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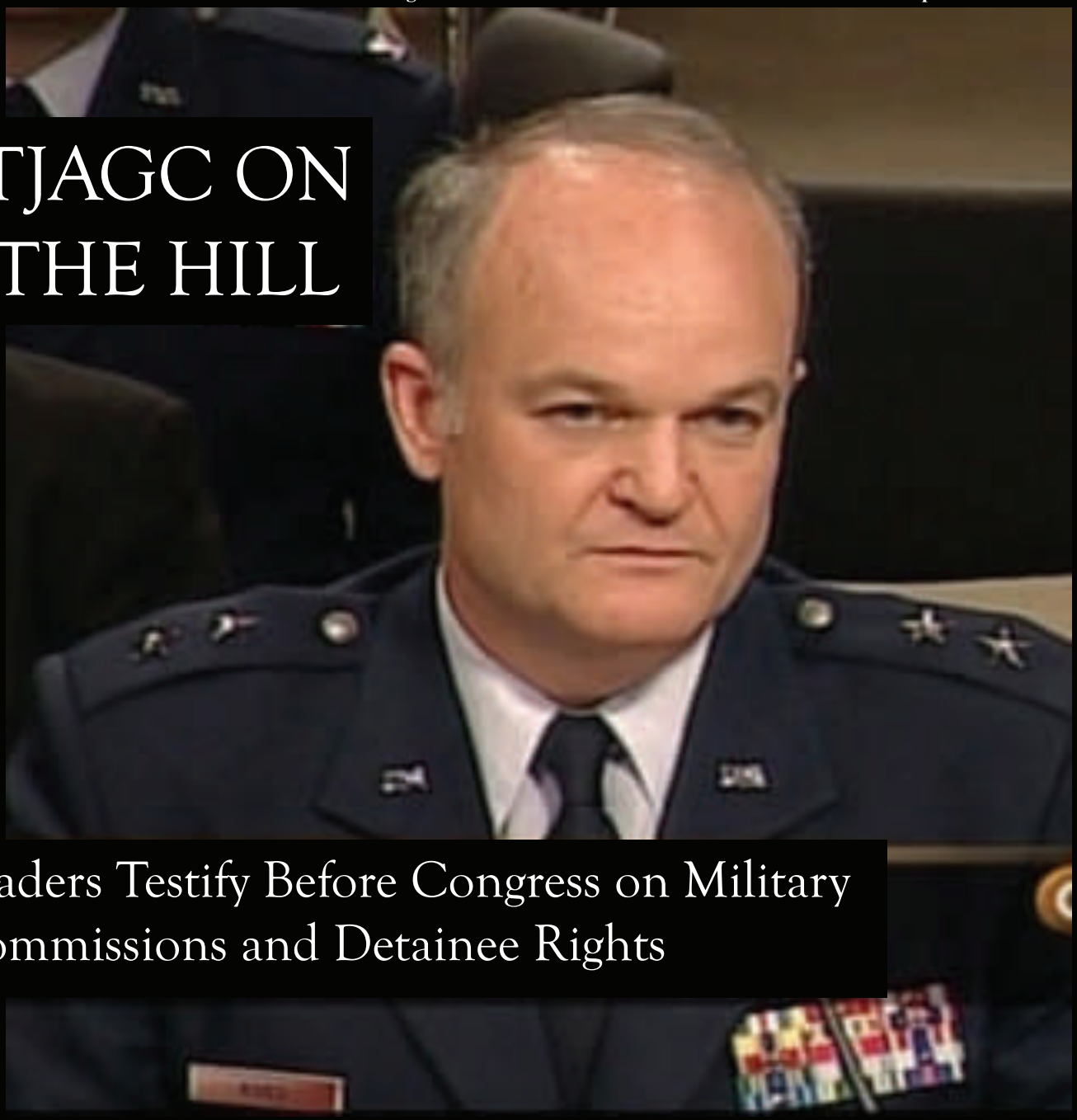
The Reporter

The Judge Advocate General's Corps



TJAGC ON THE HILL

Leaders Testify Before Congress on Military Commissions and Detainee Rights

The Reporter

Volume 33, No. 3

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Maj Gen Jack L. Rives, The Judge Advocate General of the Air Force, testified before the Senate Armed Services Committee on 13 Jul 06 concerning military commissions and the Supreme Court's decision in *Hamdan v. Rumsfeld*.

The Reporter

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The Reporter is published quarterly by The Judge Advocate General's School for the Office of the Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

Message from the

Commandant

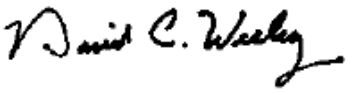
Col. David C. Wesley

It is my great pleasure to introduce a new and improved version of *The Reporter*. This has been a year of tremendous change in the Air Force and in the JAG Corps—change that will make us better, stronger, and more efficient. It has also been a year of great change here at The Judge Advocate General's School, where we constantly seek ways to keep our education of the Corps current, relevant, and practical. The changes to *The Reporter* are just another way we are striving to meet that mission.

Several months ago we surveyed the field and asked you what you would like to see in *The Reporter.* You gave us some great ideas, such as our new "Ask the Expert" section. You also motivated us to seek new ways to present you with important information about our Corps and the issues our folks face on a daily basis. We have tremendous things happening in the Corps, such as our Corps leaders testifying before Congress on issues of national importance, and you'll find coverage of current events like these in future editions of *The Reporter.*

You will also see a new "The JAG Who . . ." section which highlights ethics issues reviewed by the Professional Responsibility Division. Also, as the Air Force celebrates its 60th anniversary, we highlight the history of our JAG Corps through our "Heritage to Horizon" section. You will have the opportunity to compare the daily schedule of then-Captain Albert Kuhfeld with one from our most recent class, JASOC 06C.

We will continue to update and revise *The Reporter* to meet the needs of the JAG Corps and are always open to new ideas from the field. For example, we intend to introduce a book review section in our next edition. Through all this change, one thing remains constant: our desire to provide you with a product you can use in your daily practice. We hope you will enjoy this edition of *The Reporter!*



TJAGC Leaders Testify Before Congress on Detainee Rights

During the last three months, senior TJAGC leaders testified before Congressional committees concerning detainee rights and the appropriate response to the Supreme Court's decision in Hamdan v. Rumsfeld. *The Judge Advocate General, Maj Gen Jack Rives, testified before the Senate Armed Services on July 13, 2006, and before the Senate Judiciary Committee on August 2, 2006. The Deputy Judge Advocate General, Maj Gen Charles Dunlap, testified before the House Armed Services Committee on September 7, 2006. Reprinted below are Maj Gen Rives' prepared remarks to the Senate Judiciary Committee and Maj Gen Dunlap's prepared remarks to the House Armed Services Committee. The remarks are followed by Common Article III of the Geneva Conventions and the syllabus from* Hamdan v. Rumsfeld.

Thank you, Chairman Specter, Senator Leahy, and members of the committee. I appreciate the opportunity to appear before you today as this committee carefully considers the authority of the United States to prosecute suspected terrorists consistent with the Supreme Court's decision in *Hamdan v. Rumsfeld*.

Prior to enactment of the War Crimes Act, suspected war criminals were prosecuted domestically by the United States for the underlying common law offense, such as murder, rape or assault. Consistent with our treaty obligations, Congress enacted the War Crimes Act to proscribe misconduct internationally recognized as Constitution violations of the laws of nations.

Prosecutions under the War Crimes Act, like all prosecutions under Title 18, include the due process rights afforded in our federal court system. While these rights are necessary and appropriate for suspected terrorists investigated and apprehended through normal domestic law enforcement methods, some—such as the aggressive discovery rules and strict chain of custody requirements—are incompatible with the realities and unpredictability of the battlefield. The full discovery rights of our federal court system may reveal sensitive intelligence sources and methods that would harm our overall national security. Similarly, the chain of custody requirements of our federal system are simply unworkable, given the uncertain and ever-changing nature of the battlefield and the need for our military personnel to be free from the technical rules more applicable to domestic law enforcement officers operating in American neighborhoods.

In light of these difficulties, our laws offer alternative means to prosecute suspected terrorists seized on the battlefields of the global war on terrorism. These alternative methods were the subject of *Hamdan v. Rumsfeld*, and they are the focus of ongoing discussions outside of Title 18. However, congressional action to amend the War Crimes Act can prove helpful on a related matter.

The War Crimes Act currently characterizes all violations of Common Article 3 of the Geneva Conventions as felonies. Violations of Common Article 3 include, among other things, "outrages upon personal dignity, in particular humiliating and degrading treatment." Under our military justice system, less serious breaches can be handled through administrative or non-judicial means;

however, again, the War Crimes Act treats all violations of Common Article 3 as felonies.

We welcome congressional efforts to better define which "outrages upon personal dignity, in particular humiliating and degrading treatment" amount to serious breaches worthy of classification as felonies. Such efforts would serve our men and women fighting the global war on terrorism by providing clearly delineated limits.

As recognized and reaffirmed in last year's Detainee Treatment Act, we cannot and will not condone U.S. military personnel engaging in outrageous, humiliating and degrading conduct, as United States law defines such misconduct. Congressional efforts to better define these terms for Common Article 3 purposes will provide needed clarity to the rules of conduct for our military forces.

I look forward to discussing these issues with the committee this morning.

Thank you, Mr. Chairman.

