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Articles

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Never Have So Many Been Punished So Much by So Few: Examining the Constitutionality of the New Special Court-Martial

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Introduction

Since its creation by Congress in 1916, the special court-martial (SPCM) has been a judicial forum favored by commanders for disposing of relatively minor offenses.¹ In fiscal year 2002, the Army, Navy, Marine Corps, Air Force, and Coast Guard convened 5052 courts-martial, 3197 of them SPCMs.² In the military justice system, a system that does not distinguish felony offenses from misdemeanors, the SPCM has filled a role roughly analogous to a misdemeanor-level criminal court. The SPCM provides an accused fewer procedural safeguards than are available at a general court-martial (GCM). An accused at a SPCM is not entitled to an investigation of his offenses pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ).³ An accused at a SPCM may face trial sooner after having been served with charges than at a GCM.⁴ The military judge presiding over a SPCM is not required to be qualified in accordance with the requirements placed on GCM-certified military judges under Article 26(a), UCMJ.⁵ Perhaps most significantly, the minimum number of members required to hear SPCMs is three, compared to the five members required at a GCM.⁶

Whatever an accused loses in the way of procedural safeguards at a SPCM, the SPCM traditionally was a much more

desirable forum for an accused than the GCM because of the reduced risk to the accused at a SPCM. From 1916 until May 2002, SPCMs were not authorized to award confinement for any period longer than six months.⁷ Any non-capital offense may be tried by SPCM, and even some offenses for which death is an authorized sentence may be tried by SPCM.⁸ The offenses tried at SPCMs often carry maximum punishments that include confinement for more than six months, but no matter what maximum punishment is authorized for an offense being tried, the punishment at a SPCM never exceeds the maximum punishment associated with that forum. Thus, the maximum sentence associated with the SPCM forum, rather than the maximum authorized for particular offenses, is frequently the relevant limit on the sentencing discretion of SPCMs.⁹

Between 1999 and 2002, the accused at a SPCM lost some of the benefit of this safety net. On 17 May 1999, the Senate Committee on Armed Services report on the fiscal year 2000 defense authorization bill included a provision increasing the jurisdictional maximum sentence that can be imposed by SPCMs that use a military judge. The committee did not report any findings or rationale supporting the amendment.¹⁰ The Senate passed the defense authorization bill, including the amendment to Article 19, on 27 May 1999.¹¹ Although the House of Representatives bill contained no similar provision,

1. Articles of War of 1916, ch. 418, § 3, art. 3, 39 Stat. 651 (1916).

2. U.S. Dep't of Navy, Office of the Judge Advocate General, *Code 20 News-Mailer 2003-04: Military Justice Statistical Trend Analysis for Fiscal Year 2002* (Mar. 4, 2003). This figure does not include summary courts-martial, which have been held to be non-adversarial proceedings distinct from criminal trials. *Middendorf v. Henry*, 425 U.S. 25, 40-41 (1976).

3. UCMJ art. 32 (2002).

4. *Id.* art. 35.

5. *Id.* art. 26(a).

6. *Id.* art. 16.

7. Articles of War of 1916, ch. 418, § 3, art. 13, 39 Stat. 652 (1916); UCMJ art. 19; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2)(B) (2000) [hereinafter 2000 MCM]. Hard labor without confinement for no more than three months, forfeiture of pay not exceeding two-thirds pay per month for six months, reduction in grade, and a bad-conduct discharge (BCD) were the other maximum punishments that a SPCM could impose until the May 2002 change in the jurisdictional maximum of the SPCM. *Id.*

8. UCMJ art. 19; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2)(C)(i) (2002) [hereinafter MCM].

9. Compare MCM, *supra* note 8, app. 12 (Maximum Punishment Chart), with UCMJ art. 19.

10. S. REP. NO. 106-50, at 307-08 (1999).

11. 145 CONG. REC. S6274 (daily ed. May 27, 1999).

the House conceded the point in conference.¹² The House¹³ and the Senate¹⁴ passed the authorization bill as reported by the conference committee. At no time did Congress make the amendment to Article 19 the subject of findings or debate. President Clinton signed the authorization bill into law on 5 October 1999.¹⁵

The 1999 amendment to Article 19 did not immediately affect the jurisdictional maximum of SPCMs. Because the jurisdictional maximum punishment of the SPCM is capped by rule as well as by statute, SPCMs were still only authorized to award six months of confinement by rule, even after Congress provided for the increased sentencing authority.¹⁶ This changed in 2002 when the President amended Rule for Courts-Martial (RCM) 201(f)(2)(B) to permit SPCMs to award up to one year of confinement.¹⁷ The amendment took effect on 15 May 2002.¹⁸

On one hand, the change in the SPCM may be seen as another step, for good or for ill, in the continued “civilianization” of the military justice system—a process most view as generally beneficial to the accused.¹⁹ “Misdemeanor” courts-martial are simply now capable of awarding the same term of confinement that civilian courts may impose when sentencing a defendant for a misdemeanor.²⁰ But when viewed in the context of protections historically offered to accused, permitting a panel of three members to convict an accused of an offense punishable by a maximum term of confinement of one year marks a new low point in the protection afforded an accused. This article argues that the new SPCM should be held to be uncon-

stitutional under the Due Process Clause of the Fifth Amendment.²¹

The analysis employed in this examination follows the example of the Supreme Court by relying extensively on the history of court-martial practice as well as an examination of the fairness of the current practice. In light of the Court’s analysis, this article questions whether the factors militating in favor of larger court-martial panels in cases where a year of confinement is at stake are so weighty as to overcome Congress’s broad prerogative to establish procedures for courts-martial. The article concludes that the effect of a deliberating body’s size on the reliability of that body’s determinations—especially when viewed in light of the long history of court-martial practice—forbids the use of three-member panels in trials carrying the possibility of confinement for one year.

The Standard to Be Applied

The Constitution gives Congress the authority to make rules for the government and regulation of the military.²² Judicial deference “is at its apogee” when courts review congressional decision-making regarding the government of the military.²³ Courts view themselves as particularly incompetent to substitute their own judgments for those of Congress in military matters;²⁴ therefore, they give particular deference to the determinations of Congress when reviewing legislation concerning the government of the military.²⁵ Nonetheless, because a military accused is subject to loss of liberty or property at a

12. H.R. CONF. REP. NO. 106-301, at 742 (1999).

13. 145 CONG. REC. H8318 (daily ed. Sept. 15, 1999).

14. 145 CONG. REC. S11201 (daily ed. Sept. 22, 1999).

15. Statement on Signing the National Defense Authorization Act for Fiscal Year 2000, 34 WKLY. COMP. PRES. DOC. 1927 (Oct. 6, 1999).

16. 2000 MCM, *supra* note 7, R.C.M. 201(f)(2)(B). Statutory provisions for increases in the jurisdictional maximum sentences for other forms of punishment, such as duration of forfeiture of pay, were also not applicable to SPCMs during this time. *See id.*; *cf.* UCMJ art. 19 (2000).

17. Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (2002); MCM, *supra* note 8, R.C.M. 201(f)(2)(B).

18. 67 Fed. Reg. at 18,773; *see also* Taylor v. Garaffa, 57 M.J. 645 (N-M. Ct. Crim. App. 2002) (holding that the new jurisdictional maximum applies to offenses committed before the effective date of the executive order if the court-martial was convened after the effective date).

19. *See, e.g.*, United States v. Jones, 7 M.J. 806, 808-11 (N.M.C.M.R. 1978).

20. The term *misdemeanor* is meant here to correspond to that set of offenses less severe than felonies, which are typically punishable by imprisonment for a term exceeding one year. *See, e.g.*, MODEL PENAL CODE § 1.04(2); 18 U.S.C. § 3559(a) (2000).

21. *See* U.S. CONST. amend. V.

22. *Id.* art. I, § 8, cl. 14.

23. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

24. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.”).

25. *See, e.g.*, Rostker, 453 U.S. at 65-66. Because the right to trial by jury has never been held to apply to courts-martial, an accused must look to the Fifth Amendment Due Process Clause for a guarantee of a minimum number of members. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

court-martial, he or she is entitled to the protections afforded by the Due Process Clause of the Fifth Amendment.²⁶

The Supreme Court evaluates due process challenges to court-martial procedure under the standard announced in *Middendorf v. Henry*²⁷ and *Weiss v. United States*.²⁸ In *Middendorf*, the Court considered whether the Due Process Clause required that service members appearing before summary courts-martial be assisted by counsel.²⁹ The question in *Middendorf* was answered in the negative when the Court decided that “the factors militating in favor of counsel at summary courts-martial [were not] so extraordinarily weighty as to overcome the balance struck by Congress.”³⁰ In coming to this conclusion, the Court considered the effect participation of counsel would have on summary courts-martial.³¹ Participation of counsel, the Court feared, would turn the brief, informal summary court-martial into “an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried.”³² The Court also considered that the accused has the option of refusing trial by summary court-martial and proceeding to trial in a forum in which he may have counsel.³³

In *Weiss v. United States*,³⁴ the Court clarified and elaborated on the test first announced in *Middendorf*. In *Weiss*, service members convicted at courts-martial argued that the lack of fixed terms of office for military judges violated the Due Process Clause of the Fifth Amendment.³⁵ The petitioners in *Weiss*

urged that because a military judge’s superiors could remove a military judge at will, military judges lacked sufficient independence to ensure impartiality.³⁶ Again, the Court asked whether the factors militating in favor of a fixed term of office for military judges were so extraordinarily weighty as to overcome the balance struck by Congress.³⁷ The *Weiss* Court, however, answered the question by considering the historical and current military practices used to guarantee the independence of military courts.³⁸

The Court began its due process analysis in *Weiss* by reviewing military practice dating back to early English military tribunals.³⁹ The Court observed that Anglo-American courts-martial had not historically relied on tenured military judges, and noted that Congress did not even create the position of military judge until 1968.⁴⁰ Thus, courts-martial had functioned for a majority of the country’s history without any judge at all.⁴¹

Beyond examining the history of the questioned procedural practice, the *Weiss* Court examined the UCMJ and its corresponding regulations in their entirety to assess the degree to which the challenged scheme ensured judicial independence, and therefore judicial impartiality.⁴² The Court began by noting that by placing judges under the control of the services’ respective Judge Advocates General, who (according to the Supreme Court) had no interest in the outcome of any particular court-martial, Congress had “achieved an acceptable balance between independence and accountability.”⁴³ The Court considered the protections against unlawful command influence

26. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

27. *Id.*

28. 510 U.S. 163, 177-78 (1994).

29. *Middendorf*, 425 U.S. at 33.

30. *Id.* at 44.

31. *Id.* at 45-46.

32. *Id.* at 45.

33. *Id.* at 46-47.

34. 510 U.S. 163, 177-81 (1994).

35. *Id.* at 165.

36. *Id.* at 178.

37. *Id.* at 177-79.

38. *Id.* at 178-81.

39. *Id.* at 179.

40. *Id.* at 178-79.

41. *Id.*

42. *Id.* at 179.

provided by Articles 26 and 37, UCMJ, which forbid convening authorities from preparing fitness reports of military judges, and from censuring, reprimanding, or admonishing military judges with respect to the exercise of their judicial functions.⁴⁴ The Court noted that an additional punitive article prohibiting the knowing and intentional failure to comply with Article 37 braced this system of codal safeguards.⁴⁵ Finally, the *Weiss* Court noted that the Court of Military Appeals (now called the Court of Appeals for the Armed Forces), composed of civilian judges serving terms of fifteen years, oversaw the functioning of the military justice system. The Supreme Court commented favorably on that court's "vigilance in checking any attempts to exert improper influence over military judges."⁴⁶

Because a structurally independent judiciary was not a historically important aspect of the military justice system, and because other procedural safeguards ensured judicial impartiality, the Supreme Court found that the petitioners in *Weiss* failed to demonstrate that the factors favoring fixed terms of office for military judges were "so extraordinarily weighty as to overcome the balance achieved by Congress."⁴⁷

Although the *Middendorf* and *Weiss* opinions (both authored by now-Chief Justice Rehnquist) both sought to determine whether the factors militating in favor of the petitioner's claimed procedural protection were sufficiently weighty to overcome the balance struck by Congress, the two opinions arrived at the same conclusion in different ways. *Middendorf* evaluated the effect the desired procedural safeguard (counsel at summary courts-martial) would have on the administration of military justice, as well as the ability of the accused to obtain the safeguard at another forum.⁴⁸ *Weiss* evaluated the place the questioned procedural protection (tenured judges) held within the long tradition of Anglo-American military justice and evaluated other legal and regulatory safeguards that may tend to serve the same purpose as the procedural requirement claimed by the petitioners.⁴⁹ Taken together, these opinions pose a set of questions whose answers control whether a procedural pro-

tection claimed as a right under the Due Process Clause will outweigh Congress's deference toward military discipline:

(1) Has the questioned procedural protection traditionally been a source of protection to the accused throughout the history of Anglo-American military justice?⁵⁰

(2) Is a mechanism already in place for an accused to secure the desired procedural protection through the election of another forum?⁵¹

(3) What effect would the desired procedural protection have on the ability of the military to efficiently and appropriately discipline its members?⁵²

(4) Do other protections already in place sufficiently safeguard the interest of the accused that would be advanced by the questioned procedural protection?⁵³

The historical import of the questioned procedural safeguard within the tradition of Anglo-American courts-martial is arguably the most important factor. In *Weiss*, Justice Scalia, joined by Justice Thomas, disagreed that the Court should undertake any independent review of the balance the Congress struck in creating military justice procedures, stating,

As sometimes ironically happens when judges seek to deny the power of historical practice to restrain their decrees, the present judgment makes no sense except as a consequence of historical practice. . . . [N]o one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure

43. *Id.* at 180.

44. *Id.*

45. *Id.*; see UCMJ art. 98 (2002).

46. *Weiss*, 510 U.S. at 181.

47. *Id.*

48. *Middendorf v. Henry*, 425 U.S. 25, 45-48 (1976).

