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Articles

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The following Army Regulations have been recently updated. The list is not all inclusive, and the highlighted changes do not necessarily address all the revisions made to these particular regulations. Attorneys should regularly consult the U.S. Army Publishing Directorate's website (http://www.army.mil/usapa/index.html) for updates to Army publications, including regulations and pamphlets. All updated regulations feature a "Summary of Change" section that outlines pertinent revisions.

- AR 135-175, Officer Separations
  RAR: 27 April 2010
  Changes: Deletes the word "limited" from describing the circumstances that an officer can use to show that retention by the Separation Board/Authority is warranted. Removing the word "limited" clarifies for the Separation Board/Authority that the circumstances warranting retention are not necessarily rare.

- AR 135-178, Enlisted Administrative Separations
  RAR: 27 April 2010
  Changes: Places the authority to separate enlisted personnel under Chapter 15, Discharge for Homosexual Conduct, with a General Officer commander in the Soldier's chain of command, of equal grade or senior to the commander initiating a fact-finding inquiry or separation. Only a commander in the Soldier's chain of command, in the grade of O-7 or higher, is authorized to initiate separation proceedings on the basis of alleged homosexual conduct.

- AR 600-8-24, Officer Transfers and Discharges
  RAR: 27 April 2010
  Changes: Deletes the word "limited" from describing the circumstances that an officer can use to show that retention by the Separation Board/Authority is warranted. Removing the word "limited" clarifies for the Separation Board/Authority that the circumstances warranting retention are not necessarily rare.

- AR 600-20, Army Command Policy
  RAR: 27 April 2010
  Changes: Places the authority to initiate an inquiry into homosexual conduct with a commander in the Soldier's chain of command in the grade of O-7 or higher. Any person the O-7 commander appoints to conduct the inquiry must be in the grade of O-5 or higher. Requires third parties providing information regarding homosexual conduct to do so under oath. Defines "unreliable person" and prohibits certain categories of information from being used as evidence in the fact-finding inquiry.

- AR 635-200, Active Duty Enlisted Administrative Separations
  Rapid Action Revision (RAR): 27 April 2010
  Changes: Places the authority to separate enlisted personnel under Chapter 15, Discharge for Homosexual Conduct, with a general officer commander in the Soldier's chain of command, of equal grade or senior to the commander initiating a fact-finding inquiry or separation. Only a commander in the Soldier's chain of command in the grade of O-7 or higher is authorized to initiate separation proceedings on the basis of alleged homosexual conduct.—Major Todd A. Messinger.

Lore of the Corps

Judge Advocates in the Empire of Haile Sellasie: Army Lawyers in Ethiopia in the Early 1970s

Fred L. Borch III
Regimental Historian & Archivist

While judge advocates currently serve in a variety of locations, from Afghanistan, Germany, and Honduras to Iraq, Italy, and Japan, few in our Corps today remember that Army lawyers also once served in Africa—in the Empire of Ethiopia.

In the early 1970s, Army lawyers served on the horn of Africa at the U.S. Army Security Agency Field Station in Asmara, Ethiopia.[1] Asmara's geographic location near the equator and its altitude (7600 feet above sea level) made it the ideal location for a Cold War era "listening station" to monitor Soviet-bloc radio traffic—which explains why there were roughly 3500 Americans in Asmara at "Kagnew Station" in the early 1970s.

The lawyers assigned to the "Judge Advocate Office" in Asmara, Ethiopia, from 1971 to 1972 were Major (MAJ) Raymond K. Wicker, Captain (CPT) Michael P. Miller, and CPT Nathaniel P. Wardwell.[2] Wicker was the "Judge Advocate" while Miller and Wardwell were "Assistant Judge Advocates." All three lawyers provided legal advice to "clients" located at the Army Security Agency (which ran Kagnew Station). In addition, these judge advocates advised American uniformed and civilian personnel assigned to the Navy and Air Force communications stations, State Department communications center, and the Air Force Post Office.

The volume of work and the variety of issues were considerable. Military justice advice to the special court-martial convening authority at Kagnew Station consisted chiefly of advice on Article 15 punishment, but there were also some summary courts-martial. The limited jurisdiction of the convening authority, however, caused some problems. For example, CPT Wardwell wrote at the time that a number of special courts-martial tried in Ethiopia during his tour of duty there "would probably be referred as general courts-martial elsewhere."[3] In any event, the joint nature of command resulted in some unusual, if not unique, military justice actions: one special court-martial "involved the trial of a Navy radioman, who was prosecuted and defended by Army attorneys, before an Army judge, and with a Navy court reporter."[4] Not only was this an "interesting example of interservice cooperation," but since the court-martial occurred in Africa, it likely was a unique event in the history of the Uniform Code of Military Justice.

As far as local criminal and civil matters were concerned, an Ethiopian-U.S. executive agreement relating solely to Kagnew Station, signed in 1953, provided that members of the U.S. forces were "immune from the criminal jurisdiction of the Ethiopian courts and, in matters arising from the performance of their official duties, from the civil jurisdiction of the Ethiopian courts."[5] While this might seem to have been a good situation, it was not necessarily so. For example, if the manager of the Kagnew Station post exchange embezzled funds, or if a military spouse killed her husband at Kagnew Station, no court would have had subject-matter jurisdiction over the offenses.

The same Ethiopian-U.S. agreement also triggered other international legal issues. The station's exemption from Ethiopian taxes was one such issue. After the Imperial Ethiopian Government (IEG) negotiated a loan from the Agency for International Development, the Ethiopians began to question the validity of exemptions that had been traditionally granted to Kagnew Station. As a result, MAJ Wicker and CPTs Miller and Wardwell spent considerable time visiting with Ethiopian government officials to explain and justify tax waiver provisions in the executive agreement. Additionally, these Army lawyers helped implement measures that aided the IEG tax officials. For example, a color dye was added to duty-free gasoline sold on post so that the Ethiopian police could more easily catch persons using duty-free gas who were not entitled to make duty-free purchases![6]

The judge advocates in Ethiopia also oversaw a busy claims operation. First, a Foreign Claims Commission (created under the authority of Army Regulation 27-40, *Claims*) sitting at Kagnew Station had authority to pay claims up to $5,000. Ethiopians who were injured or killed, or whose property was damaged, lost, or destroyed by

[1] Asmara today is located in Eritrea, which gained its independence from Ethiopia in 1993. While this "Lore of the Corps" column concerns judge advocates serving in Asmara in the early 1970s, Corps personnel had been assigned to Ethiopia for some years previously. The first "JAGC Personnel and Activity Directory" (today's JAG PUB 1-1) published in August 1963, shows that a judge advocate lieutenant colonel and captain were assigned to Asmara. This suggests that Army lawyers were serving in Ethiopia prior to 1963 (perhaps as early as the 1950s).

[2] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY 19 (Sept. 1972).

[3] N. P. Wardwell, *SJA Spotlight—Military Legal Practice in Ethiopia*, ARMY LAW., Mar. 1972, at 12.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 13.

members of the U.S. Armed Forces could be compensated, and the Foreign Claims Commission paid about a hundred claims a year; the larger claims involved motor vehicle accidents. In the event of a fatality, a solatium payment also was made "according to local custom—a cow and two barrels of *sua*, the local beer."[7]

Wicker, Miller, and Wardwell also provided legal advice in other areas, including the review of local contracts; advice to the post commander and commanders of tenant units; and advice to various clubs and non-appropriated fund instrumentalities.

Perhaps not surprisingly, the largest part of an Army lawyer's time in Ethiopia was spent providing legal assistance. Apparently the isolated nature of the base meant that an "unusually large number of marriages ended in separations . . . so marriage counseling normally consumed several hours per week." Additionally, as "many Americans wished to adopt Ethiopian children and marry Ethiopian wives," there were complex immigration and family law matters to handle.[8]

Life for judge advocates in the empire of Haile Sellasie was challenging and apparently rewarding. But it ended abruptly: when post-Vietnam budget cuts caused the Army's withdrawal from Asmara in 1973, the judge advocate presence went with it; MAJ Wicker, CPT Miller, and CPT Wardwell were the last Army lawyers to serve in Ethiopia.

As for Haile Selassie, who had ruled as emperor since 1930, his thirty-four-year imperial reign came to an end in 1974, when a Soviet-backed military coup, led by Mengistu Haile Mariam, ousted him and established the People's Democratic Republic of Ethiopia.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

[7] *Id.*

[8] *Id.*

"I Won't Participate in an Illegal War": Military Objectors, the Nuremberg Defense, and the Obligation to Refuse Illegal Orders

Captain Robert E. Murdough[*]

I. Introduction

When Army First Lieutenant (1LT) Ehren Watada refused to deploy to Iraq in 2006, he became the first U.S. Army officer of Operation Iraqi Freedom to disobey deployment orders.[1] First Lieutenant Watada believed the war in Iraq was illegal, and he declared it was "the duty, the obligation of every soldier, and specifically the officers, to evaluate the legality, the truth behind every order—including the order to go to war."[2] First Lieutenant Watada claimed he had personally researched the legal issues surrounding the war and had come to the conclusion the war was illegal,[3] and he insisted that "[t]he wholesale slaughter and mistreatment of the Iraqi people with only limited accountability is not only a terrible moral injustice, but a contradiction to the Army's own Law of Land Warfare." He further stated that his "participation would make [him a] party to war crimes."[4]

First Lieutenant Watada became a minor *cause célèbre* within the American antiwar movement[5] primarily because of his rank as an officer,[6] but he was not the only servicemember to refuse orders to deploy to Iraq. At a congressional hearing in 2007, Sergeant Matthis Chiroux of the U.S. Army Individual Ready Reserve (IRR), who had received orders recalling him to active service, publicly declared his intention to disobey his recall orders, calling the war an "illegal and unconstitutional occupation."[7] Jeremy Hinzman, the first of several American deserters to attempt to avoid service in Iraq by seeking refuge in Canada, claimed his participation in the war would make him "a criminal."[8]

Often citing the International Military Tribunal (IMT) at Nuremberg as justification to refuse orders to fight, saying that soldiers bear responsibility for "crimes against the peace" and "wars of aggression,"[9] and invoking the well-established duty of soldiers to refuse to follow illegal orders, these soldiers and others like them have claimed they could not, in good conscience, participate in the Iraq war.[10] They faced administrative and judicial punishment for refusing to obey orders.

This article examines whether soldiers have a defense when they refuse to participate in a war they believe is illegal and, consequently, claim an order to deploy is an illegal order. Part II of this article outlines the legal responsibilities of soldiers regarding illegal orders and discusses the difficulty of defining an illegal war under domestic law. Despite much litigation, the federal judiciary has rarely addressed the question of a war's legality, and when it has, it has consistently found the war in question to be legal. This article then examines whether, absent a determination that a war is illegal, a defense is still available under military law against a charge of desertion, dereliction of duty, missing movement, or failure to follow an order.[11] Part III considers the responsibility for illegal war under international law, including the precedents set in the 1940s at Nuremberg. This part also examines the philosophical distinctions between *jus ad bellum* (justice of war) and *jus in bello* (justice in war) and whether military personnel can be considered war criminals for their participation in an illegal war. Part IV addresses the significance of these issues and

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[1] Hal Bernton, *Officer at Fort Lewis Calls Iraq War Illegal, Refuses Order to Go*, SEATTLE TIMES, June 7, 2006, *available at* http://seattletimes.nwsource.com/html/localnews/2003044627_nogo7m.html. The "Iraq war" hereinafter refers to the ongoing military operations of U.S. and allied military personnel in Iraq formally titled Operation Iraqi Freedom, which began in 2003.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Megan Greenwell, *Student Protestors, Fighting Image of Apathy, Call for a Cohesive Movement*, WASH. POST, Jan. 28, 2007, at A08. Despite the description as a single entity, the "American antiwar movement" is not a monolithic organization; rather, it is a loose assortment of various groups and societies, each generally opposed to the U.S.-led invasion and occupation of Iraq.

[6] Since 2003, 1LT Watada is the only officer to refuse deployment orders on legal grounds; however, there have been officers who have applied for and obtained conscientious objector status. *See, e.g.*, *West Point Grad Wins Objector Status*, ASSOCIATED PRESS, Oct. 16, 2007 (describing how Army Captain Peter Brown successfully obtained conscientious objector status).

[7] *US Soldier Refuses to Serve in 'Illegal Iraq War,'* AGENCE FRANCE-PRESSE, May 16, 2008, *available at* http://afp.google.com/article/ALeqM5inlEUuu-qX05oAPENqq3Yi51FvZg.

[8] Tracy Tyler, *U.S. Deserter Fears for His Life*, TORONTO STAR, July 8, 2004, at A02.

[9] Jeremy Brecher & Brendan Smith, *Will the Watada Mistrial Spark an End to the War?*, NATION, Feb. 9, 2007, *available at* http://www.thenation.com/article/will-watada-mistrial-spark-end-war.

[10] U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP ¶ 4-74 (12 Oct. 2006) [hereinafter FM 6-22] ("Under normal circumstances, a leader executes a superior leader's decision with energy and enthusiasm. The only exception would be illegal orders, which a leader has a duty to disobey.").

[11] *See* UCMJ arts. 85, 87, 92 (2008).

the danger to national security that would result from allowing soldiers to choose which wars to fight.

This article focuses on a specific group of soldiers,[12] for these purposes labeled "military objectors." They desert, disobey orders, or otherwise violate the Uniform Code of Military Justice (UCMJ) by refusing to participate in a war or a military operation because they believe the particular war is illegal. When faced with criminal charges or administrative action, they offer the defense that an order to deploy to an illegal war is per se an illegal order.

Military objectors as defined here differ from conscientious objectors, who oppose all wars on moral grounds.[13] Some objectors mentioned in this article claim to have witnessed or participated in specific violations of the laws of warfare; this article does not address the validity of their claims or the responsibility such soldiers and their leaders would bear for those crimes, if true. Though it is almost certain that some objectors may be motivated by political ideology, a desire for publicity, or fear of combat, it is also likely that there are some whose professed beliefs are genuine. This article illustrates that even genuine military objectors, who may be otherwise honorable and loyal soldiers yet feel they cannot in good conscience participate in a particular war, have no defense in the military justice system.

II. The Legality of War Under Domestic Law

Perhaps the most common criticism of modern wars is that they are "undeclared" wars.[14] The U.S. Constitution gives Congress the power to declare war,[15] yet only five conflicts in American history have been declared wars.[16] Presidents, however, have ordered military forces onto foreign soil for several purposes, including active combat.[17] As this section explains, today it is understood, if not always accepted, that the commitment of military forces to operations, including ground combat, does not require a congressional declaration of war to be legal. Determining a war to be illegal, therefore, has become nearly impossible. If a war is legal, an order given by competent authority to participate in the war is definitely a legal order.

A. The Illegality of an Order as a Defense Under Military Law

Military law requires soldiers to follow all lawful orders issued by their superiors and provides for criminal punishments for failure to do so.[18] All orders carry a presumption of legality, even illegal orders.[19] Under military law, the only defense for failing to follow an order is that "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[20] Though the refusal to follow an illegal order is sometimes called the "Nuremberg defense," it is not actually a defense in the legal sense. The legality of an order is not an element of the offense to be proven by the prosecution (or rebutted by the defense); it is a preliminary question of law to be determined by the military judge.[21]

B. War Powers and the Federal Judiciary

Congress has not affirmatively declared war since 1942.[22] However, in the last seven decades, nearly every

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[12] For the sake of simplicity, this article uses examples, references, and professional terms from the U.S. Army (*e.g.* "Soldiers"), but the legal principles are applicable to all American military personnel.

[13] U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION, glossary (21 Aug. 2006) (defining conscientious objection as "a firm, fixed, and sincere objection to participation in war *in any form* or the bearing of arms because of religious training and belief).

[14] *See, e.g.*, *With Regards to War, Is Congress Relevant?*, 148 CONG. REC. H7009 (daily ed. Oct. 3, 2002) (statement of Rep. Paul); KENNETH B. MOSS, UNDECLARED WAR AND THE FUTURE OF U.S. FOREIGN POLICY (2008); *Undeclared War and the Destruction of the Constitution*, Tenth Amendment Ctr., http://www.tenthamendmentcenter.com/2007/06/17/undeclared-war-and-the-destruction-of-the-constitution (June 17, 2007).

[15] *See* U.S. CONST, art. I, § 8, cl. 11.

[16] *See* 23 Annals of Cong. 298 (1812) (Declaration of War against Great Britain in 1812), *available at* http://memory.loc.gov/ammem/amlaw/lwac.html (using Browse or Search function); An Act providing for the Prosecution of the existing War between the United States and the Republic of Mexico, 9 Stat. 9 (1846) An Act Declaring that War Exists Between the United States and Spain, 30 Stat. 364 (1898), Joint Resolution Declaring that a State of War Exists Between the Imperial German Government and the Government and the People of the United States and Making Provision to Prosecute the Same, 40 Stat. 1 (1917) (first declaration of war by the United States in World War I); Joint Resolution Declaring that a State of War Exists Between the Imperial Government of Japan and the Government and the People of the United States and Making Provision to Prosecute the Same, 55 Stat. 795 (1941) (first declaration of war by the United States in World War II).

[17] MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2002) (providing historical accounts of dozens of military operations on foreign territory throughout American history, including President Jefferson's "Barbary Wars" beginning in 1801, the "Philippine War" of 1899–1902, the expedition against Pancho Villa in 1916, President Wilson's intervention against the Bolsheviks in Russia in 1918, and the long and complicated history of U.S. military involvement in China).

[18] *See* UCMJ art. 92 (2008).

[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2)(a) (2008) [hereinafter MCM].

[20] *Id.* R.C.M. 916(d). As a corollary, a servicemember who knows or has reason to know that an order is illegal would lose this defense and be held liable for his actions, thus the law implies an obligation to refuse illegal orders.

[21] United States v. New, 55 M.J. 95, 105 (C.A.A.F. 2001); *see also* MCM, *supra* note 19, R.C.M. 801(e).

[22] Joint Resolution Declaring that a State of War Exists Between the Government of Rumania and the Government and the People of the United States and Making Provisions to Prosecute the Same, Pub. L. No. 77-563, 56 Stat. 307 (1942).

President has committed military forces to continuous operations on foreign soil involving direct combat against a hostile force.[23] None of these military commitments was a war explicitly declared by Congress, nor were the commitments deviations from historical practice.[24] Nevertheless, the legality of these actions, when challenged, has been uniformly upheld.

In 1964, Congress authorized an escalation of the Vietnam War, but by 1973 Congress was determined to curtail the President's ability to make war unilaterally.[25] Congress's action led to the passage of the War Powers Act.[26] Controversial from its inception, the War Powers Act was passed into law over President Nixon's veto.[27] Every president since has considered the War Powers Act unconstitutional.[28] In particular, 50 U.S.C. § 1544, which requires the President to remove military forces from a theater of operations upon a concurrent resolution of Congress, has been called into question in light of several Supreme Court decisions invalidating so-called "legislative vetoes."[29]

Despite the challenges to its constitutionality, the War Powers Act has been invoked to authorize military action in Lebanon, Kuwait, Iraq (twice), Somalia, and Afghanistan, and also to limit the involvement of military forces in Haiti and Iraq.[30] During the same period, military actions in Iran, Honduras, Grenada, Libya, and Panama were undertaken without any prior congressional authorization.[31] In all cases, the federal judiciary has consistently avoided finding any particular military operation to be an illegal war.

In a case remarkably similar to 1LT Watada's, Army Captain (CPT) Yolanda Huet-Vaughn was convicted of desertion with intent to avoid hazardous duty in violation of Article 85, UCMJ.[32] Her attorney testified that her "intent was not to avoid hazardous duty or important service, but her intent was to expose what she felt were impending war crimes in the Persian Gulf."[33] At her court-martial, CPT Huet-Vaughn testified that, after personal research into the issues surrounding the 1991 Gulf War, she determined that the war was morally objectionable and she had an obligation "as a military person . . . to expose what [she] saw at that point as—as a move to a catastrophic consequence."[34] The Court of Appeals for the Armed Forces (CAAF) upheld the military judge's instruction that "[a]ny belief by the accused that what she might have been required to do could have been in violation of international law is not a defense."[35] The court also noted that, "to the extent that CPT Huet-Vaughn intended to contest the legality of the decision to employ military forces in the Persian Gulf, the evidence was

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[23] For example, the Korean War (Truman, Eisenhower), Vietnam War (Kennedy, Johnson, Nixon), Iran Hostage Rescue (Carter), Grenada and Lebanon (Reagan), Panama and the Gulf War (G. H. W. Bush), Somalia, Bosnia, and Kosovo (Clinton), Iraq and Afghanistan (G. W. Bush, Obama) were all significant military deployments on foreign territory, in some cases lasting years.

[24] BOOT, *supra* note 17, at 336–37. Declared wars have always been the rare exception, rather than the rule, to American military involvement abroad. *Id.*

[25] Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384 (1964) (commonly called the "Gulf of Tonkin Resolution").

[26] 50 U.S.C. §§ 1541–548 (2006).