STATEMENT OF MAJOR GENERAL CHARLES J. DUNLAP, JR., BEFORE THE HOUSE ARMED SERVICES COMMITTEE
September 7, 2006

Thank you, Chairman Hunter, Ranking Member Skelton, and members of the committee. Major General Rives, The Judge Advocate General of the Air Force, is currently overseas. Accordingly, I appreciate the opportunity to appear before you today as this committee carefully considers the authority of the United States to prosecute suspected terrorists, consistent with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S.Ct. 2749, (2006).

I start from a premise that legislation is appropriate. As the Supreme Court noted again in *Hamdan*, the President's powers, especially in wartime, are at their greatest when specifically authorized by Congress. While different approaches are feasible, I believe our Nation will be best served by a fresh start to the military commission process.

The United States is more than a nation of laws, it is a country founded upon strong moral principles of fairness to all. Moreover, our country -- to the delight of our adversaries -- has been heavily criticized because of the perception that the pre-*Hamdan* military commission processes were unfair and did not afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."

Now is the time to correct that perception and clearly establish procedures and rules that meet that standard. It will do more than merely correct legal deficiencies; it will help affirm the United States as the leading advocate of the rule of law.

The Uniform Code of Military Justice (10 USC §801 *et. seq.*) (UCMJ) and the Manual for Courts-Martial (MCM) provide superb starting points for the development of a revised commission process. There will, of course, necessarily be differences between current courts-martial procedures and the

rules and procedures for military commissions.

However, many of the processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and at the same time meet the requirements Common Article 3 of the Geneva Conventions. The proposal submitted to Congress by the President reflects an attempt to adapt the UCMJ to the military commission process. I support many of its provisions.

A revised approach to military commissions is not only the right thing to do; it also serves the pragmatic military purpose of helping us win the war on Global War on Terrorism. Success in this war requires the cooperation of many nations around the world. Addressing the Supreme Court's concerns about military commissions will reaffirm our position on the moral and legal high ground. A process fully compliant with Common Article 3 will enhance our standing internationally and empower our allies to embrace the legal reasoning and architecture behind our prosecution of military commission cases. Doing so is plainly in our warfighting interests.

I look forward to discussing these issues with the committee this morning. Thank you, Mr. Chairman.

Geneva Convention Relative to the Treatment of Prisoners of War (Article III)

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05–184. Argued March 28, 2006—Decided June 29, 2006

Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided" the September 11, 2001, al Qaeda terrorist attacks (AUMF), U. S. Armed Forces invaded Afghanistan. During the hostilities, in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the U. S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. Over a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit . . . offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacks authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted habeas relief and stayed the commission's proceedings, concluding that the President's authority to establish military commissions extends only to offenders or offenses triable by such a commission under the law of war; that such law includes the Third Geneva Convention; that Hamdan is entitled to that Convention's full protections until adjudged, under it, not to be a prisoner of war; and that, whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in

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violation of both the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §801 *et seq.*, and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. The D. C. Circuit reversed. Although it declined the Government's invitation to abstain from considering Hamdan's challenge, cf. *Schlesinger* v. *Councilman*, 420 U. S. 738, the appeals court ruled, on the merits, that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable. The court also concluded that *Ex parte Quirin*, 317 U. S. 1, foreclosed any separation-of-powers objection to the military commission's jurisdiction, and that Hamdan's trial before the commission would violate neither the UCMJ nor Armed Forces regulations implementing the Geneva Conventions.

Held: The judgment is reversed, and the case is remanded.

415 F. 3d 33, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI–D–iv, concluding:

1. The Government's motion to dismiss, based on the Detainee Treatment Act of 2005 (DTA), is denied. DTA §1005(e)(1) provides that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay." Section 1005(h)(2) provides that §§1005(e)(2) and (3)—which give the D. C. Circuit "exclusive" jurisdiction to review the final decisions of, respectively, combatant status review tribunals and military commissions—"shall apply with respect to any claim whose review is . . . pending on" the DTA's effective date, as was Hamdan's case. The Government's argument that §§1005(e)(1) and (h) repeal this Court's jurisdiction to review the decision below is rebutted by ordinary principles of statutory construction. A negative inference may be drawn from Congress' failure to include §1005(e)(1) within the scope of §1005(h)(2). Cf., *e.g.*, *Lindh* v. *Murphy*, 521 U. S. 320, 330. "If . . . Congress was reasonably concerned to ensure that [§§1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.*, at 329. If anything, the evidence of deliberate omission is stronger here than it was in *Lindh*. The legislative history shows that Congress not only considered the respective temporal reaches of §§1005(e)(1), (2), and (3) together at every stage, but omitted paragraph (1) from its directive only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within that directive's scope. Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpreta-

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tion. See *Doe* v. *Chao*, 540 U. S. 614, 621–623. Pp. 7–20.

2. The Government argues unpersuasively that abstention is appropriate under *Councilman*, which concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service members, see 420 U. S., at 740. Neither of the comity considerations *Councilman* identified weighs in favor of abstention here. First, the assertion that military discipline and, therefore, the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts, see *id.*, at 752, is inapt because Hamdan is not a service member. Second, the view that federal courts should respect the balance Congress struck when it created "an integrated system of military courts and review procedures" is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system. Rather than *Councilman*, the most relevant precedent is *Ex parte Quirin*, where the Court, far from abstaining pending the conclusion of ongoing military proceedings, expedited its review because of (1) the public importance of the questions raised, (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay, 317 U. S, at 19. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them. Pp. 20–25.

3. The military commission at issue is not expressly authorized by any congressional Act. *Quirin* held that Congress had, through Article of War 15, sanctioned the use of military commissions to try offenders or offenses against the law of war. 317 U. S., at 28. UCMJ Art. 21, which is substantially identical to the old Art. 15, reads: "The jurisdiction [of] courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such . . . commissions." 10 U. S. C. §821. Contrary to the Government's assertion, even *Quirin* did not view that authorization as a sweeping mandate for the President to invoke military commissions whenever he deems them necessary. Rather, *Quirin* recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President already had to convene military commissions—with the express condition that he and those under his command comply with the law of war. See 317 U. S., at 28–29. Neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan. Assuming the AUMF activated the President's war powers, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507, and that those powers include

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authority to convene military commissions in appropriate circumstances, see, *e.g.*, *id.*, at 518, there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21. Cf. *Ex parte Yerger*, 8 Wall. 85, 105. Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Art. 21 or the AUMF, was enacted after the President convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, this Court's task is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. Pp. 25–30.

4. The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949. Pp. 49–72.

(a) The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of *any* evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial. Pp. 49–52.

(b) The Government objects to this Court's consideration of a procedural challenge at this stage on the grounds, *inter alia*, that Hamdan will be able to raise such a challenge following a final decision under the DTA, and that there is no basis to presume, before the trial has even commenced, that it will not be conducted in good faith and according to law. These contentions are unsound. First, because

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Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a prison sentence shorter than 10 years, he has no automatic right to federal-court review of the commission's "final decision" under DTA §1005(e)(3). Second, there *is* a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been*, excluded from his own trial. Thus, review of the procedures in advance of a "final decision" is appropriate. Pp. 52–53.

(c) Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal. The procedures governing such trials historically have been the same as those governing courts-martial. Although this uniformity principle is not inflexible and does not preclude all departures from courts-martial procedures, any such departure must be tailored to the exigency that necessitates it. That understanding is reflected in Art. 36(b), which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "uniform insofar as practicable," 10 U. S. C. §836(b). The "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. The President here has determined, pursuant to the requirement of *Art. 36(a)*, that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements could be satisfied without an official practicability determination, that subsection's requirements are not satisfied here. Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion, *e.g.*, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. It is not evident why the danger posed by international terrorism, considerable though it is, should require, in the case of Hamdan's trial, any variance from the courts-martial rules. The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: The right to be present. See 10 U. S. C. A. §839(c). Because the jettisoning of so basic a right cannot lightly be excused as "practicable," the courts-martial rules must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Art. 36(b). Pp. 53–62.

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(d) The procedures adopted to try Hamdan also violate the Geneva Conventions. The D. C. Circuit dismissed Hamdan's challenge in this regard on the grounds, *inter alia*, that the Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. Neither of these grounds is persuasive. Pp. 62–68.

(i) The appeals court relied on a statement in *Johnson* v. *Eisentrager*, 339 U. S. 763, 789, n. 14, suggesting that this Court lacked power even to consider the merits of a Convention argument because the political and military authorities had sole responsibility for observing and enforcing prisoners' rights under the Convention. However, *Eisentrager* does not control here because, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher*, 119 U. S. 407, they are indisputably part of the law of war, see *Hamdi*, 542 U. S., at 520–521, compliance with which is the condition upon which UCMJ Art. 21 authority is granted. Pp. 63–65.

(ii) Alternatively, the appeals court agreed with the Government that the Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Convention signatory, and that conflict is distinct from the war with signatory Afghanistan. The Court need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i.e.*, signatories], each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons . . . placed *hors de combat* by . . . detention," including a prohibition on "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples." The D. C. Circuit ruled Common Article 3 inapplicable to Hamdan because the conflict with al Qaeda is international in scope and thus not a "conflict not of an international character." That reasoning is erroneous. That the quoted phrase bears its literal meaning and is used here in contradistinction to a conflict between nations is demonstrated by Common Article 2, which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a nonsignatory, so long as the nonsignatory "accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict "in the

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territory of" a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not). Pp. 65–68.