49. *Weiss*, 510 U.S. at 178-81.

50. *Id.* at 178-79.

51. *Middendorf*, 425 U.S. at 46-47.

52. *Id.* at 45-46.

53. *Weiss*, 510 U.S. at 179-81.

of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the *structural* protection of tenure in office, which has been provided in England since 1700, and is provided in all the States today. . . .

Thus, while the Court's opinion says that historical practice is merely "a factor that must be weighed in [the] calculation," it seems to me that the Court's judgment today makes the fact of a differing military tradition utterly conclusive.⁵⁴

Evaluating the New Special Court-Martial Under *Middendorf and Weiss*

Practitioners must now evaluate the new SPCM, which allows a panel of only three members to convict an accused and award one year of confinement, to determine whether the factors militating against the new jurisdictional maximum are so extraordinarily weighty as to overcome the balance struck by Congress.⁵⁵ This article addresses this issue using the four questions the Supreme Court used to evaluate military procedures under the Due Process Clause.

Question One:

*Has the Questioned Procedural Protection Traditionally Been a Source of Protection to the Accused Throughout the History of Anglo-American Military Justice?*⁵⁶

No precedent exists in Anglo-American military justice for subjecting service members to conviction and confinement for longer than six months by court-martial panels consisting of

three officers. Modern American courts-martial trace their origins to the passage of the first British Mutiny Act of 1689 and successive British Articles of War.⁵⁷ The British Mutiny Act and its successors provided for the trial of military offenses by a panel of at least thirteen officer members.⁵⁸ This system was transplanted to the American colonies before the American Revolution.⁵⁹

The Continental Congress based the American Articles of War of 1775 largely on the British Articles of War of 1765, which were in force in America at the beginning of the Revolution.⁶⁰ The most serious offenses were reserved for trial by general courts-martial, which could consist of no less than thirteen members. Less serious offenses were triable by regimental courts-martial, which could be composed of as few as five members, and which could impose no confinement in excess of thirty days.⁶¹ In 1786, the Continental Congress relaxed the requirement for thirteen members in general courts-martial, providing for trial by a GCM composed of as few as five members when thirteen officers could not be convened without manifest injury to the service.⁶² At the same time, Congress reduced the panel size of regimental courts-martial from five members to three.⁶³ In 1827, the Supreme Court held that a commander's determination that manifest injury to the service would not occur was not reviewable by civilian courts.⁶⁴

In 1916, Congress instituted the three types of courts-martial familiar to military practitioners today. General courts-martial, which could impose any lawful punishment, consisted of between five and thirteen members.⁶⁵ At the same time, Congress introduced the SPCM, consisting of at least three members and capable of adjudging confinement of up to six months.⁶⁶ Minimum panel sizes remained the same when the Uniform Code of Military Justice (UCMJ) superseded the Articles of War.⁶⁷

54. *Id.* at 198-99 (Scalia, J., concurring) (citations omitted) (emphasis and alteration in the original).

55. *See id.* at 177-78.

56. *Id.* at 178-79.

57. 1 W. & M., c. 5 (Eng.); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 19 (2d ed. 1920).

58. 1 W. & M., c. 5, § 4 (Eng.), *reprinted in* WINTHROP, *supra* note 57, at 929.

59. WINTHROP, *supra* note 57, at 47.

60. *Id.* at 45, 931.

61. *See* American Articles of War of 1775, 2 J. Cont. Cong. 111-23 (1775), *reprinted in* WINTHROP, *supra* note 57, at 953.

62. American Articles of War of 1786, art. 1, 30 J. Cont. Cong. 316 (1786), *reprinted in* WINTHROP, *supra* note 57, at 972.

63. American Articles of War of 1786, art. 3, 30 J. Cont. Cong. 317 (1786), *reprinted in* WINTHROP, *supra* note 57, at 972.

64. *Marvin v. Mott*, 25 U.S. 19, 34-35 (1827).

65. Articles of War of 1916, ch. 418, § 3, art. 3, 39 Stat. 651 (1916).

Although the modern UCMJ descended from Army practice and the Articles of War rather than from naval practices,⁶⁸ a brief examination of naval court-martial panel size completes the historical review of court-martial panel size through American history. Naval courts-martial were governed by the *Rules for the Regulation of the Navy of the United Colonies*, adopted by the Continental Congress in 1775.⁶⁹ These rules, drafted by John Adams, were a somewhat more lenient abridgment of the British Naval Discipline Act, passed by the British Parliament in 1749.⁷⁰ The British statute permitted between five and thirteen members to award all legal punishments;⁷¹ the American rules required a minimum of six members.⁷² The deterioration of the Continental fleet by the end of the war, however, made convening courts-martial difficult. After a series of losses culminating in the September 1781 capture of the Continental frigate *Trumbull*, the fleet consisted of only two vessels.⁷³ In 1782, Robert Morris, the Agent of Marine to the Continental Congress,⁷⁴ reported that “the present Situation of the Navy will very seldom admit of holding Courts Martial or Courts of Enquiry for the want of sufficient officers.”⁷⁵ On 12 June 1782, the Continental Congress provided for the trial of non-capital cases by panels of three officers,⁷⁶ a practice that remained until the last vessel of the Continental Navy was sold in 1785.⁷⁷

Whether confinement was a punishment naval courts-martial would have imposed during this time is harder to determine. Although the British Naval Discipline Act allowed courts-martial to award up to two years of confinement, the American rules did not specifically provide for confinement of sailors or Marines as a court-martial punishment.⁷⁸ In both the British and American navies at the time of the Revolution, punishment was virtually synonymous with flogging.⁷⁹ Confinement did not become a common American naval punishment until well after flogging was abolished in 1850.⁸⁰ The papers of the Continental Congress reveal no instance of any naval court-martial of fewer than six members imposing confinement as punishment, or, for that matter, imposing corporal punishment.⁸¹

When the federal Navy was established in 1798, naval courts followed the British naval and American Army examples, requiring panels of five to thirteen officers.⁸²

Thus, a thorough review of the history of Anglo-American military and naval courts-martial reveals no evidence that panels of fewer than five members have ever awarded sentences to confinement for more than six months. Service members have historically enjoyed the right to larger panels when tried by

66. *Id.* arts. 9, 13.

67. UCMJ art. 19 (1951); *cf.* UCMJ art. 19 (2002).

68. *See* *United States v. Culp*, 33 C.M.R. 411, 427 (C.M.A. 1963).

69. 3 J. CONT. CONG. 378 (1775).

70. CHARLES OSCAR PAULLIN, *THE NAVY OF THE AMERICAN REVOLUTION* 46-47 (1971).

71. An Act for Amending, Explaining and Reducing into One Act of Parliament, the Law Relating to the Government of His Majesty's Ships, Vessels and Forces by Sea, 22 Geo. 2, c. 33 § 12 (Eng.) [hereinafter *British Admiralty Act*].

72. 3 J. CONT. CONG. 382-83 (1775).

73. STEPHEN HOWARTH, *TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY, 1775-1998*, at 45 (1999).

74. As Agent of Marine, Morris served as head of the Naval Department overseeing naval matters for the Continental Congress. PAULLIN, *supra* note 70, at 223.

75. Robert Morris, *Report to Congress on Naval Courts-Martial*, in 5 *THE PAPERS OF ROBERT MORRIS 1781-84*, at 300 (E. James Ferguson & John Catanzariti eds., 1980).

76. 22 J. CONT. CONG. 325 (1782).

77. HOWARTH, *supra* note 73, at 48.

78. *Compare* *British Admiralty Act*, *supra* note 71 (“Provided always, That no Person convicted of any Offense shall, by the Sentence of any Court-martial to be held by virtue of this Act, be adjudged to be imprisoned for a longer Term than the Space of two Years.”), *with* *Rules for the Regulation of the Navy of the United Colonies*, 3 J. CONT. CONG. 378 (1775).

79. N.A.M. RODGER, *THE WOODEN WORLD: AN ANATOMY OF THE GEORGIAN NAVY 218-19* (1986); JAMES E. VALLE, *ROCKS AND SHOALS: NAVAL DISCIPLINE IN THE AGE OF FIGHTING SAIL* 79 (1980).

80. VALLE, *supra* note 79, at 83.

81. *See generally* *THE PAPERS OF THE CONTINENTAL CONGRESS 1774-1789* (1978).

82. An Act for the Government of the Navy of the United States ch. 24, art. 47, 1 Stat. 713 (1799).

courts-martial with the power to impose substantial confinement.

Question Two:

*Is a Mechanism Already in Place for an Accused to Secure the Desired Procedural Protection Through the Election of Another Forum?*⁸³

One of the reasons the *Middendorf* Court was less than sympathetic to the petitioner's due process claim was that the petitioner could have refused trial by summary court-martial when he was denied the right to assistance of counsel. He retained (and waived) the right to be tried in a higher forum with the assistance of counsel.⁸⁴ This same principle will usually apply when the accused faces a summary court-martial and when the accused faces nonjudicial punishment under Article 15, UCMJ, and is not attached to a vessel.⁸⁵ Unlike the accused at a nonjudicial punishment proceeding or summary court-martial, the accused at a SPCM may not secure the benefits of a larger panel by electing to proceed at a forum with greater protections—in this case, a GCM.⁸⁶

Question Three:

*What Effect Would the Desired Procedural Protection Have on the Ability of the Military to Efficiently and Appropriately Discipline Its Members?*⁸⁷

The answer to this question does not require speculation. The military justice system functioned well from 1916 to 2002 when the jurisdictional maximum term of confinement of the SPCM was set at six months.⁸⁸ When Congress amended Article 19, UCMJ, the military justice system was experiencing sig-

nificant reductions in the number of all types of courts-martial.⁸⁹ If the jurisdictional maximum term of confinement of the SPCM is restored to its previous limit of six months, the military justice system will presumably function as it had from 1916 to 2002. Likewise, the degree of protection afforded an accused before 2002 will be restored.

Question Four:

*Do Other Protections Already in Place Sufficiently Safeguard the Interest of the Accused That Would Be Advanced by the Questioned Procedural Protection?*⁹⁰

The interest of the accused advanced by a five-member panel—particularly where more than six months of confinement is at stake—is nothing less than an interest in an accurate determination of guilt or innocence. A larger panel is proportionally more likely to reach an accurate determination about the guilt of the accused.

During the past forty years, the Supreme Court has recognized the importance of panel size, group psychology, and statistics in the context of jury group dynamics. In *Ballew v. Georgia*,⁹¹ the Court addressed the effect panel size has on the reliability of verdicts. The Court noted a positive correlation between group size and the quality of both group performance and group productivity. Citing studies by social scientists, the Court credited a variety of possible explanations for this conclusion.⁹² One study cited by the Court found that the smaller the group, the less likely members are to make critical contributions necessary for the solution of a given problem. The Court further observed that the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When the Court compared studies of individual and

83. See *Middendorf v. Henry*, 425 U.S. 25, 46-47 (1976).

84. *Id.*

85. See MCM, *supra* note 8, R.C.M. 1303; UCMJ art. 15(a) (2002).

86. See MCM, *supra* note 8, R.C.M. 404(d), 601.

87. *Middendorf*, 425 U.S. at 45-46.

88. Articles of War of 1916, ch. 418, § 3, art. 13, 39 Stat. 652 (1916).

89. Compare *Report of the Judge Advocate General of the Army, October 1, 1989, to September 30, 1990*, 32 M.J. CXLVII, CLXI (1991), with *Report of the Judge Advocate General of the Army, October 1, 1999, to September 30, 2000*, 54 M.J. CXXI, CXXXI (2001) (reflecting a 49% decrease in total courts-martial); compare *Annual Report of the Judge Advocate General of the Navy Fiscal Year 1990*, 32 M.J. CLXIII, CLXXV (1991), with *Annual Report of the Judge Advocate General of the Navy for October 1, 1999 to September, 30 2000*, 54 M.J. CXXXV, CXLVII (2001) (reflecting a 47% decrease in total courts-martial); compare *Report of the Judge Advocate General of the Air Force, October 1, 1989 to September 30 1990*, 32 M.J. CLXXVII, CLXXXVIII (1991), with *Report of the Judge Advocate General of the Air Force, October 1, 1999 to September 30, 2000*, 54 M.J. CXLIX, CLXIII (2001) (reflecting a 40% decrease in total courts-martial); compare *Report of the Chief Counsel of the U.S. Coast Guard, October 1, 1989 to September 30, 1990*, 34 M.J. CXCI, CXCVII (1991), with *Report of the Chief Counsel of the U.S. Coast Guard, October 1, 1999 to September 30, 2000*, 54 M.J. CLXV, CLXXIV (2001) (reflecting a 57% decrease in total courts-martial).

90. *Weiss v. United States*, 510 U.S. 163, 179-81 (1994).

91. 435 U.S. 223 (1978) (holding that five-person juries violate the constitutional right to trial by jury).

92. *Id.* at 232-34.

group decision-making, it saw that groups performed better because the prejudices of individuals were frequently counterbalanced, resulting in greater objectivity. Groups also exhibited more self-criticism. Most of the advantages possessed by groups tended to diminish as group size diminished.⁹³ Applying these principles to civilian juries, the Court held that the benefits of larger groups were important, particularly the counterbalancing of various biases among the members of the group.⁹⁴

The Court went on to find that as group size diminishes, the resultant increase in the rate of error does not affect the government and the accused equally.⁹⁵ Rather, due to psychology, human dynamics, and the increased importance society places on protecting the innocent accused from wrongful conviction, the accused disproportionately bears the risk of error. The *Ballew* Court looked further to social science, expressing doubts about the fairness to defendants of the results achieved by smaller panels.⁹⁶ The Court cited statistical studies suggesting that the risk of convicting an innocent person rises as the size of the jury diminishes.⁹⁷ Because the risk of acquitting a guilty person increases with the size of the panel, an optimal jury size could be seen as a function of the comparative undesirability of the two risks. After weighting the risk of wrongful conviction as ten times more significant than the risk of wrongful acquittal, one study cited by the Court concluded that the optimal jury size was between six and eight. As panel size diminishes to five or fewer, the risk of wrongfully convicting an innocent defendant increases.⁹⁸ Coincidentally, the Supreme Court's use of comparative weighting of competing risks applies precisely to trials at which more than six months of confinement is at stake; potential confinement of less than six months does not implicate the right of a civilian defendant to a jury trial.⁹⁹

Thus, civilian scholars and the Supreme Court have relatively recently recognized the benefits of large panels, even as the military has retreated from their use. The benefit of the large panel is an accurate result; this is the specific interest that the use of larger panels advances within the framework of a due process analysis.

