TBD (Phase II – TJAGLCS)	(5-27-C20)
8th Speech Recognition Training	1– 12 December 03	(512-27DC4)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)
11th Court Reporter Course	2 June - 1 August 03	(512-27DC5)
12th Court Reporter Course	25 August - 28 October 03	(512-27DC5)
13th Court Reporter Course	26 January - 26 March 04	(512-27DC5)
14th Court Reporter Course	26 April - 25 June 04	(512-27DC5)
15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)
17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August – 5 October 05	(512-27DC5)
3d Court Reporting Symposium	17 - 21 November 03	(512-27DC6)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
178th Senior Officers Legal Orientation Course	8 - 12 September 03	(5F-F1)
179th Senior Officers Legal Orientation Course	17 - 21 November 03	(5F-F1)
180th Senior Officers Legal Orientation Course	26 - 30 January 04	(5F-F1)
181st Senior Officers Legal Orientation Course	22 - 26 March 04	(5F-F1)
182d Senior Officers Legal Orientation Course	17 - 21 May 04	(5F-F1)
183d Senior Officers Legal Orientation Course	13 - 16 September 04	(5F-F1)
184d Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185d Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)

186d Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)
187d Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)
188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
10th RC General Officers Legal Orientation Course	21- 23 January 04	(5F-F3)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
34th Staff Judge Advocate Course	7 - 11 June 04	(5F-F52)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
7th Staff Judge Advocate Team Leadership Course	7 - 9 June 04	(5F-F52-S)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2004 Reserve Component Judge Advocate Workshop	19 - 22 April 04	(5F-F56)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)
2004 JAOAC (Phase II)	4 - 16 January 04	(5F-F55)
2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)
2003 JAG Annual CLE Workshop	6 - 10 October 03	(5F-JAG)
2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
15th Legal Administrators Course	21 - 25 June 04	(7A-550A1)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
15th Law for Paralegal NCOs Course	29 March - 2 April 04	(512-27D/20/30)

16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)
15th Senior Paralegal NCO Management Course	14 - 18 June 04	(512-27D/40/50)
16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
8th Chief Paralegal NCO Course	14 - 18 June 04	(512-27D- CLNCO)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOG	25 October - 10 November 04	
5th 27D ANCOG	10 - 28 January 05	
6th 27D ANCOG	25 April - 13 May 05	
7th 27D ANCOG	18 July - 5 August 05	
4th JA Warrant Officer Advanced Course	12 July - 6 August 04	(7A-270A2)
11th JA Warrant Officer Basic Course	31 May - 25 June 04	(7A-270A0)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

2d Advanced Federal Labor Relations Course	22 - 24 October 03	(5F-F21)
3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
57th Federal Labor Relations Course	20 - 24 October 03	(5F-F22)

58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)
53d Legal Assistance Course	3 - 7 November 03	(5F-F23)
54th Legal Assistance Course	10 - 14 May 04	(5F-F23)
55th Legal Assistance Course	1 - 5 November 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2003 USAREUR Legal Assistance CLE	20 - 24 Oct 03	(5F-F23E))
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)
28th Admin Law for Military Installations Course	8 - 12 March 04	(5F-F24)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)
2003 USAREUR Administrative Law CLE	8 - 12 September 03	(5F-F24E)
2004 USAREUR Administrative Law CLE	13 - 16 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 15 September 05	(5F-F24E)
2003 Federal Income Tax Course (Montgomery, AL)	15 - 19 December 03	(5F-F28)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 Hawaii Estate Planning Course	20 - 23 January 05	(5F-F27H)
2003 USAREUR Income Tax CLE	8 - 12 December 03	(5F-F28E)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2004 Hawaii Income Tax CLE	12 - 16 January 04	(5F-F28H)
2005 Hawaii Income Tax CLE	11 - 14 January 05	(5F-F28H)
2004 PACOM Income Tax CLE	5 - 9 January 2004	(5F-F28P)
2005 PACOM Income Tax CLE	3 - 7 January 2005	(5F-F28P)
21st Federal Litigation Course	4 - 8 August 03	(5F-F29)

22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)
2d Ethics Counselors Course	12 - 16 April 04	(5F-F202)
3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)

CONTRACT AND FISCAL LAW

151st Contract Attorneys Course	28 July - 8 August 03	(5F-F10)
152d Contract Attorneys Course	23 February - 5 March 04	(5F-F10)
153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
154th Contract Attorneys Course	28 February - 11 March 05	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)
6th Advanced Contract Law	15 - 19 March 04	(5F-F103)
5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2003 Government Contract Law Symposium	2 - 5 December 03	(5F-F11)
2004 Government Contract Law Symposium	8 - 11 December 04	(5F-F11)
67th Fiscal Law Course	27 - 31 October 03	(5F-F12)
68th Fiscal Law Course	26 - 30 April 04	(5F-F12)
69th Fiscal Law Course	3 - 7 May 04	(5F-F12)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
11th Comptrollers Accreditation Course (Fort Bragg)	20 - 24 October 03	(5F-F14)
12th Comptrollers Accreditation Course (Hawaii)	26 - 30 January 04	(5F-F14)
13th Comptrollers Accreditation Course (Fort Monmouth)	14 - 17 June 04	(5F-F14)
6th Procurement Fraud Course	1 - 3 June 04	(5F-F101)