(iii) While Common Article 3 does not define its "regularly constituted court" phrase, other sources define the words to mean an "ordinary military cour[t]" that is "established and organized in accordance with the laws and procedures already in force in a country." The regular military courts in our system are the courts-martial established by congressional statute. At a minimum, a military commission can be "regularly constituted" only if some practical need explains deviations from court-martial practice. No such need has been demonstrated here. Pp. 69–70.

(iv) Common Article 3's requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless. The commission convened to try Hamdan does not meet those requirements. P. 72.

(d) Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment. P. 72.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts V and VI–D–iv:

1. The Government has not charged Hamdan with an "offense . . . that by the law of war may be tried by military commission," 10 U. S. C. §821. Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan. Among the preconditions, incorporated in Article of War 15 and, later, UCMJ Art. 21, for such a tribunal's exercise of jurisdiction are, *inter alia*, that it must be limited to trying offenses committed within the convening commander's field of command, *i.e.*, within the theater of war, and that the offense charged must have been committed during, not before or after, the war. Here, Hamdan is not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001. More importantly, the offense alleged is not triable by law-of-war military commission. Although the common law of war may render triable by military commission certain offenses not defined by statute, *Quirin*, 317 U. S., at 30, the precedent for doing so with respect to a particular offense must be plain and unambiguous, cf., *e.g.*, *Loving* v. *United States*, 517 U. S. 748, 771. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, *e.g.*, the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan. Pp. 30–49.

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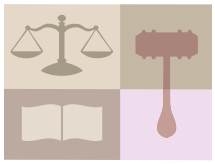
2. The phrase "all the guarantees . . . recognized as indispensable by civilized peoples" in Common Article 3 of the Geneva Conventions is not defined, but it must be understood to incorporate at least the barest of the trial protections recognized by customary international law. The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees. Moreover, various provisions of Commission Order No. 1 dispense with the principles, which are indisputably part of customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. Pp. 70–72.

JUSTICE KENNEDY, agreeing that Hamdan's military commission is unauthorized under the Uniform Code of Military Justice, 10 U. S. C. §§836 and 821, and the Geneva Conventions, concluded that there is therefore no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan. Pp. 17–19.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI–D–iii, VI–D–v, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts V and VI–D–iv, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined. KENNEDY, J., filed an opinion concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Parts I and II. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to all but Parts I, II–C–1, and III–B–2. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined as to Parts I through III. ROBERTS, C. J., took no part in the consideration or decision of the case.

The JAG Who . . .



Facts

A1C Whiskey* allegedly provided alcohol to a minor, A1C Underage. Facing nonjudicial punishment, A1C Whiskey brought A1C Underage to the ADC office. The ADC, Capt Heavydocket, was TDY that day. The defense paralegal obtained a statement from A1C Underage stating A1C Whiskey did not provide him alcohol. A1C Underage did not tell the defense paralegal that he was facing disciplinary action himself. Shortly before making his statement or soon after (the facts are not clear), A1C Underage received an Article 15 for underage drinking. When A1C Underage eventually sought assistance for his Article 15, he was referred to an ADC office at another base.

At the advice of his attorney, A1C Whiskey submitted A1C Underage's statement as part of his Article 15 response. Soon after, additional witnesses established that A1C Underage lied in his statement to the defense paralegal. The ADC representing A1C Underage complained that AIC Whiskey's ADC disclosed A1C Underage's statement in violation of an attorney-client privilege.

Rules of Professional Responsibility at Issue

Air Force Rule of Professional Conduct 1.6 – *Confidentiality of Information*
Air Force Rule of Professional Conduct 5.3 – *Responsibilities Regarding Nonlawyer Assistants*

Take-Aways

In this case, the facts did not support a conclusion that Capt Heavydocket, through his defense paralegal, knowingly established an attorney-client relationship with A1C Underage or that the defense paralegal delayed referring A1C Underage to another ADC office in order to get a statement from him. Before encouraging his client to submit the statement from A1C Underage as part of his Article 15 response, Capt Heavydocket called his CCDC. They determined that, based on what they knew at the time, Capt Heavydocket's responsibilities toward A1C Whiskey favored using the statement.

The Rules do not distinguish between temporary and full-time assistants. Take care to ensure that *all* assistants understand the types of actions that may have legal significance. Also, when witnesses may be subject to disciplinary action for matters related to the interview, take care to document efforts to verify that the witness is not represented and that he or she is not providing the information in conjunction with efforts to obtain legal representation. Although TJAG found no violation in this case, established procedures for logging contacts and verifying representational interests upon discovery of incriminating information might have forestalled later problems.

**Names have been changed*

Questions about this issue, or any other issues related to the Rules of Professional Conduct, should be directed to The Professional Responsibility Division, AF/JAU, afjau.workflow@pentagon.af.mil or DSN 754- 7391, COMM (202) 404-7392.

ASK THE EXPERT

I have been asked to review several Air Force Instructions for legal sufficiency. What should I be looking for?

Judge Advocates are often called upon to conduct legal sufficiency reviews of new or revised Air Force publications (AF pubs) including Operating Instructions (OI) or Supplements to Air Force Instructions (AFI). To accomplish this, JAGs require a working knowledge of AFI 33-360, *Communications and Information*. AFI 33-360 provides detailed guidance and procedures for creating, managing, and disseminating AF pubs at all levels. Newly revised in May 2006, the AFI contains mandatory formatting and legal requirements. Some of these requirements include accessibility, releaseability, Privacy Act, and systems notice (retainability) statements. The AFI also explains how to staff new AF pubs or recommend changes to existing pubs, including the offices that must coordinate. This instruction also provides practical guidance when you want to publish a technical writing, such as an OI for internal office procedures. The "AFI on AFIs" is an essential tool for getting the right guidance to the right people in the right way. If you have any questions on reviewing AFIs or other publications, please contact Major Dawn Zoldi, HQ USAF/JAA, DSN 227-7733.

Our legal office is currently handling a child pornography case that involves videos and photographs. The defense keeps asking for a copy, but we feel uncomfortable releasing the material. What are the rules?

On 27 July 2006, the Adam Walsh Child Protection Act, H.R. 4472, act modified 18 USC § 3509 by proscribing the reproduction and release of child pornography to the defense community. The Act states that such material must stay in the care, custody and control of the court or the government. This means that the review of evidence in child pornography cases is to be conducted only in a government facility while under the court's or government's control. The law directs that "a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant." The act then defines reasonable availability as ample opportunity to inspect the material in the government facility.

If you have any questions, please contact Major Jennifer Hays at AFLOA/JAJM, (703) 767-1531, DSN 297-1539.

If you have a question you would like to pose to our experts, please e-mail your question to Major Rebecca Vernon, rebecca.vernon@maxwell.af.mil.

THE ELEPHANT IN THE ROOM:
A History of the Military's Political Partisanship and the Modern Move to the Republican Party

By Richard Ladue,* Major, USAF

> I had made it clear that I wasn't interested in a political career, but I wanted to be active in the discussion and debate of issues in the country.
>
> *Gen. Colin Powell, Ret.***
>
> When the military is politically active, when it believes it is uniquely aware of certain dangers, when it discusses responding to domestic threats to cherished values, then it edges toward becoming an independent actor in domestic politics.
>
> *Thomas E. Ricks****

It has been said that politics stops at the water's edge.[1] Throughout American history, the United States military has been afforded the same bipartisan national support and treatment. When Americans are polled on their confidence in various institutions, the United States military is consistently ranked first.[2] This lofty position comes amid warnings from presidents and pundits, past and present, about the dangers of a standing army. George Washington, in writing to Congress in September 1776 to persuade them of the need for a standing professional army that could stand toe to toe with British regulars, noted Congressional fear of a standing army and attempted to assuage those fears.[3] Two centuries later in his farewell address to the nation in 1961, President Dwight Eisenhower echoed those same concerns about "unwarranted

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** Interview by Academy of Achievement with Gen. Colin L. Powell, Ret., in Jackson Hole, WY (May 23, 1998), *available at* http://www.achievement.org/autodoc/page/pow0int-1.

*** *The Widening Gap between the Military and Society*, ATLANTIC, at 19 (July 1997).

[1] United States Senate, "Arthur Vandenberg: A Featured Biography," *available at* http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_Vandenberg.htm (last visited Mar. 8, 2006). In a "speech heard round the world" delivered on Jan. 10, 1945, Sen. Arthur Vandenberg (R-MI) (1928-1951), abandoned his isolationist position and became an interventionist alongside Democrat President Harry Truman.

[2] Trust & Confidence in Major Institutions Polls, *available at* http://www.pollingreport.com/institut.htm (last visited Apr. 1, 2006). In a May 23-26 2005 Gallup Poll of 1,004 adults with a margin of error of 3 percent, the military was ranked first of several American institutions (including police, church, banks, the Presidency, the medical system, the U.S. Supreme Court, and others) when the polled individuals were asked which institution they had the most confidence in. This poll mirrored the military's top ranking in a Fox News/Opinion Dynamics poll of institutional confidence conducted May 20-21 2003, all of which are available at the Polling Report website.

[3] Letter from George Washington to the Continental Congress (Sept. 24, 1776), *available at* http://memory.loc.gov/ammem/gwhtml/1776.html (last visited Feb. 9, 2006).

influence" by the "military-industrial complex."[4] Since the 1950s, critics have examined the standing army Washington and Eisenhower worried about, noted a modern gap between military and civilian culture, and found it troubling.[5] Of particular concern to some is the perceived "new" breed of military leader who flouts the professionalism and nonpartisanship of yesteryear's military leader, especially post-Civil War. Some argue this culture gap has produced an estrangement between the military and civilian world at large, while others maintain the only values gap is between a socially conservative military emphasizing the team where individual needs are secondary, and a modern Democratic Party that emphasizes the individual or certain groups arguably at the expense of the whole.[6] What appears to be agreed upon is that a values gap exists.