No other procedural protection sufficiently safeguards the accused's interest in a reliable result by compensating for the loss of the five-member panel in cases where more than six months of confinement is at stake. While some benefit may accrue to an accused due to the Article 25, UCMJ, selection criteria in comparison to civilian juries,¹⁰⁰ the vote of only two of the three members is sufficient to find an accused guilty of an offense.¹⁰¹ Indeed, the homogenous nature of the military officer corps and the lack of a unanimity requirement may particularly necessitate a larger panel size to gain the benefits cited in *Ballew*, such as the counterbalancing of individual prejudices.¹⁰²

Fundamental Fairness of the New Special Court-Martial

Although this article has evaluated all four factors the Supreme Court has previously used to evaluate military procedures under the Due Process Clause of the Fifth Amendment, a broader look at the overall fairness of the new SPCM is in order. The Court has not used any of the four factors more than once; however, when one reads the opinions more broadly, the Court has repeatedly concerned itself with the overall fairness of the military system. The *Middendorf* Court's concern with whether an accused could obtain the right to counsel through a forum election,¹⁰³ and the *Weiss* Court's willingness to consider alternative procedures to guarantee judicial independence¹⁰⁴ indicate that the Court will take a pragmatic approach to the question of due process. Procedures which, when taken as a

93. *Id.* at 233.

94. *Id.* at 232-34.

95. *Id.* at 234.

96. *Id.*

97. *Id.* at 234-35.

98. *Id.* at 234.

99. *Baldwin v. New York*, 399 U.S. 66, 71 (1970).

100. Convening authorities are required to detail members who are, in the opinion of the convening authority, "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2) (2002).

101. UCMJ art. 52(a)(2); *cf.* *Burch v. Louisiana*, 441 U.S. 130 (1979) (requiring a unanimous verdict when the jury consists of only six members).

102. *Ballew v. Georgia*, 435 U.S. 223, 232-35 (1978); *see supra* notes 91-99 and accompanying text.

103. *Middendorf v. Henry*, 425 U.S. 25, 46-47 (1976).

104. *Weiss v. United States*, 510 U.S. 163, 179-81 (1994).

whole, seem fundamentally fair to the Court are more likely to survive a Due Process Clause challenge, particularly if they enjoy the sanction of history.

The infirmities inherent in small panels do not merely result in the technical violation of a supposed constitutional right, but rather in a fundamentally unreliable, unfair result.¹⁰⁵ Under the new SPCM, the use of three-member panels extends for the first time into that class of crimes the Supreme Court has deemed to be non-petty crimes. The Court defines non-petty crimes as those for which more than six months of confinement is authorized.¹⁰⁶ The Supreme Court has held that defendants accused of non-petty crimes must be given the opportunity to be tried by a jury of sufficient size to produce a reliable result.¹⁰⁷ Until the recent expansion of the jurisdictional maximum of the SPCM, the use of the three-member panel paralleled civilian practice; it was restricted to those crimes which were insufficiently “serious” to trigger the right to a jury trial had they been tried by a civilian court.¹⁰⁸ Service members facing the possibility of conviction for an offense the Supreme Court classifies as non-petty were previously entitled to the larger and more reliable panel associated with the GCM. As a matter of fundamental fairness, service members are entitled to the accurate determination of their cases. This requires panels of sufficient size to produce reliable results, especially when the offense carries such potential confinement as to be considered non-petty.¹⁰⁹

Overcoming the Balance Struck by Congress

The Supreme Court will not evaluate the factors favoring the use of larger panels in isolation. Rather, the Court will examine them in light of whether they “are so extraordinarily weighty as to overcome the balance struck by Congress.”¹¹⁰

As was discussed at the beginning of the analysis, courts have traditionally deferred to Congress when reviewing legislation affecting the armed forces.¹¹¹ Congress passed the amendment to Article 19, UCMJ, as part of the annual Defense Authorization Bill.¹¹² The statute’s legislative history does not contain any findings or discussion regarding the reason Congress increased the jurisdictional maximum of the SPCM. The lack of congressional findings or relevant legislative history makes reviewing and assigning weight to the balance struck by Congress somewhat more difficult.¹¹³ Nonetheless, courts must evaluate the policy decision to provide for smaller panels and weigh the decision against the factors militating against the new SPCM.¹¹⁴

In the absence of direct evidence of the reasoning behind Congress’s legislative judgment, courts may reasonably suppose that Congress intended to avail the military of the obvious benefits that would directly accrue from the amendment of Article 19. The obvious benefit of the amendment raising the jurisdictional maximum punishments of the SPCM relates to judicial economy. Commanders who wish to subject service members to the possibility of longer terms of confinement no longer have to formally investigate alleged offenses pursuant to Article 32, UCMJ.¹¹⁵ They no longer must be advised by a staff judge advocate regarding the appropriateness of a court-martial as provided by Article 34, UCMJ.¹¹⁶ Lower-ranking commanders now have the option of subjecting service members to a greater potential term of confinement, as the convening authority will no longer generally be required to be a flag or general officer.¹¹⁷ All of these factors provide for the more efficient administration of military justice, insofar as justice is always administered more efficiently when the procedural safeguards to the accused are reduced. Recent court-martial trends do not reveal any developments that would specially indicate the need

105. *See Ballew*, 435 U.S. at 232-33.

106. *Baldwin v. New York*, 399 U.S. 66, 70-71 (1970).

107. *See id.*; *Ballew*, 435 U.S. at 232-33.

108. *Cheff v. Schnackenberg*, 384 U.S. 373 (1965).

109. *See Weiss*, 510 U.S. at 178; *Ballew*, 435 U.S. at 233-34.

110. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Weiss*, 510 U.S. at 177-78.

111. *See supra* notes 23-26 and accompanying text.

112. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999).

113. *See United States v. Lopez*, 514 U.S. 549, 563 (1995) (noting that a lack of congressional findings posed a difficulty to the Court in its evaluation of legislative judgment).

114. *Middendorf*, 425 U.S. at 43.

115. UCMJ art. 32 (2002).

116. *Id.* art. 34.

117. *See id.* art. 23.

Conclusion

for a more efficient application of military justice. In fiscal year 2000, the armed forces tried over fifty percent fewer special and general courts-martial than in fiscal year 1990. The percentage of SPCMs using members also decreased during this period.¹¹⁸ In short, no identifiable rationale exists for this amendment, except for a generalized and abiding congressional interest in increased efficiency of criminal trials.

Against this generalized desire for ever-greater expediency, courts must weigh the cost in justice of abandoning larger panels that have protected service members from unjust punishment for centuries, and whose value has recently been confirmed by social science and accepted by the Supreme Court.¹¹⁹ The right of service members to fair trials significantly outweighs the desire for expediency. The desire to dispose of cases with a minimum expenditure of time and resources cannot outweigh the factors—rooted both in history and modern understandings of justice—that militate in favor of limiting the use of SPCM panels to cases where no more than six months of confinement is at stake.

Although many probably viewed the expansion of SPCM jurisdiction as a step toward greater similarity between the civilian and military justice systems, the use of three-member panels to convict and sentence an accused to a year of confinement marks a new low in the protection of the military accused. Using the Supreme Court standard for evaluating Due Process claims in the court-martial context, the new SPCM violates the accused's right to due process of law. The use of small panels in this manner is unprecedented in the long tradition of Anglo-American courts-martial. Because of the small size of SPCM panels, the distinction between SPCMs and GCMs is more analogous to the difference between petty and non-petty offenses, rather than the distinction between misdemeanors and felonies. Service members facing more than six months of confinement deserve to have their cases tried by larger—and therefore more reliable—panels. The accused's right to the fair adjudication of his case substantially outweighs the speculative, generalized interest in increasing efficiency that the new SPCM appears intended to advance.

118. *See supra* note 89.

119. *Ballew v. Georgia*, 435 U.S. 223, 232-34 (1978).

The Security Clearance Process: How to Help Soldiers Who Lose Their Clearances (and Potentially Their Careers)¹

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Scenario

Assume, for a moment, that you are a military defense counsel. First Lieutenant (1LT) True Blue, an Arabic linguist with the 34th Military Intelligence Battalion, comes to you for legal advice because he is under investigation for allegations of downloading child pornography and disclosing classified information. The U.S. Army Criminal Investigation Command (CID) thinks your client downloaded the pornography on his government computer, and that he also electronically mailed classified information to a non-authorized recipient on the same computer system. Your client proclaims his innocence on the pornography charge; he maintains that the government computer is a workstation shared by several individuals, any of whom could have downloaded the pornography. As for the sending of classified information to an unauthorized user, 1LT Blue admits this mistake but claims that it was a one-time transgression resulting from simple negligence. You also learn that he gave a statement to CID consistent with this version.

At the end of the counseling, you tell your client to remain silent, and then you call CID to inform the investigating agent that you now represent 1LT Blue.² After several months, the government decided not to pursue criminal charges. The command, upon consultation with its trial counsel, did not think the case should go to court because there was not enough evi-

dence.³ Although the child pornography was found on his personal account, the government was unable to show that 1LT Blue was the person who downloaded the files. The isolated nature of the classified breach resulted only in a verbal reprimand from 1LT Blue’s battalion commander. Your client is very happy; it is yet another defense victory.

Receiving an “Intent to Revoke Security Clearance” Letter

About a month later, there is a knock on your office door. It is 1LT Blue, and he looks very upset. He is holding a letter entitled, “Intent to Revoke Security Clearance.” The letter is from the U.S. Army Central Personnel Security Clearance Facility (CCF); it states that the CCF has made a preliminary decision to revoke 1LT Blue’s security clearance.

You realize that the letter your client now holds is a result of the criminal investigation. During this investigation, the CID found “credible information”⁴ to believe that 1LT Blue possessed illegal child pornography and compromised classified information, in violation of the Uniform Code of Military Justice (UCMJ).⁵ This information, in the form of a CID report, was then forwarded to 1LT Blue’s command.⁶ The command, in turn, forwarded a Department of Army Form 5248-R, “Report of Unfavorable Information for Security Determina-

1. This note addresses the process for the revocation of an existing clearance, but the process is the same for an initial denial of a security clearance.
2. This call to CID triggers your client’s rights under *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Under *McOmber*, law enforcement officers must inform the defense counsel before they interrogate a soldier they know to be one of the defense counsel’s clients. *Id.* at 383.
3. The standard of proof at a court-martial would be that 1LT Blue is “presumed to be innocent until [his] guilt is established by legal and competent evidence beyond reasonable doubt.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(5)(A) (2002).
4. See U.S. DEP’T OF DEFENSE, INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE app. E, at E1.1.1 (7 Jan. 2003) (defining “credible information” as “[i]nformation disclosed or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained investigator to presume that the fact or facts in question are true”); see also U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES paras. 1-4f(1)(b), 4-4b (30 Oct. 1985) [hereinafter AR 195-2].
5. This determination is known as “titling” and constitutes a decision by an authorized official, such as a CID agent,

to place the name of a person or other entity in the “subject” block of a CID report of investigation (ROI). A “subject” is “[a] person . . . about which credible information exists which would cause a reasonable person to suspect that person . . . may have committed a criminal offense, or otherwise cause such person . . . to be the object of a criminal investigation.”

Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW., Aug. 1998, at 1 (quoting AR 195-2, *supra* note 4, at glossary). Titling is not a determination that “there is probable cause to believe that the subject actually committed the offense for which he is titled.” *Id.* at 2. Lieutenant Colonel Ham’s article is an excellent discussion of the titling process.

6. AR 195-2, *supra* note 4, para. 4-2e(2).

tion,” to the Commander of the CCF.⁷ Based on that report, the CCF reviewed 1LT Blue’s security suitability. Pending the CCF’s decision whether to revoke a soldier’s clearance, the soldier’s command or the CCF will normally suspend the soldier’s access to classified information.⁸

1LT Blue’s situation is serious. If he loses his clearance, he will be referred to the Department of Army’s Suitability Evaluation Board (DASEB). The DASEB will “decide what unfavorable information, if any, will be made a part of the recipient’s official personnel files.”⁹ If the unfavorable information is placed in 1LT Blue’s official military personnel file (OMPF),¹⁰ it will hinder promotion, assignment, and schooling opportunities, and could even trigger an elimination board.¹¹

The “Intent to Revoke” Process

The “intent to revoke security clearance” letter from CCF contains a statement of reasons (SOR).¹² The SOR outlines the security concerns and the adverse information pertaining to the soldier; in 1LT Blue’s case, the concerns stem from security violations and sexual behavior that is criminal in nature.