[27] Joint Resolution Concerning the War Powers of Congress and the President, Pub. L. No. 93-148, 87 Stat. 555, 559–60 (1973).

[28] James A. Baker III & Warren Christopher, *Put War Powers Back Where They Belong*, N.Y. TIMES, July 8, 2008, at A21; *see also* GEORGE H.W. BUSH, Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, *in* 1 PUB. PAPERS OF GEORGE BUSH 40 (Jan. 14, 1991) (stating that by signing the resolution, he was not reversing the longstanding position of the executive branch that the War Powers Act is unconstitutional). President Obama's view of the constitutionality of the War Powers Act is unknown.

[29] *See generally* INS v. Chadha, 462 U.S. 919 (1983) (invalidating so-called "legislative vetoes"). Note that 50 U.S.C. § 1548 provides for severability should any portion of the act be invalidated.

[30] Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983); Authorization for Use of Military Force Against Iraq, Pub. L. No. 102-1, 105 Stat. 3 (1991); Department of Defense Appropriations Act, 1994, Pub L. No. 103-139 § 8151, 107 Stat. 1418, 1476, (1993) (approving use of U.S. military forces for certain purposes in Somalia); National Defense Authorization Act of 2000, Pub L. No. 106-65 § 1232, 113 Stat. 512, 788, (1999) (limiting deployment of U.S. Armed Forces in Haiti); Authorization for Use of Military Force, Pub L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L. No. 107-243, 116 Stat. 1498; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 1227, 119 Stat. 3136, 3465–66 (section titled "United States Policy in Iraq," requiring quarterly reports from the President on policy and operations in Iraq).

[31] President Carter reported to Congress in 1980 after the failed hostage rescue attempt in Iran; some members of Congress expressed displeasure but no formal action was taken by Congress as a whole. RICHARD F. GRIMMET, THE WAR POWERS RESOLUTION AFTER THIRTY YEARS 15 (Gerald M. Perkins ed., Novinka Books, 2005). President Reagan reported the deployment of troops to Honduras in 1983 as a training exercise, although some in Congress alleged the deployment was to support the anti-government rebellion. *Id.* at 17–18. President Reagan also reported the 1983 invasion of Grenada to Congress after the troops had landed. The House of Representatives passed a resolution seeking to invoke the limiting provisions of the War Powers Act; the Senate passed a different measure and the resolution did not survive the conference committee. *Id.* at 21. The use of U.S. forces in Libya in 1986 was short-lived, and though some bills were introduced amending the Act to deal with incidents of terrorism, none passed. *Id.* at 22. Although President Bush notified Congress of the 1989 invasion of Panama, Congress was out of session when the invasion occurred, and the invasion lasted only a few months. *Id.* at 25-26. The invasion of Panama was also very popular with the public and most of Congress. *Id*. at 26.

[32] United States v. Huet-Vaughn, 43 M.J. 105, 106–07 (C.A.A.F. 1995).

[33] *Id.* at 107.

[34] *Id.* at 109.

[35] *Id.* at 112.

irrelevant, because it pertained to a non-justiciable political question."[36]

In the late 1960s and early 1970s, many litigants, civilian and military, challenged the legality of the Vietnam War; none was successful.[37] In most cases, the legality of war was considered a non-justiciable political question.[38] Those that addressed the legality of the war consistently found the President's actions to be within the "zone of twilight" described by Justice Jackson in which the President is free to act provided he is not contravened by Congress.[39] Noting that Congress had passed the Gulf of Tonkin resolution, approved conscription, and appropriated funds, the courts held that Congress's actions had sufficiently ratified the legality of the war.[40]

After the Vietnam War, the War Powers Act made this reasoning even more applicable. The existence of the Act allows courts to determine clearly whether Congress has endorsed, acquiesced in, or actively opposed a particular war. Failure to invoke the restrictive portions of the War Powers Act has been considered sufficient ratification to validate a President's decision to commit military forces overseas. In 1982, following a suit by twenty-nine members of Congress, the Court of Appeals for the District of Columbia Circuit upheld a district court ruling that the determination of whether the President had violated the War Powers Act by sending troops to El Salvador was a political question.[41] In 1990, fearful that President George H.W. Bush would commit troops to war in Iraq without congressional authorization, fifty-four members of Congress sought an injunction preventing him from doing so.[42] Though finding the issue justiciable and that the representatives had standing to sue, the district court denied the injunction because Congress as a whole had not taken action to oppose the President's plan.[43]

C. The Military Objectors' Defense Given the Presumptive Legality of War

Under modern American law, it is almost impossible for any war to be considered unconstitutional or illegal.[44] Under American military law, all orders are presumptively legal.[45] Given the current state of the law as described above, absent a formal resolution from Congress explicitly declaring a particular military action to be unauthorized, all military actions endorsed, funded, or simply not opposed by Congress are presumptively valid under the Constitution, as are the orders to participate therein.[46] Both of the current wars in Iraq and Afghanistan were conducted pursuant to congressional authorization under the War Powers Act.[47] Congress has never taken action declaring either war unconstitutional or illegal and has continued to fund military operations in both theaters. Thus, under current law, both wars are evidently legal, at least as a matter of domestic law.[48]

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[36] *Id.* at 115 (citing Flast v. Cohen, 392 U.S. 83, 95 (1968); Ange v. Bush, 752 F. Supp. 509, 518 n.8 (D.D.C. 1990)).

[37] *See* Holtzman v. Schlesinger, 484 F.2d 1307, 1312 n.3 (2d Cir. 1973).

[38] *E.g.*, Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967); *see generally* Baker v. Carr, 369 U.S. 186 (1962) (explaining the non-justiciability of "political questions").

[39] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("[T]here is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility").

[40] *E.g.*, Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971). One such case was granted certiorari and affirmed by the Supreme Court. Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973) (Elliot Richardson succeeded Melvin Laird as Secretary of Defense at the start of President Nixon's second term).

[41] Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983).

[42] Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

[43] *Id.* at 1150 (citing Goldwater v. Carter, 444 U.S. 996, 997–98 (1979)) ("If the Congress chooses not to confront the President, it is not our task to do so.").

[44] There are many scholars of law and politics who argue that this should not be so. Particularly since 2001, concern has grown over the authority of the executive branch to use military force without any meaningful restraints provided by another branch of government or an international body. *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004) (arguing that, since the end of World War II, Presidents have repeatedly violated the Constitution by waging undeclared wars); MOSS, *supra* note 14 (noting that, in the face of compliant legislative and judicial branches, Presidents have been increasingly willing to make war more frequently and more unilaterally). *But see* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) (arguing that the constitutional framework is, and should be, flexible to allow for a variety of constitutionally acceptable methods for going to war). Despite the vigorous debate on the subject, these normative arguments remain, for the time being, academic. The current state of the law allows a President to initiate a war easily and legally.

[45] *See supra* text accompanying note 19.

[46] It is possible that even such a congressional resolution is not enough to hold military action invalid unless passed as legislation, with a presidential signature or veto override. *See supra* text accompanying note 29.

[47] The Authorization for Use of Military Force Against Iraq Resolution of 2002 is arguably the resolution that most faithfully adheres to the intent of the drafters of the War Powers Act. GRIMMET, *supra* note 31, at 58–59. Prior to ordering the invasion of Iraq, President Bush submitted a resolution to Congress. *Id.* at 56. This resolution was debated, amended, and passed as legislation before the invasion began. *Id.* at 56–57. Although, when signing the legislation President Bush echoed his father, saying that his "request for [the resolution] did not, and [his] signing the resolution does not constitute any change in the long-standing positions of the executive branch . . . on the constitutionality of the War Powers Resolution." *Id.* at 57.

[48] In 2007 Congress passed legislation that linked funding for the Iraq war to a nonbinding "timetable" on troop withdrawals in Iraq. H. 1591, 110th Cong. § 1 (2007). President Bush vetoed the legislation, and after failing to override the veto Congress passed subsequent legislation that did not include such restrictions. H. 2206, 110th Cong. § 1 (2007). This appears to

The presumptive legality of wars makes the defenses of military objectors difficult to support. The prosecution can generally prove every necessary element of the prima facie offense, regardless of the particular charge an objector faces—including desertion, missing movement, or failure to obey an order.[49] In each of these cases, the soldier is under orders to report to a specific location at a specific time, normally to deploy to a combat theater, and the soldier purposely or knowingly fails to do so, which completes the crime. The soldier's defense, therefore, relies on a finding that the order was illegal. However, as discussed above, the legality of orders is not a discrete element of the offenses relevant to military objectors that must be proven by the Government; rather, the legality of orders is a matter of law to be determined by the judge before trial.[50]

Furthermore, mistake of law is not a defense under military law.[51] Presumably, a soldier who disobeys an order believing it to be illegal would have no defense if the order is determined to be legal.[52] The military objector's defense requires a finding that the war is illegal; a reasonable yet erroneous belief in the illegality of the war would not sustain the defense. The precedents on which military judges can draw uniformly indicate that the legality of war is a non-justiciable question, at least unless Congress has acted to oppose the particular military operation, and therefore an order to deploy to war is always a legal order.[53] Therefore, having committed a crime under the UCMJ, the military objector is left with no defense.

III. Responsibility for Wars Under International Law

At his administrative separation hearing,[54] Sergeant Chiroux claims to have quoted from the Constitution of the United States, specifically Article VI, which states that treaties entered into under the authority of the United States are part of the "supreme law of the land" and that, because the Iraq War was a violation of the U.N. Charter, it was therefore illegal under both domestic and international law.[55] At first glance, this argument appears stronger than any based solely in domestic law. Compared with the presumption of legality under domestic law, very narrow conditions determine which wars are legal under international law.

The Nuremberg trials established the precedent that individuals can be punished for "Crimes Against Peace," defined as the "planning, preparation, and waging of wars of aggression,"[56] as well as the well-known principle that "superior orders" (i.e., that following the orders of a superior, even if illegal) is not a defense.[57] The U.S. Army's Field Manual (FM), *Law of Land Warfare*, alluded to by 1LT Watada,[58] recognizes that "crimes against peace" are punishable violations of international law.[59] It further acknowledges that superior orders is not a defense against a violation of the law of war and that an act may violate international law even if it is not illegal under domestic law.[60] Thus, an order to participate in a war that is legal under domestic law may be illegal if the war is illegal under international law. This leaves a possible opening for the

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indicate an awareness of Congress that a congressional resolution alone would be legally insufficient to end the war. *See supra* note 46 and accompanying text.

[49] *See* UCMJ arts. 85, 87, 92 (2008). For example, 1LT Watada was charged with a violation of Article 87 (missing movement), and he stipulated in a pretrial agreement that he was under orders to board an airplane which he did not board. This stipulation essentially admitted all factual elements of the offense. Watada v. Head, 2008, No. C07-5549BHS, U.S. Dist. Lexis 88489 at *5, 9–10 (W.D.Wa. 2008). (The military judge later found that 1LT Watada did not fully understand the significance of his admission, leading to a mistrial). *Watada*, 2008 U.S. Dist. Lexis 88489, at *15.

[50] *See supra* note 21 and accompanying text. At 1LT Watada's court martial, the military judge made the preliminary decision that the order was legal, and prevented the defense from introducing evidence challenging the validity of the Iraq War. *Watada*, 2008 U.S. Dist. Lexis 88489, at *9. This was correct under military law, but some in the American anti-war movement saw this as a deliberate measure by the U.S. Army to avoid publicly admitting or confronting the illegality of the war. Brecher & Smith, *supra* note 9. First Lieutenant Watada attempted to raise this defense as a mistake of fact related to *mens rea*, but the military judge, recognizing it as an issue of law, did not allow this defense to be raised. *Watada*, 2008 U.S. Dist. Lexis 88489, at *8–9.

[51] MCM, *supra* note 19, R.C.M. 916(l)(1).

[52] *See* FM 6-22, *supra* note 10, ¶ 4-75 ("There is a risk when a leader disobeys what may be an illegal order . . . .").

[53] An order to deploy to war that Congress has opposed may constitute an illegal order, assuming such congressional opposition is sustained. *See supra* note 46 and accompanying text. As a practical matter, however, a war opposed by Congress would not be funded, and thus brought to a very swift conclusion. Soldiers would not continue to deploy (and be ordered to deploy) in such a scenario.

[54] An administrative separation hearing is sometimes convened to determine the character of a Soldier's discharge, normally when issues of conduct are involved. *See generally* U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (13 Mar. 2007). This was the regulation that was in effect, as Chiroux was a sergeant in the individual ready reserve at the time of his hearing. Matthis Chiroux, Confessions of a War Resister (Apr. 23, 2009), http://matthisresists.us ("I faced the military for my refusal to deploy to Iraq, and I walked away a free man with a general Discharge from the Army's Individual Ready Reserve.").

[55] Chiroux, *supra* note 54 (citing U.S. CONST. art. VI, §2).

[56] *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (1947), *available at* http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html [hereinafter IMT]. Article 6, Charter of the IMT established individual culpability for Crimes "Against Peace." Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279

[57] Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 ("The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.").

[58] *See supra* text accompanying note 4.

[59] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ch. 8, ¶ 498 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

[60] *Id.* ch. 8, ¶¶ 509, 511.

military objectors' defense that they had justifiably refused to participate in illegal activities.

Since the inception of modern international law, the responsibility of military personnel has been confined to the realm of *jus in bello*—governing conduct in war. Under international law, military personnel generally do not bear responsibility for *jus ad bellum*—the legality of war itself. United States military law acknowledges that, while "crimes against peace" and "crimes against humanity" are violations of international law, "members of the armed forces will normally be concerned, only with those offenses constituting 'war crimes.'"[61] Military objectors often conflate these principles, claiming that because war crimes occur, the war itself is morally objectionable and illegal. But there is a distinct legal difference. Though a soldier can be punished for participation in war crimes (e.g., pillage or purposeless destruction, killing prisoners or other "protected persons," firing on undefended localities),[62] since Nuremberg, military personnel below a certain rank cannot be held responsible for the legality of war.[63] Even if a war is illegal, under international law military objectors, typically of enlisted or junior officer rank, cannot be held criminally liable for "crimes against peace," which makes it doubtful that they can legally refuse an order to participate in the war. This is essentially an issue of standing and blends international and domestic law. If a soldier cannot be punished under international law for the consequences of following the order, he cannot claim that by participating in the war he would be committing an illegal act, or that the order to deploy was an illegal order.

A. The Legality of War Under International Law

The second article of the U.N. Charter requires that members refrain "from threat or use of force against the territorial integrity or political independence of any state."[64] The General Assembly has declared that "a war of aggression constitutes a crime against peace, for which there is responsibility under international law,"[65] and defined aggression as an illegal use of force, invasion, or attack.[66] Though classifying a war as illegal under U.S. domestic law is difficult, an illegal war can readily be envisioned under international law. Under the U.N. Charter, only two instances permit the use of military force against another state: self-defense[67] or when approved by the Security Council.[68] Absent one of these two conditions, all military invasions or attacks by parties to the Charter against another are illegal under international law.

Prior to the invasion of Iraq in 2003, the U.S. Government recognized both of these conditions. The 2002 Authorization for the Use of Military Force Against Iraq includes references to enforcement of U.N. Security Council resolutions and invokes the right to national self-defense.[69] However, U.N. Security Council Resolution 1441, which found Iraq in violation of previous resolutions, used the ambiguous phrase "serious consequences"; in comparison, U.N. Security Council Resolution 678, which authorized the 1991 war against Iraq to liberate Kuwait, used the phrase "all necessary means," which has normally been interpreted as justifying military force.[70]

In addition to the uncertainty over the level of force authorized by the Security Council resolutions, President Bush controversially defined self-defense to include "preemptive" self-defense.[71] Furthermore, then-U.N. Secretary General Kofi Annan declared the invasion of Iraq illegal.[72] Given that wars are presumptively illegal under international law, absent the two circumstances described above, the invasion of Iraq was questionably legal at best and plausibly illegal.[73] Nonetheless, within months, the Security Council passed a resolution that declared the United States and the United Kingdom as "occupying powers" and conferred legitimacy on the occupation.[74] Although the

[61] *Id.* ¶ 498.

[62] *Id.* ¶¶ 503, 504.

[63] XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10, at 486 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html [hereinafter NMT] (The title uses the contemporary spelling of Nuremberg) ("Somewhere between the dictator and supreme commander of the military forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it.").

[64] U.N. Charter art. 2

[65] G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970).

[66] G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

[67] U.N. Charter art. 51 (recognizing that the right of individual and collective self-defense is "inherent").

[68] *See id.* arts. 34, 35, 41, 42, 43.

[69] *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

[70] *Compare* S.C. Res 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002), *with* S.C. Res 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

[71] NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (2002), *available at* http://merln.ndu.edu/whitepapers/USnss2002.pdf.

[72] *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, *available at* http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.

[73] Given that the United States has veto authority in the Security Council, does not submit to the compulsory jurisdiction of the International Court of Justice, and does not consider itself a signatory to the Rome Statute of the International Criminal Court, there is likely no international body that could have authoritatively ruled that the 2003 invasion of Iraq was illegal and imposed punishment on the United States or U.S. personnel who participated in it.

[74] The resolution was extended several times until an agreement akin to a Status of Forces Agreement was executed between the United States and the newly sovereign government of Iraq. *See* S.C. Res. 1483, U.N. Doc S/RES/1483 (May 22, 2003); S.C. Res. 1546 U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1637 U.N. Doc. S/RES/1637 (Nov. 11, 2005); S.C. Res. 1723 U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790 U.N. Doc. S/RES/1790 (Dec. 18, 2007); *see also* Agreement Between the United

resolution pointedly did not confer legality on the invasion ex post facto, from that point on, military operations in Iraq have been sanctioned by the U.N. and are presumably legitimate under international and domestic law. As discussed below, regardless of whether military operations begin, become, or remain illegal under international law, the legality of the war is irrelevant to the defense of military objectors.

B. The Nuremberg Precedents

The trials of German war criminals at Nuremberg established many precedents. Perhaps the most well-known is the principle that superior orders is not a justification for violating international law.[75] The trials also established that individual government officials can be held responsible for their nations' "wars of aggression" waged in violation of international law.[76] The tribunals' decisions reflect a careful acknowledgement that military officers are expected to obey orders and that their responsibility and capacity for questioning the legality of orders is limited.

The first trial was the Trial of the Major War Criminals before the International Military Tribunal (IMT); this was the only trial conducted by an international tribunal.[77] The defendants included many high-ranking members of the Nazi Party, civilian government leaders, and top military officers.[78] The military officers were Field Marshal Wilhelm Keitel, Chief of the High Command of the Armed Forces; Colonel-General Alfred Jodl, Chief of Staff of the Armed Forces (Oberkommando der Wehrmacht or OKW); and Admiral Erich Raeder, Commander of the Navy (Kreigsmarine).[79] Because the military high command was intertwined with the political leadership of the Nazi regime, some of the defendants held military positions as well as political office. For instance, Herman Göring was the commander-in-chief of the Air Force (Luftwaffe), as well as the supreme leader of the Nazi Sturmabteilung (SA) and second in command to Hitler, and Karl Dönitz was the commander-in-chief of the Kreigsmarine and became the "head of the German Government" following Hitler's death.[80] Additionally, many of the civilian defendants at the IMT held the equivalent rank of general in the Schutzstaffel (SS)[81] but were not military officers in the legal or professional sense.

The IMT indicted each defendant separately for some combination of four charges: participation in a conspiracy to commit crimes against peace, crimes against peace by waging aggressive war, war crimes, and crimes against humanity.[82] Field Marshal Keitel and Colonel-General Jodl were each indicted on all four counts.[83] In support of these indictments, the prosecution alleged that Keitel, in addition to having an "intimate connection" with Hitler, "participated in the political planning and preparation . . . for Wars of Aggression and Wars in Violation of International Treaties, Agreements, and Assurances," and was responsible for the execution of the military plan.[84] Jodl's indictment alleged he was responsible for "the military planning" of such wars.[85] Likewise, Raeder allegedly promoted the "political planning and preparation" for wars and "executed and assumed responsibility" for the military plan.[86]

The tribunal convicted Keitel and Jodl on all counts and convicted Raeder on counts one, two, and three—he was not indicted on count four, crimes against humanity.[87] In support of the conviction, the tribunal noted that Jodl bore responsibility for planning the invasion of Czechoslovakia in 1938, including the plan to trigger the invasion with a manufactured "incident" to "give Germany provocation for military intervention."[88] The tribunal also found that Keitel and Jodl were involved in the plan to overthrow the Government of Norway.[89] The tribunal found Raeder responsible for the buildup of the German Navy in violation of the Versailles Treaty and for first suggesting the invasion of Norway.[90] All these defendants bore responsibility for both political as well as military decisions, orders, and acts in violation of international laws, and their convictions for conspiracy and crimes against peace rested on political as well as military grounds.

The United States conducted twelve additional trials of lower-ranking individuals, known formally as the Trials of War Criminals before the Nuremberg Military Tribunal (NMT).[91] These trials were all prosecuted by Brigadier

States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

[75] *See supra* note 57and accompanying text.

[76] 1 IMT, *supra* note 56, at 11.

[77] *Id.*, at 10.