This article maintains the politicization of the military is not a recent phenomenon, but has existed throughout the nation's history, albeit in more and less pronounced fashions. As cultural and value issues have begun to supplant economic ones as a voting impetus for America as a whole,[7] the military has followed suit by choosing to become more openly involved in politics, and more partisan in nature. This article highlights the history of military partisanship as a retort to those that argue a politically-motivated military is a recent development; if anything, those periods of perceived military political neutrality serve as the exception rather than the rule. With this partisanship, the parties have begun to treat the military as any other interest group or voting bloc, as evidenced by the 2000 and 2004 elections. And while the military could ominously begin to act as other interest groups—demanding policy and resource attention commensurate with their election clout—this article maintains that the military creed and tradition will curtail this impulse. In spite of concern over the military's open political affiliations, the profession of arms remains committed to civilian control of the military, and military personnel exercising their political rights does not endanger that control or portend a Constitutional crisis in the future.

History of Military Political Neutrality

The Country's Origins and the Society of Cincinnati

The founding fathers, like James Madison, Thomas Jefferson, and Samuel Adams, were very vocal in their opposition to a standing army. Adams stated that "it is a very improbable supposition that any people can long remain free, with a strong military power in the very heart of their country…"[8]

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[4] Dwight D. Eisenhower, "Farewell Speech," Jan. 17, 1961, *available at* http://www.eisenhower.utexas.edu/farewell.htm (last visited Mar. 8, 2006).

[5] *See generally* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS (Belknap Press of Harvard University Press 1957).

[6] John Hillen, *The Gap Between American Society and Its Military: Keep It, Defend It, Manage It,* 4 J. NATL'L SECURITY L. 151 (Dec. 2000).

[7] Robert Barro, *The Political Power of the Pew*, BUSINESSWEEK, Aug. 22, 2005, at 4. Most analysts think religious attendance, not income, is now the biggest predictor of political affiliation.

[8] Jonathon Turley, *The Military Pocket Republic*, 97 NW. U.L. REV. 1 (Fall, 2002). Madison, in Federalist 41, opined "the liberties of Rome proved the final victim to her military triumphs: and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale, it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution." Turley notes that Jefferson felt that

Fears over the size of the army were matched by fears over the army's actions. The Society of Cincinnati was founded in 1783 by veteran officers of the Revolutionary War, chief among them Generals Henry Knox and Friedrich von Steuben, in order to obtain "greater honors" for surviving Revolutionary War veterans.[9] As a hereditary foundation, Republicans like Jefferson feared the founding of the Society of Cincinnati was the first step towards a "titled, privileged military aristocracy on the European model"[10] and that it "emphasized the military as a separate caste."[11] Early members of this society felt they "were the saviors of the country, who deserved social distinction outside the army and could best judge the necessary strengthening of state and Continental governments" through reliance on "military virtues, social hierarchy, and strong government" and that the public lacked virtue and yielded to vice.[12]

But it was not only this Society's founding and ideals that had Jefferson and other Republicans concerned. Past and present members of the Continental Army were showing they could translate their military bona fides into political influence. Before the Society's founding, disaffected Continental Army officers in 1783 circulated the Newburgh Addresses—demands for military pensions and back pay that, if unmet, would result in the army taking matters into its own hands. It took a personal appeal from George Washington to put an end to the military's foray into politics.[13] New military recruits later deserted the army and barricaded Congress demanding pay when news of the Treaty of Paris's conclusion reached America in 1783.[14] Daniel Shays, a former Continental Army officer dissatisfied with debts, taxes, and the threat of land seizures, led a rebellion in 1786 that took five months for the ineffectual Massachusetts militia to quash (which it did alone, despite pleas from Congress to surrounding states for militia assistance for fear the rebellion would spread).[15] Then, in 1798, another former Continental Army veteran, Captain John Fries, led a quasi-rebellion against the collection of property taxes by scaring the local federal marshal into releasing prisoners in Bethlehem, Pennsylvania who had refused to pay a new house tax.[16]

While the army (or more frequently former army personnel) at America's birth showed a willingness to flex its muscle in anti-tax or pay disputes, the real touchstone was the army's role in sorting out the great dispute about the size and reach of the federal government. The Republicans, represented in the main by Jefferson, and the Federalists, represented by John Adams and more fervently by Alexander Hamilton, vied

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the military has a "tendency to grow beyond the bounds of necessity" and that "the defense of the country would rest with a militia."

[9] *Id.* at 20, nn.81-84 (citing CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR 354—356 (Univ. of North Carolina 1996)).

[10] H. Richard Uviller and William Merkel, *Fresh Looks: The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 520 (2000) (citing RUSSELL WEIGLEY, HISTORY OF THE UNITED STATES ARMY 77 (Ind. Univ. Press 1984)).

[11] Turley, *supra* note 8, at 21, n.81 (citing CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR at 354—356 (Univ. of North Carolina 1996)). Royster also wrote of how various states, also fearful of the military as a separate caste, experienced movements to deprive members of the franchise or the right to hold office.

[12] *Id.* at 21, nn.81-83. Royster points out that few officers advocated military rule or unRepublican government, however.

[13] Uviller and Merkel, *supra* note 10, at 520.

[14] Id. at 520—521.

[15] Jay Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 19-20 (1997).

[16] William Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U.L. REV. 903, 905-6 (Summer 1991).

to limit or grow, respectively, the power of the new federal government at the expense of the states. Hamilton, Washington's Secretary of the Treasury disgraced into resignation for illicit sexual liaisons with a married woman and his subsequent payoffs to the lady's husband to keep it quiet,[17] continued to influence Federalist thought through his writings. The army was an item of interest to both sides for political reasons. Hamilton wanted "an ideologically purged army of 60,000," while Jefferson and his allies fretted over whether Hamilton would lead this army to Washington to stop Jefferson from being seated as President in 1800, as rumors suggested.[18] In fear of Federalist power grabs, Republican governors from Pennsylvania and Virginia planned to march their state militias to Washington to ensure the transfer of power.[19] While this conflict came to pass without a shot, the Revolutionary Era showed that the military, at least the leadership in the person of the Society of Cincinnati and other individual officers, felt its military virtues and a strong government should prevail over the vice of civilian life. Their views matched that of the Federalists, and became synonymous with the Federalists themselves. But because there was not a true American military tradition at the country's founding—likelier still a true distaste for all things military due to British abuses—Jefferson could be "against" the military and not be labeled unpatriotic. The fact remained that the nascent military had been viewed as an ideological arm of the Federalist movement, and its politics differed little from the Federalists in their patrician, arguably European, outlook on an orderly, virtuous society with a strong central government. A military tradition, nurtured by West Point (established 1802) and representing specifically military interests (as opposed to the politician-soldiers of the American Revolution who held civilian interests paramount), would come of age when officers trained in the profession of arms began to assume leadership positions in America's bloodiest conflict, the Civil War.

The Mexican-American War: The Military Professional as Politician

It is ironic in light of today's distress over our professional military's involvement in politics that the man many consider the country's first "regular, professional soldier,"[20] Winfield Scott, was an overt partisan. Winfield Scott served every president from Jefferson to Lincoln.[21] Scott was not a West Point graduate, but entered service with a commission in 1808 (a commission he personally requested and received from President Thomas Jefferson) as an artilleryman, and throughout his career he embodied the West Point ideals of discipline, drill, and training.[22] He served successfully in the War of 1812 and in numerous other engagements, and took command of the entire army in 1841.[23]

Scott's politics were equally clear cut, although less successful. Echoing the sentiments of Hamilton and other Federalists, and hewing to the same political vein, Scott was a Whig who eschewed reliance on militia and advocated a standing, professional

[17] Robert F. Blomquist, *The Trial of William Jefferson Clinton: "Impartial Justice," the Court of Impeachment and Ranked Vignettes of Praiseworthy Senatorial Rhetoric*, 84 MARQ. L. REV. 383, 402-3 (Winter 2000).

[18] Uviller and Merkel, *supra* note 10, at 521.

[19] Id. at 522.

[20] E.A. Harper, Book Note, 163 MIL. L. REV. 163 (March 2000) (reviewing JOHN S. D. EISENHOWER, AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT (2000)).

[21] *Id.*

[22] *Id.* at 166.

[23] Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4, 7 (Dec. 1997).

army.[24] His affiliations did not serve him so well during the Mexican-American War (1846-1848). The President at the time, Democrat James Polk, correctly suspected both Scott and General Zachary Taylor of being Whigs, so he directly supervised many of their military decisions and appointed people to military positions to counter Scott's influence.[25] So while Scott was victorious in the Mexican-American War, he was never embraced politically, possibly due to his "lack of guile, his opinionated manner, or his peacock air."[26] To wit, Scott wrote a letter to Secretary of War William Marcy during the Mexican-American War that Marcy and President Polk, in a brazen political act, provided to the newspapers for publishing. They highlighted the letter's beginning ("As I sit down to a hasty plate of soup") to belittle Scott for his vanity. Scott eventually won the Whig nomination for U.S. President in 1852, but lost the general election to Franklin Pierce. Many other senior officers of the Army "indulged in partisan politics at least as much as Scott."[27]

Polk had attempted to walk a fine line between winning "Polk's War" and denying Scott the hero's glory he might otherwise have been accorded by controlling him through the Secretary of War and highlighting his personal quirks that were otherwise easily discerned. Scott, with his open Whig affiliation, presented an easy political target to Polk. Open political affiliation by Scott while on active duty had, at the least, complicated the military operations in Mexico and presented a fractured diplomatic front to Santa Anna. Further, Polk's micromanagement of the war would set the precedent for future presidents, tired of middling military leadership, to make their own tactical and operational decisions. But the tension between Polk and Scott was borne of political differences, not military policy decisions. That would not always be the case.