2004 USAREUR Contract & Fiscal Law CLE	12 - 16 January 04	(5F-F15E)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)
2004 Maxwell AFB Fiscal Law Course	10 - 13 February 04	
2005 Maxwell AFB Fiscal Law Course	7 - 11 February 05	

CRIMINAL LAW

9th Military Justice Managers Course	25 - 29 August 03	(5F-F31)
10th Military Justice Managers Course	23 - 27 August 04	(5F-F31)
11th Military Justice Managers Course	22 - 26 August 05	(5F-F31)
47th Military Judge Course	26 April - 14 May 04	(5F-F33)
48th Military Judge Course	25 April - 13 May 05	(5F-F33)
20th Criminal Law Advocacy Course	15 - 26 September 03	(5F-F34)
21st Criminal Law Advocacy Course	15 - 26 March 04	(5F-F34)
22d Criminal Law Advocacy Course	13 - 24 September 04	(5F-F34)
23d Criminal Law Advocacy Course	14 - 25 March 05	(5F-F34)
24d Criminal Law Advocacy Course	12 - 23 September 05	(5F-F34)
27th Criminal Law New Developments Course	17 - 21 November 03	(5F-F35)
28th Criminal Law New Developments Course	15 - 19 November 04	(5F-F35)
2004 USAREUR Criminal Law CLE	5 - 9 January 04	(5F-F35E)
2005 USAREUR Criminal Law CLE	3 - 7 January 05	(5F-F35E)

INTERNATIONAL AND OPERATIONAL

3d Domestic Operational Law Course	27 - 31 October 03	(5F-F45)
4d Domestic Operational Law Course	25 - 29 October 04	(5F-F45)
7th Basic Intelligence Law Course (TJAGLCS)	28 - 29 June 04	(5F-F41)

7th Advanced Intelligence Law (National Ground Intelligence Center)	30 June - 2 July 2004	(5F-F41)
8th Intelligence Law Course	31 May - 3 June 05	(5F-F41)
81st Law of War Course	2 - 6 February 04	(5F-F42)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84d Law of War Course	11 - 15 July 05	(5F-F42)
40th Operational Law Course	11 - 22 August 03	(5F-F47)
41st Operational Law Course	23 February - 5 March 04	(5 F-F47)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44d Operational Law Course	8 - 19 August 05	(5F-F47)

3. Civilian-Sponsored CLE Courses

**For further 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

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
National Law Center
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

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

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.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually

Arizona	15 September annually	North Carolina**	28 February annually
Arkansas	30 June annually	North Dakota	31 July annually
California*	1 February annually	Ohio*	31 January biennially
Colorado	Anytime within three-year period	Oklahoma**	15 February annually
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.	Oregon	Period end 31 December; due 31 January
Florida**	Assigned month triennially	Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Georgia	31 January annually	Rhode Island	30 June annually
Idaho	31 December, admission date triennially	South Carolina**	1 January annually
Indiana	31 December annually	Tennessee*	1 March annually
Iowa	1 March annually		Minimum credits must be completed by last day of birth month each year
Kansas	30 days after program, hours must be completed in compliance period July 1 to June 30	Texas	Minimum credits must be completed by last day of birth month each year
Kentucky	10 August; 30 June is the end of the educational year	Utah	31 January
Louisiana**	31 January annually	Vermont	2 July annually
Maine**	31 July annually	Virginia	31 October annually
Minnesota	30 August	Washington	31 January triennially
Mississippi**	1 August annually	West Virginia	31 July biennially
Missouri	31 July annually	Wisconsin*	1 February biennially
Montana	1 April annually	Wyoming	30 January annually
Nevada	1 March annually		
New Hampshire**	1 August annually		
New Mexico	prior to 30 April annually		
New York*	Every two years within thirty days after the attorney's birthday		

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2003 issue of *The Army Lawyer*.

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

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2003***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2004 ("2004 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2004 JAOAC will be held in January 2004, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2003). If the student receives notice of the need to re-do any examination or exercise after 1 October 2003, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not

be cleared to attend the 2004 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

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

Current Materials of Interest

1. The Judge Advocate General's Legal Center & School (TJAGLCS) Materials Available through the Defense Technical Information Center (DTIC)

For detailed information, see the March 2003 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the March 2003 issue of *The Army Lawyer*.

3. 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 the TJAGLCS 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 OT-JAG 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:

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

(b) Follow the link that reads "Enter JAGCNet."

(c) 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.

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

(e) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(f) 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.

(g) Once granted access to JAGCNet, follow step (c), above.

4. TJAGLCS Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2003 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The JAGLCS continues to improve capabilities for faculty and staff. We have installed new computers throughout the School, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-

mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at the School. Dial-up internet access is available in the TJAGLCS billets.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you to the appropriate department or directorate. For additional information, please contact the Legal Technology Management Office at (434) 971-3264.

6. 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. Dan Lavering, The Judge Advocate General's School & Legal Center, United States 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.Lavering@hqda.army.mil.

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