[78] *Id.* at 68–79.

[79] *Id.* at 77–78. Raeder was also a member of the Secret Cabinet Council. *Id.* at 78.

[80] *Id.* at 68–79.

[81] *Id*.

[82] *Id.* at 28–29.

[83] *Id.* at 77–78.

[84] *Id.* at 77.

[85] *Id.* at 77–78.

[86] *Id.* at 78.

[87] *Id.* at 291 (Keitel), 325 (Jodl), 317 (Raeder).

[88] *Id.* at 196.

[89] *Id.* at 205.

[90] *Id.* at 315.

[91] NMT, *supra* note 63

General (BG) Tedford Taylor.[92] In four of the twelve trials, BG Taylor charged the defendants with "war making" or "crimes against peace," using language similar to the indictments of the IMT.[93] Defendants were civilians at three of the four trials, namely the "Krupp Case," (Trial No. 10)[94] the "Farben Case" (Trial No. 6),[95] and the "Ministries Case" (Trial No. 11).[96]

The only trial at which military officers—distinct from officers of the SS, who held military-equivalent ranks—were tried was the "High Command Case" (Trial No. 12).[97] The fourteen defendants included seven Army, Naval, and Air Group commanders; four Army Commanders; two staff officers; and the Judge Advocate General of the OKW.[98] At this trial, count one of the indictment was for crimes against peace, namely "participating in wars and invasions aggressive in character and violative of international treaties, agreements, and assurances."[99] Count four was for participation in a conspiracy to commit crimes against peace.[100] At the trial, the OKW Judge Advocate General, Rudolf Lehmann, speaking for all defendants, informed the tribunal that under the Weimar Constitution the legality of orders was not reviewable by a court.[101] The tribunal first struck the conspiracy count from the indictment because the prosecution had not introduced evidence supporting a conspiracy separate from, and in addition to, evidence in support of other counts, and because any defendant who could be convicted of conspiracy could also be convicted of a principal offense.[102] The tribunal then acquitted all fourteen defendants of count one (crimes against peace) en masse.[103] In doing so, the tribunal stated:

> If . . . a defendant came into possession of knowledge that the invasion and wars to be waged, were aggressive and lawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.[104]

The tribunal found that while all the defendants were generals, admirals, or field marshals, they were nonetheless below the "policy level" and could not have influenced the decision to wage war.[105] The tribunal stated that while it would have been "eminently desirable" for the defendants to have disobeyed orders, it also recognized the "obligations which individuals owe to their states" and observed that international law did not require military personnel to refuse to participate in aggressive wars.[106]

C. The Distinction Between *Jus ad Bellum* and *Jus in Bello*

The discussion above deals primarily with the responsibility for the political decision to engage in warfare rather than the conduct of soldiers in war. Throughout history, nations and armies have evolved a "set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements" to govern the conduct of soldiers and states engaged in warfare.[107] Since medieval times, two different moral standards have been applied to war: *jus ad bellum* and *jus in bello*.[108] The "crime of war," including aggressive, unprovoked attack by one state upon another, is distinct from "war crimes," which are violations of the legal and moral principles and norms governing soldiers in war.[109] These two standards are separate; "it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."[110] For example, although Field Marshal Erwin Rommel fought for Hitler, he has been repeatedly described as "an honorable man" who was not involved in the Nazis's dishonorable activities and who refused to follow Hitler's order to kill enemy soldiers caught behind the lines or to shoot prisoners.[111] This dichotomy illustrates

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[92] BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON NUERNBERG WAR CRIMES TRIALS CONTROL COUNCIL ORDER NO. 10 (1949) (using the contemporary spelling of Nuremberg).

[93] *Id.* at 67.

[94] United States v. Alfried Felix Alwyn Krupp, IX NMT, *supra* note 63, at 7–9. Defendants were agents and officials of Fried Krupp Essen, a corporation. Some also had ties to the SS. *Id.*

[95] United States v. Carl Krauch, VII NMT, *supra* note 63, at 11–14. Defendants were agents and officials of I.G. Furberindustrie Abtiergesellschaft. Some were SS officers. *Id.*

[96] United States v. Ernst von Weizsaecker, XII NMT, *supra* note 63, at 1. Defendants were various government and Nazi party officials. Some also had ties to the SS. *Id.*

[97] United States v. Wilhelm von Leeb, X NMT, *supra* note 63, at 11.

[98] *Id.*

[99] *Id.* at 3.

[100] *Id.*

[101] *Id.* at 433.

[102] *Id.* at 483.

[103] *Id.* at 490.

[104] XI NMT, *supra* note 63, at 488–89.

[105] *Id.* at 489.

[106] *Id*.

[107] MICHAEL WALZER, JUST AND UNJUST WARS 44 (4th ed. 2006). Walzer labels this "set of articulated norms," etc. "The War Convention." *Id.*

[108] *Id.* at 21.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 38.

> the distinction between *jus ad bellum* and *jus in bello*. We draw a line between the war itself, for which soldiers are not responsible, and the conduct of the war, for which they are responsible, at least within their own sphere of activity. Generals may well straddle the line, but that only suggests that we know pretty well where it should be drawn . . . . Rommel was a servant, not a ruler, of the German state . . . . By and large we don't blame a soldier, even a general, who fights for his own government.[112]

Military law recognizes the distinction. The CAAF has stated that "[t]he so-called 'Nuremberg defense' applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war."[113] Immunizing soldiers from responsibility for *jus ad bellum* is crucial to maintaining military order and discipline, and also to ensuring that soldiers are not punished, either by their own nation or other nations, for political decisions. The International Committee of the Red Cross (ICRC) refutes the military objectors' belief that participating in an illegal war makes soldiers war criminals. The ICRC maintains that the distinction is necessary to ensure soldiers and civilian citizens of a state receive the protections of international humanitarian law, including protections against reprisals for the actions of their governments, even if their state is engaged in an unjust war.[114]

After Nuremberg, one of the most oft-cited examples of the failure of the defense of superior orders is the trial of 1LT William Calley.[115] First Lieutenant Calley was convicted of murdering several unarmed civilians in the Vietnamese village of My Lai in March, 1968.[116] While admitting to his participation in the killings,[117] Calley claimed alternately that the civilians were legitimate combatants not entitled to protection under international law and that his acts were justified because he was following orders.[118] Testimony at trial differed as to whether Calley's commanding officer had issued orders to kill civilians.[119] The court held that this made no difference. The trial judge instructed the court members that such an order, if it was given, was illegal as a matter of law; that it was such that "a man of ordinary sense" would have known it to be illegal; and that obedience to such an order was no defense.[120] *Calley* is well-known for confirming and clarifying the duty of military personnel to disobey illegal orders and the concept, established at Nuremberg, that obedience to orders is not always a defense. But *Calley* is distinguishable from the Nuremberg trials in that it solely involves *jus in bello*; 1LT Calley was punished for specific actions during wartime for which he was personally responsible. *Jus ad bellum* was never an issue.

D. Collective Responsibility for War Crimes

Conflating *jus ad bellum* and *jus in bello*, many contemporary military objectors allege that war crimes have occurred in Iraq and by participating in the war they would become complicit in their commission.[121] Some claim to have witnessed criminal acts during previous deployments.[122] Others, like 1LT Watada, never deployed yet claimed to have become aware of war crimes from the accounts of others.[123] In addition to their objections to the war itself, military objectors may also attempt to incorporate into their defenses the assumption that they would bear legal responsibility for crimes committed by others during the war, even if they did not participate themselves.

Their interpretation of the law is correct insofar as soldiers can be punished for committing war crimes,[124] and

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[112] *Id.* at 38–39.

[113] United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995).

[114] *What Are* Jus ad Bellum *and* Jus in Bello*?* INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS (International Committee of the Red Cross), Jan. 1, 2004, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZJJD.

[115] United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973).

[116] *Id.* at 1168–173.

[117] *Id.* at 1173.

[118] *Id.* at 1174.

[119] *Id.* at 1182.

[120] *Id.* at 1183.

[121] See 1LT Watada's claim that by deploying to Iraq he would become a "party to war crimes." *See supra* text accompanying note 4. See also Hinzman's claim that he would be "a criminal." *See supra* text accompanying note 8.

[122] *See* Peter Laufer, *You Wouldn't Catch Me Dead in Iraq*, SUNDAY TIMES (London), Aug. 27, 2006, *available at* http://www.timesonline.co.uk/to1/life_and_style/article612898.ece?token=null&offset=0&page=1. Darrel Anderson says he was ordered to fire on a family of civilians. *Id.* Joshua Key claims to have arrived at the scene of a massacre of civilians where Soldiers were "kicking the heads around." *Id.* Ivan Brobeck says he witnessed abuse of detainees and prisoners. *Id.* All three are former Soldiers who deserted and sought refuge in Canada. *Id.*

[123] *Id*. Ryan Johnson, another former Soldier, deserted and fled to Canada to avoid deploying to Iraq. *Id.* He said "we're blowing up museums, people's homes, all the culture [*sic*]." *Id.*

[124] FM 27-10, *supra* note 59, ¶ 507(b).

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. . . . Commanding officers of United States troops must insure [*sic*] that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

military law makes it a crime to "aid[], abet[], counsel[], command[], or procure[] [the commission of a crime]."[125] But the military objectors' argument requires an unsustainable extrapolation of the law. Under their proposed interpretation, every soldier in a theater of operations would be culpable for the criminal actions of every other soldier in the theater. This is not a correct interpretation of the law.[126] Under the UCMJ, to be guilty of a crime committed by another person, one must "share in the criminal purpose of the design."[127] Though physical presence at the scene of a crime is not required,[128] the shared purpose requirement is sufficient to define the scope of and participation in a criminal enterprise. Absent shared intent, individuals cannot be liable for the criminal acts of others.

In addition to aiding and abetting, individual defendants can be tried and punished for the crimes of others if they participate in a criminal conspiracy.[129] Military law allows for participants in a conspiracy to be found liable for all offenses committed pursuant to the conspiracy,[130] but conspiracy requires shared intent.[131] So again, even if a conspiracy to commit war crimes existed, an individual must have had the intent that such crimes occur to be culpable for the commission of war crimes in furtherance of the conspiracy.

It would be legally dubious and logistically impractical to individually charge and prosecute all soldiers in a theater of operations for war crimes committed by a few. However, some military objectors rely on the assumption that they could be held responsible for violations of international law for mere participation in the military operation. As discussed, under international law, military personnel cannot be held responsible for the legality of war itself, and, assuming they do not intend for war crimes to occur or work to further their commission, they cannot be held responsible for illegal acts that take place during the course of the war. Therefore, military objectors' belief that they would become war criminals simply by deploying to a combat theater is unsupportable.

Furthermore, the argument that committing one crime (the disobedience of an order) to avoid committing another crime (participation in an illegal war under international law) is a red herring. If a soldier cannot be held liable for participation in a war, illegal or otherwise, then disobedience of an order to avoid the legal repercussions of participating in the war cannot be justified.[132] An order to participate in war cannot be an illegal order, and military objectors cannot justify refusing to follow such an order.

III. Significance

Any sustained or controversial military conflict will inevitably give rise to some public opposition movement. This opposition may be miniscule and insignificant, or it may become a socially and politically significant phenomenon. The longer, more dangerous, and more controversial the conflict becomes, the more likely servicemembers within the ranks will refuse to fight. Some will defend or justify their conduct by claiming it is their professional responsibility to oppose an illegal war—but the law does not support this interpretation. The legality of war is not the professional responsibility of soldiers; soldiers do not have a right or an obligation to refuse to participate in a war.

As discussed, soldiers below a certain rank have no responsibility for *jus ad bellum*, yet paradoxically, soldiers at the "policy level" who may have such responsibility frequently can avoid personal responsibility for the decision to go to war. A general who feels he cannot in good faith execute the orders given by his superiors, including the President or the Secretary of Defense, has the ability to retire or "resign under protest."[133] But an enlisted soldier who is under a contract of enlistment, a junior officer who has not

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Id. As an example, though his actions likely could have been considered "war crimes" under international law, 1LT Calley was tried and convicted of murder under UMCJ Article 118. *Calley*, 46 C.M.R. at 1138.

[125] UCMJ art. 77 (2008). Military law, like most modern jurisdictions, does not distinguish between "accessories" (other than accessories after the fact, Article 78) and "principals"; those who aid and abet are tried and punished as principals. *Id.* art. 77 ("Any person punishable under [the UCMJ] who commits an offense punishable by [the UCMJ], or aids, abets, counsels, commands, or procures its commission . . . is a principal").

[126] In dismissing her appeal, the CAAF noted that CPT Huet-Vaughn had "tendered no evidence that she was individually ordered to commit a 'positive act' that would be a war crime." United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995).

[127] MCM, *supra* note 19, pt. IV, ¶ 1 (b)(2)(b); *see also* United States v. Jacobs, 2 C.M.R. 115, 117 (C.M.A. 1952) ("The proof must show that the aider or abettor . . . participated in it as in something he wished to bring about, that he sought by his action to make it successful.").

[128] *Id.* pt. IV, ¶ 1 (b)(3)(a).

[129] *Id.* pt. IV, ¶ 5 (c)(5).

[130] *Id. See generally* Pinkerton v. United States, 328 U.S. 640 (1946) (finding that acts committed by one person in furtherance of a conspiracy can be attributed to all conspirators).

[131] *See* United States v. LaBossiere, 32 C.M.R. 337 (C.M.A. 1962) (holding that a conspiracy in military law requires "meeting of minds"); *see also* United States v. Valigura, 54 M.J. 187, 190 (C.A.A.F. 2000) (rejecting the Model Penal Code's concept of a unilateral conspiracy).

[132] *See supra* note 63 and accompanying text.

[133] The obligation of a senior officer to resign if he cannot faithfully execute the orders of his civilian superiors is the subject of a great deal of scholarship and debate in military law and civil-military relations. *See, e.g.*, Leonard Wong & Douglas Lovelace, *Knowing When to Salute*, 52 ORBIS 278 (2008) (citing many authorities on the subject and arguing that there are additional measures available to officers, short of resignation); Richard Swain, *Reflection on an Ethic of Officership*, 37 PARAMETERS NO. 1, at 4 (Spring 2007) (giving a history of the actions taken by officers who disagreed with their superiors); *but see* Richard B. Myers & Richard H. Kohn, *Salute and Disobey? The Civil-Military Balance, Before Iraq and After*, FOREIGN AFF., Sept.-Oct. 2007, at 147 (arguing that resignation is never an appropriate course of action).

completed his service obligation, or a field grade officer whose resignation offer is denied, cannot leave the military service, even though his belief in the injustice of an impending or ongoing war is just as fervent as those of the general. These soldiers are left in a difficult moral dilemma. They are forced to choose between participation in a war they believe is illegal and the threat of punitive action.

This has profound legal and ethical implications. Although military law and doctrine emphasize individual responsibility and the duty to disobey blatantly illegal orders, there is no such duty (or even a right) to disobey an order to participate in war. Although many military objectors may be ultimately motivated by political ideology or a desire to avoid the danger of combat, even military objectors whose professed beliefs are genuine have no available recourse. This is the law as it currently exists, and it is necessary for the preservation of military discipline and national security.

There are those who believe that all soldiers bear individual responsibility for the wars in which they fight;[134] however, exposing soldiers to moral and legal responsibility for the decision to wage war would create the potential for serious harm to military discipline. If soldiers are expected to shoulder such responsibility, it follows that they must also be given the opportunity to refuse it. This would create a situation where every soldier is obligated to question every order and is free to disobey orders that run counter to his personal views on their legality or morality. This runs contrary to the expectation that all orders are to be obeyed.[135] In the military, disobeying orders, desertion, and other violations of the UCMJ are not laudable forms of civil disobedience; they amount to an unacceptable degradation of good order and discipline. For the sake of national security, the military and individual members thereof cannot be allowed to decide which wars to fight. The reasons for and decision to wage war are the responsibility entrusted by the American people to the civilian political leadership, to whom the military must be loyally subordinate.[136] Exempt from bearing responsibility for the decision to go to war, soldiers are expected to obey the orders of their civilian leaders when that decision is made.

Those soldiers who feel they cannot, in good conscience, fight a war—yet cannot leave military service—are admittedly faced with a difficult choice: fight the war they feel is wrong or be punished. This has the potential to result in punishment of otherwise honorable and loyal individuals. Allowing any alternative, however, would create the potential for a massive breakdown of military discipline and a serious crisis of national security. In order to preserve the relationship between the military and civilian authority and to maintain military discipline, the law holds that belief in the illegality of war is no defense for a soldier who refuses to fight.

[134] *E.g.*, J. Joseph Miller, Jus ad Bellum *and an Officer's Moral Obligations: Invincible Ignorance, the Constitution, and Iraq*, 30 SOC. THEORY & PRAC. 457 (2004). After addressing many of the same legal and philosophical principles discussed above and in Michael Walzer's *Just and Unjust Wars*, Miller concludes that "every officer who participated in the 2003 Gulf War is guilty of having violated his or her Oath to defend the Constitution and is accordingly morally accountable for the violation." *Id.* at 484. Miller also adds, in a footnote, that "it is not at all obvious to me that punishing officers [by criminal prosecution] for their participation in an unjust war . . . is sufficiently weighty to require that the nation jeopardize one of its most fundamental purposes, namely, that of defending its citizens." *Id.* With this, he appears to acknowledge that holding officers responsible for unjust wars would be detrimental to national security.

[135] As noted, military law recognizes that Soldiers are not expected to analyze the legal and ethical implications of all orders; rather they are expected to obey all orders except those that are obviously illegal to a "person of ordinary sense and understanding." *See* MCM, *supra* note 19, R.C.M. 916(d) and accompanying text.

[136] U.S. CONST art. II, § 2, cl. 1 ("The President shall be Commander in Chief ot the Army and Navy of the United States"); *see also* 10 U.S.C. § 113, 50 U.S.C. § 401 (2006) (vesting control over the military in the Secretary of Defense, a civilian official subordinate to the President).

United States v. Blazier: So Exactly Who Needs an Invitation to the Dance?

Major David Edward Coombs[*]

Introduction

March 8, 2010, marked the sixth anniversary of *Crawford v. Washington*,[1] the U.S. Supreme Court decision that held that an unavailable witness's statement is only admissible if the statement is nontestimonial or the accused had a prior opportunity for cross-examination of the witness.[2] The case transformed the previous practice of relying on "adequate indicia of reliability" to admit an unavailable witness's statement against an accused.[3]

Some feared that the *Crawford* opinion would bring the military's drug testing system to a screeching halt.[4] It had long been a practice of the Government to either introduce the results of a lab report through a law enforcement agent under a business record exception to the hearsay rule[5] or by having an analyst from the drug lab testify concerning the entire report.[6] Under *Crawford*, the legitimacy of both of these practices was called into doubt.[7]

After the initial dust from *Crawford* settled, judge advocates began to ask the obvious question of whether a court would consider the data in a lab report as being testimonial for the purposes of the Sixth Amendment.[8] The issue did not take long to percolate up to the Court of Appeals for the Armed Forces (CAAF).[9] Unfortunately, the answer provided by the CAAF—that lab reports can sometimes be testimonial—raised more questions than it resolved. The most critical of these questions—who does the Government have to call in order to satisfy the Confrontation Clause?—is currently being considered by the CAAF.[10]

In *United States v. Blazier*, the CAAF is wrestling with the issue of what the Confrontation Clause requires when the Government attempts to admit a drug lab report that contains testimonial evidence.[11] The answer has the potential to significantly impact the military's drug testing system. This case note discusses why the CAAF should seize this opportunity to reconsider its position on when lab reports are considered testimonial and also to provide clarity on who is required to testify as a witness to satisfy the Confrontation Clause. The following discussion will begin with a brief synopsis of the *Blazier* opinion and the main issue currently before the CAAF. Next, the article will discuss the history of relevant military Confrontation Clause cases dealing with lab reports. The article will then analyze how these cases are impacted by the recent Supreme Court decision of *Melendez-Diaz v. Massachusetts*.[12] The article will scrutinize the typical process by which laboratories test

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[1] 541 U.S. 36 (2004). Justice Scalia wrote the opinion for the Court, in which Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. Rehnquist, C.J., filed an opinion concurring in the judgment, in which O'Connor, J., joined.

[2] *Id*. at 54.

[3] Ohio v. Roberts, 448 U.S. 56 (1980). The former test was met whenever the evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Id*. at 66.

[4] *See generally* Lieutenant Commander David M. Gonzalez, *The Continuing Fallout from* Crawford*: Implication for Military Justice Practitioners*, 55 NAVAL L. REV. 31 (2008).

[5] Business records are defined under Military Rule of Evidence (MRE) 803(6), which provides in pertinent part as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803(6) (2008) [hereinafter MCM]; *see also* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539–40 (2009) (explaining that statements are not *per se* nontestimonial because they are business records, but rather, business records are nontestimonial because they are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial").

[6] *Id*.

[7] The Supreme Court declined to state specifically what constituted a "testimonial" statement, but did provide a non-exclusive list of examples: (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52. (citations and quotation marks omitted).

[8] The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend VI.

[9] United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006).