The Civil War and George McClellan: Nonpartisanship & Military Acceptance of Civilian Control

General George McClellan is also considered by some to be the first "thoroughly professional officer," and some have argued he presented "a new departure in civil-military relations" with his acquiescence to civilian control of the military.[28] McClellan graduated second from West Point in 1846, and was the General in Chief of the Union Army in the Civil War from November 1861 (replacing Scott) until Lincoln replaced him in November 1862 for temerity in leading the Union Army.[29] But while McClellan may have never questioned civilian control of the military, his "political allegiance was to the Democratic Party rather than to Lincoln and

[24] Harper, *supra* note 20, at 167. Eisenhower points out that over half of the army Scott commanded went home to Tennessee, Illinois, Georgia, and Alabama. The army was halfway to Mexico City and had defeated Santa Anna at numerous battles, but "the very fact that a conquering army could melt away on the verge of ultimate victory illustrates that this country, while capable of foreign campaigning, still had an immature military system."

[25] Steven Calabresi and Christopher Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 691 (Summer 2003). Many in the Whig Party called the Mexican-American War "Polk's War" due to his "assertive and occasionally partisan management of the Mexican War."

[26] Harper, *supra* note 20, at 170.

[27] Russell F. Weigley, *The American Military and the Principle of Civilian Control from McClellan to Powell*, 57 J. MIL. HIST. 27-58 (Oct. 1993).

[28] *Id.* at 37.

[29] Shawn Shumake, Book Note, 150 MIL. L. REV. 434 (Fall 1995) (reviewing JOHN WAUGH, THE CLASS OF 1846, FROM WEST POINT TO APPOMATTOX: STONEWALL JACKSON, GEORGE MCCLELLAN AND THEIR BROTHERS (1994)).

the Republicans."[30] He exhibited "contempt bordering on insubordination" expressed in letters to his wife, calling Lincoln "a well meaning baboon."[31] His affronts and evident distaste for Lincoln and the Republicans were not limited to secret correspondence with his wife. In late 1861, Lincoln and the Secretary of State, William Seward, called upon McClellan at McClellan's house, but he was out, so they waited. When McClellan returned, he refused to see the President, strolled past Lincoln, and went to bed. Lincoln continued to sit there for an hour in silence, apparently stunned by McClellan's actions.[32] McClellan's slights were not limited to the personal, either. By late 1861, McClellan was keeping his war plans to himself and away from Lincoln, including the decision to postpone major operations until the Spring of 1862.[33] Then, a mere two years after his removal as commander of the Union Army, McClellan ran for president against Lincoln as a pro-war Democrat—perhaps as rare in the 1864 election as it is today. McClellan wanted to prosecute the war to a successful conclusion, but the Democrat platform was anti-war. McClellan was routed on Election Day, losing over 70% of the military vote in the process, and resigned from the Army that same day.[34]

Thus, despite arguments that McClellan and subsequent military "professionals" never questioned civilian policies, publicized questions and personal snubs that would be met with Uniform Code of Military Justice action or demands for resignation today were common in the past. Differences over policy and politics continued, and complaints over presidential interference in military operations persisted. A century later both politics and policy would continue to prove contentious.

Cold War Conflicts: The "Return" to Military Partisanship

From Summer 1950 until April 1951, President Harry Truman and General Douglas MacArthur endured a relationship that harkened back to Lincoln—McClellan, which Truman realized when he declared "MacArthur was a worse double crosser than McClellan."[35] Give 'em Hell Harry stayed true to form in his relations with MacArthur, deriding him as "Mr. Prima Donna," "Brass Hat," "Five-Star MacArthur," and "a supreme egotist who regarded himself as a god."[36] In 1950 the Joint Chiefs of Staff recommended MacArthur as their sole choice to be United Nations Commander of forces in

[30] Weigley, *supra* note 27, at 34. Weigley is adamant that McClellan's treatment was due to Lincoln's pedigree as a "backwoods prairie lawyer" and that McClellan did not challenge Lincoln's policy, or that Lincoln's policies were indecipherable and McClellan was simply trying to ascertain Lincoln's policies.

[31] Shumake, *supra* note 29, at 437.

[32] *See generally* Jay Winik, *Commanding the Commanders*, PUBLIC INTEREST (Winter 2003) (reviewing ELIOT A. COHEN, SUPREME COMMAND (2002)). *But see* Rafuse, *infra* note 33, discussing the fact McClellan may have had typhoid fever when Lincoln and Seward attempted to meet him.

[33] Ethan S. Rafuse, *Typhoid and Tumult: Lincoln's Response to General McClellan's Bout with Typhoid Fever During the Winter of 1861 – 62*, JOURNAL OF THE ABRAHAM LINCOLN ASSOCIATION (Summer 1997), *available at* http://www.historycooperative.org/journals/jala/18.2/rafuse.html (last visited Sept. 24, 2006).

[34] Maury Klein, *Judging Lincoln: The Passion of Chief Justice Williams*, 9 ROGER WILLIAMS U. L. REV. 213 (Fall 2003) (reviewing FRANK J. WILLIAMS, JUDGING LINCOLN (2002)). Klein, in reviewing the book, notes this was the first time soldiers in the field were allowed to vote absentee, so such an overwhelming rejection from the men he'd spent his life leading must have been devastating (if known at that time).

[35] Michael E. Long, Book Review, MILITARY REVIEW 78 (Nov.-Dec. 2003) (reviewing ARNOLD OFFNER, ANOTHER SUCH VICTORY: PRESIDENT TRUMAN AND THE COLD WAR, 1945-1953 (2003)).

[36] *Id.*

Korea after the North Koreans attacked South Korea, and MacArthur's views and policy opinions on the conduct of the Korean War continually conflicted with Truman's.

Truman worried about MacArthur making policy for the Korean War.[37] "Against the President's direct policy of a cease-fire proposal, MacArthur had issued a communiqué to the Chinese communists in which he threatened to expand the war into the Chinese mainland," contrary to Truman's desire that the war be narrowly limited to Korea to avoid massive Chinese involvement.[38] MacArthur wanted to broaden the range of attack to bomb supply routes from China to North Korea.[39] Truman insisted that MacArthur be fired and not allowed to retire, which some argue helped derail any hopes Truman had for another term as President.[40]

This was not the first time a Democrat, and others, had been both mindful and apprehensive of MacArthur's political machinations. Called the "political soldier," MacArthur was "prepared to use his prestige as a soldier to influence civil policy decisions."[41] Future President Dwight Eisenhower commented "most of the senior officers I had known always drew a clean-cut line between the military and the political…but if General MacArthur ever recognized the existence of that line, he usually chose to ignore it."[42] Eisenhower had seen MacArthur's politically-motivated actions first-hand. After MacArthur had been appointed Army Chief of Staff by Herbert Hoover in 1930, he was forced to handle thousands of unemployed veterans marching on Washington in 1932 demanding immediate payment of a bonus Congress had promised. MacArthur, believing that this was Communist-influenced or led, was appalled by the actions of these former World War I veterans, some of whom he'd led. He believed that 90% of these men and their families were not veterans but rather "criminals, men with prison records for such crimes as murder, manslaughter, rape, robbery, burglary, blackmail, and assault."[43] President Hoover ordered the city of Washington, D.C. cleared of marchers, and MacArthur personally led the troops (in uniform, against the advice of aide Eisenhower) that burned the tents of those protesting. Images from this "clearing out" shocked some of the nation, but others applauded MacArthur's actions. Some describe this action in stark political terms, claiming that MacArthur "played to the right wing of the Republican Party all of his life," and that this action "solidified his base."[44]

Franklin Roosevelt referred to MacArthur as "one of the two most dangerous men in America."[45] Roosevelt was concerned that MacArthur would use the Depression to seize power outside the bounds of the Constitution, so kept him as

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[37] *Id.* Truman stated "There cannot be two policy makers at the head of government."

[38] Christopher Yoo, Steven Calabresi and Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945 – 2004*, 90 IOWA L. REV. 601, 611 (2005) (citing DAVID MCCULLOUGH, TRUMAN 348 (1992)).

[39] *Congress and the Issues of the Douglas MacArthur Affair*, CONGRESSIONAL DIGEST, vol. 30, no. 5, 129 (May 1951).

[40] Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 MIL. L. REV. 52, n.34 (1998) (noting D. CLAYTON JAMES, COMMAND CRISIS: MACARTHUR AND THE KOREAN WAR 6 (1982)). Scott points out that MacArthur learned of his relief from a public radio broadcast.

[41] W. MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880—1964 141 (Laurel 1978).

[42] *Id.* at 148. MacArthur also equated pacifism with Communism—"pacifism and its bedfellow, Communism" were equally reprehensible.

[43] *Id.* at 150.

[44] THE AMERICAN EXPERIENCE: MACARTHUR (PBS 1999) (comments by Stephen Ambrose).