The “intent to revoke” letter sets forth two procedural paths for 1LT Blue: (1) forfeit his opportunity to contest the security

clearance revocation; or (2) elect to submit a statement and materials for consideration in the final adjudication.¹³ A client should always elect to submit a statement and materials for consideration in the CCF’s final adjudication. First Lieutenant Blue has ten calendar days to inform the CCF of his intent to submit a statement and materials for consideration. He then has sixty calendar days from the date he received the “intent to revoke” letter to respond.¹⁴

This timeline will give the client time to exercise two critical rights outlined in the letter: (1) his right to request a copy of the investigative file; and (2) his right to seek legal advice from a judge advocate. To understand the factual background of the case, the client or his attorney should immediately request a copy of the file from the CCF. A preprinted form requesting this information from the CCF should be attached to the letter.¹⁵ The file will give the factual basis for the proposed revocation and allow the attorney and client to address each allegation with particularity. Armed with the facts, a judge advocate¹⁶ can, in turn, hone the client’s submission and thereby give him the greatest possible benefit of counsel.¹⁷

As one administrative judge aptly penned, “[A]n attorney should give maximum effort to contesting the proposed denial or revocation at the agency level.”¹⁸ The attorney drafting the response should therefore consult *Department of Defense*

7. U.S. DEP’T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. 8-101b(1) (9 Sept. 1988) [hereinafter AR 380-67].

8. *Id.* para. 8-102a. Titling is not the only way a soldier can have his security clearance denied or revoked. Others include a positive urinalysis for illegal drugs, a civilian criminal conviction, an attempted suicide, a diagnosis of alcohol abuse or dependence, bankruptcy or other financial problems, possession or use of a foreign passport, or other indications of foreign preference or influence. *See* U.S. DEP’T OF DEFENSE, REG. 5200.2-R, PERSONNEL SECURITY PROGRAM (1 Jan. 1987) [hereinafter DODR 5200.2-R]. This note addresses only the procedures used following the issuance of an “intent to revoke security clearance” letter.

9. U.S. DEP’T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 4-4a(3) (19 Dec. 1986).

10. The Commander, U.S. Army Personnel Command, usually maintains a soldier’s OMPF. It consists of a performance section (performance, commendatory, and disciplinary data), a service section (general information and service data), and, in some cases, a restricted section (controlled data). U.S. DEP’T OF ARMY, REG. 600-8-104, MILITARY PERSONNEL INFORMATION MANAGEMENT/RECORDS ch. 2 (27 Apr. 1992). Once unfavorable information is placed in a soldier’s OMPF, the procedure to remove this unfavorable information from the OMPF is difficult and “appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.” AR 600-37, *supra* note 9, para. 7-2a.

11. *See* U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (29 June 2002); U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (1 Nov. 2000) (governing the involuntary separation procedures for officers and enlisted personnel, respectively).

12. DODR 5200.2-R, *supra* note 8, at 169.

13. AR 380-67, *supra* note 7, para. 8-102b.

14. *Id.* para. 8-102c.

15. If there is no form, the CCF should obtain the investigative file from the Commander, U.S. Army Intelligence and Security Command, Freedom of Information and Privacy Office, 4552 Pike Road, Fort Meade, Maryland 20755-5995. If obtaining a copy of the investigative file takes more than sixty days, the client may request an extension of the response period. *Id.* para. 8-102b(2).

16. A local Memorandum of Agreement (MOA) between the Trial Defense Service (TDS) and the Office of the Staff Judge Advocate will determine which office will represent a soldier whose clearance is the subject of revocation proceedings. For example, a legal assistance attorney could assist this client. *See* U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3.7g (21 Feb. 1996).

17. In 1LT Blue’s scenario, because he already has an attorney-client relationship with a TDS counsel, the TDS counsel would likely handle the matter, even though the case is not a criminal matter. *See* U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (6 Sept. 2002) [hereinafter AR 27-10].

18. Emilio Jaksetic, *Judicial Review of Security Clearance Decisions*, 9 AD. LAW BULL. 4 (1996).

*Directive 5200.2*¹⁹ (*DODD 5200.2*) and its implementing regulation. The implementing regulation outlines the procedures for the security clearance review process.²⁰ In particular, Appendix 8 of the regulation defines the “adjudicative guidelines for determining eligibility for access to classified information.”²¹ This appendix lists thirteen guidelines used to determine “whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security.”²² Each guideline begins with an explanation “of its relevance in determining whether it is clearly consistent with the interest of national security to grant or continue a person’s eligibility for access to classified information.”²³ Then, for each guideline, there is a list of “conditions that could raise a security concern and may be disqualifying” and “conditions that could mitigate security concerns.”²⁴ In the security clearance process, these are referred to as disqualifying and mitigating conditions.²⁵

Appendix 8 also describes the adjudication process as “the careful weighing of a number of variables known as the *whole*

person concept.”²⁶ The appendix defines this concept by listing a number of factors for consideration in each case.²⁷ Using Appendix 8 as a road map will ground the client’s argument in language and policy the CCF knows and understands; this may help him muster a successful argument.

Ensuring that the client understands the overall security clearance process and some commonly held misconceptions is essential to preparing him to make the best possible argument.²⁸ First, there is no right or entitlement to a security clearance; there is no property interest in a security clearance.²⁹ The client and his lawyer should focus on how continued access to classified information is clearly consistent with the national interest. Second, the government may revoke a security clearance “by proving the [soldier]’s actual misconduct, by a preponderance of the evidence,”³⁰ even if the charges were dropped or the soldier was acquitted.³¹ If the misconduct is disputed, the client must make this clear to the deciding officials and present supporting evidence. Third, hearsay and circumstantial evidence are admissible and may be a basis for the Army’s decision.³²

19. U.S. DEP’T OF DEFENSE, DIR. 5200.2, DOD PERSONNEL SECURITY PROGRAM (9 Apr. 1999) [hereinafter *DODD 5200.2*].

20. See generally *DODR 5200.2-R*, *supra* note 8.

21. *Id.* at 132.

22. *Id.* at 133.

23. *Id.* at 134.

24. *Id.* at 135-53.

25. Interview with Michael H. Leonard, Administrative Judge, U.S. Dep’t of Defense, Defense Office of Hearings and Appeals, Washington Hearing Office, Arlington, Va. (Feb. 2, 2003) [hereinafter *Leonard Interview*]. In *1LT Blue*’s scenario, for example, mitigating conditions of a security violation could include: that the actions were inadvertent, isolated or infrequent; that they were due to improper or inadequate training; and that the individual demonstrates a positive attitude towards the discharge of security responsibilities. See *DODR 5200.2-R*, *supra* note 8, at 151.

26. *DODR 5200.2-R*, *supra* note 8, at 132 (emphasis added).

27. The “whole person concept” includes consideration of the following factors:

- The nature, extent and seriousness of the conduct.
- The circumstances surrounding the conduct, to include knowledgeable participation.
- The frequency and recency of the conduct.
- The individual’s age and maturity at the time of the conduct.
- The voluntariness of participation.
- The presence or absence of rehabilitation and other pertinent behavioral changes.
- The motivation for the conduct.
- The potential for pressure, coercion, exploitation, or duress.
- The likelihood of continuation or recurrence.

Id.

28. *Leonard Interview*, *supra* note 25.

29. *Dep’t of Navy v. Egan*, 484 U.S. 518, 528 (1988).

30. *Brown v. Dep’t of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983).

31. *Id.*

32. See, e.g., *United States v. Ellis*, 50 F.3d 419, 422 (7th Cir. 1995); *Crawford v. Dep’t of Agriculture*, 50 F.3d 46, 49 (D.C. Cir. 1995) (holding that “administrative agencies are not barred from reliance on hearsay evidence”).

This lower threshold may inure to the benefit of the soldier because he can collect affidavits, letters, and other favorable documentation without facing the hurdles of admissibility. Finally, unlike a criminal case where a reasonable doubt favors the defendant, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”³³ Again, the client and his attorney should focus on the favorable factors, as outlined in *DODD 5200.2* and its implementing regulation.³⁴

Revocation and the Personal Appearance Before DOHA

If, after considering the soldier’s statements and materials, the CCF decides to revoke the client’s security clearance, the CCF will send the soldier a letter of denial or revocation (LOD)³⁵ based on the information outlined in the SOR.³⁶ This LOD triggers two different appeal options for the client: he can either submit a direct written appeal to the Army Personnel Security Appeals Board (PSAB) within thirty days,³⁷ or he can request a personal appearance³⁸ before a Defense Office of Hearings and Appeals (DOHA) administrative judge within ten calendar days.³⁹ If the client selects the DOHA option, then the

administrative judge makes a written recommended decision to the PSAB. Thereafter, the PSAB, a three-member board, will consider the appeal and “render a final determination” on the soldier’s security clearance.⁴⁰

The soldier has a right to appear personally before a DOHA administrative judge.⁴¹ The soldier should elect this right whenever possible. The personal appearance⁴² gives the soldier a face-to-face meeting with the administrative judge, and a fresh opportunity to argue against revoking his security clearance. It may also be possible for a judge advocate to make the argument on the client’s behalf.⁴³

The soldier’s rights at his personal appearance are strikingly similar to those at an Article 15, UCMJ, hearing.⁴⁴ At the personal appearance, the administrative judge will have a copy of the SOR, the CCF file, and the client’s submissions. The soldier is limited to submitting documentary evidence to refute or mitigate the SOR. Government counsel will not be present, but the soldier or his representative will have the opportunity to speak on the soldier’s behalf.⁴⁵

33. *Egan*, 484 U.S. at 531.

34. See generally *DODR 5200.2-R*, *supra* note 8; *DODD 5200.2*, *supra* note 19.

35. LOD is a term used in *DODR 5200.2-R*. *DODR 5200.2-R*, *supra* note 8, at 176.

36. *Id.* at 178; see *AR 380-67*, *supra* note 7, para. 8-201d.

37. *DODR 5200.2-R*, *supra* note 8, at 178-79. The notification to the PSAB, however, must be within ten days. *Id.*

38. An executive order created the personal appearance process under a uniform federal personnel security program for employees who will be considered for initial or continued access to classified information. Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995). Change 3 to *DODR 5200.2-R* implements this executive order. *DODR 5200.2-R*, *supra* note 8, change 3. On 29 February 1996, the Department of the Army issued guidance revising *AR 380-67*. See *AR 380-67*, *supra* note 7; Robert R. Gales, *The DOD Processes for Access to Classified Information and Employment in Sensitive Duties for Employees of American Industry, Civil Servants, and Military Members*, in *INTRODUCTION TO DEFENSE SECURITY CLEARANCE CASES 9* (2002).

39. The Defense Office of Hearings and Appeals (DOHA) is a creation of the Secretary of Defense pursuant to 10 U.S.C. § 125(a) and its implementing regulations. The DOHA, under the general supervision of the DOD General Counsel, is the largest component of the Defense Legal Services Agency. The DOHA: (1) provides hearings and issues decisions in personnel security clearance cases for contractor personnel doing classified work for all DOD components and twenty other federal agencies and departments; (2) conducts personal appearances and issues recommended decisions in security clearance cases for DOD civilian employees and military personnel; (3) settles claims for uniformed service pay and allowances and claims for transportation carriers for amounts deducted for loss or damage; (4) conducts hearings and issues decisions in cases involving claims for special education benefits and claims for medical and dental benefits; and (5) functions as a central clearing house for DOD alternative dispute regulation activities and as a source of third-party arbitrators for such activities. U.S. DEP’T OF DEFENSE, DIR. 5220.6, *DEFENSE INDUSTRIAL PERSONNEL SECURITY CLEARANCE REVIEW PROGRAM* ch. 4 (2 Jan. 1992) (implementing the industrial security program); Leonard Interview, *supra* note 25; U.S. Dep’t of Defense, *Defense Office of Hearings and Appeals*, at <http://www.defenselink.mil/dodgc/doha/> (last visited June 6, 2003).

40. *DODR 5200.2-R*, *supra* note 8, app. 12 (detailing the structure and function of the PSAB).

41. *Id.* at 76 (“No final unfavorable personnel security clearance or access determination shall be made on a member of the Armed Forces . . . without granting the individual concerned the procedural benefit[] [of an a]ppeal with a personal appearance.”).

42. See *id.* app. 13 (explaining how a personal appearance is conducted).

43. It will up to the judge advocate’s chain of command to determine whether he will be allowed to represent the soldier at the DOHA hearing. There is no regulatory right to free representation at the hearing, but the soldier does have a regulatory right to consult with an attorney. At a minimum, therefore, the judge advocate can help prepare the soldier to present his case in the most favorable light possible. If the opportunity arises, however, representing soldiers at the personal appearance hearing could be a tremendous advocacy opportunity for a young judge advocate, as well as the best way to help the client. See *supra* notes 16-17.

44. See *AR 27-10*, *supra* note 17, para. 3-18 (explaining the soldier’s rights at an Article 15, UCMJ, hearing).

Department of Defense Regulation 5200.2-R is surprisingly silent about the necessary quantum of proof for a personal appearance case before a DOHA administrative judge. The Supreme Court observed, however, that the government's burden of proof in a security clearance case is less than a preponderance of the evidence.⁴⁶ Likewise, during the DOHA's parallel industrial security clearance cases involving employees of defense contractors,⁴⁷ the government's burden of proof is substantial evidence, which is less than a preponderance of the evidence.⁴⁸

Using the substantial evidence standard as a template, although arguably not controlling for personal appearance cases, will help the attorney and client work within an established framework. The DOHA administrative judge is likely to be comfortable with this standard, and the attorney and client's use of it will foster a procedural fluency, which will help the attorney tailor a more effective presentation. With this standard in mind, the attorney and client can make their best argument that the favorable factors outweigh the disqualifying ones.