[10] United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010).

[11] *Id*.

[12] 129 S. Ct. 2527 (2009).

military samples and how the Government obtains litigation reports from laboratories for court-martial use and concludes that under this process, every drug lab report contains testimonial statements. Finally, the article will suggest a common sense solution to the remaining issue of who the Government should call as a witness to satisfy the Confrontation Clause.

The *Blazier* Rubik's Cube[13]

In *Blazier*, the Government obtained a urine sample from Blazier as part of a random urinalysis. The sample was sent to a military testing laboratory that subsequently reported that the sample tested positive for the presence of several controlled substances. As a result of the positive urinalysis, Blazier was interviewed by the Air Force Office of Special Investigations (AFOSI). During this interview he consented to a second urinalysis. The second urinalysis was also sent to the lab for testing, and it also tested positive for the presence of several controlled substances.[14]

Based on the positive results, the Government charged Blazier with dereliction of duty and wrongful use of controlled substances.[15] In preparation for court-martial, the prosecution requested "the drug testing reports and specimen bottles" for the two urine samples.[16] The drug testing laboratory sent the prosecution a cover memorandum for each urinalysis and the results of the tests. The cover memoranda stated, among other things, "The specimen was determined to be presumptive positive by the 'screen' and the 'rescreen' immunoassay procedures. The specimen was then confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS)."[17] Each cover memorandum listed the nature of the substances, the concentrations of the substances, and the corresponding Department of Defense (DoD) cutoff levels. The memoranda were each signed by a "Results Reporting Assistant" from the drug testing division and by Dr. Vincent Papa the "Laboratory Certifying Official."[18]

Prior to trial, the defense filed a motion requesting that the military judge either preclude the Government from admitting the laboratory reports and the testimony of Dr. Papa, or compel the Government to produce each member of the laboratory "who had the most important actions involved in the samples."[19] The defense, however, did not name the specific individuals it wanted to testify from the laboratory.

The military judge denied the defense motion. He ruled that the two reports were nontestimonial, for different reasons, and allowed Dr. Papa to testify as an expert witness concerning the positive results and as a foundation witness for the admissibility of both reports.[20] Based in large part on the testimony of Dr. Papa, Blazier was convicted by a court-martial panel of the two wrongful uses of controlled substances.[21] The Air Force Court of Criminal Appeals (AFCCA) affirmed.[22]

The CAAF granted the petition for review of the case based in large part on the Supreme Court's *Melendez-Diaz* decision.[23] On 23 March 2010, the CAAF issued a preliminary opinion in *Blazier*.[24] Instead of issuing a final opinion, the CAAF sought the view of the parties, as well as the Government and defense appellate divisions of each service, on an additional question: Although the drug testing reports were testimonial and the accused did not have the opportunity at trial to cross-examine the declarants of the testimonial statements, was the Confrontation Clause nevertheless satisfied by testimony from Dr. Papa?[25]

The CAAF will presumably provide an answer to this question soon. Meanwhile, it should take this opportunity to reconsider its position on when lab reports should be considered testimonial and clarify who must testify as a witness to satisfy the Confrontation Clause.

To Be or Not To Be Testimonial

In 2006, and then again in 2008, the CAAF was asked to consider whether statements in a lab report were testimonial, thus entitling an accused the right to confront

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[13] The Rubik's Cube is a 3-D mechanical puzzle invested in 1974 by Hungarian sculptor and professor of architecture Erno Rubik. Encyclopedia Britannica Online, Rubik's Cube (Puzzle Toy), http://www.britannica.com/EBchecked/topic/511992/Rubiks-Cube (last visited July 20, 2010).

[14] *Blazier*, 68 M.J. 439, 440.

[15] *Id.*

[16] The request by the Government noted that the information was "needed for court-martial use." *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] The military judge determined that the lab analysts in the first test did not associate the sample collected from Blazier with a particular individual, it was a random urinalysis, and it was not processed in furtherance of a law enforcement investigation. With regards to the second test, the military judge determined that the request for consent was "more akin to a shot in the dark than a pursuit of a specific law enforcement objective." *Id.*

[21] Appellant was convicted of dereliction of duty and wrongful use of controlled substances in violation of Articles 92 and 112a, Uniform Code of Military Justice. 10 U.S.C. §§ 892, 912a (2006). The members sentenced the appellant to a bad-conduct discharge, forty-five days of confinement, and reduction to the grade of E-3. *Id.*

[22] United States v. Blazier, 68 M.J. 544 (A.F.C.C.A. 2008).

[23] United States v. Blazier, 68 M.J. 240 (C.A.A.F. 2009).

[24] *Blazier*, 68 M.J. 439.

[25] The CAAF also asked an additional question: If Dr. Papa's testimony did not itself satisfy the Confrontation Clause, was the introduction of testimonial evidence nevertheless harmless beyond a reasonable doubt under the circumstances of this case if he was qualified as, and testified as, an expert under MRE 703? *Id.*

the makers of the statements. In its first opinion, *United States v. Magyari*, the CAAF concluded that lab report statements were not testimonial.[26] Two years later the CAAF reached the exact opposite conclusion in *United States v. Harcrow*.[27] Both *Magyari* and *Harcrow* were cases largely decided on their specific facts.

In *Magyari*, the appellant's name was randomly generated for urinalysis testing. He, along with over thirty other servicemembers, provided a urine sample for testing. Their samples were sent to the Navy Drug Screening laboratory in San Diego, California. Once at the lab, Magyari's sample was combined in a batch of 200 samples. As a result of the analysis by the drug lab, Magyari's sample tested positive for methamphetamine.[28]

At his contested court-martial, the Government introduced the lab report from the Navy Drug Screening Laboratory and called four additional witnesses to testify concerning the evidence contained in the lab report. Three of those witnesses were from Magayri's unit and had been involved in the collection of his sample. The remaining witness, Mr. Robert Czamy, was the civilian quality assurance officer for the drug screening laboratory. He testified at the court-martial about how the urine samples were handled, how the lab generated its results, and that he had signed off on Magayri's report. Significantly, Mr. Czamy was not personally involved in the handling or testing of Magayri's sample.[29]

Instead of requesting a witness from the lab who had handled or tested the urine sample, the defense counsel chose instead to cross-examine Mr. Czamy. On appeal, Magayri claimed his constitutional rights were violated because he was not provided the opportunity to cross-examine the lab technicians who had handled and tested his sample. Magayri contended that the data recorded in the lab reports were testimonial statements; therefore, he argued, the Government could not use the lab report against him at trial without first affording him the opportunity to cross-examine the lab technicians who made the testimonial statements contained in the report.[30]

The CAAF rejected Magyari's claim and held that the statements in the lab report were not testimonial.[31] The court concluded that the lab technicians worked in a "nonadversarial environment" and had no reason to suspect or zero in on Magyari's sample.[32] In the context of a random urinalysis, the court believed the "lab technicians were not engaged in a law enforcement function."[33] Based on its conclusions, the court held "the technicians could not reasonably expect their data entries would 'bear testimony' against Appellant at his court-martial."[34]

Unlike in *Magyari*, the evidence seized in *Harcrow* was conducted at the direction of law enforcement.[35] Instead of resulting from a random, non-investigative screening, the lab report was generated based on evidence seized during an arrest. Additionally, the samples sent to the lab, and tested by the lab technicians, indentified the accused as "a 'suspect.'"[36] Given these facts, the CAAF concluded that the statements in the lab report in *Harcrow* were testimonial. The CAAF applied the following three factors to reach its conclusion:

> (1) whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry; (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (3) whether the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial.[37]

These factors, commonly referred to as *Rankin* factors,[38] are designed to test whether, under the totality of the circumstances, a particular statement is testimonial or not.

After *Magyari* and *Harcrow*, it appeared that statements contained in a lab report generated as a result of a non-investigative screening—not in the furtherance of a particular law enforcement investigation—would be considered nontestimonial and could be admitted as a business record at trial.[39] Likewise, statements in lab reports

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[26] 63 M.J. 123 (C.A.A.F. 2006). The CAAF, however, did not rule out the possibility that a lab report could be testimonial.

[27] 66 M.J. 145 (C.A.A.F. 2008).

[28] *Id.*

[29] *Id.* at 124–25. The Government chose not to call any of the approximately twenty lab personnel who handled or tested Appellant's sample. *Id*. at 124.

[30] *Id*. at 125–26.

[31] *Id*. at 126–27.

[32] *Id*. at 127.

[33] The court believed the data entries by the lab technicians were "simply a routine objective cataloging of an unambiguous factual matter." *Id.* at 126 (citing United States v. Bahena-Cardenas, 411 F.3d 1067, 1075 (9th Cir. 2005) (internal quotations omitted)).

[34] *Id*. at 127.

[35] United States v. Harcrow, 66 M.J. 154, 159 (C.A.A.F. 2008).

[36] *Id*.

[37] *Id*. at 158 (citing United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007)).

[38] *Id.* at 159.

[39] United States v. Magyari, 63 M.J. 123, 124–25 (C.A.A.F. 2006). *But see* Lieutenant Colonel Nicholas F. Lancaster, *If It Walks Like a Duck, Talks Like a Duck, and Looks Like a Duck, Then It's Probably Testimonial*, ARMY LAW., June 2008, at 16, 24–27 (providing a detailed discussion of how *Ohio v. Roberts* may still apply in the military to nontestimonial statements); *see also* United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007).

generated "at the behest of law enforcement in anticipation of prosecution" would be viewed as testimonial.[40] However, just as the confrontational requirements for admitting a drug lab report in the military were becoming clearer, the Supreme Court muddied the waters with its decision in *Melendez-Diaz v. Massachusetts*.[41]

De-Facto Testimonial Under *Melendez-Diaz*?

In *Melendez-Diaz*, the defendant was charged with distributing and trafficking cocaine.[42] The prosecution submitted three certificates in affidavit form to prove the substance found by the police was cocaine.[43] The certificates reported the weight of the seized bags and the composition and quality of the controlled substance.[44] The prosecution chose not to call an expert witness from the drug lab to lay the foundation for the certificates.[45] In an unusual 5-4 split, Justice Scalia, writing for the majority, concluded that results of the lab report, in affidavit form, were within the core class of testimonial statements covered by the Confrontation Clause.[46]

The impact of the *Melendez-Diaz* opinion on the military is debatable.[47] On one end of the spectrum, based on the Court's assertion that its decision was a straightforward "application of our holding in *Crawford*," *Melendez-Diaz* arguably changes nothing.[48] Meanwhile, at least two of the military service courts have adopted this view.[49] In their opinions, the service courts distinguish *Melendez-Diaz* by noting that *Melendez-Diaz*, unlike in *Magyari*, dealt with "summary affidavits by laboratory technicians prepared expressly at the direction of law enforcement personnel for criminal prosecution."[50] The service courts equate this situation to the one in *Harcrow* where the CAAF determined, using the *Rankin* factors, that under the totality of the circumstances, the statements in the laboratory report were testimonial because the tests were specifically requested by law enforcement and because the information in the reports indicated the technicians knew the items tested were seized during the arrest of an identified "suspect."[51]

Other service courts have followed this line of reasoning.[52] For example, in *United States v. Harris*, the appellant was singled out for testing and his sample was labeled as a probable cause urinalysis when it was sent to the testing laboratory.[53] However, even under these circumstances, the AFCCA determined the statements in the lab report were nontestimonial. In reaching this conclusion, the service court noted the manner of collection and the labeling of the sample did not alter how the laboratory conducted its tests. Despite being a probable cause urinalysis, the Harris's sample was still placed in a batch of 100 other samples; the batch contained blind samples for quality assurance; the laboratory technicians did not associate any particular sample with Harris; and the laboratory technicians did not have an expectation that any particular sample would test positive for a particular drug.[54] In applying the *Rankin* factors, the service court emphasized the primary purpose of the testing:

> [W]hile at some level of administrative control within the lab, the designation of the sample as "probable cause" was known, given the range of options for which a positive lab report might be used by a Navy command, it is less than certain that a "probable cause" designation alone would lead a lab official to believe the report would be used in a criminal prosecution. Finally in this regard, the prospective witnesses, the technicians, were unaware the sample had been obtained based on probable cause, so they

[40] *Magyari*, 63 M.J. at 127.

[41] 129 S. Ct. 2527 (2009).

[42] *Id*. at 2530.

[43] *Id*. at 2531.

[44] *Id*.

[45] *Id*.

[46] Scalia, J., delivered the opinion of the Court, in which Stevens, Souter, Thomas, and Ginsburg, JJ., joined. Thomas, J., filed an opinion concurring in the judgment. *Id*. at 2532 ("[T]he *Confrontation Clause* is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions").

[47] *See* Major Daniel M. Froehlich, *The Impact of* Melendez-Diaz v. Massachusetts *on Admissibility of Forensic Test Results at Courts-Martial*, ARMY LAW., Feb. 2010, at 24 (providing an excellent discussion on the impact of *Melendez-Diaz* on the military).

[48] *Melendez-Diaz*, 129 S. Ct. at 2542.

[49] United States v. Borgman, 2009 CCA LEXIS 488 (A.F. Ct. Crim. App. Dec. 14, 2009) (unpublished) (holding at an Article 62 appeal that judge's denial of a Government motion to admit drug testing results based on Melendez-Diaz was in error); United States v. Bradford, 2009 CCA LEXIS 437 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding at an Article 62 appeal of a random urinalysis case that the judge committed error by denying the Government motion to preadmit into evidence a drug testing report based on the determination that post-initial screening tests are testimonial); United States v. Skrede, 2009 CCA LEXIS 443 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding at an Article 62 appeal that military judge read *Melendez-Diaz* too broadly and improperly granted a defense motion to exclude two drug testing reports); United States v. Anderson, 2009 CCA LEXIS 438 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding at an Article 62 appeal that the military judge improper denied Government motion to admit accused's drug testing report).

[50] *Borgman*, 2009 CCA LEXIS 488.

[51] *Id*. (citing United States v. Harcrow, 66 M.J. 154, 159 C.A.A.F. 2008)).

[52] *Skrede*, 2009 CCA LEXIS 443; United States v. Harris, 66 M.J. 781 (N-M. Ct. Crim. App. 2008), *pet. dismissed*, 68 M.J. 174 (C.A.A.F. 2009).

[53] 66 M.J. at 789.

[54] *Id*. at 788–89.

> employed the standard urinalysis testing and reporting protocol, just as in *Magyari*, objectively cataloging the facts. Their primary purpose in so doing was the proper implementation of the Navy Lab's drug screening program, not the production of evidence against this appellant for use at trial.[55]

On the other end of the spectrum, it could be argued, and this article agrees, that *Melendez-Diaz* severely undercuts the logic of *Magyari*, the second *Rankin* factor relied on by the CAAF in *Harcrow*, and various military service court decisions, such *Harris*.[56] Significantly, *Melendez-Diaz* rejected the argument focused on how the lab technicians' entries were not part of a law enforcement function but, instead, the "result of neutral, scientific testing" and "simply a routine objective cataloging of an unambiguous factual matter."[57] The Court perceived these arguments as "little more than an invitation to return to our overruled decision of *Ohio v. Roberts*, which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the Confrontation Clause."[58] In rejecting this argument, the Court held that "the analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation."[59]

The analysts in *Magyari*, *Harcrow*, and *Harris* are no different from those in *Melendez-Diaz*. Their statements, like those in *Melendez-Diaz*, were necessary to prove the presence and nature of the illegal substance within the accused's sample. Without their statements, the Government would not have been able to prove its case. As the Court in *Melendez-Diaz* stated, the text of the Sixth Amendment "contemplates two classes of witnesses—those against the defendant and those in his favor . . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[60]

Under *Melendez-Diaz*, the better approach seems to be to discard the second *Rankin* factor—"whether the statement involved more than a routine and objective cataloging of unambiguous factual matters"—and, instead, focus the analysis on the remaining two factors untouched by *Melendez-Diaz*: "whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry" and "whether the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial."[61] In considering these remaining *Rankin* factors, it is important to discuss how laboratories test the samples sent to them and how the Government obtains a litigation report from drug testing laboratories.

Military Testing Procedure

Once a servicemember's sample reaches one of the military's forensic drug testing labs, the laboratory processes the sample. As part of this process, the laboratory inserts blind negative and positive control samples into every batch of specimens tested. These blind quality control samples are tested without any indication that they are control samples. As a result, laboratory technicians do not know whether a particular sample being tested belongs to a servicemember or whether it is a quality control sample.[62]

The laboratory employs an immunoassay-based test to quickly distinguish between samples that are negative and those which are presumptive positive. Specimens that test negative are reported as negative and are subsequently destroyed. Specimens that test presumptive positive, on the other hand, go on for further testing. The next level of testing simply repeats the immunoassay-based test a second time to determine whether the second test corroborates the presumptive positive result obtained from the first. If the second test matches the first, then the laboratory performs a final confirmatory test by Gas Chromatography/Mass Spectrometry (GC/MS). Gas chromatography/mass spectrometry is considered the "gold standard" of tests within the forensic drug testing field.[63] If the GC/MS test confirms the earlier two results, the sample is reported as positive.[64]

Based on the process described above, laboratory personnel must realize that subsequent tests performed on presumptive positive samples are intended to either confirm or invalidate the initial screen.[65] Thus, second immunoassay screenings and GC/MS tests seem to be conducted solely for the purpose of producing "evidence with an eye toward

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[55] *Id.*

[56] *See* Froehlich, *supra* note 47, at 24 (discussing how the U.S. Supreme Court in *Melendez-Diaz* rejected the logic of *Commonwealth v. Virginia*, 827 N.E.2d 701, 704 (Mass. 2005) relied on by the CAAF in *Magyari*).

[57] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009).

[58] *Id.*

[59] *Id.* at 2537.

[60] *Id.* at 2533.

[61] United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007).

[62] Fort Meade Forensic Toxicology Drug Testing Laboratory, Tour Our Lab, https://iftdtl.amedd.army.mil/ftmd/Tour.html (last visited July 20, 2010). *See also* United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010) (discussing the normal process for drug testing at a military drug testing laboratory).

[63] *Id.*

[64] *Id.* For a sample to be reported as positive, it must be above a cutoff level in all three independent tests. A sample is reported as negative if it is below a cutoff value in any of the three tests. *Id.*

[65] The CAAF asked several questions on this point during the oral argument of *United States v. Blazier*. *See* Audio Recording, Oral Arguments, Jan. 26, 2010, United States v. Blazier (C.A.A.F. Oct. 29, 2009) (No. 09-0441/AF), *available at* http://www.armfor.uscourts.gov/CourtAudio2/20100126a.wma.

trial,"[66] and, therefore, any statements made by analysts based on second immunoassay screenings or GC/MS tests are clearly testimonial.[67]

Drug Testing Cover Memorandum

Under the usual process, the prosecution sends a memorandum to the drug testing lab requesting drug testing reports and specimen bottles.[68] Usually the Government's request will note that the information is needed for court-martial and will also request that the lab expedite its response. The drug lab will then prepare a report with a cover memorandum summarizing both the tests and results of the examination. Cover memoranda are signed by the primary analysts who conducted the examination and a certifying official confirming the authenticity of the report and declaring that it was created and kept in the course of regularly conducted activity.[69]

The drug testing cover memoranda prepared by labs closely resemble the affidavits at issue in *Melendez-Diaz*. Both documents are used by the prosecution to indentify the nature of an illegal substance and its quantity. Even under the most strained reading of *Melendez-Diaz*, it is difficult to imagine how a drug testing cover memorandum from a lab could ever be viewed as non-testimonial. As the Court in *Melendez-Diaz* acknowledged, "We can safely assume that the analysts were aware of the affidavits' evidentiary purpose . . . ."[70] Likewise, we can safely assume that analysts at a military laboratory are aware of a drug testing cover memorandum's evidentiary purpose. The CAAF, in its initial *Blaizer* opinion, acknowledges as much but arrives at this conclusion through a strained analysis that seems to ignore the practical realities of when a drug testing cover memorandum is created.[71] A better approach for the CAAF would be to simply state that drug testing cover memoranda are always testimonial, and that the analysts who signed them are always "witnesses" for purposes of the Sixth Amendment.

Common Sense Solution

Assuming that drug testing cover memoranda are testimonial and that any tests conducted after the first immunoassay are for a law enforcement purpose, who does the Government need to call in order to satisfy the Confrontation Clause? The CAAF has sought assistance from the parties to answer this remaining question;[72] however, the answer should not be an unnecessarily complicated one. The CAAF should look to the Military Rules of Evidence (MRE) to resolve this issue. If the Government does not attempt to admit a drug testing cover memorandum, it should be able to call any qualified expert to testify regarding the testing results and the actual raw data from those tests.