[45] D. CLAYTON JAMES, THE YEARS OF MACARTHUR: 1880—1941 411 (Boston: Houghton Mifflin Co. 1970). Roosevelt felt the other most dangerous American was Huey Long.

his Army Chief of Staff and assigned him the task of administering the Civilian Conservation Corps,[46] a task MacArthur likely found beneath him. MacArthur also chafed at the thought that Roosevelt's socialist New Deal would be funded through cuts to the military; he told Roosevelt "when we lose the next war and an American boy is writhing in pain in the mud with a Japanese bayonet in his belly, I want the last words that he spits out in the form of a curse to be not against Douglas MacArthur but against Franklin Roosevelt."[47] Roosevelt was enraged, and told MacArthur not to speak to the President that way, and MacArthur immediately offered his resignation. Roosevelt refused it.[48] Shortly after Pearl Harbor, when Roosevelt "fired" the Pacific commanders unprepared for the Japanese attack, some believe he spared MacArthur "because the Republican Party would have been up in arms. MacArthur was their President—was their General."[49] Roosevelt's view of MacArthur as a political opponent was corroborated when Congressman Albert Miller of Nebraska supported a MacArthur Presidential candidacy in 1944, writing MacArthur that "unless this New Deal can be stopped our American way of life is forever doomed."[50] MacArthur responded "I do unreservedly agree with the wisdom of your comments." However, this correspondence became public and MacArthur backed down.[51]

Immediately after securing the Democratic nomination in 1944, Roosevelt hoped to pacify conservatives in the U.S. by linking himself to MacArthur, choosing to tour Pacific military installations with MacArthur figured prominently at his side. Nor was MacArthur tone deaf to the politics of the situation—he used the opportunity to argue for the emancipation of the Philippines (to whom he had promised "I will return" in the face of the Japanese onslaught) by hinting at the reelection difficulty Roosevelt might face.[52] This give and take has led some to believe the two struck a sub rosa agreement that MacArthur would not actively work to defeat Roosevelt in the election, and that Roosevelt would push for the liberation of the Philippines, led by MacArthur.[53] To wit, with the 1944 election only days away, MacArthur's forces claimed the crucial island of Leyte in the Philippines was secure, even though American forces had just landed; journalists who questioned why this claim was made were told "the elections are coming up in a few days."[54] Shortly thereafter in December, MacArthur was promoted to the five star rank. Two presidents had viewed MacArthur to be as much a politician as a soldier; it is quite probable MacArthur viewed himself the same way. He was another example of the political military, but in spite of this when he was dismissed he "faded away"[55] instead of attempting an overthrow of the government or some other act of political retribution. This new 20th Century tension between the military and the Democratic Party would not end with MacArthur. If anything, the Truman-MacArthur conflict would serve as a harbinger.

Vietnam and Beyond

The Vietnam War saw two rebirths. The first was the Democratic Party, which changed from a party of blue collar labor unions and party politics dominated by political machines, to a party of "highly educated,

[46] *Id.*
[47] *Id.* at 428—429.
[48] *Id.*
[49] AMERICAN EXPERIENCE, *supra* note 44 (comments by Stephen Ambrose).
[50] Manchester, *supra* note 41, at 362.
[51] *Id*.
[52] *Id.* at 369.
[53] *Id.* at 371.
[54] *Id.* at 371-73.
[55] *Id.* at 681.

affluent, moralistic" individuals who were "alienated from the worlds of business and commerce."[56] The second was the United States armed forces, which became an all volunteer force in 1973, and which began a long climb back to respectability and professional competence from the depths of what most concede was a defeat in Vietnam. Considered jointly, they represent the point at which the modern divide between the military and liberal politics diverge and clash. Some argue the military critique of modern liberal politics grew from Democrats' opposition to the war equaling "contempt for all things military, including baby killers"[57] in uniform, from the weakness of the U.S. military during the inept Carter years, from boastful Democratic opposition to the Reagan military buildup, and from the fact Democratic lawmakers voted overwhelmingly against going to war in Kuwait and Iraq in 1991, the eventual victory that the military proudly points to as a sign of their return to glory.[58] Others contend that after Vietnam, "the Democratic Party virtually abandoned the military, offering antimilitary rhetoric and espousing reduced defense spending."[59] With an all volunteer force, the military began a self-selection process that attracted those "who embrace traditionally conservative views on social issues."[60] The military has been equally willing to choose political sides and critique Democratic policies. The transition from World War II nonalignment to modern military partisanship was swift and aided by the fervor over the Vietnam War. General George C. Marshall, Chief of Staff from 1939 to 1945 and Secretary of State from 1947 to 1949, refused to vote "to preserve his neutral, apolitical status while serving as a fighting man."[61] In 1976, only 33% of military officers claimed Republican status; by 1999, 64% of military officers considered themselves Republican, and only 8% said they were Democrats.[62] "The students who protested the war became the tenured faculty and civilian government leaders of today…they

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[56] ALONZO L. HAMBY, LIBERALISM AND ITS CHALLENGERS: FROM FDR TO BUSH 277—278 (1992). Hamby described the new liberal coalition as an "intellectual elite with a mass-following of liberal-minded, highly educated middle class people" who turn to the New York Times, the Washington Post, and the Atlantic Monthly for their "consensus viewpoints." He phrased this alliance the New Politics.

[57] Adrian Cronauer, *The 23rd Charles l. Decker Lecture in Administrative and Civil Law,* 183 MIL. L. REV. 176 (Spring 2005). From a military lecture given at the U.S. Army JAG School, Charlottesville, Virginia, on April 2, 2004. Cronauer was the character upon whom Robin Williams' character in "Good Morning, Vietnam" was based. Of the movie, he comments: "I take a lot of pride in "Good Morning, Vietnam" because of the number of people who have told me it was the first film that began to show Americans as they really were in Vietnam rather than murderers and rapists and baby killers and dope addicts and psychotics." As Cronauer maintains, because of Williams' portrayal of him "a lot of people are surprised to learn that I'm a lifelong, card carrying Republican" and states he was very active in the Bush—Cheney 2004 campaign, serving as the National Vice Chairman of Veterans for Bush.

[58] Tom Donnelly, *Why Soldiers Dislike Democrats: In the Mythology of Military Life, the Democratic Party is the Enemy*, THE WEEKLY STANDARD, Dec. 4, 2000, at 14.

[59] Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 60 NAVAL WAR C R 9 (Summer 2002).

[60] James Kitfield, *The Pen and the Sword: It's the Press vs. the Pentagon in a Clash of Two Mighty – And Increasingly Polarized – Cultures*, GOVERNMENT EXECUTIVE, Apr. 2000, at 18.

[61] Kirk Kicklighter, *A Dangerous Alienation: Citizen vs. Soldier*, DUKE UNIVERSITY ALUMNI MAGAZINE, Mar.-Apr. 2000, *available at* http://www.dukemagazine.duke.edu/alumni/dm27/dm27.html (last visited Sept. 24, 2006).

[62] *Id.* (discussing the Triangle Institute for Security Studies, *Project on the Gap Between the Military and Civilian Society*, available at http://www.poli.duke.edu/civmil/ (last visited Sept. 24, 2006)).

are highly skeptical of the military. The junior officers who fought became the military leadership we have now…they've vowed never again to let the military go through what happened in the late Sixties and Seventies."[63] The military, especially its officers, came out of Vietnam with a sense that they "had been abandoned by American liberals."[64] These Vietnam era junior officers may have taken their cue from their leadership—the Joint Chiefs of Staff.

During the height of the Vietnam War in August 1967, Democrat Senator John Stennis chaired the Preparedness Subcommittee hearings reviewing the conduct of the Vietnam War.[65] The debate between Secretary of Defense Robert McNamara (staunchly opposed to expanding the war into Laos, Cambodia, and North Vietnam) and the Joint Chiefs of Staff (or JCS, who desired expansion of the war to include at the least bombing of North Vietnamese ports) came to light in the glow of the fireworks at this hearing.[66] McNamara argued for a limited war, maintaining loyalty to what he thought were President Lyndon Johnson's policy decisions on the war; in response, and under pressure from officers below them, the JCS decided to resign en masse.[67] By the following morning, that decision had been reversed—Chairman of the Joint Chiefs of Staff General Earle Wheeler called their plan mutinous, and convinced the others that Johnson would "just get someone else…and we'll be forgotten."[68] President Johnson feared a "military revolt backed by right wingers in Congress,"[69] so McNamara was transferred to the World Bank and the JCS was arguably given wider latitude in bombing targets.[70] The JCS had voiced their opposition to McNamara's opinion on the conduct of the war, and provided their voice and considerable political weight to the policy discussion. While they discussed wholesale resignation based on differences with Johnson and specifically McNamara over policy, they never advocated the overthrow of the government or demanded a leadership change based on party.

Whether this incident was wholly policy-based, or if the policy disagreement was politically motivated, remains unclear. What is clear is that the tension between the military and Democrat Presidents and the Democratic Party would, in the future, include a political tone, whether the issue was completely social or policy-based. Vietnam was the conflict that taught the military that challenging civilian leaders privately would not work, as seen with the publicized Stennis hearings and other military attempts to preclude President Johnson and McNamara picking individual, tactical targets for the air campaign Operation ROLLING THUNDER. When protesters went after military members during Vietnam instead of confining their protests to the policy makers, the predictable and legitimate military response provided the military an avenue of public, partisan expression.[71]

More recently, military leaders continue to publicly challenge Democrat Presidents where they feel military interests

[63] *Id*.

[64] Benjamin Wallace-Wells, *Corps Voters*, WASHINGTON MONTHLY, Nov. 2003, at 30.