After the attorney has done the relevant research, he and the client must present documentary evidence and testimony that supports a coherent theory of the case. In the case of 1LT Blue, he will contest the pornography charge and mitigate the inadvertent disclosure of classified information. He should consider presenting documentary evidence that many people have access to the computer in question. Concerning the security violation, his theory could be that he was careless on this one occasion, but that he is not a criminal. He should attempt to demonstrate some command training deficiencies; for example, he could present evidence that he was not properly trained how

to secure or use the secure network. First Lieutenant Blue should also explain the steps he will take to ensure that he will not repeat the inadvertent release of classified information. Documents from 1LT Blue's supervisors can help demonstrate his positive attitude toward his security responsibilities.⁴⁹ Moreover, 1LT Blue should present information that falls within any of the pertinent favorable factors of the "whole person concept."⁵⁰

The Soldier's Remaining Options

After the personal appearance, the DOHA will issue a recommendation to the PSAB on whether to sustain or overturn the CCF's decision to revoke the security clearance. The PSAB will then make a final determination based on an official transcript of the DOHA hearing, the allied documents, and the recommended decision of the DOHA administrative judge.⁵¹ If the PSAB's decision is adverse, then the client has two last options: he can file suit in federal district court, or he can request a waiver from the Secretary of the Army.⁵²

There are problems with both options. Federal courts lack jurisdiction to review government security clearance decisions on their merits.⁵³ The courts can review whether the Army followed its own regulations, however.⁵⁴ If the Army has not done so, then the courts can compel compliance, but this does not mean that 1LT Blue will win back his security clearance; he merely gets a second chance to present his case after the agency fixes the procedural flaw.⁵⁵ Of course, 1LT Blue probably has neither the time nor the money for federal litigation. First Lieu-

45. Robert R. Gales, Chief Administrative Judge, Defense Legal Services Agency, Defense Office of Hearings and Appeals, *Guidance for Your Personal Appearance* (24 Oct. 1997), at <http://www.defenselink.mil/dodgc/doha/pap-g.html> [hereinafter DOHA Guide]. The documentary evidence need only be relevant and material. Moreover, the documents can take virtually any form, including memoranda, affidavits, or notarized papers. *Id.*

46. *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988).

47. For cases involving industrial personnel (unlike federal employees and service members) where an SOR is issued, industrial personnel can contest the SOR through the DOHA process. They will have more procedural rights than their military counterparts; for example, these personnel can produce documents, call witnesses, cross-examine the agency's witnesses, and make opening and closing statements. Gales, *supra* note 37, at 41-46. See also Emilio Jaksetic, *The DOHA Appeal Process: An Introduction and Overview*, in INTRODUCTION TO DEFENSE SECURITY CLEARANCE CASES 9-10 (2002).

48. ISCR Case No. 01-20700, 2002 DOHA LEXIS 204, at *13-14 (App. Bd. Dec. 19, 2002) (noting that "[t]he government's burden to prove its case is one carried by 'substantial evidence'").

49. DODR 5200.2-R, *supra* note 8, at 151.

50. See *supra* note 27.

51. DOHA Guide, *supra* note 45.

52. See generally *Dep't of Navy v. Egan*, 484 U.S. 518 (1988); *Duane v. Dep't of Defense*, 275 F.3d 988 (10th Cir. 2002).

53. *Duane*, 275 F.3d at 993 (citing *Egan*, 484 U.S. at 518). Although *Egan* addressed only review by external administrative boards and not the judiciary, all the circuits that have addressed the scope of review have held that there is no jurisdiction for external review, including judicial review. See *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *Becerra v. Dalton*, 94 F.3d 145, 148-49 (4th Cir. 1996); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).

54. *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988).

55. *Duane*, 275 F.3d at 993-95.

tenant Blue can also request a waiver from the Secretary of Army; however, this is an extraordinary measure.⁵⁶

Conclusion

Security clearances are necessary for many soldiers to function in the military. If 1LT Blue does not get his clearance reinstated, this information will be placed in his personnel file. The Army, in turn, will review his suitability for continued service.

A security clearance thus could be central to 1LT Blue's future. Although a soldier's rights in the security clearance process are limited, judge advocate participation in the process—especially by writing responses to “intent to revoke” letters and making personal appearances before DOHA administrative judges—could significantly improve the odds the client will be able to keep his clearance. An attorney can help focus a client's submissions and presentation on the issues that are material and relevant, thereby increasing his chances of successfully defending his security clearance, and his military career.

56. Exec. Order No. 12,968, 60 Fed. Reg. 40,245, § 5.2(b) (Aug. 7, 1995) (“[N]othing in this section shall prohibit an agency head from personally exercising the appeal authority . . .”). Under a provision known as the Smith Amendment, the Secretary of the Army has no waiver authority when the revocation is due to current illegal drug use or mental incompetence. 10 U.S.C. § 986 (2000). This amendment applies only to the DOD and its services' personnel, including civil servants, military members, and contractors; it mandates that a security clearance *must* be revoked or denied if the person has been convicted of a crime in any court of the United States and sentenced to imprisonment for a term exceeding one year; is an unlawful user of, or is addicted to, a controlled substance; is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or has been discharged or dismissed from the Armed Forces under dishonorable conditions. The Secretary of the Army may grant a waiver if the person was convicted of a crime and sentenced to more than one year, or was discharged or dismissed from the military. *Id.* As of this date, the substance of the Smith Amendment has not been challenged in federal court. Leonard Interview, *supra* note 25.

TJAGSA Practice Note

Faculty, The Judge Advocate General's School

Legal Assistance Note

Soldiers' and Sailors' Civil Relief Act Now Applicable to the National Guard . . . Sort Of

The Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA),¹ as amended, provides a number of protections and benefits for active duty service members.² For example, the SSCRA provides for stays or continuances of civil proceedings when a service member's military service materially affects his ability to participate in litigation.³ It provides for reductions of interest rates on pre-service loans to an annual rate of six percent when the service member's military service materially affects his ability to pay interest in excess of six percent.⁴ The law's coverage usually begins "on the date on which the person enters active service and [ends] on the date of the person's release from active service or death while in active service."⁵

To take advantage of the SSCRA, a service member previously had to be serving on federal active duty under Title 10 of the U.S. Code.⁶ A recent change amends the law and expands its coverage to certain Guardsmen who are not serving in a Title 10 status.⁷ Legal assistance attorneys and others must understand the capacities or statuses in which Guardsmen serve to help their clients take advantage of the SSCRA.

Although discussions of the National Guard's (NG) structure and the status of its members can be "complicated by the murky and mystical duality of the National Guard system,"⁸ Guardsmen can perform duty in one of three statuses: state active duty, Title 32, or Title 10 status. To understand why this is the case, it is helpful to keep in mind that the NG is an integral component of the Army and Air Force,⁹ but it is first and foremost subject to the command and control of individual state governors.¹⁰ First, state governors can (and routinely do) acti-

1. 50 U.S.C. app. §§ 501-594 (2000).

2. Although the SSCRA is obviously written for the benefit of soldiers and sailors, it also applies to "members of . . . the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy." *Id.* § 511(1).

3. *Id.* § 521. Other provisions offer similar types of protection. *See, e.g., id.* § 520 (conferring protections related to default judgments); *id.* § 522 (allowing for stays of contractual fines); *id.* § 523 (allowing for stays of judgments, attachments, and garnishments); *id.* § 525 (allowing for possible delays in the tolling of the statute of limitations).

4. *Id.* § 526. The SSCRA also provides other important legal protections. *See, e.g., id.* § 530 (conferring protections against eviction); § 531 (allowing for relief from obligations in installment contracts); *id.* § 532 (conferring protections against mortgage foreclosure); *id.* § 534 (conferring protections against lease termination); *see also* Lieutenant Colin A. Kisor, *Who's Defending the Defenders?: Rebuilding the Financial Protections of the Soldiers' and Sailors' Civil Relief Act*, 48 NAVAL L. REV. 161, 178-79 (2001) (discussing the six-percent interest cap).

5. 50 U.S.C. app. § 511(2). Coverage for most of the important protections is extended on the front end of duty to "any member of a reserve component of the Armed Forces who is ordered to report for military service . . . [from] the date of receipt of such order." *Id.* § 516.

6. *See id.* § 511(1) ("The term 'military service,' as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to . . ."). Under ordinary circumstances, members of the armed forces enter active duty through enlistment or appointment. *See* 10 U.S.C. §§ 505, 532 (enlistments and officer appointments, respectively); *see also id.* § 651 (governing service obligations). Members of the Reserve Component (RC) may be brought to active duty under several statutory provisions. *See generally id.* § 12301(a) (authorizing the activation of the entire RC in the event of a war or national emergency, for the duration of the crisis plus six months); *id.* § 12302 (authorizing the activation of up to one million members of the Ready Reserve for up to twenty-four months following a presidential declaration of national emergency); *id.* § 12304 (authorizing the activation of up to 200,000 members of the Selected Reserve for up to 270 days "to augment the active forces for any operational mission"). The President recently called large numbers of Guardsmen to active duty, consistent with these authorities. *See* Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001) ("Declaration of National Emergency by Reason of Certain Terrorist Attacks"); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (authorizing the activation of Ready Reserve to active duty in response to terrorist attacks against the United States).

7. 50 U.S.C. § 511(1) (LEXIS 2003). The relevant portion of the SSCRA is as follows:

The term "person in military service," the term "persons in military service," and the term "persons in the military service of the United States," as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy, and *all members of the National Guard on service described in the following sentence.* The term "military service," as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service, and, *in the case of a member of the National Guard, shall include service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.* The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave or other lawful cause.

Id. (emphasis added).

vate Guardsmen into state active duty to provide manpower and other resources to assist during natural disasters and other emergencies.¹¹ Next, governors can call these forces to duty under Title 32 of the United States Code. The ordinary training cycle, consisting of one weekend per month and a two-week annual training cycle, is an example of this duty.¹² In this status, Guardsmen remain under the command and control of their state authorities, but they receive federal funding.¹³ Finally, the NG may be mobilized and called to federal active duty under Title 10.¹⁴

Again, before the recent amendment, the SSCRA's benefits and protections did not apply to Guardsmen unless they were on active federal duty under Title 10.¹⁵ In other words, the SSCRA was inapplicable to Guardsmen if they were performing duty under Title 32 or if the duty was state active duty. The inequity of this situation came into focus after the hijackings

and terrorist attacks of 11 September 2001. In response to those attacks, many Guardsmen were ordered to active duty under Title 32 to provide additional security at major airports throughout the country.¹⁶ Therefore, they did not receive SSCRA protections while on active duty, despite the similarities this duty had to active duty performed by other members of the armed forces. In response, Congress drafted section 305 of the Veterans Benefits Improvement Act of 2002.¹⁷ This Act, signed by the President on 6 December 2002, extends the SSCRA's reach to certain situations in which Guardsmen are brought to active duty under Title 32. It amends the SSCRA to include service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by federal funds.¹⁸

8. *Bowen v. United States*, 49 Fed. Cl. 673, 676 (2001). Statutorily, “[t]he term ‘National Guard’ means the Army National Guard and the Air National Guard.” 10 U.S.C. § 101(c)(1) (2000). The statutory definition is as follows:

“Army National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive that—
(A) is a land force;
(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution;
(C) is organized, armed and equipped wholly or partly at Federal expense; and
(D) is federally recognized.”

Id. § 101(c)(2). The Air National Guard is defined similarly. *See id.* § 101(c) (4).

9. As a technical matter, the Army National Guard is not a component of the Army. Instead, it is the Army National Guard of the United States, which makes up one of the Army's two Reserve components. *See* 10 U.S.C. §§ 101(c)(3); *id.* § 10105 (“The Army National Guard of the United States is the reserve component of the Army that consists of—(1) federally recognized units and organizations of the Army National Guard; and (2) members of the Army National Guard who are also reserves of the Army”); *see also id.* § 10101 (listing the seven reserve components). The same is true for the Air National Guard. *See id.* § 101(c)(5) (defining the Air National Guard of the United States as a component of the Air Force); *id.* § 10111 (“The Air National Guard of the United States is the reserve component of the Air Force that consists of—(1) federally recognized units and organizations of the Air National Guard; and (2) members of the Air National Guard who are also Reserves of the Air Force”); *see also* Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service,”* ARMY LAW., June 1994, at 35-40 (discussing the various types of status for NG members as well as the legal authorities establishing the NG's place within the broader Defense Department structure).

10. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power “[t]o call forth the Militia”); *id.* art. I, § 8, cl. 16 (giving Congress the power “[t]o provide for organizing, arming, and disciplining the Militia and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”).

11. *See* MICHAEL D. DOUBLER, *CIVILIAN IN PEACE, SOLDIER IN WAR: THE ARMY NATIONAL GUARD, 1636-2000*, at 357-60 (2003); *see also* N.Y. MIL. LAW § 6 (McKinney 2003) (“[W]henver it shall be made to appear to the governor that there is a breach of the peace, riot, resistance to process of this state or disaster or imminent danger thereof, the governor may order into the active service of the state . . . all or any part of the organized militia.”); N.D. CENT. CODE § 37-01-04 (2003) (permitting the governor to call up the NG in cases of “insurrection, invasion, tumult, riot, breach of the peace, . . . or to provide assistance . . . in search and rescue efforts or to respond to a potential natural disaster or environmental hazard or nuisance”).

12. *See* 32 U.S.C. § 502(a) (2000).

13. *See id.* (governing standard annual training and inactive duty (drill) training); *id.* § 502(f) (governing “training or other duty . . . in addition to that prescribed under [§502(a)]”); *see also id.* § 106 (governing annual appropriations).

14. *See supra* note 6.

15. *Bowen v. United States*, 49 Fed. Cl. 673, 676-77 (2001), *aff'd*, 292 F.3d 1383 (Fed. Cir. 2002).

16. Letter from Norman Mineta, Secretary of Transportation, to state governors, subject: National Guard Deployment at Airports (Oct. 19, 2001) (on file with the author).

17. Pub. L. No. 107-330, § 305, 116 Stat. 2820, 2826-27 (codified at 50 U.S.C. app. § 511(1) (LEXIS 2003)).

18. 50 U.S.C. app. § 511(1).