Expert testimony in a court-martial must pass several evidentiary hurdles, governed by MREs 702 through 705, before a military judge may admit it.[73] Military Rule of Evidence 702 establishes the first two hurdles: that the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue" and that the individual testifying qualifies as an expert by "knowledge, skill, experience, training, or education."[74] In wrongful use, possession, or distribution cases, neither of these hurdles is usually much of an issue. It is usually clear that expert testimony will be required in these types of cases, and the witnesses called to testify on these matters almost always satisfy the knowledge requirements of MRE 702.[75] The more controversial issue is whether the expert will be allowed to discuss the basis of her opinion.[76]

Military Rule of Evidence 703 refers to the facts or data on which an expert can base an opinion or inference.[77] Experts are not limited to opinions or inferences based on their own perceptions.[78] Instead, experts may also consider information that they learn from attending the trial or

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[66] Dr. Vincent Papa testified that the purpose of the lab was "[t]o produced forensically defensible results for the military to use in legal proceedings." *Blazier*, 68 M.J. 439.

[67] Any argument that the analysts do not know the sample being tested is a quality control sample or a servicemember's sample and thus the statements are not testimonial seems to rely on the *Verde* line of reasoning subsequently rejected by *Melendez-Diaz*. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009).

[68] Fort Meade Forensic Toxicology Drug Testing Laboratory, Tour Our Lab, https://iftdtl.amedd.army.mil/ftmd/Litigation.html (last visited July 20, 2010).

[69] *Id*.

[70] *Melendez-Diaz*, 129 S. Ct. at 2532.

[71] *Blazier*, 68 M.J. 439.

[72] *Id*.

[73] MCM, *supra* note 5, MIL. R. EVID. 702–705. These evidentiary tests are questions of law that the military judge must decide. The proponent of the expert testimony has the burden of proving its right to admissibility by a preponderance of the evidence. *Id.* MIL. R. EVID. 104(a).

[74] *Id.* MIL. R. EVID. 702.

[75] Military Rule of Evidence 702 provides that an expert is anyone "qualified as an expert by knowledge, skill, experience, training, or education." *Id*. An expert need only have greater knowledge that a lay person to make her testimony "helpful" to the trier of fact. *Id*.

[76] *See* United States v. Neeley, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988) (holding that an expert witness could not testify regarding inadmissible basis of her opinion); United States v. Hartford, 50 M.J. 402 (1999) (defense not allowed to use the basis of an expert witness' opinion to smuggle in impermissible evidence).

[77] MCM, *supra* note 5, MIL. R. EVID. 703. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in hypothetical question; and hearsay reports from third parties. United States v. Reveles, 42 M.J. 388 (1995).

[78] *Id*.

hearing itself, as well as other facts or data not otherwise admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[79] Therefore, a doctor could consider hospital records, other doctors' opinions, medical treatises, statements from family and friends of the patient, the patient's own statements, and even *laboratory results* in forming her opinion.[80]

While a doctor could rely on "facts or data" not otherwise admissible into evidence, MRE 703 specifically precludes disclosing this portion of the basis for the expert's opinion to the members unless the military judge determines that the "probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect."[81] While the proponent of the expert testimony is limited in what it can disclose under MRE 703, the opponent is not. Under MRE 705, an opponent is free to disclose the other otherwise inadmissible evidentiary basis on cross-examination if they chose to do so.[82] Typically, this would be done when the opponent believes the basis calls into question the accuracy or veracity of the expert's testimony.[83]

What about the expert in *United States v. Blazier*? Can Dr. Vincent Papa base his opinion on the cover memorandum and the raw data from the testing results even though some of this information would otherwise offend the Confrontation Clause? The simple answer is yes he can. The Fourth Circuit Court of Appeals case of *United States v. Washington* illustrates this point.[84]

In *Washington*, the accused, Dwonne Washington, was charged with driving under the influence and unsafe operation of a vehicle.[85] At his trial, the district court admitted the testimony of a Government expert, Dr. Barry Levine. Dr. Levine, the Director of the Forensic Toxicology Laboratory of the Armed Forces Institute of Pathology, was called to testify about the lab testing procedure and to prove that a blood sample taken from Washington contained drugs and alcohol. At trial, Washington claimed Dr. Levine's testimony amounted to testimonial hearsay statements of the lab technicians who operated the machines and, therefore, violated his Sixth Amendment rights. The magistrate judge overruled Washington's objection and admitted Dr. Levine's testimony. On appeal, Washington maintained that Dr. Levine's testimony was admitted in violation of the Confrontation Clause and the hearsay rule.[86]

The *Washington* case, like the *Blazier* case, involved an expert who did not conduct any of the tests himself.[87] Instead, both experts relied on the raw data presented to them by the lab technicians who actually conducted the tests.[88] To establish a Confrontation Clause issue, Washington argued that the raw data relied on by the respective experts were the hearsay "testimonial statements" of the various lab technicians who operated the machines.[89] The Fourth Circuit rejected this argument and instead found that the statements were "of the machines themselves."[90] Based on this determination, the Fourth Circuit concluded that statements "made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.[91] As such, Washington could not complain when Dr. Levine relied on this information in forming his expert opinion.[92]

The CAAF in *Blaizer* should likewise determine that the raw data relied on by Dr. Papa was not testimonial hearsay. The fact the Dr. Papa did not himself conduct any of the tests is of no consequence.[93] Any concern about the reliability of the testing or the raw data provided by the machines should be "addressed through the process of authentication not by hearsay or Confrontation Clause analysis."[94]

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[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] MCM, *supra* note 5, MIL. R. EVID. 705 (2008). Military Rule of Evidence 705 does not require that the expert on direct examination disclose underlying facts or data before stating an opinion or inference unless the military judge requires it. However, the expert may be required, on cross-examination, to disclose the underlying facts or data.

[83] This is most commonly seen in situations where the basis of the expert's opinion is the statements of the accused.

[84] United States v. Washington, 498 F. 3d 225 (4th Cir. 2007).

[85] *Id*. at 227.

[86] *Id*. at 227–30.

[87] *Id*.; United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010).

[88] *Id*.

[89] *Washington*, 498 F. 3d at 230.

[90] *Id*.

[91] *Id*. at 231. A "statement" is defined by MRE 801(a) as an "(1) oral or written assertion or (2) nonverbal conduct of a *person*, if it is intended by the person as an assertion." MCM, *supra* note 5, MIL. R. EVID. 801 (2008).

[92] The U.S. Supreme Court denied certiorari in *United States v. Washington*. 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (U.S. June 29, 2009). The denial of certiorari is significant given the fact the court had vacated other cases in light of *Melendez-Diaz*. *See* Froehlich, *supra* note 47. *See also* United States v. Moon, 512 F.3d 359 (7th Cir. 2008) (citing *Washington* for support of determination that the laboratory's raw results are not "testimonial" statements of the lab technicians); United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008).

[93] *Moon*, 512 F.3d at 362 ("[W]e agree with *Washington* that the *Sixth Amendment* does not demand that a chemist or other testifying expert have done the lab work himself.") (citing *Washington* for support of determination that the laboratory's raw results are not "testimonial" statements of the lab technicians); United States v. Washington, 498 F. 3d 225 (4th Cir. 2007); United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008)).

[94] *Washington*, 498 F. 3d at 231.

Conclusion

The CAAF in *Blaizer* should reconsider when lab reports will be considered testimonial. By discarding the second *Rankin* factor, the CAAF can simplify this area of the law. The resulting analysis should focus on whether a statement is "elicited or made in response to law enforcement or prosecutorial inquiry" and whether "the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial."[95] Under this analysis, only the cover memoranda from drug testing laboratory reports should be considered testimonial hearsay. If the Government chooses to admit a memorandum, then it should be subjected to the requirements of the Confrontation Clause. Otherwise, the Government should be able to rely on a single expert to provide the testimony necessary to admit raw data from a laboratory examination and the actual results of those tests.

It has been six years since *Crawford* transformed the landscape of the Sixth Amendment. Since that landmark decision, courts have attempted to define *Crawford's* left and right boundaries. The CAAF in *Blazier* can take a positive step towards simplifying this area for military practitioners. Time will tell if the CAAF seizes the opportunity to do so.

[95] United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007).

Criminal Law Notes

Spice—"I Want a New Drug"*

Major Andrew Flor[1]

What Is "Spice"?

As early as 2002, a new drug product emerged on the market: Spice.[1] Spice is advertised as an herbal incense not intended for human consumption.[2] Spice is a green, leafy product sprayed with synthetic cannabinoid substances that mimic the effects of marijuana when smoked.[3] It is marketed under numerous brand names, including Spice, Spice Silver, Spice Gold, Spice Diamond, Spice Tropical Synergy, Spice Arctic Synergy, Spice Gold Spirit, PEP Spice, PEPpourri, K2, Genie, Yucatan Fire, Dream, Ex-ses, Blaze, Spike 99, Spark, Fusion, Magma, Hard Core, and Deliverance, as well as other names.[4] Spice is generally packaged in two inch by three inch metallic packets containing approximately three grams of the substance;[5] three grams is enough to make seven or eight "joints."[6] Spice products are commonly sold in "head shops" and on the Internet.[7] Google trends show that in 2010, the term "spice drug" has been searched numerous times and a majority of those searches have come from the United States.[8]

The popularity of Spice has continued to rise since it was first introduced in 2002. Some seek it for a "legal high," while others are just curious.[9] With some of the synthetic substances claiming to be one-hundred times as potent as THC, the market for these products is vast.[10] Despite its popularity, Spice can also be dangerous. "Poison centers nationwide have reported 352 cases [of patients sickened by Spice] in 35 states."[11] Common symptoms include "rapid heart rate, dangerously high blood pressure and sometimes hallucinations or paranoia."[12]

Is Spice Legal?

Spice and most synthetic cannabinoid substances are currently legal in the United States, with the exceptions of Kansas[13] and Kentucky;[14] laws to ban synthetic cannabinoid substances are currently pending in Alabama, Florida, Georgia, Illinois, Louisiana, Missouri, New York, Tennessee, and Utah.[15] The most notable exception to the legality of synthetic cannabinoids is the substance HU-210.[16]

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* HUEY LEWIS AND THE NEWS, *I Want a New Drug*, *on* SPORTS (Chrysalis 1983).

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[1] NCIS Norfolk Field Office, *Introduction to Spice*, Dec. 9, 2009 (on file with author).

[2] Sarah Aarthun, *Synthetic Marijuana a Growing Trend Among Teens, Authorities Say*, CNN.COM, Mar. 24, 2010, http://www.cnn.com/2010/HEALTH/03/23/synthetic.marijuana/index.html?hpt=T2.

[3] *Id.*

[4] This note refers to all synthetic cannabinoid herbal incense products as "Spice." Any attempt to list all Spice products is probably futile. The market moves quickly to evade detection by law enforcement. *See* Navy Alcohol and Drug Abuse Prevention (NADAP), *Herbal Incense an Awareness Presentation*, Nov. 17, 2009 [hereinafter NADAP Presentation] (providing a recent listing, including pictures) (on file with author). *See infra* appendix (providing pictures of Spice products).

[5] Drug Enforcement Agency, *Intelligence Alert: "Spice"—Plant Material(s) Laced with Synthetic Cannabinoids or Cannabinoid Mimicking Compounds*, Mar. 2009, MICROGRAM BULL., http://www.justice.gov/dea/programs/forensicsci/microgram/mg0309/mg0309.html (last visited May 21, 2010).

[6] European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), *Drug Profile: Synthetic Cannabinoids and "Spice,"* http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cannabinoids (last visited May 21, 2010).

[7] A "head shop" is a "shop specializing in articles (as hashish pipes and roach clips) of interest to drug users." MERRIAM-WEBSTER ONLINE DICTIONARY, http://mw1.m-w.com/dictionary/head%20shop (last visited May 21, 2010). A recent Google search for "spice" turned up nine sponsored links advertising Spice and other "herbal incense" products for sale (research on file with author).

[8] Google Trends: Spice Drug, http://www.google.com/trends?q-spice+drug&ctab=0&geo=all&date=all&sort=0 (last visited May 21, 2010).

[9] Brian Neill, *Legal Weed?*, METRO SPIRIT, Apr. 28, 2010, http://metrospirit.com/index.php?cat=1211101074307265&ShowArticle_ID=11012704104659247.

[10] *See* NADAP Presentation, *supra* note 4.

[11] Donna Leinwand, *Places Race to Outlaw K2 "Spice" Drug*, USA TODAY, May 24, 2010, http://www.usatoday.com/news/nation/2010-05-24-k2_N.htm.

[12] *Id.*

[13] KAN. STAT. ANN. § 65-4105 (2010).

[14] KY. REV. STAT. ANN. § 218A.010 (West 2010).

[15] Research on file with author.

[16] HU-210 was developed in 1988 in Israel (HU stands for Hebrew University, located in Jerusalem). *See* Spice Cannabinoid—HU-210, http://www.deadiversion.usdoj.gov/drugs_concern/spice/spice_hu210.htm (last visited May 25, 2010). HU-210 is "structurally and pharmacologically similar to [Delta-]9-tetrahydrocannabinol, the main active ingredient of marijuana. *Id.* However, HU-210 is approximately sixty-six to eighty

HU-210 is currently a schedule I controlled substance and is equally as illegal as marijuana.[17] HU-210 has been found to be an ingredient in Spice, which led to a customs seizure of Spice in Ohio.[18]

Since virtually no synthetic cannabinoids are listed as controlled substances under the Controlled Substances Act, the possession or use of these substances cannot be charged as a violation under Article 112a, UCMJ;[19] however, use of any of these substances "for the purpose of inducing excitement, intoxication, or stupefaction of the central nervous system is prohibited" by Army Regulation 600-85.[20] Unfortunately, a violation of this regulatory provision can only be charged as a failure to obey a lawful general regulation under Article 92, UCMJ.[21] Moreover, establishing a violation of the regulation can be difficult because these substances cannot currently be detected by standard Department of Defense drug testing methods.[22] This makes prosecution of Spice use very challenging. Significantly, the regulation does not prohibit the possession, distribution, introduction, or manufacture of these substances.[23]

Is Spice Being Used in the Military?

Reports from the field are sporadic and mostly anecdotal at this point; however, there have been several high profile media reports about Spice use in the military. In a case study conducted at the Naval Air Station in Pensacola, Florida, twenty-eight Sailors were involved in incidents with Spice over a two-year period.[24] At Hill Air Force Base near Salt Lake City, Utah, the Air Force discharged seven Airmen in early 2010 for Spice use, and another eleven Airmen are pending disciplinary action for Spice use.[25] Outside of the use prohibition in AR 600-85, the Army has been handling the possession, distribution, and introduction of these products on an installation–by–installation basis. The promulgation of an installation general order banning the possession, use, sale, distribution, or introduction of these products has been the most common solution to the Spice dilemma.[26]

Recent Opinion—*United States v. Larry*[27]

On 18 May 2010, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Larry*. The appellant was convicted, contrary to his pleas, at a special court-martial of conspiracy to violate a lawful general order, violation of a lawful general order, false official statement, wrongful possession of "Spice" with intent to distribute, and solicitation of another to distribute "Spice."[28] He was sentenced to six months confinement and a bad-conduct discharge.[29] One of the issues on appeal was whether or not "possession with intent to distribute the substance is a violation of Article 134."[30]

During trial, a Navy Criminal Investigation Service (NCIS) agent had testified that Spice use and distribution was "a huge problem for the military . . . and [Spice] was being widely abused by military members."[31] On appeal, the appellant argued that because possession of Spice was legal, the use of the word "wrongful" in the charge made the specification legally insufficient. The NMCCA cited *United*

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times more potent than Delta-9-tetrahydrocannabinol based upon laboratory animal tests. *Id.*

[17] 21 U.S.C. § 812 (2006) (listing tetrahydrocannabinols as a Schedule I controlled substance). HU-210 is a tetrahydrocannabinol.

[18] *See* Steve Bennish, *Synthetic Drug Seized at DHL Hub*, DAYTON DAILY NEWS, Jan. 15, 2009, http://www.daytondailynews.com/n/content/oh/story/news/local/2009/01/15/ddn011509bustweb.html.

[19] Except for the above mentioned HU-210. *See* UCMJ art. 112a (2008) (requiring prohibited drugs to be listed in Article 112a, specified by the President, or to be listed in the controlled substances act. 21 U.S.C. § 812.

[20] U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 4-2p (RAR, 2 Dec. 2009) [hereinafter AR 600-85].

[21] UCMJ art. 92 (2008).

[22] *See* NADAP Presentation, *supra* note 4. However, European countries are reported to have detection capabilities via blood tests. *Id.*

[23] AR 600-85, *supra* note 20, para. 4-2p.

[24] *Id.* A Navy instruction prohibits

> [t]he unlawful use by persons in the DON [Department of the Navy] of controlled substance analogues (designer drugs), natural substances (e.g., fungi, excretions), chemicals (e.g., chemicals wrongfully used as inhalants), propellants, and/or a prescribed or over-the-counter drug or pharmaceutical compound, with the intent to induce intoxication, excitement, or stupefaction of the central nervous system.

U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5300.28D, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL para. 5.c (5 Dec. 2005).

[25] Associated Press, *7 Air Force Airmen Discharged for Utah Spice Use*, GAZETTE, Mar. 27, 2010, http://www.gazette.com/articles/size-96303-font-11px.html. The Air Force has an instruction that requires separation for use of "any intoxicating substance, other than alcohol, that is inhaled, injected, consumed, or introduced into the body in any manner for purposes of altering mood or function." U.S. DEP'T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 5.54.1 (10 June 2004). The only exception is if the Airman meets all seven listed criteria for retention. *Id.* para. 5.52.2.1.

[26] For example, Fort Drum, New York, recently prohibited the "actual or attempted possession, use, sale, distribution, manufacture, or introduction of" Spice and other similar substances. *See* Installation Policy Memorandum 10-30, Headquarters, 10th Mountain Division (Light Infantry), Fort Drum, New York, subject: Prohibition of Certain Unregulated Intoxicants (21 Apr. 2010).

[27] No. 200900615 (N-M. Ct. Crim. App. May 18, 2010) (unpublished).

[28] *Id.* at *1.

[29] *Id.*

[30] *Id.* at *2.

[31] *Id.* at *3.

States v. Erickson[32] for the proposition that there "is nothing on the face of the statute creating Article 112a or in its legislative history suggesting that Congress intended to preclude the armed forces from relying on Article 134 to punish wrongful use by military personnel of substances, not covered by Article 112a, capable of producing a mind-altered state."[33] The NMCCA held that "a reasonable fact finder could have found beyond a reasonable doubt that the appellant's wrongful possession of Spice with the intent to distribute was prejudicial to good order and discipline in the armed forces."[34] Based on *Erickson* and the testimony of the NCIS agent, the court upheld the conviction.[35]

The primary take away from the *Larry* case is that even in the absence of a lawful general order or regulation prohibiting certain types of conduct with Spice products, the Government may still be able to prosecute that conduct as a violation of Article 134. The NMCCA specifically did not decide whether "the mere possession of Spice was prohibited or illegal in a general sense," but the court left the door open to include other types of misconduct involving Spice as violations under Article 134.[36] In *Larry*, the specific conduct was possession with the intent to distribute. However, other types of conduct, such as introduction or simple possession of Spice, may qualify as chargeable offenses under Article 134 if the Government can prove that the conduct was prejudicial to good order and discipline in the Armed Forces.

Practice Pointers

Practitioners in the field should be vigilant of the threat that Spice and Spice-like products pose to the good order and discipline of their installations. Until these substances are declared illegal or prohibited completely by regulation, Soldiers will continue to use and potentially abuse these products. Installation legal offices should push for general orders that prohibit more than just the use restriction contained in AR 600-85.[37] Additionally, establishments that sell Spice near military installations should be considered being placed off limits by the local Armed Forces Disciplinary Control Board.[38]

[32] 61 M.J. 230 (C.A.A.F. 2005).

[33] *Id.* at 233.

[34] *Larry*, No. 200900615, at *3.

[35] *Id.*

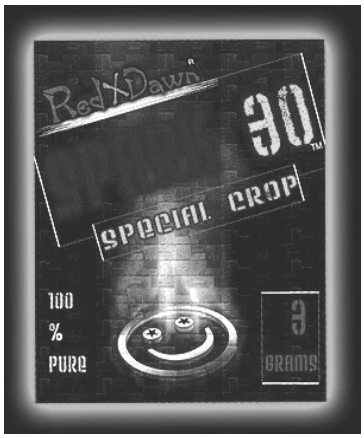
[36] *Id.* at *2.

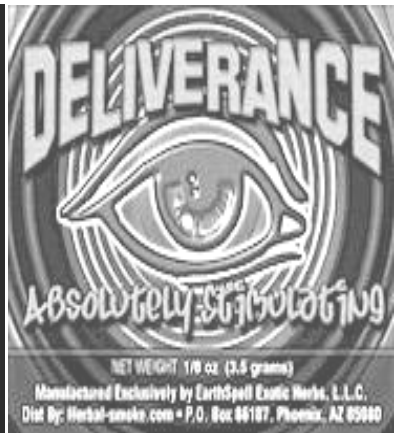
[37] AR 600-85, *supra* note 20, para. 4-2p.

[38] *See* U.S. DEP'T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS (27 July 2006).