[65] George C. Herring, Address at United States Air Force Academy Harmon Memorial Lecture at Colorado Springs, Colorado 1990: *Cold Blood: LBJ's Conduct of Limited War in Vietnam*, *available at* http://www.usafa.af.mil/df/dfh/docs/Harmon33.doc (last visited Sept. 24, 2006).

[66] *Id.*

[67] *Id.* at n.39.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Colonel Charles Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 362—365 (Summer 1994).

are at stake. And those doing the challenging are not "playing to the right wing of the Republican Party" as some feel MacArthur did. General Colin Powell, as Chairman of the JCS in the Fall of 1992 immediately after Bill Clinton was elected President, came out publicly against Clinton's plan to lift the military's ban against homosexuals in uniform. General Powell said "open homosexuality would have a very negative effect on military morale and discipline" and told Naval Academy midshipmen that "if it strikes at the heart of your moral beliefs, then you have to resign."[72] He was very adamant when responding to Representative Pat Schroeder's equating homosexual activity to race when he stated "skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument."[73] Most feel his defense of the military's policy on homosexuals, combined with the perception that Clinton was at best ignorant or worse harbored anti-military feelings, resulted in the "don't ask, don't tell" policy enunciated in 1993. Republicans and military leaders feared the 1992 election would usher in Democrats who "would undermine the masculine as well as moral virtues that had won victory over the Communist empire."[74]

The dispute between the military and liberal politics, specifically gays in the military, has not been settled. In 1990, the American Association of Law Schools (AALS) voted to require all member schools to exclude employers who discriminate on grounds of sexual orientation from campus recruiting activities, and schools began enforcing this prohibition by preventing military recruiting on campus, ironically using the 1993 Clinton "Don't Ask, Don't Tell" policy as proof that the military discriminated against homosexuals.[75] In 1994, Republican U.S. House Representative Gerald Solomon added a limiting amendment to the annual defense appropriations bill that proposed withholding Department of Defense funding from any school with a policy of denying the military entry to campuses for recruiting purposes, which passed in 1995.[76] After September 11, 2001, the Department of Defense began demanding strict compliance, and the AALS allowed schools to exempt the military from their schools' nondiscrimination policies.[77] In 2004, the Solomon Amendment was expanded to require not only military access to law school campus recruiting, but access "in a manner that is at least equal in quality and scope" to that provided other employers.[78] The conflicts between those liberal "protesting students who became tenured professors" and a conservative military continued. As Operation IRAQI FREEDOM continues, the tension between conservative military personnel and liberal activists has only increased.

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[72] 139 Cong. Rec. S7603, S7606 (daily ed. Jun. 22, 1993) (statement of Sen. Coats), *available at* http://dont.stanford.edu/regulations/HomosexualityDebate.html (last visited Mar. 8, 2006).

[73] *Id.*

[74] Weigley, *supra* note 27, at 31.

[75] Michael Collins, *Current Event: FAIR v. Rumsfeld*, 13 AM. U.J. GENDER SOC POL'Y & L. 717, 718 (2005).

[76] *Forum for Academic & Institutional Rights v. Rumsfeld,* 390 F.3d 219, 225-26 (2004). On March 6, 2006, the Supreme Court handed down its decision on this case, ruling 8-0 (Justice Alito recused himself, as he was a member of the 3rd Circuit when the case was heard at that federal circuit court) that law schools must allow military access to law school campuses as other law firms and employers are allowed access, in order to receive federal funding.

[77] Collins, *supra* note 75, at 718.

[78] *Id.* (citing Pub. L. No. 108-375, 552, 118 Stat. 1811 (2004)).

Walter Reed Army Medical Center treats many of the troops that have been injured in Iraq since the conflict started in 2003. Most of the prosthetic limb replacements and physical therapy that veterans undergo occur at Walter Reed. Since March 2005, Code Pink Women for Peace have been protesting outside the main entrance to the hospital, holding signs that say "Maimed for Lies" and "Enlist here and die for Halliburton."[79] This group also uses props like mock caskets lined up on the sidewalk to represent the death toll in Iraq, and the group usually demonstrates on Friday evenings, "a popular time for the family members of wounded soldiers to visit the hospital."[80] Kevin Pannell, 1st Cavalry Division, had both legs amputated after a grenade attack near Baghdad in 2004 and was admitted to Walter Reed. He says he tried to ignore the anti-war activists camped out in front of the hospital, but he considers the flag-draped coffins in front of the hospital the most distasteful thing he has ever seen, and feels "Walter Reed is a sheltered environment and it needs to stay that way…we don't like them [speaking of the anti-war protesters]…"[81] The protesters argue that the hospital is the "most appropriate place for the demonstrations and that the vigils are designed to ultimately help the wounded veterans."[82] Protests over the Vietnam War are being replayed a quarter century later, with the same protagonists.

The difference now is the military has become a key, public part of the Republican base in a 50-50 nation, and more importantly, in 50-50 states. With a more conservative military due to an all volunteer force, and with military leaders willing to speak out on both policy and political issues, it would take the Republican Party effort and the right candidate to bring them into the Republican fold. And as it turns out, in an evenly divided nation, a nearly monolithic military vote came none too soon for Republican candidates.

Election 2000: The Military Becomes Part of the Republican Base

As the military leadership consistently voiced its opposition to Democratic policies and Presidents, and politics came to rest less on economic factors and more on social ones, the natural assumption was that military voters—active duty and retired—would trend Republican of their own accord. Upon closer inspection, it took a coordinated effort.

The Military Decides the Republican Nominee

While preparing for the 2000 Republican primary for president, Arizona Senator John McCain's election team discovered military veterans had not voted as an overwhelming bloc since 1980, when they helped elect Ronald Reagan.[83] Despite assumptions about military voting and military veteran voting, exit polling indicated that Clinton won 41% of the veteran vote, President George H.W. Bush won 37%, and Ross Perot won 22%.[84] Then, in 1996, President Clinton won larger numbers of veterans than Senator Bob Dole, despite Dole's World War II service.[85] The McCain campaign felt that the Dole campaign had "made no effort for veterans."

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[79] Greg Pierce, *Salt on Wounds*, WASHINGTON TIMES, Aug. 26, 2005, at A07.

[80] *Id.*

[81] Marc Morano, *Anti-War Protests Target Wounded at Army Hospital*, CNSNews.com, (Aug. 25, 2005), *available at* http://www.cnsnews.com/ViewSpecialReports.asp?Page=%5CSpecialReports%5Carchive%5C200508%5CSPE20050825a.html (last visited Sept. 21, 2006).

[82] *Id.*

[83] Alison Mitchell, *McCain Enlisting Fellow Veterans to Back His Campaign*, N.Y. TIMES, Nov. 11, 1999, at 24.

[84] *Id.*

[85] *Id.*

McCain's campaign realized that "New Hampshire, South Carolina, Washington and Virginia have large numbers of families with ties to the military," and to appeal to military families and members McCain highlighted the 12,000 military families on food stamps, citing Clinton as "AWOL—Absent Without Leadership."[86] With New Hampshire and South Carolina's early primaries, and those states' large population of active duty military and military veterans, McCain realized that locking up the military vote would nearly be akin to locking up the Republican nomination. McCain—fresh from his drubbing of Bush in New Hampshire's February 1, 2000 Republican presidential primary—and Bush both viewed South Carolina as the decisive state, with the decisive "votes of veterans and military families, who make up a greater percentage of the population than any other state in the country."[87] Bush eventually portrayed McCain as too liberal for South Carolina, and won the primary 53.4% to 41.9%.[88] South Carolina and its military voters and veterans had been identified for their key role in selecting the Republican nominee, especially their crucial position after the Iowa caucuses and New Hampshire primary. South Carolina's military voters, veterans, and families would also be the first Southern voters helping select the Republican candidate; as the first southern state to vote, it is a bellwether for the South and the candidate's strength in what is the Republican Solid South.

The 2000 Election and Its Aftermath—Cementing the Republican Military Vote and the "Democratic Party's War on the Military."[89]

The 2000 Presidential election came down to the state of Florida, and President George W. Bush won the state, and the election, by 537 votes. In a Military Times post-2000 election poll, over two-thirds of respondents nationally (active duty military, their families, and veterans) voted for George W. Bush, compared to 14% for Al Gore, and 87% of respondents said they voted in 2000.[90] Florida has approximately 159,000 people in military service, which more than likely swung the election to President Bush.[91] Pursuing the military-affiliated voter began long before George W. Bush became the Republican candidate. The Republican Party began tailored, niche campaigning (what Karl Rove would call narrowcasting) to capture the military vote by running full page ads touting the Republican Party's commitment to military spending, including pay raises, in the Army Times, Air Force Times, and the Navy Marine Corps News as early as December 1999.[92] Bush also enjoyed instant

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[86] *Id*.

[87] Terry Neal and Thomas Edsall, *Polls Show McCain Surging in South Carolina*, WASHINGTON POST, Feb. 4, 2000, at A01.

[88] Federal Election Commission, "2000 Presidential Election Results," *available at* http://www.fec.gov/pubrec/fe2000/2000presprim.htm#SC (last visited Sept. 21, 2006). Bush campaign operatives allegedly spread rumors that McCain wanted to remove the pro-life plank from the Republican Party platform, that his wife Cindy McCain had drug problems, that he abandoned his fellow Vietnam veterans, and that he had fathered illegitimate children. *See* JAMES MOORE AND WAYNE SLATER, BUSH'S BRAIN: HOW KARL ROVE MADE GEORGE W. BUSH PRESIDENTIAL 256—257 (Wiley Publishers 2003).