One must consider at the outset whether the law's extension will provide much actual relief. For example, a Guardsman ordered to duty to protect the airport in his hometown will probably find that his military duty has about the same effect on his ability to defend or prosecute a civil action as his civilian occupation.¹⁹ A rapid activation and deployment to an airport in another city across the state, however, would probably hold great potential to materially affect his ability to participate in the litigation. Financial benefits, such as the six-percent cap on interest rates,²⁰ would likewise assist many Guardsmen ordered to active duty under Title 32.²¹

This amendment to the SSCRA also prompts at least three other interesting questions. First, does the law apply to Active Guard and Reserve (AGR) soldiers and airmen activated under Title 32? Second, does the law broaden the existing mobilization authorities? Third, does it implicate the Posse Comitatus Act (PCA)?²²

The first of these questions concerns the law's applicability to the 36,289 authorized²³ AGR soldiers and airmen serving on

full-time National Guard duty under Title 32.²⁴ The new provision broadens the SSCRA to protect Guardsmen in a Title 32 status, but only if they are on duty for at least thirty consecutive days during a time of national emergency declared by the President. Thus, it would not apply to Title 32 AGR members. While these soldiers are on active duty for periods well in excess of thirty days, they are not on duty solely because of a national emergency. The statute's text and its legislative history both support this conclusion;²⁵ both establish that Congress clearly had airport security-type missions in mind when it wrote the law.²⁶

The new provision may be limited to certain groups of NG members, but it is broader in at least one sense. While the amendment may have been in response to the airport security mission, the new SSCRA provisions will also benefit guardsmen ordered to active duty under Title 32 because of a national emergency. It will apply to them regardless of whether their mission involves law enforcement or law enforcement-like roles. This is important because an earlier version of the proposed amendment would have limited application to situations

19. *Id.* § 521 (governing possible stays of civil proceedings). Other protections are of even less potential applicability. For example, a soldier called to active duty in his home state would be subject to the state's income and property taxation rules. The SSCRA's proscription against double taxation—taxation by a home state and the state where a service member serves on active duty—would be inapplicable. *See id.* § 574.

20. *Id.* § 526.

21. Congress's vision on this subject came from Senator Mark Dayton:

The Soldiers' and Sailors' Civil Relief Act allows America's military personnel to have their legal rights secured until they can return from the military to defend themselves. It covers such issues as rental agreements, security deposits, prepaid rent, evictions, installment contracts, credit card interest rates, mortgage interest rates, mortgage foreclosures, civil judicial proceedings, and income tax payments. One of the most widely known benefits under the act, for example, is the ability to reduce consumer debt and mortgage interest rates to six percent under certain circumstances.

148 CONG. REC. S11562 (daily ed. Nov. 19, 2002) (statement of Sen. Dayton).

22. 18 U.S.C. § 1385 (2000).

23. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 412, 116 Stat. 2458, 2527 (2002) (establishing the end strength numbers for full time active duty with the Army, Navy, Air Force, and Marine Corps Reserve, and with the Army and Air National Guard of the United States).

24. Specifically, the statute defines "Full-time National Guard duty" as

training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of . . . title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States."

32 U.S.C. § 101 (2000). Section 502 is the broadest provision of those referenced, providing that "a member of the National Guard may . . . be ordered to perform training or other duty in addition to [regularly scheduled drills and annual training]." *Id.* § 502(f). Active Guard and Reserve members of the Army and Air Force Reserve and the Active Reserve of the Navy and Marine Corps Reserve perform active duty under a similar provision. *See* 10 U.S.C. § 12301(d) (2000); *see also id.* § 101(d)(5) (defining "Full-time National Guard duty").

25. As the Veterans' Benefits Act of 2002 passed from the Senate to the House of Representatives, conference committees of the two houses of Congress crafted certain compromises. The House's explanatory statement records the following viewpoint on the language ultimately adopted:

[It] would provide that when members of the National Guard are called to active service for more than 30 consecutive days under section 502(f) of title 32, United States Code, to respond to a national emergency declared by the President, coverage under the provisions of the SSCRA would be available. The committees note that this provision is intended to extend protections of the SSCRA to members of the National Guard when called to duty under circumstances similar to those following the terrorist attacks of September 11, 2001.

148 CONG. REC. H9005-6 (daily ed. Nov. 14, 2002) (Explanatory Statement on House Amendment to Senate Bill S. 2237).

where the Guard is activated “pursuant to a call or order to duty by the Governor of a State, upon the request of a Federal law enforcement agency and with the concurrence of the Secretary of Defense, to perform full-time duty . . . for purposes of carrying out homeland security activities.”²⁷

The second question is whether this change to the SSCRA works as an implicit expansion of the Title 10 mobilization authorities,²⁸ and as a ratification of how the National Guard was used in the aftermath of 11 September 2001.²⁹ Current Title 10 mobilization authorities permit the Secretary of Defense to call up one million members of the Ready Reserve for up to twenty-four months of service “[i]n time of national emergency declared by the President.”³⁰ This constitutes political control over the number of troops that may be activated. The SSCRA amendment seems to tacitly allow the President to mobilize more troops than the other mobilization statutes authorize by requesting their activation under Title 32. Whether the strategic situation would ever require this addi-

tional flexibility for the call-up of more troops, or for longer durations, remains to be seen.

The final question concerns the PCA,³¹ which prohibits the use of federal troops as a replacement for civilian law enforcement authorities. It is at least debatable that the airport security mission violated this law. Those involved were performing a recognized “national mission.”³² The fact that the Guardsmen were still under state control, however, substantially weakens this argument. When Congress decided to drop the “law enforcement” language from the earlier version of the amendment,³³ it dropped any tacit recognition that it was creating a PCA exception.³⁴

Conclusion

For more than sixty years, the SSCRA has provided active duty service members a range of protections and benefits.

26. After passage of the Veterans’ Benefits Act of 2002, Senator Dayton made these comments:

Following the terrorist attacks against the United States on September 11, 2001, members of the Minnesota National Guard were activated by our State at the request of the President to provide security at several major airports. As the duration of these activations grew to several months, I began to hear from these brave men and women about the stress and financial burdens that accompanied their service. Senator Wellstone and I were shocked to learn that although the Soldiers’ and Sailors’ Civil Relief Act exists to ease many of these same burdens for active-duty service members and reservists, members of the National Guard were not similarly covered for these types of activations, because this service was deemed to be State, rather than Federal service.

148 CONG. REC. S11562 (daily ed. Nov. 19, 2002) (statement of Sen. Dayton). The amendment’s sponsors explained the problem as follows:

The Soldiers’ and Sailors’ Civil Relief Act of 1940 suspends enforcement of certain civil liabilities and provides certain rights and legal protections to Servicemembers who have been called up to active duty under title 10, United States Code. However, these protections do not extend to National Guard members called to duty under section 502(f) of title 32, United States Code, “to perform training or other duty.” Certain homeland security duties performed under title 32, United States Code such as protecting the nation’s airports, have been carried out at the request and expense of the Federal government with National Guard members under the command of their state governors.

148 CONG. REC. H9005 (daily ed. Nov. 14, 2002) (Explanatory Statement on House Amendment to Senate Bill S. 2237) (quoting 32 U.S.C. § 502(f)).

27. See Veterans’ Benefits Improvement Act of 2002, S. 2237, 107th Cong. § 401 (2002); 148 CONG. REC. S9554 (daily ed. Sept. 26, 2002).

28. See 10 U.S.C. §§ 12301(a), 12302, 12304 (2000).

29. In support of the legislation, Senator Jay Rockefeller said the following:

In the days following September 11, 2001, under the direction of the President, the Federal Aviation Administration and the Secretary of Defense coordinated the use of National Guard members at commercial airports. These National Guard members, called to active duty from four to six months, clearly served a national mission. However, because they were called up under title 32, they were not entitled to SSCRA protections.

148 CONG. REC. S11334 (daily ed. Nov. 18, 2002) (statement of Sen. Rockefeller).

30. 10 U.S.C. § 12302.

31. 18 U.S.C. § 1385 (2000). A complete examination of the PCA is beyond the scope of this note. See generally INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 323-50 (2003).

32. See *supra* note 29.

33. See *supra* note 27 and accompanying text.

34. As previously noted, future missions for the NG may be similar to the airport security mission, but not this is not necessarily the case. The SSCRA applies to NG members when they are on Title 32 duty during national emergencies for thirty or more consecutive days, regardless of the mission. See 50 U.S.C. app. § 511(1) (LEXIS 2003).

Recent changes extend its protections to members of the National Guard when they serve the nation in a Title 32 status during national emergencies for periods greater than thirty days. In some ways, this is a small measure of thanks for their sacrifice and service. Practitioners advising clients from the

National Guard must understand when their clients are covered. They must also recognize a renewed sense of congressional interest in the SSCRA and be mindful that additional changes are pending.³⁵ Lieutenant Colonel JT. Parker.

35. One proposal during the 107th Congress would have made remarkably broad changes to the SSCRA. *See* H.R. 5111, 107th Cong. (2002). This measure did not receive much initial attention, but was reintroduced early during the 108th Congress. *See* H.R. 100, 108th Cong. (2003). This proposal would modernize the SSCRA's language, and would define or otherwise expand many benefits. *Id.*

Note from the Field

Key Terms in the Whistleblower Protection Act Clarified

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In two recent cases, the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit (CAFC) clarified two key terms in the Whistleblower Protection Act of 1989 (WPA).¹ In *Huffman v. Office of Personnel Management*,² the CAFC focused on the definition of a “protected disclosure,” while in *Schmittling v. Department of the Army*,³ the MSPB provided guidance on whether an agency has taken a “personnel action” regarding the appellant. The CAFC and the MSPB each expanded the interpretation of the term in question in favor of the appellant.

Basic Whistleblowing

The WPA states that an agency may not

take or fail to take . . . a personnel action with respect to any employee . . . because of any disclosure of information by the employee [that] the employee . . . reasonably believes evidences . . . a violation of law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”⁴

If an appellant files an individual right of action alleging such a transgression, he bears the burden of establishing by a prepon-

derance of the evidence that: (1) such an allegation is a protected disclosure under 5 U.S.C. § 2932(b)(8); and (2) that the disclosure was a contributing factor in the personnel action that the agency took against him. The term “contributing factor” means any factor, taken with other factors, that has a tendency to affect the outcome of a decision in any manner.⁵ One of the many possible ways to show that whistleblowing was a contributing factor in a personnel action is to show that “the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.”⁶ Thus, circumstantial evidence of (1) knowledge of the protected disclosure, and (2) a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was “a contributing factor” in taking personnel action.⁷

If the appellant demonstrates that the disclosure was a contributing factor in the personnel action in question, the agency must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure.⁸ The MSPB has defined clear and convincing evidence as proof sufficient to give “the trier of fact a firm belief or conviction as to the allegations sought to be established.”⁹

The test to determine whether a putative whistleblower has a reasonable belief that management violated the WPA is an objective one; the appellant must show that the matter reported was one that a reasonable person in that position would believe was evidence of “a violation of law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”¹⁰

1. Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201-1222 (2000)).

2. 263 F.3d 1341 (Fed. Cir. 2001).

3. No. Ch-1221-96-0362-M-1, 2002 MSPB LEXIS 1361 (Sept. 20, 2002).

4. 5 U.S.C. § 2302(b)(8).

5. 5 C.F.R. § 1209.4(c) (1999).

6. 5 U.S.C. § 1221(e)(1)(A)-(B); see *Scott v. Dep’t of Justice*, 69 M.S.P.R. 211, 238 (1995).

7. *Powers v. Dep’t of the Navy*, 69 M.S.P.R. 150, 155 (1990).

8. 5 C.F.R. subpt. 1209.4 (2002); *McDaid v. Dep’t of Housing & Urban Dev.*, 46 M.S.P.R. 416 (1990).

9. 5 C.F.R. § 1201.56(c)(2).

10. 5 U.S.C. § 2302(b)(8); see *Haley v. Dep’t of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), cert. denied, 508 U.S. 950 (1993); see also *Lewis v. Dep’t of Army*, 63 M.S.P.R. 119, 122, aff’d, 48 F.3d 1238 (Fed. Cir. 1993), cert. denied, 516 U.S. 834 (1995).

Huffman Redefines “Protected Disclosure”

In *Huffman v. Office of Personnel Management*,¹¹ the CAFC clarified the term “protected disclosure” in three different situations involving the employee, his supervisor, and the employee’s normal reporting channels. Specifically, the case answered three distinct questions: (1) whether complaints to a supervisor about the supervisor’s wrongful conduct constitute “protected disclosures” under the WPA; (2) whether complaints to a supervisor about the wrongful conduct of other agency employees or other misconduct constitute such disclosures; and (3) whether reports made as part of an employee’s normal work duties constitute disclosures.¹²

The appellant, Kenneth Huffman, filed a complaint with the Office of Special Counsel alleging that he had been removed from his position as an Assistant Inspector General for numerous protected disclosures that he made about his supervisor, various other supervisors, and other employees of the Office of the Inspector General for the Office of Personnel Management where the appellant worked.¹³

Complaining to a Supervisor Is Not a “Disclosure”

The CAFC first analyzed the disclosures that the appellant made about his supervisor, Patrick McFarland. The appellant accused McFarland of pre-selecting an agency employee for a Senior Executive Service position. He further accused McFarland of gross mismanagement when McFarland permitted a company known as All-Star Personnel to perform an organizational study for the Office of the Inspector General.¹⁴

The CAFC rejected the appellant’s argument that the WPA applies when an employee complains to his supervisor about the supervisor’s own conduct. The court relied on *Willis v. Department of Agriculture*,¹⁵ which said that disagreements with supervisors over job-related matters are a normal part of most occupations.¹⁶ It is entirely ordinary for an employee to disagree with a supervisor who overturns the employee’s decision.¹⁷ The Court also cited *Horton v. Department of the Navy*,¹⁸ which holds that allegations directed toward alleged wrongdoers themselves are considered viewable as whistleblowing under the WPA.¹⁹ Criticism directed at a supervisor does not further the WPA’s purpose, which is to encourage disclosure of wrongdoing to persons who may be in a position to remedy it.²⁰

The CAFC examined various dictionary definitions of the word “disclosure,” and held that the appellant’s argument lacked merit.²¹ The essence of this definition is that a disclosure is an act that makes a formerly unknown fact known, or reveals something that was previously hidden. If an employee tells a supervisor of a supervisor’s own misconduct, the court reasoned, the employee is not making a disclosure of misconduct. The court presumed that the supervisor would certainly have known of the existence of any misconduct the supervisor had committed; thus, the employee has not “disclosed” anything. To claim WPA protection, employees should make disclosures to those who can rectify the wrongdoing; the supervisor who has allegedly committed the wrongdoing is not such a person.²²

Complaining to a Supervisor About Co-Workers Is a “Disclosure”

The results are decidedly different when an employee complains to a supervisor about another employee’s misconduct.