Appendix

Pictures of Spice Products





Substantive Crimes and Defenses
Lesser Included Offenses Update: *United States v. Jones*

Major Patrick D. Pflaum[*]

Article 79 of the Uniform Code of Military Justice (UCMJ) provides the basic rule for lesser included offenses (LIOs): "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."[1] In April 2010, the Court of Appeals for the Armed Forces (CAAF) issued a landmark decision governing the interpretation of Article 79. In *United States v. Jones*, the CAAF returned to the basic "elements test" for determining which offenses are necessarily included in other offenses under the UCMJ.[2] While this fundamental shift appears to greatly simplify the doctrine, application of the holding generates significant questions that will challenge practitioners and military judges until subsequent decisions offer more clarification. The purpose of this note is to alert practitioners to this important decision and its implications for court-martial practice.

In *Jones*, the CAAF stated the "elements test" as follows:

> Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.[3]

The basic source of this test is *United States v. Schmuck*, a 1989 Supreme Court case analyzing Federal Rule of Criminal Procedure (FRCP) 31(c), which, for a time, was substantially similar to the language of Article 79.[4] In *Schmuck*, the Supreme Court held that, for FRCP 31(c), "one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given . . . ."[5] In 1993, in *United States v. Teters*, the Court of Military Appeals (CMA) adopted this "elements test" for lesser included offenses under Article 79, UCMJ.[6]

About a year later, in *United States v. Foster*,[7] the CMA found it necessary to soften this basic elements test when actually applying it to military offenses. First, the court had to account for those offenses in the *Manual for Courts-Martial* (*MCM*) listed under Article 134, which contains an element that the enumerated articles (Articles 80 through 133) do not: "That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."[8] To ensure that listed Article 134 offenses would be "necessarily included" in the enumerated articles, the CMA held

> an offense arising under the general article may, depending upon the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article. Our rationale is simple. The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles.[9]

The court then departed from a strict elements test even further, stating, "[D]ismissal or resurrection of charges based upon 'lesser-included' claims can only be resolved by lining up elements *realistically* and determining whether *each* element of the supposed 'lesser' offense is *rationally* derivative of one or more elements of the other offense—and *vice versa*."[10] A year later, the elements test was refined once again. In *United States v. Weymouth*, the CAAF adopted a pleadings-elements approach to LIOs, declaring, "[I]n the military, the *specification*, in combination with the statute, provides notice of the essential elements of the offense."[11] For more than a decade, these three cases

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[1] UCMJ art. 79 (2008).

[2] 68 M.J. 465 (C.A.A.F. 2010).

[3] *Id.* at 470.

[4] 489 U.S. 705 (1989); United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993).

[5] *Schmuck*, 489 U.S. at 716.

[6] *Teters*, 37 M.J. at 376.

[7] 40 M.J. 140 (C.M.A. 1994).

[8] UCMJ art. 134 (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60(b)(2) (2008) [hereinafter MCM].

[9] *Foster*, 40 M.J. at 143 (emphasis in original).

[10] *Id.* at 146 (emphasis in original).

provided the fundamental principles for LIO doctrine in the military.

In 2008, with *United States v. Medina*,[12] the CAAF began tightening the military LIO doctrine, especially as it applies to Article 134 offenses.[13] In *Jones*, the CAAF definitively declared, "We return to the elements test . . . ."[14] In doing so, the court specifically overruled those portions of the opinions after *Teters* that adopted rules for LIOs that varied from the basic elements analysis, including *Foster* and *Weymouth*.[15]

In addition to returning to a strict elements test for LIOs, the *Jones* opinion announced another key principle for military practitioners, declaring that the lists of LIOs provided in the *MCM* are not binding on the courts.[16] The offenses listed as LIOs in the *MCM* are necessarily included only if they satisfy the elements test.[17] The court found that "Congress has not delegated to the President a general authority to determine whether an offense is necessarily included in the charged offense under Article 79, UCMJ."[18] The CAAF rejected the notion that the President has the power to make one offense an LIO of another by simply listing it as such in the *MCM*.[19] Lesser included offenses are "determined with reference to the elements defined by Congress for the greater offense."[20] As such, practitioners should not rely on the LIOs listed under each punitive article in Part IV of the *MCM*, but should use the list as a suggestion of a relationship and then apply the elements test to ensure that the lesser offense is indeed "necessarily included."

The *Jones* opinion also provides three more key principles for military practitioners. First, it is now clear that offenses listed in the *MCM* under Article 134 are no longer necessarily included in the enumerated articles (Articles 80 through 133, UCMJ).[21] As described above, each listed offense contains an element that the enumerated articles do not: "That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."[22] In *United States v. Miller*, decided in 2009, the CAAF specifically overruled the portion of *Foster* that held that this extra element was implied in the enumerated articles.[23] In *Jones*, the court clarified that it is the statutory language, not the pleadings, that makes one offense necessarily included in another.[24] As such, the Government cannot create an LIO relationship between an Article 134 offense and an enumerated article by simply adding language to the specification alleging that the conduct was also prejudicial to good order and discipline or service-discrediting.[25] The Government must plead the Article 134 offense separately in order to provide the requisite notice. Second, defense agreement or concession that an offense is an LIO does not waive the issue. Conviction of a lesser offense that does not meet the elements test triggers a plain error analysis by the appellate courts.[26] Third, practitioners should view with extreme caution any language in the *MCM* that appears to describe a rule for LIOs that varies from the elements test.[27] The *Jones* opinion makes clear that the elements test is the law, overruling some of the cited cases and suggesting that some of the *MCM* language has probably been obsolete since *Schmuck* and *Teters*.[28]

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[11] 43 M.J. 329, 333 (C.A.A.F. 1995) (emphasis in original).

[12] 66 M.J. 21 (C.A.A.F. 2008) (holding that clauses 1 and 2 of Article 134 are not necessarily included in clause 3).

[13] *See* United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009) (overruling *Foster*, 40 M.J. 140, in part, which held, *inter alia*, that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense, and holding that Article 134 "is not an offense necessarily included under Article 79, UCMJ, of the enumerated articles") (internal quotations omitted); United States v. McCracken, 67 M.J. 467, 468 (C.A.A.F. 2010).

[14] United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010).

[15] *Id.* at 472 ("To the extent any of our post-*Teters* cases have deviated from the elements test, they are overruled.").

[16] *Id.* at 471. For an example of an *MCM* listing of LIOs, see MCM, *supra* note 8, pt. IV, ¶ 45d (listing LIOs "based on internal cross-references provided in the statutory text of Article 120.").

[18] *Id.* (emphasis omitted).

[19] *Id.* at 472.

[20] *Id.* at 471.

[21] *Id.* at 474 (Baker, J. dissenting).

[22] UCMJ art. 134 (2008); MCM, *supra* note 8, pt. IV, ¶ 60(b)(2).

[23] 67 M.J. 385 (C.A.A.F. 2009).

[24] *Id.* at 471 ("[A]n LIO—the 'subset' 'necessarily included' in the greater offense—must be determined with reference to the elements *defined by Congress* for the greater offense.") (emphasis added).

[25] This is different from Article 134 offenses where the Government *can* add clause 1 or 2 language to a clause 3 specification. In *Medina*, the CAAF held that clauses 1 and 2 are not necessarily included in clause 3 of Article 134. United States v. Medina, 66 M.J. 21, 26 (C.A.A.F. 2008). However, the court stated that clauses 1 and 2 are "alternative theories" under Article 134 and the Government could provide notice of this alternative theory through the drafting of this specification. *Id.* at 26–27.

[26] United States v. Jones, 68 M.J. 465, 467, 473 (C.A.A.F. 2010) (setting aside conviction for indecent acts despite defense agreement at trial that "as a general concept," indecent acts was an LIO of rape under the state of the law at the time).

[27] *See, e.g.*, MCM, *supra* note 8, pt. IV, ¶ 3b(1) ("A lesser offense is included in a charged offense when the specification contains allegations which either expressly *or by fair implication* put the accused on notice to be prepared to defend against it in addition to the offense specifically charged.") (emphasis added); *id.* Analysis of Punitive Articles at 23-15 ("Rather than adopting a literal application of the elements test, the [*Foster*] Court stated that resolution of lesser-included claims 'can only be resolved by *lining up elements realistically* and determining whether each element of the supposed 'lesser' offense is *rationally derivative* of one or more elements of the other offense—and vice versa.'") (quoting United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994)) (emphasis added).

Based on the principles described above, *Jones* will significantly impact the charging decision. In general, the Government wants a lesser offense available in case the evidence at trial fails to prove the greater offense beyond a reasonable doubt. An LIO relationship between offenses allows the Government to streamline the charge sheet: if the lesser offense is necessarily included, there is no need to charge the LIO separately. Accordingly, the discussion to R.C.M. 307(c)(4) counsels, "In no case should both an offense and a lesser included offense thereof be separately charged."[29] If a lesser offense is not necessarily included, the Government must charge both the greater and the lesser offenses in order for the fact-finder to consider conviction for the lesser offense. This is generally referred to as "pleading in the alternative."[30] The Government avoids issues concerning multiplicity or unreasonable multiplication of charges because the Government does not intend that the fact-finder convict the accused of both offenses.[31] For example, after *Jones*, Communicating a Threat under Article 134[32] is no longer an LIO of Extortion under Article 127.[33] In a case where the Government has probable cause to charge Extortion but wants to have Communicating a Threat available should the evidence fail to prove the specific intent element, the Government would have to charge both offenses. This charging strategy was suggested in *Foster*, revitalized in *Medina*, and repeated in several lesser included offense cases since, including *Jones*.[34] Counsel are cautioned, however, against excessive use of this tactic. While briefly mentioned in the MCM, "pleading in the alternative" lacks a clear set of procedural rules.[35] As such, there is the potential for error in the findings instructions or in the entry of findings.[36] Second, pleading too many offenses in the alternative may confuse the fact-finder or create an appearance of overreaching. As such, counsel should limit pleading in the alternative to the most critical offenses in a particular case.

In addition to pleading in the alternative, the CAAF reminded practitioners of two other tools that can address incongruities between pleading and proof. Rule for Courts-Martial (RCM) 603(d) allows the Government, with the consent of the accused, to "amend[ ] the charge sheet in course of trial to allege a less serious or different offense."[37] Also, under RCM 910, the accused may plead "not guilty to an offense as charged, but guilty of a named lesser included offense," or guilty by exceptions or by exceptions and substitutions.[38]

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[28] *Jones*, 68 M.J. at 470 n.8 ("Although the commentary of the 1968 *MCM* and each one thereafter has included the vague 'or by fair implication' language, that language predates and was effectively if not formally superseded by *Schmuck* and *Teters*.").

[29] MCM, *supra* note 8, R.C.M. 307(c)(4).

[30] *Jones*, 68 M.J. at 472.

[31] This is distinguished from a situation where the Government charges the accused with multiple offenses for one criminal act and intends that the accused be punished for all of the charged offenses. Classic examples include larceny and forgery and rape and adultery. This charging strategy is controlled by multiplicity and unreasonable multiplication of charges.

[32] *See* MCM, *supra* note 8, pt. IV, ¶ 110b. Communicating a threat requires proof of the following elements:

> (1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
> (2) That the communication was made known to that person or to a third person;
> (3) That the communication was wrongful;
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[33] *See id.* pt. IV, ¶ 53b. Extortion requires proof of the following elements:

> (1) That the accused communicated a certain threat to another;
> (2) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage or immunity.

Id.

[34] *See* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994) ("[I]t seems clear to us that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives."); United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008) ("[W]here a distinct offense is not inherently a lesser included offense, during the guilty plea inquiry the military judge or the charge sheet must make the accused aware of any alternative theory of guilt to which he is by implication pleading guilty."); United States v. Miller, 67 M.J. 385, 389 n.6 (C.A.A.F. 2009) ("Our opinion in *Medina* also noted that when comparing the elements of two offenses reveals that one offense is not necessarily a lesser included offense of the other, the requirement of notice to an accused may be met if the charge sheet "make[s] the accused aware of any alternative theory of guilt.") (quoting *Medina*, 66 M.J. at 27); *Jones*, 68 M.J. 465, 472–73 ("Nothing here prevented the Government from charging indecent acts in addition to rape—the government is always free to plead in the alternative."); United States v. Morton, 69 M.J. 12, 16 (C.A.AF. 2010) ("In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law.") (citing United States v. Villareal, 52 M.J. 27, 31 (C.A.A.F. 1999); United States v. Medley, 33 M.J. 75, 76 (C.M.A. 1991); United States v. Heyward, 22 M.J. 35, 37 (C.M.A. 1986)).

[35] *See* MCM, *supra* note 8, R.C.M. 907(b)(3)(B).

[36] It is beyond the scope of this article to describe the varying types of findings instructions necessitated by a particular set of offenses pled in the alternative. However, for an example of favorable appellate treatment of a particular set of instructions, see United States v. Moore, 2001 WL 321906 (A.F. Ct. Crim. App. Mar. 22, 2001) (unpub.). *See also Foster*, 40 M.J. at 143 ("The court-martial would then be instructed as to the required elements of each offense and would be further admonished that the accused could not be convicted of both offenses. If he were convicted of the offense, the members would simply announce no findings as to the lesser offense, and it would be dismissed.") (emphasis added).

[37] *Jones*, 68 M.J. at 473 (citing MCM, *supra* note 8, R.C.M. 60).

[38] *Id.* (quoting MCM, *supra* note 8, R.C.M. 910(a)).

Practitioners should also be aware that several important questions remain, including whether the concept of a "qualitative lesser included offense" still exists in the UCMJ. This is the type of lesser offense described by the following language in the *MCM*:

> (b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as a lesser included offense of burglary); or
> (c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).[39]

The CAAF's formulation of the elements test and the tenor of the opinion cast at least some doubt on the continued viability of this type of LIO in military practice because a lesser mens rea or a "legally less serious" element is technically a *different element*.[40] Whether the courts will find that a qualitatively lesser offense is necessarily included in a greater offense remains to be seen. However, it seems logical that an accused would be on notice that a lesser mens rea is included in a greater mens rea or that a legally less serious element is included in a more serious element. Also, as a practical matter, eliminating this type of LIO would eliminate a substantial number of LIOs under the UCMJ. For example, wrongful appropriation would no longer be an LIO of larceny under Article 121 and involuntary manslaughter under Article 119 would no longer be an LIO of intentional murder under Article 118(2). Until the dust settles, trial counsel should rely on the wise employment of "pleading in the alternative" to ensure the charge sheet allows the fact-finder to consider lesser offenses that may not be necessarily included in the greater offense.

With *Jones*, the court has returned to the basic elements test for lesser included offenses. While the court has been slowly chipping away at the holdings of *Foster* and *Weymouth*, *Jones* is the case that clears away past LIO constructions, leaving the fundamental rules announced in *Schmuck* and *Teters*. Perhaps most significant is the court's conclusions regarding the power of the President to "create" LIO relationships through the listings in the *MCM*. Many offenses traditionally understood to be LIOs of other offenses are not so anymore. Blind reliance on the listing of LIOs in the *MCM* and deviation from the elements test in determining lesser included offenses are fraught with peril, if not outright erroneous.

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[39] MCM, *supra* note 8, pt. IV, ¶ 3(b)(1).

[40] For example, under Article 121, UCMJ, larceny requires, in general, the intent to *permanently* deprive another of the property, while wrongful appropriation requires that the accused only intend to deprive another of the property *temporarily*. *See id.* pt. IV, ¶ 46b(1) & (2).

Claims Note

The Judge Advocate General's Award for Excellence in Claims

Colonel R. Peter Masterton[*]

The Judge Advocate General's Award for Excellence in Claims is an annual award designed to recognize outstanding field claims offices.[1] Initiated as a competitive award in 1998,[2] the award is an important measure of excellence for all Army claims offices.

The criteria for the award are posted on the Claims Discussion Board at the end of each fiscal year.[3] The criteria measure the type and number of personnel dedicated to processing claims and various indications of excellence.[4]

This year, twenty-seven field offices won this prestigious award. There were a total of fifty-two applicants, and over one hundred field claims offices are eligible for the award. The winners of the award, along with winners from previous years, are posted at the end of this note.

The Award for Excellence in Claims is an ideal way for staff judge advocates and other legal leaders to assess their claims operations. Even if an office does not win the award, the application process enables the office to assess its strengths and weaknesses. All offices are encouraged to apply for this prestigious award.[5]

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[1] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 1-23 (8 Feb. 2008).

[2] Lieutenant Colonel Masterton, *Winners of 1998 Award for Excellence in Claims*, ARMY LAW., Sept. 1999, at 41.

[3] U.S. DEP'T OF ARMY, PAM. 27-20, CLAIMS PROCEDURES para. 1-23 (21 Mar. 2008). The criteria for the 2008 award were posted on 30 November 2009. Posting of Colonel Reynold P. Masterton to Claims Discussion Board, subject: Claims Award Applications Due 29 Jan 2010, https://www.jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=4E911F66373F22DA8525767E00735E0B&Count=30&ExpandSection=2.

[4] *Id.*

[5] An excellent note describing the application process and suggestions for improving award scores can be found in the September 2009 edition of *The Army Lawyer*. Lieutenant Colonel Cheryl E. Boone, *The Judge Advocate General's Excellence in Claims Award,* ARMY LAW., Sept. 2009, at 45.

Appendix

Winners of The Judge Advocate General's Excellence in Claims Award

(winners denoted with "x")

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Aberdeen Proving Grounds			x		x	x						
Beaumont MEDCEN						x						
Brooke MEDCEN												x
Fort Belvoir									x		x	
Fort Benning		x	x	x	x						x	x
Fort Bliss	x	x	x	x	x	x	x	x	x	x	x	
Fort Bragg				x		x		x	x	x	x	x
Fort Buchanan					x	x						
Fort Campbell		x	x		x			x	x	x		
Fort Carson		x	x	x	x		x	x	x		x	x
Fort Dix						x	x			x		
Eisenhower MEDCEN	x	x	x							x	x	x
Fort Eustis									x		x	
Fort Gordon			x	x	x	x	x	x	x		x	x
Fort Greely		x										
Fort Hood					x	x	x	x	x	x	x	x
Fort Huachuca			x	x	x							
Fort Jackson				x	x				x			
Fort Knox	x	x	x	x	x	x	x	x	x	x	x	x
Fort Leavenworth	x	x	x	x	x	x	x	x	x	x		x
Fort Lee				x								
Fort Leonard Wood			x		x	x	x	x		x	x	x
Fort Lewis			x	x	x	x	x		x	x	x	x
Madigan MEDCEN											x	x
Fort McPherson			x	x				x	x			x
Fort Meade						x						
Fort Monmouth	x											
Fort Polk		x	x	x	x	x	x	x	x	x	x	x
Presidio of Monterey						x	x	x	x	x	x	x
Redstone Arsenal							x				x	
Fort Richardson				x								
Fort Riley	x				x	x		x	x	x	x	x
Fort Rucker				x		x	x	x				
Fort Sam Houston	x			x			x	x	x		x	x
Schofield Barracks						x	x	x				
Fort Sill				x	x	x	x		x	x		
Fort Stewart							x				x	x
Fort Wainwright				x								
Military District Washington											x	x
West Point						x		x				
White Sands Missile Range	x	x	x	x			x		x			
Womack MEDCEN				x	x			x		x		
Bad Kreuznach, Germany		x	x									
Bamberg, Germany				x	x	x		x				
Baumholder, Germany		x	x			x	x	x	x	x	x	
Friedberg, Germany			x									
Grafenwoehr, Germany												x
Hanau, Germany			x	x	x	x	x					

Heidelberg, Germany				x								
Kaiserslautern, Germany						x	x		x	x	x	x
Katterbach, Germany		x	x		x	x						
Mannheim, Germany		x	x	x	x	x	x		x	x	x	
Menwith Hill, England		x	x	x	x							
Mons, Belgium	x	x	x		x		x			x	x	x
Schinnen, Netherlands		x	x	x	x		x		x	x	x	x
Schweinfurt, Germany		x	x	x	x	x	x	x			x	x
Wiesbaden, Germany						x	x	x	x	x		
Camp Casey, Korea			x	x	x	x	x	x	x		x	x
Camp Henry, Korea				x	x		x	x	x			
Camp Humphreys, Korea						x	x	x	x		x	
Camp Red Cloud, Korea					x	x	x	x	x	x		
Torii Station, Japan		x		x	x	x	x	x	x	x	x	x
Yongsan, Korea						x	x	x		x	x	x
Camp Zama, Japan			x	x	x		x			x		

Foreign Claims—Not Just for Overseas Offices

Douglas Dribben[*]

Claims offices in the continental United States (CONUS) are familiar with the provisions of the Federal Tort Claims Act (FTCA), 18 U.S.C. §§ 2671–2680,[1] as implemented by Army Regulation (AR) 27-20, *Claims*, chapter 4.[2] After all, this law applies to tort claims that make up the bread and butter of most claims offices. Claims under the Military Claims Act (MCA), 10 U.S.C. § 2733,[3] as implemented by AR 27-20, chapter 3,[4] are also common within these jurisdictions, as the MCA is the statute applied to tort claims if the FTCA does not apply. Finally, claims offices are very familiar with the Personnel Claims Act, 31 U.S.C. § 3721,[5] as implemented by AR 27-20, chapter 11,[6] which applies damage to or loss of household goods shipments and other property claims arising incident to military service. However, most U.S.-based claims offices are less familiar with the rules governing foreign claims, including the International Agreement Claims Act (IACA), 10 U.S.C. §§ 2734a and b,[7] and the Foreign Claims Act (FCA), 10 U.S.C. § 2734,[8] as most believe these laws apply only outside the United States.

Claims judge advocates (JAs) and attorneys need to be aware of the IACA and FCA, as the former applies within the CONUS as well as overseas, and claimants may file claims under the latter at any office, including CONUS claims offices,[9] and most JAs will be appointed as foreign claims commissioners at some time in their careers. This article will provide an overview of the fundamentals of receiving and processing claims under the IACA and FCA.

The IACA is the legal basis for paying claims under status of forces agreements (SOFA) and other stationing agreements. The IACA applies to any international agreement with reciprocal claims processing requirements. Within the United States, 10 U.S.C. § 2734a is the statute that authorizes the United States to adjudicate and pay claims arising from in-scope tortious activities of foreign forces on duty within the United States.[10] Normally, these claims arise from activities of our allies under the North Atlantic Treaty Organization (NATO)[11] and Partnership for Peace (PfP)[12] SOFAs. In addition, the United States has SOFAs with Singapore[13] and Australia[14] under which the United States processes claims.

Under these agreements, the nation sending forces to a foreign country is the Sending State, while the nation to which the forces are sent is the Receiving State. Under the SOFA, the foreign forces are considered assimilated into the U.S. armed forces, and the claims are considered claims against the United States under the FTCA or MCA. For claims arising within the United States, the Department of Defense has assigned singe-service responsibility for adjudicating the claims to the Army.[15] The Foreign Torts Branch (FTB), U.S. Army Claims Service (USARCS) is the U.S. Receiving State Claims Office (RSCO) for these SOFAs.[16]

Field claims offices are likely to receive claims arising under these SOFAs, as the claimant is usually an American citizen or legal resident. These claimants will turn to the nearest military installation, to include Navy, Marine, and Air Force bases, to request assistance in filing claims. Field claims offices are charged with notifying the FTB of all "incident[s] involving a member of a foreign military force or civilian component resulting in personal injury, death, or property damage . . . ."[17] Upon receipt of information about a potentially compensatory event, correspondence from a

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[1] Federal Tort Claims Act, 18 U.S.C. §§ 2671–2680 (2006) [hereinafter FTCA].

[2] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS ch.4 (8 Feb. 2008) [hereinafter AR 27-20].

[3] Military Claims Act, 10 U.S.C. § 2733 (2006) [hereinafter MCA].

[4] AR 27-20, *supra* note 2, ch. 3.

[5] Personnel Claims Act, 31 U.S.C. § 3721 (2006) [hereinafter PCA].

[6] AR 27-20, *supra* note 2, ch. 11.

[7] International Agreement Claims Act, 10 U.S.C. §§ 2734a, 2734b (2006) [hereinafter IACA].

[8] Foreign Claims Act, 10 U.S.C. § 2734 (2006) [hereinafter FCA].

[9] AR 27-20, *supra* note 2, para. 2-7.

[10] FCA, *supra* note 8, para. 7-1a.

[11] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

[12] Agreement Among the States Parties to the North Atlantic Treaty and other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June 19, 1995, T.I.A.S. No. 12,666.

[13] Agreement on the Status of the Singapore Personnel in the United States, with Agreed Minutes, Dec. 3, 1993, T.I.A.S. 12519. The contents of the SOFA beyond the reciprocal claims arrangements are classified. *See* Status of Forces Agreements (June 29, 1999), http://www.defenselink.mil/policy/sections/policy_offices/isa/inra/da/list_of_sofas.html.

[14] Agreement Concerning the Status of United States Forces in Australia with Protocol, May 9, 1963, U.S.-Austl., 14 U.S.T. 506.

[15] U.S. DEP'T OF DEF., DIR. 5515.08, ASSIGNMENT OF CLAIMS RESPONSIBILITY (11 Nov. 2006).

[16] AR 27-20, *supra* note 2, para. 7-10.

[17] *Id.* para. 7-8.

potential claimant or attorney, or a written claim, the field claims office should contact the FTB immediately. Upon receipt of a claim, the field claims office should log in the claim on the Tort and Special Claims Application (TSCA) database using the field office's claim number.

Field claims offices are also tasked with carrying out an investigation of the incident and providing the FTB with the results of the investigation.[18] In practice, this requires close coordination with the FTB, which will work with the Sending State embassy or defense agency to obtain information regarding the claim and scope of duty of the foreign force member. Field claims offices are required to record information and evidence obtained from their investigation in the TSCA database so the FTB can access the information.[19]

Field claims offices need to be aware that they have no authority to settle claims under the SOFAs, even if the claimed amount is within the field offices' normal monetary authority under the FTCA or MCA. However, field offices may assist the FTB in the negotiation and settlement of such claims.

On occasion, a field claims office may receive an inquiry about filing a claim for alleged tortious activity of U.S. forces outside the United States, or may receive an actual claim. Field claims offices need to determine the location where the claim arose and ensure they do not assume the claim arose within the field office's jurisdiction. They also need to become familiar with common foreign statutes of limitations (SOL), which vary from three months to three years.

Some field offices have provided potential claimants and attorneys with incorrect advice on issues such as SOLs, which may be much different in some countries than the standard two-year time frame under the FTCA and MCA, and cause claimants to lose their ability to file claims.[20] For example, one CONUS claims attorney advised a potential claimant who was injured in Germany that the applicable SOL was the standard two-year FTCA/MCA SOL; in fact, under the NATO SOFA, the SOL in Germany is three months.[21] The Commander, USARCS, has the authority to accept such claims for good cause or excusable delay, which can include reliance on misinformation from CONUS claims offices.[22]

Field claims offices need to determine whether the foreign claim received arose in a country with a claims agreement, as noted above.[23] If so, the claimant should be informed of the proper RSCO and directed to file the claim with that office. The appendices at the end of this article contain contact information for the Korean, German, and Belgian RSCOs, which are the ones most commonly involved.[24] Field claims offices should contact the FTB if they have any questions on handling these claims.

Claims that do not arise in countries where there is a SOFA are adjudicated under the FCA. The Commander, USARCS, or the Chief of a Command Claims Service will appoint foreign claims commissions (FCCs) to adjudicate the claims. These FCCs may be composed of a single member, with monetary authority up to $15,000, or three members, with monetary authority up to $50,000 in the field and $100,000 at USARCS.[25] The FCA has a two-year SOL but permits an oral claim filed within that time period to toll the SOL for an additional year for the claimant to file a written claim.[26] Field offices that receive FCA claims should immediately contact FTB for assistance in identifying the correct FCC to process the claim and transferring the claim to that FCC.

Finally, many JAs will find themselves deployed to foreign countries and may receive appointments as a foreign claims commissioner. Deployment to a foreign country is a hectic experience, which involves little free time. Accordingly, it behooves JAs to educate themselves on the applicable claims laws, regulations, and procedures before they are immersed in a deployment environment. Good customer service to claimants, potential claimants, and their attorneys, as well as to the United States, is the hallmark of a professional claims office. Knowledge of what to do when presented with a foreign claim or potentially compensable event will help field claims offices and JAs provide such service.

[18] *Id.* para. 7-9.

[19] *Id.* para. 13-1.

[20] *Id.* para. 7-13c.

[21] *Id.* ch. 7.

[22] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 3-4a(2) (21 Mar. 2008).

[23] This includes the NATO countries, Australia, Singapore, Korea, and Kuwait.

[24] *See infra* apps. A and B. Although there is a Security Agreement with Iraq effective 1 January 2009 that addresses claims, it requires claims against U.S. forces arising in Iraq be handled by the United States under the FCA and not by the Iraqis. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 21, Nov. 17, 2008.

[25] AR 27-20, *supra* note 2, paras. 10-6, 10-7, 10-9.

[26] *Id*. para. 2-30.

Appendix A

List of Republic of Korea RSCOs

Seoul District Compensation Committee
Seoul High Prosecutor's Office
1724, Socho-dong, Socho-gu, Seoul 137-740
Phone: (02) 530-3628

Taejon District Compensation Committee
Taejon High Prosecutor's Office
1390, Dunsan-dong, So-gu, Taejon 02-709
Phone: (042) 470-3258

Taegu District Compensation Committee
Taegu High Prosecutor's Office
458-2, Bomo 2-dong, Susong-gu, Taegu 706-714
Phone: (053) 740-4673

Pusan District Compensation Committee
Pusan High Prosecutor's Office
1501, Goje-dong, Yonje-gu, Pusan 611-743
Phone: (051) 606-3274 or 3275

Kwangju District Compensation Committee
Kwangju High Prosecutor's Office
342-1, Jisan-dong, Dong-gu, Kwangju 501-707
Phone: (062) 231-3263 or 3264

Inchon District Compensation Committee
Inchon District Prosecutor's Office
278-1, Hakik-dong, Nam-gu, Inchon 402-040
Phone: (032) 860-4674

Suwon District Compensation Committee
Suwon District Prosecutor's Office
80, Wonchon-dong, Paldal-gu, Suwon 442-703
Phone: (031) 210-4416

Chunchon District Compensation Committee
Chunchon District Prosecutor's Office
356, Hyoja-dong, Chunchon, Kangwon-do 200-716
Phone: (033) 251-5432

Chongju District Compensation Committee
Chongju District Prosecutor's Office
93-1, Sugok-dong, Hungdok-gu, Chongju 361-704
Phone: (043) 299-4674

Ulsan District Compensation Committee
Ulsan District Prosecutor's Office
635-3, Ok-dong, Nam-gu, Ulsan 680-705
Phone: (052) 228-4673

Changwon District Compensation Committee
Changwon District Prosecutor's Office
1, Sapa-dong, Changwon, Kyongnam 641-704
Phone: (055) 239-4436

Jonju District Compensation Committee
Jonju District Prosecutor's Office
1416-1, Dokjin-dong, Dokjin-gu, Jonju 561-705
Phone: (063) 259-4673

Jeju District Compensation Committee
Jeju District Prosecutor's Office
950-1, Yido 2-dong, Jeju, Jeju-do 690-022
Phone: (064) 729-4568

Appendix B

List of European RSCOs

Germany

Oberfinanzdirektion Nürnberg
SRB Regionalbüro Süd
Krelingstrasse 50
90408 Nürnberg
Phone: 0911/376-3801
0911/376-3470
Fax: 0911/376-2449
Handles claims arising in Baden-Württemberg,

Oberfinanzdirektion Koblenz
SRB Regionalbüro West
Schloss/Hauptgebäude
56068 Koblenz
Phone: 0261/3908-104
0261/3908-183
Fax: 0261/3908-181
Handles claims arising in Rheinland-Pfalz, Saarland, Nordrhein-Westfalen, and Bundesgebeit (except Bayern, Hessen, and Niedersachsen)

Oberfinanzdirektion Erfurt
SRB Regionalbüro Ost
Jenaer Strasse 37
99099 Erfurt
Phone: 0361/377-289
Fax: 0361/3787-073
Handles claims arising in Hessen, Berlin, Sachsen, Thüringen, Sachsen-Anhalt (but not Regierungsbezirk Magdeburg), Brandenburg (only nördlicher Teil), and Bundesgebeit (except Bayern, Hessen, and Niedersachsen)

Oberfinanzdirektion Magdeburg
SRB Regionalbüro Nord
Sitz Soltau
Winsener Strasse 34g
29604 Soltau
Handles claims arising in Bundesgebeit, Bremen, Hamburg, Nordrhein-Westfalen (only Regierungsbezirk Detmold), Mecklenburg-Vorpommern, Sachsen-Anhalt (only Regierungsbezirk Magdeburg), Brandenburg (only nördlicher Teil), and Bundesgebeit.

Netherlands

Netherlands Ministry of Defence
Commando DienstenCentra
JDV/Sectie Claims
MPC58L
Postbus 20703
2500 ES Den Haag
Phone: +31-70-3397089
Fax: +31-70-3397794

A View from the Bench

"You Don't Know What You Don't Know"

Perspectives from a New Trial Judge

Major Matthew McDonald
Circuit Judge, Third Judicial Circuit
Fort Hood, Texas

Introduction

Last year, I was privileged to be selected to serve as a military judge. The job provides a great opportunity to experience the courtroom from a perspective different from that of a trial or defense counsel. However, one thing that has not changed is my role in training and mentoring counsel to help improve their advocacy skills. Throughout my career, I have watched judges mentor counsel in different ways, and I have tried to take what I have learned to assist those practicing before me now.

While I have seen counsel gradually improve their level of advocacy by avoiding some common mistakes, those who fail to improve can still do so if properly trained. As I always tell counsel, "you don't know what you don't know." So, with that in mind, here are some observations I can share to help counsel become better litigators.

Common Mistakes by Government Counsel with the Trial Script

Misreading the trial script is one of the most common errors I have seen Government counsel commit. Often, counsel err because they do not understand what they are saying and do not ask questions to clarify the meaning behind the script. Frequently, no one appears to have taken the time to explain the various parts of the script to them.

Stating the wrong individual when announcing who preferred the charges is a common mistake. The correct individual is the accuser who swore to the charges, as reflected in block 11a on the DD Form 458, Charge Sheet. Instead, some counsel incorrectly identify the person who informed the accused of the sworn charges (in block 12) as the person who preferred the charges. While these two individuals can be the same person, often they are not.

Another common mistake is citing the wrong date for the service of referred charges on the accused. This date is often confused with the date charges were read by the command to the accused after preferral or the date the convening authority referred the charges. Both are incorrect. The appropriate date is the date referred charges were actually served on the accused. This is important because the three- or five-day statutory waiting period under Article 35, Uniform Code of Military Justice, does not begin until actual service of the charges.

Finally, I have noticed that trial counsel sometimes indicate that the convening authority made a recommendation as to disposition of the charges. The convening authority does not make a recommendation as to disposition; the convening authority actually disposes of the charges, sometimes by referring them to either a special or general court-martial.

Many counsel make these simple mistakes, but they are easy to correct once they have been explained.

Attention to Detail in Preparing Court-Martial Charges

One circumstance that should not arise, but often does, is the preferral of court-martial charges drafted by a trial counsel who has not interviewed essential witnesses in the case. Instead of interviewing witnesses, some trial counsel rely solely on sworn statements for information about the case. This reliance on sworn statements raised issues in three recent contested courts-martial. In one case, a female victim revealed in her sworn statement that she was choked by the accused. The Government assumed the accused choked the victim with his hands and drafted the specification accordingly. During pretrial preparation, however, the victim told the trial counsel that the accused used his forearm to choke her. A basic interview with the victim before charges were preferred would have ensured the specification accurately reflected the manner of assault.

In two other cases the trial counsel charged the wrong location. In one, the specification alleged the offense occurred at Fort Hood when the offense actually occurred in San Antonio. In another case alleging desertion with the intent to shirk hazardous duty, the specification listed the accused's unit as a forward operating base in Iraq that was actually four hours from the unit's actual location. The preferral of charges listing a location that was not even near the unit's location demonstrates the problems that can arise when counsel draft charges without talking to essential witnesses. Inattention to detail can significantly affect the

Government's case, particularly when an error is considered a major, rather than a minor, variance.

Something that should already be common practice is the review of charge sheets by more than one person. I often see specifications on charge sheets that have been changed after arraignment for numerous reasons, including the failure to include words of criminality or the omission of entire elements. Apparently, no one took the time to compare the specifications on the charge sheet with the model specifications in the *Manual for Courts-Martial* (*MCM*)[1] or the *Military Judges' Benchbook*.[2] Counsel should always endeavor to use the model specification, absent a compelling reason. Except for Article 133[3] offenses and clause 1 and clause 2 offenses under Article 134,[4] creativity in drafting specifications is not helpful. If the chief of justice does not review the charge sheets, then ask the deputy staff judge advocate or other experienced judge advocate to look over them. It should not be up to the military judge to catch the mistakes that result from poor preparation or inattention to detail.

Think Before You Speak

Counsel on both sides of the aisle should think before speaking, especially in front of panels. Your words can greatly impact the panel's perception of you and, by extension, your case. In one contested panel case, after a witness had finished testifying on the merits, I asked both counsel whether the witness was excused temporarily or permanently. Without thinking, the defense counsel stated he wanted the witness temporarily excused *so he could recall the witness during sentencing proceedings.* The accused was subsequently convicted. While the Freudian slip may not have been the reason, a defense counsel should never give the members the impression that he or she thinks the accused is guilty. The military judge will not ask you why you want a witness temporarily excused, and do not volunteer one. If asked whether the witness should be temporarily or permanently excused, "Temporary excusal, Your Honor," will suffice, especially in front of members.

In another contested panel case, a trial counsel announced in front of the panel his objection to a member's questions of a witness. Before speaking, the counsel failed to consider the impact his declaration could have on the panel's perception of the Government's case or the possibility that the panel would see the objection as an attempt to keep evidence from them. If you need to discuss a matter, indicate so in writing on the bottom of the panel member's question or ask the judge for an Article 39(a) session so the issue can be addressed outside of the presence of the members.

Supervisory attorneys for both trial and defense counsel can resolve some of these issues by spending more time with them in court. This should include observing their subordinates in court so they can provide feedback on their performance after trial; sitting with newer counsel as a second chair in contested panel cases; reviewing common procedural issues and rehearsing how they could be handled; and reading records of trial so counsel mistakes can be identified and corrected before the next trial.

Exuding Confidence

Even if petrified in court, successful counsel give the illusion of confidence in front of panels. You must harness your emotions, control your nervous habits, and be able to speak to the fact-finder without notes. You should strive to reach a point where you feel comfortable giving every opening statement and closing argument extemporaneously, focusing on the fact-finder when telling your story. Counsel who has prepared properly for trial will know the facts of the case inside and out, and the ability to present a case without notes or scripted examinations and arguments gives the appearance of confidence and lends credibility before the panel. Practicing opening and closing statements in front of others seated in the panel box can help prepare counsel for trial. Reading openings and closings rarely inspires confidence.

Keeping Track of the Elements

Counsel's failure to keep track of evidence that has been introduced for each element of the offenses is another frequent problem. I have presided over more than a few judge-alone cases where I have asked more questions than the trial counsel, including asking witnesses about elements that were not covered by the Government. At a minimum, Government counsel should track the evidence that has been presented to ensure the case survives a Rule for Court-Martial 917 motion.[5] Noting what evidence has already been presented, on an elements checklist or other tracking document, can be a good job for a co-counsel or second chair. Once evidence to prove an element has been elicited—through witness testimony, a stipulation of fact or stipulation of expected testimony, documentary evidence, or judicial notice—the element can be checked off the list. Before resting, both trial counsel should review the elements checklist to ensure they have offered evidence to prove each element of each offense beyond reasonable doubt. With

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

[2] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010).

[3] MCM, *supra* note 1, R.C.M. 133.

[4] *Id.* R.CM. 134,

[5] *Id.* R.C.M. 917.

easy access to the electronic *Benchbook* on the Trial Judiciary Homepage,[6] counsel have no excuse for not having the elements printed off and ready for use at trial.

Discovery Issues

An issue that never seems to disappear is lack of discovery. I recently witnessed Government counsel attempt to admit evidence at trial that appeared to be clearly covered by a defense discovery request but that was not turned over prior to trial. When asked to explain the failure to provide discovery, I usually hear three responses: (1) I was not the initial counsel on the case so providing discovery was not my responsibility; (2) I thought the material had already been turned over; and (3) I didn't believe the material was covered by the defense discovery request. All of these answers are not very helpful during trial.

The easiest solution, especially when a specific defense discovery request has been made, is to ensure you can show you provided the evidence to the defense. One way to do this is to e-mail all the evidence to the defense. Keeping a copy of the e-mail with all attachments creates an electronic record showing what material was provided and when it was provided. Alternatively, the Government can simply list each document provided to the defense and have the defense counsel or a defense paralegal sign for the documents. All too often at trial, the military judge must excuse the members and hear argument on whether certain documents were or were not provided to the defense. Simple recordkeeping and documentation of discovery maintained by the trial counsel can settle many discovery issues that arise at trial and prevent unnecessary delay of the case.

Conclusion

Government and defense counsel can overcome basic mistakes with better trial preparation, greater attention to detail, and greater involvement by first-line supervisors. Counsel should not hesitate to seek the advice of more experienced practitioners and bounce ideas off more experienced litigators. The bottom line is that counsel should periodically remind themselves: "I don't know what I don't know."

[6] U.S. Army Trial Judiciary, https://www.jagcnet2.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/USARMYTJ.NSF/(JAGCNetDocID)/Home?OpenDocument (last visited July 15, 2010) (password protected).