11. 263 F.3d 1341 (Fed. Cir. 2001).

12. *Id.* at 1344-45.

13. *Id.* at 1345.

14. *Id.*

15. 141 F.3d 1139 (Fed. Cir. 1998).

16. *Id.* at 1143. Willis, the aggrieved employee, sent letters to his supervisor critical of the supervisor’s actions. The agency ordered Willis’s reassignment. Willis refused and ultimately retired. *Id.* at 1141.

17. *Id.* at 1143.

18. 66 F.3d 279 (Fed. Cir. 1995).

19. *Id.* at 282. John Horton, a librarian, criticized the behavior of other library employees and his supervisor to fellow staff members and his supervisor. As a result of Horton’s comments, his confrontational attitude, and a tantrum, the Navy removed him. *Id.* at 279-80.

20. *Huffman*, 263 F.3d at 1349.

21. See *id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1965); BLACK’S LAW DICTIONARY (7th ed. 1998); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998)).

22. *Id.* at 1350.

Huffman alleged that his agency had hired various auditors under the agency's Outstanding Scholars Program instead of filling the positions through open competition. Huffman accused an Assistant Inspector General of encouraging three of the outstanding scholars to falsify their applications for federal employment.²³ The agency argued that Huffman had disclosed this information to McFarland, a person who did not have the authority to correct the wrongdoing. Therefore, the agency contended, Huffman's disclosures were not protected because an employee, in accordance with *Willis* and *Horton*, must disclose this information to someone in a position to resolve the matter.²⁴

The CAFC rejected the agency's argument, noting that the case law and the legislative history of the WPA recognize that disclosures to the news media, to Congress, and to independent agencies such as the Office of the Inspector General are all protected under the WPA. An employee does not have to disclose information to someone in authority to correct the alleged wrongdoing to invoke WPA protections.²⁵ In *Czarkowski v. Department of the Navy*,²⁶ the MSPB clearly stated that it is a prohibited personnel practice to take—or fail to take—a personnel action because of any disclosure of information by an employee that the employee reasonably believes to be evidence of misconduct or gross mismanagement.²⁷ *Huffman* went further, noting that any government supervisor is in a position to remedy abuse by telling someone who has the authority to correct the wrongdoing.²⁸ The purpose of the WPA is to encourage employees to report matters within the scope of the WPA—even if the receiver of the information lacks the authority to correct the situation. The fact that the news media or a government employee cannot personally resolve the wrongdoing is irrelevant to the question of whether the employee made a protected disclosure.

Complaining During the Normal Course of Job Duties Is a "Disclosure"

Finally, the court examined the scope of protections the WPA affords to an employee who discloses wrongdoing in the normal course of his duties. Examples of such disclosures could include law enforcement officers or inspectors general who investigate other government employees' malfeasance or nonfeasance of duty, and later prepare and submit reports through normal duty channels. The CAFC readily conceded that neither its own jurisprudence nor the WPA has been completely clear about this issue. The court resolved this question by focusing on those employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel.²⁹ The court's analysis suggests that it focused on the risk the employee incurred by making the disclosure. If an employee risks physical harm or loss of employment by making a disclosure in the normal course of duties, the disclosure will probably qualify for protection under the WPA.³⁰

Czarkowski illustrates this principle perfectly. In the normal course of her duties, the appellant, who worked in contracting, issued a "stop work" order to a contractor for various performance deficiencies.³¹ After the appellant issued her order, the agency relieved her of her responsibilities regarding the project and issued her a performance appraisal with a close-out rating. The agency then sent the appellant a memorandum that informed her that her performance was unacceptable and that it was giving her an opportunity to improve her performance.³² The MSPB noted that this memorandum was the equivalent of a Performance Improvement Plan.³³ Such a draconian measure threatened the appellant's job security by menacing her with an adverse personnel action. *Czarkowski* could thus claim WPA protection because of the significant risk of losing her job for performing normally assigned duties.³⁴

23. *Id.*

24. *Id.* at 1351.

25. *Id.*

26. 87 M.S.P.R. 107 (2000).

27. *Id.* ¶ 16.

28. *Huffman*, 263 F.3d at 1351.

29. *Id.* at 1352.

30. *See id.*

31. *Czarkowski*, 87 M.S.P.R. 107, ¶ 8. According to the appellant, the contractor's statement of work did not list the specific size of the product to be delivered or the way to deliver the equipment. The contractor also repeatedly postponed the contract delivery date. *Id.*

32. *Id.* ¶ 2.

33. *Id.* ¶ 21.

34. *Id.* ¶¶ 16-17.

Both *Huffman* and *Czarkowski* expand WPA protection to include those disclosures made by employees in the regular course of those duties if the employees find themselves the subject of adverse personnel actions as a result of those disclosures.

Schmittling: An Agency's Failure to Act Can Trigger WPA Protection

In *Schmittling v. Department of the Army*,³⁵ the appellant was the Chief of the Automated Systems and Management Accounting Division, at the GS-15 pay grade. Schmittling alleged that shortly after he made a protected disclosure, the agency reassigned another employee to a vacant position that Schmittling had sought. The agency ultimately assigned the appellant to a customer service position. Schmittling claimed that the agency's decision to place the other employee in the vacant position effectively blocked his assignment to that position during a reduction in force (RIF).³⁶ The appellant alleged that the agency did not assign him to his desired position because he "blew the whistle" on several unauthorized agency expenditures.³⁷

The agency argued that the appellant's reassignment to the customer-service position instead of the position he sought was the result of the appellant's voluntary actions. The agency

argued that the appellant recommended that the agency abolish his original position in the upcoming RIF. The agency argued that because the appellant voluntarily offered his position for RIF, he had no claim to the vacant position.³⁸

The MSPB examined the legislative history of the WPA and 5 U.S.C. § 2302, which defines "prohibited personnel action" to include a failure to take a personnel action.³⁹ The MSPB noted that "[n]o distinction . . . is made in the legislative history between protecting whistleblowers from personnel actions taken, as opposed to personnel actions not taken."⁴⁰ If the agency's failure to take a personnel action is retaliation for making a protected disclosure, the agency has committed a prohibited personnel action. In *Schmittling*, the MSPB held that the agency failed to assign the appellant to the vacant position because of his protected disclosures.⁴¹

Conclusion

In the last two years, the MSPB has greatly expanded the scope of the WPA in favor of those making protected disclosures. The MSPB considers most disclosures of serious management misconduct to be protected disclosures; the reporting of a supervisor's own alleged misconduct to that supervisor stands as an exception to this general rule.⁴²

35. No. Ch-1221-96-0362-M-1, 2002 MSPB LEXIS 1361 (Sept. 20, 2002).

36. *Id.* at *1-2.

37. *Id.*

38. *Id.* at *11-12.

39. *Id.* at *13-16 (citing 5 U.S.C. § 2302 (2000)).

40. *Id.* at *16.

41. *Id.* at *28-31.

42. Readers who have questions about these and other rapidly changing WPA issues are welcome to contact the author at PJANOFF@SPD.USACE.army.mil.

USALSA Report

United States Army Legal Services Agency

Litigation Division Note

Sometimes It Pays to Be Ignorant

Introduction

The federal statute of limitations in 28 U.S.C. § 2401(b) requires claims brought under the Federal Tort Claims Act (FTCA) to be filed within two years of the accrual of the claim.¹ The statute, however, does not define “accrual.” As tensions frequently arise between the desire to give fair treatment to possible victims of inadequate medical treatment and the need to resolve claims efficiently and rapidly, courts have long grappled with the term.²

Accrual and the “Blameless Ignorance” Rule

In its 1979 decision in *United States v. Kubrick*,³ the Supreme Court provided what has become the bedrock answer to the question of when such claims accrue under the FTCA. *Kubrick* stands for the proposition that accrual of a claim does not wait until the patient knows that his treatment was performed negligently, but instead, accrues when a patient knows he has been injured and what caused it. By its very reasoning, *Kubrick* requires a fact-based analysis of what the patient knew and when he knew it. Many courts wrestle with that issue, however, when it becomes apparent that doctors misled or misinformed a patient about the nature or cause of an injury.⁴ In those cases, some courts have adopted a “blameless ignorance” exception to *Kubrick* and held that the accrual of an FTCA claim—and thus, the tolling of the statute of limitations—is

delayed when a patient’s doctors give an inaccurate or incomplete explanation for complications. Because a patient may reasonably rely on such explanations, the claim for malpractice only accrues in those circumstances when the patient is aware of the true nature of her injury. The U.S. Court of Appeals for the Third Circuit (Third Circuit) became the latest court to jump on the “blameless ignorance” bandwagon when it decided *Hughes v. United States*.⁵ In *Hughes*, the court refused to grant the government’s motion to dismiss under the statute of limitations, and remanded the case to the district court.

Hughes v. United States

On 15 April 1997, Mr. Hughes went to a Veterans Administration (VA) hospital in South Carolina, complaining of neck pain. The same day, Mr. Hughes underwent a cardiac catheterization, which revealed coronary artery disease. In preparation for coronary bypass surgery, the hospital administered heparin, a blood thinner. After the surgery, Mr. Hughes remained unconscious and on a heparin drip for about one week, during which time he began to demonstrate signs of an allergic reaction to the heparin. Mr. Hughes’s physicians did not treat the allergic reaction until he had developed gangrene in his hands and legs. As a result of the gangrene, doctors had to amputate Mr. Hughes’s hands and his legs below the knees.⁶ When Mr. Hughes awoke from his coma, the doctors explained that the amputations were the result of the allergic reaction to the heparin. The doctors did not explain that they failed to notice or treat the reaction until after the gangrene made the amputations necessary. Mr. Hughes was discharged from the hospital on 23 July 1997, and did not file a claim with the VA until December 1999.⁷

1. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000).

2. This tension is not limited to the courts. See Bryan A. Liang, *Risks of Reporting Sentinel Events; A System for Reporting Medical Errors Could Be Used for Lawsuits Rather than Just for Safety Purposes*, HEALTH AFFAIRS, Sept.-Oct., 2000; Andrea Gerlin, *Senate Panel Gets Input on Medical Mistakes*, PHIL. INQUIRER, Jan. 27, 2000, at A14. Other newspapers report similar concerns from various quarters of society. Andrea Gerlin, *A Message to Doctors: Admit Errors and Apologize*, SEATTLE TIMES, Dec. 21, 1999, at A23; Andrea Gerlin, *Hospital Errors Often Buried in Internal Accident Reports; Families Belatedly Learn of Mistakes That Kill*, NEW ORLEANS TIMES-PICAYUNE, Sept. 26, 1999, at A22; Robert Pear, *Experts Cast Doubt on Medical Reporting Plan*, N.Y. TIMES, Feb. 23, 2000, at A12; Andrea Gerlin, *Clinton’s Plan to Cut Medical Mistakes Lacks Two Key Allies*, PHIL. INQUIRER, Feb. 27, 2000, at D3; *Diagnosing Error: Clinton Pushes for Reporting of Medical Mistakes*, PITTSBURGH POST-GAZETTE, Mar. 8, 2000, at A-18; Joanne Weintraub, *Lifting the Covers Off Hospital Mistakes*, MILWAUKEE SENTINEL J., Nov. 19, 2000, at 1E.

3. 444 U.S. 111 (1979).

4. See, e.g., *McDonald v. United States*, 843 F.2d 247, 249 (6th Cir. 1988); *Wehrman v. United States*, 830 F.2d 1480, 1484-85 (8th Cir. 1987); *Rosales v. United States*, 824 F.2d 799, 804 (9th Cir. 1987); *Otto v. Nat’l Inst. of Health*, 815 F.2d 985, 989 (4th Cir. 1987); *DuBose v. Kans. City S. Ry.*, 729 F.2d 1026 (5th Cir. 1984).

5. 263 F.3d 272, 278 (3d Cir. 2001), *reh’g denied*, No. 00-3606 (3d Cir. Oct. 30, 2001) (order denying rehearing). At the time of this writing, the district court had ordered the case held in suspense pending settlement mediation. Telephone interview with Nuriye Uygur, Assistant United States Attorney, Eastern District of Pennsylvania (Sept. 25, 2002) [hereinafter Uygur Interview].

6. *Hughes*, 263 F.3d at 274.

7. *Id.* at 274-75.

The VA rejected the claim as beyond the statute of limitations, and Mr. Hughes brought suit in July 2000.⁸ The United States filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Hughes's claim accrued when his doctors explained his allergic reaction to the heparin in July 1997.⁹ The district court agreed and dismissed the suit.¹⁰ On appeal, however, the Third Circuit overruled and remanded.¹¹

The Third Circuit's reasoning in *Hughes* is similar to the positions of the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, all of which have adopted the "blameless ignorance" exception. These courts have held that the claim of a patient who reasonably relies on explanations from his doctor will not accrue until the patient gains accurate knowledge about the cause of the injury.¹² The Third Circuit came to the same conclusion in *Hughes*, asserting that Hughes's claim did not accrue when he left the hospital because his doctors "led [him] to believe that the formation of the gangrene was a natural, albeit unexpected allergic reaction to the heparin dosage."¹³ The court determined that although Hughes's doctors informed him of his injury before he left the hospital,¹⁴ they did so in a misleading fashion.¹⁵ The Third Circuit joined five other circuits in holding that a doctor's inaccuracy, deliberate or otherwise, will not be held against the patient in determining when a claim accrues under the FTCA.¹⁶

Significantly, courts that recognize the blameless ignorance exception have continued to apply *Kubrick* and have narrowed the exception to only the most necessary cases—those in which physicians misinform patients through faulty assurances.¹⁷ In *Hughes*, the Third Circuit likewise did not reject *Kubrick*. The

court rejected the government's argument that the claim accrued when Mr. Hughes left the hospital because doctors had informed him of the allergic reaction; this, coupled with the amputations, was sufficient to put a reasonable patient on notice.¹⁸ Instead, the court pointed out that Mr. Hughes's injury arose not from the application of the drug and the subsequent allergic reaction, but from the doctors' failure to treat that reaction.¹⁹ The court reasoned that because of his doctors' incomplete explanations, Mr. Hughes was not aware that the failure to treat the allergic reaction had caused his injury when he left the hospital. The Third Circuit remanded the case to the district court to determine when Mr. Hughes learned of the doctors' failure to treat the gangrene.²⁰ While there is reason to believe that district courts in the Third Circuit will also construe this exception narrowly,²¹ judge advocates must consider the blameless ignorance exception in their analysis of medical malpractice cases; they must also ensure that medical providers know the legal risks they run when they are less than forthcoming with patients.