Book Reviews

Reagan's Secret War

Reviewed by *Major Joe Schrantz*[*]

> *I want to be remembered as the President of the United States who brought a sense and reality of peace and security. I want to eliminate that awful fear that each of us feels sometimes when we get up in the morning knowing that the world could be destroyed through a nuclear holocaust.*[1]

I. Introduction

Based primarily on recently declassified top-secret files, *Reagan's Secret War*[2] details the efforts Ronald Reagan made during his presidency to rid the world of nuclear weapons, increase the level of human rights, and promote democracy abroad. Focusing on Reagan's battle to end the nuclear arms race with the Soviet Union, authors Martin Anderson and Annelise Anderson guide the reader through strategic leadership discussions, National Security Council meetings, public appearances, and the personal thoughts of Reagan.

While revealing the previously unknown story of his efforts to prevent nuclear disaster, the authors capture the leadership traits that helped Reagan change the world. Understanding he had a major role in the world's fate, Reagan bravely cast aside the diminished respect for the presidential office he inherited, a weakened military, cancer, economic turmoil, an assassination attempt, and scandal to successfully bring Soviet leadership to the negotiating table.[3]

Reagan began formulating his convictions and goals as early as 1952, thirty years before his presidency.[4] By the time he ascended to the presidency, Reagan firmly grasped that although a "country could reduce or eliminate its nuclear weapons . . . that would not mean its citizens were free. It could still be evil."[5] With his foundation firmly established, Reagan alone "decided the direction and strategy of U.S. policy" and "succeeded in getting the Soviets to accept his vision."[6]

This review examines the authors' presentation and analysis of documents relied on in *Reagan's Secret War*. The review then explores the leadership lessons military leaders and their judge advocates may learn from Reagan's life and career.

II. Analysis

The authors had extensive histories with Reagan in their capacities as both authors and members of his administration.[7] Nevertheless, some of the declassified documents they reviewed during their research revealed a level of involvement and determination on the part of Reagan that even they were unaware of.[8] Historians previously uncertain about who set policy and made decisions during the Reagan Administration should now be convinced that Reagan was in charge.

The authors present three examples to illustrate Reagan's decisiveness and determination. First, during his initial National Security Council meeting, Reagan bluntly told his advisers, "I will make the decisions."[9] Second, in response to a reporter's question about how involved his wife Nancy was with policy, and having heard similar critiques before, Reagan replied, "I'm too old and stubborn to put up with that. I make up my mind. I do listen for counsel and advice. I want to get expertise from people that are expert in various fields. But I haven't changed my views since I've been here."[10] Finally, even a Soviet note-taker observed Reagan's energy during his meetings with Mikhail Gorbachev. Expecting to find an elderly man in his mid-70s, the note-taker instead discovered a "lion" that, when challenged, became "crisp" and "engaged."[11] The authors use these examples, along with many others, to reveal how Reagan was determined to be the one who "carried out goals he had long held, carefully plotted the strategy that brought about

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* U.S. Marine Corps. Written while assigned as a student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[1] DICK WIRTHLIN & WYNTON C. HALL, THE GREATEST COMMUNICATOR: WHAT REAGAN TAUGHT ME ABOUT POLITICS, LEADERSHIP, AND LIFE 113–14 (2004), *reprinted in* MARTIN ANDERSON & ANNELISE ANDERSON, REAGAN'S SECRET WAR (2009), *infra* note 2, at 10.

[2] MARTIN ANDERSON & ANNELISE ANDERSON, REAGAN'S SECRET WAR (2009).

[3] *Id.* at ix, 23, 24, 43, 203, 213, 233, 317.

[4] *Id*. at 248.

[5] *Id*. (alteration in original).

[6] *Id*. at 201.

[7] *Id*. at 4.

[8] *Id.*

[9] *Id.* at 9 (quoting *Minutes of the National Security Council* 3 (Feb. 6, 1981)).

[10] *Id.* at 198 (quoting Interview with Ann Devroy & Johanna Neuman of *USA Today* (Jan. 17, 1985)).

[11] *Id.* at 246 (quoting Edmund Morris, *Dutch: A Memoir of Ronald Reagan* 596, 828 (1999)).

the ends he achieved, and made all the major decisions of his administration."[12]

The authors' prior relationship with Reagan might suggest a degree of bias or favoritism toward their subject. As the authors of several past bestselling books about Reagan, it is unlikely they would choose to damage his legacy now with the publication of *Reagan's Secret War*.[13] Nevertheless, the verbatim documents speak for themselves. The riveting one-on-one dialogue between Reagan and Gorbachev, the personal thoughts captured in Reagan's journal, and the content of Reagan's self-written speeches show a determined leader who personally set the agenda for his administration, often without support, full consultation, or "advice" from his staff members, the State Department, the Central Intelligence Agency, or the Department of Defense.[14] The evidence clearly reveals that Reagan was driving the policy of his administration. Even the harshest Reagan critics would have difficulty arguing that the authors had not presented the evidence fairly.

Reagan's Secret War maintains the focus on Reagan, rather than his staff, throughout the book. With the exception of his trusted Secretary of State, George Shultz, the authors give very little credit to the rest of Reagan's "simply spectacular" staff.[15] The majority of the National Security Council meetings mentioned in the book highlight Reagan's positions, and when mentioned, the staff is generally depicted expressing their reservations to his views.[16]

While glossing over the involvement of Reagan's staff does not detract from the book, the authors' failure to expand on Mikhail Gorbachev's leadership does. Despite acknowledging his rise to power and political skill, the authors portray Gorbachev as someone bullied into accepting Reagan's demands by the deteriorating condition of the Soviet economy.[17] While historians generally agree that economic conditions led to the demise of the Soviet Union and undoubtedly put Gorbachev in a complex dilemma, Gorbachev was confronted by a number of other considerations as well. Stating simply that Gorbachev "caved" without examining the leadership challenges and internal governmental pressures he faced leaves the whole story untold.[18]

Having risen through the ranks of the Soviet leadership, Gorbachev had only been General Secretary for two years when he announced that the Soviet Union was willing to make concessions.[19] Reagan had been President for seven years.[20] One could argue that the challenges and risks Gorbachev endured were far greater than those Reagan had to endure. For example, he inherited the leadership position of an already crumbling Soviet Union. The authors briefly note, "because the Soviet Union was not democratic, effecting such a change in their policies was extremely difficult. Nothing less than a majority vote on the fifteen man politburo—perhaps even in some cases a unanimous vote—could lead to change."[21] Ultimately, the Russian with the "iron teeth" was brave enough to use those same teeth to "bite the bullet" and make huge concessions.[22] *Reagan's Secret War* would have benefited from a more in-depth examination of the challenges and considerations Gorbachev faced.

Despite not developing Gorbachev's personality or challenges more fully, the authors effectively allow the face-off between the two men to build to an exhilarating point.[23] Readers who lived through the end of the Cold War and the collapse of the Soviet Union will likely recall the "more than 150 times" Reagan publicly called for the elimination of nuclear weapons.[24] Younger readers, born in the 1970s and 1980s, which includes the majority of current active duty officers in the military, may only recall replayed popular images of Reagan or such frightening nuclear war movies like the 1983 television movie, "The Day After."[25]

For readers too young to remember the specifics of how the Cold War ended, *Reagan's Secret War* might seem anti-climactic after a statistically insignificant number of weapons destroyed because of the treaty ultimately signed by Reagan and Gorbachev in 1988.[26] At the beginning of Reagan's presidency in the early 1980s, "the United States had an estimated stockpile of 23,464 nuclear warheads. The Soviet Union stockpile was considerably larger, with 32,049 warheads."[27] Reagan's repeated goal was the complete

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[12] *Id.* at 1.

[13] *Id*. at 6.

[14] *Id*. at 52, 89, 95, 127, 164.

[15] *Id.* at 12 (quoting Godfrey Sperling, *"Democrat's Strauss Impressed by Reagan Performance But . . . ,"* CHRISTIAN SCI. MONITOR, May 15, 1981 at 10).

[16] *Id.* at 65–71, 85–86, 127, 164.

[17] *Id*. at 339.

[18] *See* Lance Morrow, *Mikhail Gorbachev: Man of The Decade*, TIME MAG. Jan. 1, 1990, *available at* http://www.time.com/subscriber/person of theyear/archive/stories/1989.html (describing Gorbachev as "the patron of change" who symbolized "[c]hange and hope for a stagnant system, motion, creativity, an amazing equilibrium, a gift for improvising a stylish performance as he hang glides across an abyss").

[19] ANDERSON & ANDERSON, *supra* note 2, at 127, 164.

[20] *Id*. at 335.

[21] *Id*. at 200.

[22] *Id*. at 205.

[23] *Id*. at 305–09.

[24] *Id.* at 94.

[25] THE DAY AFTER (ABC Circle Films 1983).

[26] ANDERSON & ANDERSON, *supra* note 2, at 364.

[27] *Id*. at 17.

elimination of nuclear weapons.[28] Not until the Intermediate-Range Nuclear Forces Treaty deadline in 1991, when only 2,692 of these nuclear weapons had been destroyed, do the authors begin to back away from numeric achievements and instead begin to stress the symbolic importance of the treaty.[29]

Readers will find it difficult to feel like anyone "won." The United States and Soviet Union still possessed enough nuclear weapons to destroy the world. However, in reality, the two leaders were moving towards peace. This was the "first real reduction in an arms race that, until then, had seemed unstoppable, inevitable."[30] In addition, the threat of an "all-out nuclear war ebbed away."[31] The two leaders had moved the standoff away from an "oncoming Armageddon."[32] The authors succeed in explaining the significance was not in the numbers of weapons reduced, but rather in the knowledge that an agreement was reached, albeit a statistically small one, in the hopes the "sapling" might "one day grow into a mighty tree of peace."[33]

One stylistic critique of the book includes the authors' inclusion of facsimiles of handwritten journal entries as well as the transcribed text of the same journals. The incorporation of both is redundant and unnecessary. While the use of Reagan's handwritten notes lends credence to the argument that Reagan actively participated in formulating policy and making the decisions, it is excessive. Similarly, the inclusion of both the typed minutes of National Security Council meetings and the transcribed, verbatim text is unwarranted. The incorporation of additional photos would have been more insightful and interesting. Diagrams and charts of the different types of weapons and their capabilities would also be helpful. Finally, maps detailing nuclear weapons locations throughout the world would have illuminated the exchanges between Reagan and Gorbachev, especially their discussions of weapons locations and their impact on the European nations.

III. Lessons for Military Leaders and Their Judge Advocates

Reagan's Secret War provides several meaningful lessons for military leaders and their judge advocates.

First, "envision the future" and plan how to get there.[34] Reagan dreamed of a world free of nuclear weapons. This dream motivated Reagan and guided his policy. For military leaders, vision is important. Often, military leaders who command units for short periods can find this difficult. Many want to see immediate results, which encourages short-term planning and the search for a "quick fix." The truly great leaders do what is best for the long term, and judge advocates should remember this when advising commanders of their legal options.

Second, be open and honest. The Iran-Contra scandal and its follow-on investigation illustrate this principle. Despite this unfortunate incident, Reagan led the administration correctly through the controversy and its aftermath. Reagan immediately appointed an investigator and promised the American people he would "get to the bottom of this matter."[35] History has shown this commitment to be the "smartest thing Reagan did" once the scandal struck.[36] For the war in Afghanistan, one of the most tragic incidents became worse due to allegations of leadership failures during the investigation process.[37]

Third, know your history and the history of your enemy. Understanding the history of your adversary can help explain much of what they do. For Reagan, recognizing that guarding "the homeland has always been of paramount importance" to the Russians was critical when formulating his foreign policy.[38] For today's military leader, especially those guiding the wars in Iraq and Afghanistan, cultural awareness is of equal importance.

Fourth, remember who the decision-maker is. Reagan made it clear to his staff that he was the one who would make the decisions. Give the leader his options, and give the best advice you can. Once the leader makes a decision, if it is legally permissible, implement it to the best of your ability.

Fifth, assemble the right team. Reagan firmly believed in surrounding himself with the best team possible. While some leaders fear being surrounded by brilliant staff officers,

[28] *Id.* at 94.

[29] *Id.* at 364.

[30] *Id.* at 365.

[31] *Id.* at 369.

[32] *Id.* at 59

[33] *Id.* at 364 (quoting *Remarks on Signing the Intermediate-Range Nuclear Forces Treaty* (Dec. 8, 1987)).

[34] JAMES M. KOUZES & BARRY Z. POSNER, THE LEADERSHIP CHALLENGE 103 (2007).

[35] ANDERSON & ANDERSON, *supra* note 2, at 321 (quoting *Address to the Nation on the Investigation of the Iran Arms and Contra Aid Controversy* (Dec. 2, 1986)).

[36] *Id.* at 323.

[37] *See* Josh White, *Army Withheld Details About Tillman's Death*, WASH POST, May 4, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/03/AR2005050301502.html.

[38] ANDERSON & ANDERSON, *supra* note 2, at 102 (quoting *Minutes of the National Security Council* (Apr. 16 1982)).

"Reagan thrived on them."[39] For the military leader, assembling a solid team is also important.[40]

Finally, relentlessly communicate.[41] Reagan communicated "more than 150 times—to the necessity of wiping out nuclear weapons, not just to protect the United States but to protect every other country in the world."[42] He knew the importance of pressing his message. Similarly, military leaders need to ensure their commands understand their intent and guidance, and should take every opportunity to communicate their message.[43]

IV. Conclusion

Reagan's Secret War tells the story of Reagan's actions to bring about world change. Today's headlines publicly challenge the President to repair the economy, clean up the Gulf oil spill, and serve as the Commander in Chief of two small wars. While certainly significant, these challenges pale in comparison to Reagan's "secret war" to prevent nuclear disaster. This is not to suggest that the economic challenges are not complex, the oil cleanup is not burdensome, or the wars in Iraq and Afghanistan have not been without terrible cost. Each present unique challenges.

However, when compared to the nuclear standoff, the prospect of nuclear annihilation, the collapse of the Soviet Union, and the end of the Cold War, *Reagan's Secret War* can serve as a reminder that today's challenges are surmountable. This message, as well as the historical and leadership lessons interspersed throughout the book, makes *Reagan's Secret War* worth reading.

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[39] *Id.* at 12.

[40] *See* XVIII AIRBORNE CORPS, OFFICE OF THE STAFF JUDGE ADVOCATE, AFTER ACTION REPORT, OPERATION IRAQI FREEDOM (FEB. 2008–APR. 2009) (11 June 2009) (discussing the importance of assembling the right leadership team).

[41] BE, KNOW, DO (Leader to Leader Inst. ed., 2004)

[42] ANDERSON & ANDERSON, *supra* note 2, at 94.

[43] *See id.*

CLE News

1. Resident Course Quotas

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

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

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

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

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

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

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

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2010–September 2011) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
	GENERAL	
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5-27-C20	183d JAOBC/BOLC III (Ph 2)	5 Nov – 2 Feb 11
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F1	214th Senior Officer Legal Orientation Course	18 – 22 Oct 10
5F-F1	215th Senior Officer Legal Orientation Course	24 – 28 Jan 11
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	13 – 17 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11

5F-F5	2011 Congressional Staff Legal Orientation (COLO)	17 – 18 Feb 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
5F-F55	2011 JAOAC	3 – 14 Jan 11
5F-F70	41st Methods of Instruction	15 – 16 Jul 20
5F-F70	42d Methods of Instruction	7 – 8 Jul 11
5F-JAG	2010 WWCLE	4 – 8 Oct 10
JARC-181	2010 Judge Advocate Recruiting Conference	21 – 23 Jul 10
JARC 181	2011 Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES		
512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	1st Advanced Leaders Course (Ph 2)	4 Oct – 9 Nov10
512-27D30	2d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	3d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	1st Senior Leaders Course (Ph 2)	4 Oct – 9 Nov 10
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES		
7A-270A0	18th JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrator Course	13 – 17 Jun 11
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11
7A-270A3	2011 Senior Legal Administrator Symposium	1 – 5 Nov 10
ENLISTED COURSES		
512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10

512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 1
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	14th Redictation Course	3 – 7 Jan 11
512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11
5F-F58	27D Command Paralegal Course	1 – 5 Nov 10
ADMINISTRATIVE AND CIVIL LAW		
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F23	66th Legal Assistance Course	25 – 29 Oct 10
5F-F23E	2010 USAREUR Legal Assistance CLE Course	18 – 22 Oct 10
5F-F24	35th Administrative Law for Military Installations & Operations	14 – 18 Mar 11
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
5F-F24E	2011 USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F28	2010 Income Tax Law Course	6 - 10 Dec 10
5F-F28E	2010 USAREUR Tax CLE Course	29 Nov – 3 Dec 10
5F-F28H	2011 Hawaii Income Tax CLE Course	10 – 14 Jan 11
5F-F28P	2011 PACOM Income Tax CLE Course	3 – 7 Jan 11
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	163d Contract Attorneys Course	19 – 30 Jul 10
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F11	2010 Contract & Fiscal Law Symposium	16 – 19 Nov 10
5F-F12	82d Fiscal Law Course	7 – 11 Mar 11
5F-F14	29th Comptrollers Accreditation Fiscal Law Course	28 Feb – 4 Mar 11
5F-F103	2011 Advanced Contract Law Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	34th Criminal Law Advocacy Course	13 – 17 Sep 10
5F-F34	35th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	36th Criminal Law Advocacy Course	31 Jan – 4 Feb 11
5F-F34	37th Criminal Law Advocacy Course	7 – 11 Feb 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Oct 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F45	10th Domestic Operational Law	19 – 23 Oct 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47	55th Operational Law of War Course	22 Feb – 4 Mar 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10
5F-F47E	2011 USAREUR Operational Law CLE	19 – 23 Sep 10
5F-F48	3d Rule of Law Course	16 – 20 Aug 10
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2009–2010 Course Schedule

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

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030)	2 Aug – 9 Oct 10
0258	Senior Officer (050) Senior Officer (060) Senior Officer (070)	12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA)

	Senior Officer (Fleet) (050)	26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (030)	10 May – 23 Jul 10
03TP	Trial Refresher Enhancement Training (020)	2 – 6 Aug 10
4046	Mid Level Legalman Course (020)	14 – 25 Jun 10 (Norfolk)
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
850T	Staff Judge Advocate Course (020)	5 – 16 Jul 10 (San Diego)
900B	Reserve Lawyer Course (020)	20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961J	Defending Complex Cases (010)	12 – 16 Jul 10
NA	Iraq Pre-Deployment Training (040)	6 – 9 Jul 10

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (060) Legal Clerk Course (070)	19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (060) Senior Officer Course (070)	9 – 13 Aug 10 13 – 1 7 Sep 10

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	7 – 25 Jun 10 19 Jul –6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (070) Legal Clerk Course (080)	26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (090)	13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10
Defense Orientation Course, Class 11-A	4 – 8 Oct 2010
Federal Employee Labor Law Course, Class 11-A	4 – 8 Oct 2010
Paralegal Apprentice Course, Class 11-01	5 Oct – 17 Nov 2010
Judge Advocate Staff Officer Course, Class 11-A	12 Oct – 16 Dec 2010
Paralegal Craftsman Course, Class 11-01	12 Oct – 23 Nov 2010
Advanced Environmental Law Course, Class 11-A (Off-Site, Wash., DC Location)	19 – 20 Oct 2010
Civilian Attorney Orientation, Class 11-A	21 – 22 Oct 2010
Article 32 Investigating Officer's Course, Class 11-A	19 – 20 Nov 2010

Deployed Fiscal Law & Contingency Contracting Course, Class 11-A	6 – 10 Dec 2010
Pacific Trial Advocacy Course, Class 11-A (Off-Site, Japan)	13 – 17 Dec 2010
Trial & Defense Advocacy Course, Class 11-A	3 – 14 Jan 2011
Paralegal Apprentice Course, Class 11-02	3 Jan – 16 Feb 2011
Gateway III, Class 11-A	19 Jan – 4 Feb 2011
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 11-A (Off-Site)	21 – 22 Jan 2011
Homeland Defense/Homeland Security Course, Class 11-A	24 – 28 Jan 2011
CONUS Trial Advocacy Course, Class 11-A (Off-Site, Charleston, SC)	31 Jan – 4 Feb 2011
Interservice Military Judges' Seminar, Class 11-A	1 – 4 Feb 2011
Legal & Administrative Investigations Course, Class 11-A	7 – 11 Feb 2011
European Trial Advocacy Course, Class 11-A (Off-Site, Kapaun AS, Germany)	14 – 18 Feb 2011
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 2011
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 2011
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 2011
Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 2011
Defense Orientation Course, Class 11-B	4 – 8 Apr 2011
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 2011
Military Justice Administration Course, Class 11-A	18 – 22 Apr 2011
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 2011
Cyber Law Course, Class 11-A	26 – 28 Apr 2011
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 2011
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 2011
Operations Law Course, Class 11-A	16 – 27 May 2011
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 2011
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 2011
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 2011
Law Office Management Course, Class 11-A	13 – 24 Jun 2011
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 2011

Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 2011
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 2011
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 2011
Environmental Law Course, Class 11-A	22 – 26 Aug 2011
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 2011
Accident Investigation Course, Class 11-A	12 – 16 Sep 2011

5. Civilian-Sponsored CLE Courses

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

AAJE:
American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA:
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:
Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA:
American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM:
American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB:
Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA:
Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100

MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900

UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

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

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

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

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

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

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

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

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

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

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

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

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