Practice Points

Before *Hughes*, the law in the Third Circuit governing the accrual of medical malpractice claims was significantly more favorable to the government. Judge advocates, however, can limit the impact of this decision and encourage better service to patients by taking some prudent steps.²² Claims judge advocates and attorneys must, of course, continue to thoroughly investigate questions of what medical providers did or did not do with respect to their patients. They must now also investi-

8. *Id.*

9. *Hughes v. United States*, No. 00-3065, 2000 U.S. Dist. LEXIS 15470, at *4 (E.D. Pa. Oct. 23, 2000).

10. *Id.* at *9.

11. *Hughes*, 263 F.3d at 278.

12. *See supra* note 4.

13. *Hughes*, 263 F.3d at 276.

14. *Id.* at 276-77.

15. *Id.* at 274, 277.

16. *See supra* note 4.

17. *See, e.g.*, *Hanafin v. United States*, No. 1:95:CV:128, 1995 U.S. Dist. LEXIS 14450 (W.D. Mich. Aug. 14, 1995).

18. *Hughes*, 263 F.3d at 276.

19. *Id.* at 276-77.

20. *Id.* at 277-79.

21. It is unlikely that the U.S. District Court for the Eastern District of Pennsylvania (District Court) will hear *Hughes* on remand; the District Court has ordered the case held in suspense pending settlement mediation, and it appears that the case may settle without further assistance from the court. Uygur Interview, *supra* note 5.

22. Anecdotal evidence indicates that patients may file fewer lawsuits if they feel that their doctors are forthcoming about medical errors. *See supra* note 2.

gate what medical providers said and did not say to patients about unfavorable outcomes. Judge advocates should urge hospitals and medical providers to inform patients of the true causes of injuries as early as possible.

Before claims judge advocates and attorneys decide when a medical malpractice claim accrued, they should carefully screen the medical file to determine when the patient received accurate information about the causes of the injury. If it appears that the claim is beyond the statute of limitations, the claims attorney or judge advocate must consider whether a provider misled or misinformed the patient, and whether the blameless ignorance exception or another equitable tolling provision operates to delay the accrual of the claim in that jurisdiction. Judge advocates and claims attorneys should retain potential claim files (including complete copies of the medical records) until two years after the patient is advised of the true nature of the injury.²³ This additional analysis will allow for efficient and just adjudication if an injured patient files a claim.

Finally, judge advocates should talk with their medical providers and review the importance of giving patients timely and accurate outcome information. In the summer of 2001, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) established new patient protection standards designed to encourage frank, honest, and timely discussions between health care professionals and patients when a health care outcome differs significantly from that which was expected.²⁴ As health care professionals implement the new standards, the industry will gradually develop standards of care for patient protection.²⁵ Plaintiffs may push this process and continue to test how far courts are willing to stretch *Kubrick*.²⁶ One excellent source of materials to add to any such discussion is the JCAHO Patient Safety Standards and other JCAHO materials. Those standards require practitioners and hospitals to explain the outcome of any treatment or procedure to patients clearly whenever the actual outcome differs significantly from the anticipated outcome.²⁷ While the standards certainly do not require medical providers to admit negligence, providers must know that honesty is the best policy—from both the ethical and legal points of view. Captain Julie Long.

23. See U.S. DEP'T OF ARMY, REG. 25-400-2, THE MODERN ARMY RECORDKEEPING SYSTEM 1 (18 Mar. 2003).

24. In July 2001, the JCAHO applied new patient safety standards in response to growing concern in this area. The new standards are designed primarily to help health care providers and institutions reduce medical errors. For the first time, the JCAHO's accreditation standards incorporate long-standing medical ethics requirements regarding the responsibility of medical providers and hospitals to tell patients if they have been harmed by care. The JCAHO standards do not require medical professionals or hospitals to admit legal negligence or liability, nor do they set a standard that places a legal duty on medical providers. The JCAHO recognizes, however, that the fear of litigation often makes health care providers and hospitals unwilling to be forthcoming with patients. The JCAHO attempts to address this problem by requiring practitioners to explain to their patients clearly whenever the outcome of any treatment or procedure differs significantly from the anticipated outcome. It is important to note that the JCAHO standards do not create a legal duty. See the JCAHO's Web site at <http://www.jcaho.org> for the text of the standards and more information about patient safety issues.

25. Significantly, the Third Circuit remanded *Hughes* to the District Court to determine when Hughes had accurate knowledge of his injury; the Solicitor General's Office is considering whether to request a writ of certiorari to the Supreme Court. Uygur Interview, *supra* note 5.

26. In *McGraw v. United States*, No. 00-35514, 2002 U.S. App. LEXIS 15774 (9th Cir. Feb. 25, 2002), for example, the U.S. Court of Appeals for the Ninth Circuit relied in part on the Third Circuit's holding in *Hughes* to expand its holding in *Augustine v. United States*, 704 F.2d 1074, 1078 (9th Cir. 1983), a case in which the Ninth Circuit held that the claim of a plaintiff alleging failure to diagnose did not accrue until the patient learned that a preexisting condition had transmuted into a more serious ailment. *Id.* In *McGraw*, the Ninth Circuit held that under the FTCA, a failure-to-diagnose plaintiff does not "discover" the claim until he is aware of both the pre-existing condition and the fact that the condition has transformed into a more serious ailment. Although McGraw's widow knew of the more serious condition, she did not discover that her husband had a pre-existing condition until more than two years after his death. *McGraw*, 2002 U.S. App. LEXIS 15774, at *6. The court held that because doctors failed to inform the decedent of the pre-existing condition, the claim did not accrue until Mrs. McGraw, the plaintiff, discovered it. *Id.* at *3. *Hughes* has also influenced state court holdings. In *Walk v. Ring*, 44 P.3d 990 (Ariz. 2002), the Arizona Supreme Court relied on *Hughes*, in part, to adopt a blameless ignorance rule for state medical malpractice cases. *Id.*

27. See *supra* note 24.

CLE News

1. Resident Course Quotas

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

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

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

2003

June 2003

2-6 June	6th Intelligence Law Course (5F-F41).
2-6 June	177th Senior Officers' Legal Orientation Course (5F-F1).

2-27 June	10th JA Warrant Officer Basic Course (7A-550A0).
3-27 June	161st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9-11 June	6th Team Leadership Seminar (5F-F52S).
9-13 June	10th Fiscal Law Comptroller Accreditation Course (Alaska) (5F-F14-A).
9-13 June	33d Staff Judge Advocate Course (5F-F52).
23-27 June	14th Legal Administrators' Course (7A-550A1).
27 June - 5 September	161st Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2003

7 July - 1 August	4th JA Warrant Officer Advanced Course (7A0550A2).
14-18 July	80th Law of War Course (5F-F42).
21-25 July	7th Chief Paralegal NCO Course (512-27D-CLNCO).
21-25 July	14th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 July	34th Methods of Instruction Course (5F-F70).
28 July - 8 August	151st Contract Attorneys Course (5F-F10).

August 2003

4-8 August	21st Federal Litigation Course (5F-F29).
4 August - 3 October	11th Court Reporter Course (512-27DC5).
11-22 August	40th Operational Law Course (5F-F47).

11 August 03 - 22 May 04	52d Graduate Course (5-27-C22).	17-21 November	3d Court Reporting Symposium (512-27DC6).
25-29 August	9th Military Justice Managers' Course (5F-F31).	17-21 November	179th Senior Officers' Legal Orientation Course (5F-F1).
September 2003		17-21 November	2003 USAREUR Operational Law CLE (5F-F47E).
8-12 September	178th Senior Officers' Legal Orientation Course (5F-F1).	December 2003	
8-12 September	2003 USAREUR Administrative Law CLE (5F-F24E).	1-5 December	2003 USAREUR Criminal Law CLE (5F-F35E).
15-26 September	20th Criminal Law Advocacy Course (5F-F34).	2-5 December	2003 Government Contract & Fiscal Law Symposium (5F-F11).
16 September - 9 October	162d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	8-12 December	7th Income Tax Law Course (5F-F28).
October 2003		January 2004	
6-10 October	2003 JAG Worldwide CLE (5F-JAG).	4-16 January	2004 JAOAC (Phase II) (5F-F55).
10 October - 18 December	162d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	5-9 January	2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).
20-24 October	57th Federal Labor Relations Course (5F-F22).	5-9 January	2004 USAREUR Income Tax Law CLE (5F-F28E).
20-24 October	2003 USAREUR Legal Assistance CLE (5F-F23E).	6-29 January	163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
22-24 October	2d Advanced Labor Relations Course (5F-F21).	12-16 January	2004 PACOM Income Tax Law CLE (5F-F28P).
26-27 October	8th Speech Recognition Training (512-27DC4).	20-23 January	2004 Hawaii Income Tax Law CLE (5F-F28H).
27-31 October	3d Domestic Operational Law Course (5F-F45).	21-23 January	10th Reserve Component General Officers Legal Orientation Course (5F-F3).
27-31 October	67th Fiscal Law Course (5F-F12).	26-30 January	9th Fiscal Law Comptroller Accreditation Course (Hawaii) (5F-F14-H).
27 October - 7 November	6th Speech Recognition Course (512-27DC4).	26-30 January	180th Senior Officers' Legal Orientation Course (5F-F1).
November 2003		26 January - 26 March	12th Court Reporter Course (512-27DC5).
3-7 November	53d Legal Assistance Course (5F-F23).	30 January - 9 April 04	163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
12-15 November	27th Criminal Law New Developments Course (5F-F35).		

February 2004

2-6 February 81st Law of War Course (5F-F42).

9-13 February 2004 Maxwell AFB Fiscal Law Course.

23-27 February 68th Fiscal Law Course (5F-F12).

23 February - 5 March 41st Operational Law Course (5F-F47).

March 2004

1-5 March 69th Fiscal Law Course (5F-F12).

8-12 March 28th Administrative Law for Military Installations Course (5F-F24).

15-19 March 5th Contract Litigation Course (5F-F102).

15-26 March 21st Criminal Law Advocacy Course (5F-F34).

22-26 March 181st Senior Officers' Legal Orientation Course (5F-F1).

April 2004

12-15 April 2004 Reserve Component Judge Advocate Workshop (5F-F56).

19-23 April 6th Ethics Counselors' Course (5F-F202).

19-23 April 15th Law for Paralegal NCOs Course (512-27D/20/30).

26 April - 7 May 152d Contract Attorneys' Course (5F-F10).

26 April - 14 May 47th Military Judges' Course (5F-F33).

26 April - 25 June 13th Court Reporter Course (512-27DC5).

May 2004

10-14 May 53d Legal Assistance Course (5F-F23).

24-28 May 182d Senior Officers Legal Orientation Course (5F-F1).

June 2004

1-3 June 6th Procurement Fraud Course (5F-F101).

1-25 June 11th JA Warrant Officer Basic Course (7A-550A0).

2-24 June 164th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

7-9 June 7th Team Leadership Seminar (5F-F52S).

7-11 June 34th Staff Judge Advocate Course (5F-F52).

12-16 June 82d Law of War Workshop (5F-F42).

14-18 June 8th Chief Paralegal NCO Course (512-27D-CLNCO).

14-18 June 15th Senior Paralegal NCO Management Course (512-27D/40/50).

21-25 June 15th Legal Administrators' Course (7A-550A1).

25 June - 2 September 164th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2004

12 July - 6 August 5th JA Warrant Officer Advanced Course (7A-550A2).

19-23 July 35th Methods of Instruction Course (5F-F70).

27 July - 6 August 153d Contract Attorneys' Course (5F-F10).

August 2004

2-6 August 22d Federal Litigation Course (5F-F29).

2 August - 1 October 14th Court Reporter Course (512-27DC5).

9-20 August 42d Operational Law Course (5F-F47).

9 August - 22 May 05 53d Graduate Course (5-27-C22).

23-27 August 10th Military Justice Managers' Course (5F-F31).

September 2004

7-10 September 2004 USAREUR Administrative Law CLE (5F-F24E).

13-17 September 54th Legal Assistance Course (5F-F23).

13-24 September 22d Criminal Law Advocacy Course (5F-F34).

October 2004

4-8 October 2004 JAG Worldwide CLE (5F-JAG).

3. Civilian-Sponsored CLE Courses

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

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

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

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

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

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

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

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

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

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

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

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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

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

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

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

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

(800) 727-1227

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

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

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

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

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

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

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

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

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

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118

(504) 865-5900

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

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

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

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program, hours must be completed

	in compliance period July 1 to June 30
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
	Minimum credits must be completed by last day of birth month each year
Texas	Minimum credits must be completed by last day of birth month each year

Utah	31 January
Vermont	2 July annually
Virginia	31 October annually
Washington	31 January triennially
West Virginia	31 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

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

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

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

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

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

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2004 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

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

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

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

2. Regulations and Pamphlets

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

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

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

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

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

(b) Follow the link that reads “Enter JAGCNet.”

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General’s School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The 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 calling the LTMO at (434) 972-6314. 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 web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessi-

ble e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at the School. Dial-up internet access is available in the TJAGSA billets.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 244-6264. CW4 Tommy Worthey.

6. The Army Law Library Service

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

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 488-6306, commercial: (434) 972-6306, or e-mail at Daniel.Lavering@hqda.army.mil.

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US Army
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