[89] Mackubin Thomas Owens, *The Democratic Party's War on the Military,* WALL STREET JOURNAL, Nov. 22, 2000, at A22.

[90] Gordon Trowbridge, *Who You Chose for President, And Why*, ARMY TIMES, Oct. 11, 2004, at 14.

[91] Matthew Stannard, *Armed With the Ballot: Military Voters Increasingly Vocal With Their Opinions*," S.F. CHRONICLE, Oct. 12, 2004, at A1.

[92] Pat Towell, *GOP Advertises Differences with Commander in Chief*," CONGRESSIONAL QUARTERLY, Dec. 10, 1999.

credibility with the military based on "party affiliation, policy positions, his running mate, his advisors, and his father."[93] While Vice President Gore served in Vietnam, he did so as a journalist—an occupation that was sometimes the object of military animus for its perceived part in the Vietnam debacle.[94] And after the Clinton impeachment for activities a socially conservative military would particularly find reprehensible and claims that the Clinton-Gore years had led to a decline in the military's readiness, it was no surprise that then-Governor Bush won the military vote.

More crucial for long-term politics was the aftermath of the 2000 election. The Gore campaign's publicized scrutiny of military absentee votes was seen as "one more battle in the ongoing culture war between the core of the Democratic Party and the U.S. military."[95] Mackubin Owens, Associate Dean at the U.S. Naval War College, wrote that the "twitching carcass" of the Democrat Party fully backed Gore when he stated during the Democratic primaries that any appointment he made to the JCS would have to pass his litmus test—gays openly serving in the military.[96] Some said Gore and the Democratic Party had come to see military culture—reliant on unit cohesion, morale, courage, a sense of honor, duty, discipline, and loyalty—as something to be "eradicated in the name of multiculturalism, feminism and the politics of sexual orientation."[97] Owens related how Madeline Morris of Duke Law School, Special Consultant to the Secretary of the U.S. Army in 1997, criticized the military's culture as "masculinist" and advocated an "ungendered vision" reliant not on "macho posturing" but on unit cohesion "achieved by compassion and idealism."[98] So when Gore election attorney Mark Herron sent out a memo to Florida Democratic elections attorneys instructing them how to invalidate military absentee ballots (which eventually numbered over 2,400 in Florida),[99] the military reaction was vehement and loud. As the Gore campaign attempted to scrutinize absentee ballots, overseas military personnel and their families said they were "pretty disgusted," that "we got ripped off," and that "we'll obey orders if Gore wins, but there's something wrong with the system."[100] Other active duty military members noted "they want to let Florida Democrats vote twice, but they won't let us vote even once."[101] Some overseas military personnel argued that their absentee ballots were sent 4th class instead of 1st class and that they were cheated out of their vote, a fact never proven but that some critics cited as "a tactic by a Democratic administration designed to deny servicemen and women their right to vote, since it is widely assumed based on past elections that most overseas military votes will end up in the Republican column."[102] Some American military families in Germany reportedly flew the American flag "upside down—a traditional sign of distress—at their places of residence as a result of the presidential

[93] Steven Myers, *The 2000 Campaign: Support of the Military*, N.Y. TIMES, Sept. 21, 2000 at A1.
[94] *Id.*
[95] Owens, *supra* note 89.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Jed Babbin, *Disenfranchised Defenders: Avoiding a Repeat of 2000*, NATIONAL REVIEW ONLINE (Aug. 19, 2004), *available at* http://www.nationalreview.com/babbin/babbin200408190823.asp (last visited Sept. 24, 2006).
[100] Thomas Ricks, *Challenging of Overseas Ballots Widens Divide Between Military, Democrats*," WASHINGTON POST, Nov. 21, 2000, at A18.
[101] Tom Donnelly, *Why Soldiers Dislike Democrats*, THE WEEKLY STANDARD, Dec. 4, 2000, at 14.
[102] Jon E. Dougherty, *Military Anguishes Over Missing Ballots*," WORLDNETDAILY (Nov. 14, 2000), *available at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=15601 (last visited Sept. 22, 2006).

election and subsequent balloting difficulties."[103] Bush won the election, but the battle scars from Florida remain. The Gore campaign's actions at the end of the 2000 election likely hurt Senator John Kerry's efforts to win the military vote in 2004.

Election 2004: Military Turnout for the GOP

U.S. military voter participation reached an all-time high in the 2004 election, reaching nearly 80%.[104] Again, conflict arose over alleged Democrat suppression of absentee military ballots, this time in the state of Pennsylvania. The U.S. Department of Justice, in October 2004, requested Pennsylvania Democratic Governor Ed Rendell to extend the deadline for absentee ballot (including absentee military ballots) counting until November 17, 2004, because of ballot confusion over Ralph Nader's inclusion on the ballot, but a federal judge sided with Rendell in refusing to extend the ballot deadline.[105] So despite Kerry's Vietnam War combat experience in the Navy, less than a month prior to the vote charges flew that the Democrat Party was trying to suppress the military absentee vote in Pennsylvania, helping harm any chance Kerry had to lessen the divide between his party and the military voter with his military background. This came as a Military Times poll showed Bush leading Kerry 73% to 18% among military voters, that 60% of respondents identified themselves as Republicans, 13% Democrats, and 20% independents, and more than two-thirds said Kerry's anti-war activities after returning from Vietnam would impact how they vote.[106] This was followed by the media criticizing popular and recently retired General Tommy Franks for endorsing Bush, as well as Kerry's comments about Operation IRAQI FREEDOM being "the wrong war at the wrong place at the wrong time," actions that likely helped push reluctant or wavering military voters back into Bush's arms.[107] Further, Kerry's vote against the 1991 Operation DESERT STORM may have had a negative impact on the military voter, as did the Kerry votes against weapon systems proposed throughout the 1980s and 1990s (heatedly pointed out by Democrat Senator Zell Miller of Georgia at the Republican National Convention, after which he challenged newsman Chris Matthews of MSNBC to a duel).[108] Further, allegedly 3% of the delegates to the Republican National Convention were active duty military personnel, attending in direct violation of Department of Defense directives.[109] Despite the casualties and highly publicized problems in post-war Iraq, the military continued to support President Bush by large margins. Whether during peacetime in 2000 or wartime in 2004, the military's support of Bush remained steadfast.

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[103] *Id*. Note that "in some cases, local military police forced personnel to take the inverted flags down."

[104] Josh White, *80% of Military Voted or Tried To*, WASHINGTON POST, Dec. 7, 2005, at A23.

[105] Michael Rubinkam, *GOP Attacks Rendell Over Military Ballots*, Phillyburbs.com (Oct. 22, 2004), *available at* http://www.phillyburbs.com/pb-dyn/news/103-10222004-387942.html (last visited Mar. 8, 2006).

[106] Trowbridge, *supra* note 90.

[107] Stannard, *supra* note 91.

[108] Carl Hulse, *Senator Who Crossed Party Line is a Polarizing Figure After His Speech*," N.Y. TIMES, Sept. 3, 2004, at 10.

[109] Karen Kwiatkwski, *Military Politics*, Militaryweek.com (Sept. 9, 2004), *available at* http://militaryweek.com/kk090904.shtml (last visited Mar. 8, 2006). Department of Defense Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty* (Aug. 2, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf2/d134410p.pdf (last visited Mar. 8, 2006).

The Military Vote's Future

Some argue that the military vote is "critical to carrying at least 10 states.[110] Further, these military voters and their families are concentrated in crucial swing states like Florida. The "Project on the Gap Between the Military and Civilian Society" has concluded that "the elite military is probably the most solidly Republican professional group in American society."[111] But with this increasingly open partisan affiliation comes risks. It may be that the military's support partially stems from the perception it is nonpartisan, and if it is seen as a Republican interest group, public support will wane.[112] In fact, as the military has come to be viewed as another Republican interest group, it should not be surprised to be treated like one, as seen in 2000 when some would argue Democratic Party lawyers in Florida attempted to disqualify military absentee votes,[113] or when Republican candidates placed ads in military newspapers touting their support for military spending and pay raises.[114]

The difference in values between a "private society in a liberal democracy" and the "social order needed to succeed in the unnatural stresses of war" will naturally produce a tension,[115] but how this tension manifests itself has historically seen the military politically back the leader or party of a strong central government protecting what it deems to be American ideals and social mores abroad and at home—Federalists originally, Republicans more recently. The advent of the all volunteer force has produced a self-selecting military, and has magnified its political polarity as reflected in polling discussed *infra*. As such, it has evolved into an identifiable partisan voting bloc and interest group, applying its political pressure in its self interest and when it sees the national interest at stake. But it is still different from most interest groups in that it is Constitutionally beholden to Presidential control and Congressional purse strings. The military, professionally trained and mindful of its Constitutional raison d'etre, has proven it will salute smartly and follow orders given by both Republican and Democrat leaders, regardless of any perception of political favoritism. Hopefully members of both political parties will lead in a similar nonpartisan fashion in the future.

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[110] Ralph Hallow, *Military Vote Vital for a Bush Victory*, WASHINGTON TIMES, Jul 9, 2004, at A01. Loren Thompson of the Lexington Institute stated "If Eglin [Air Force Base] were in Alabama instead of Florida, Al Gore would be in the White House."

[111] Rowan Scarborough, *Most in Military Plan to Vote for Bush-Cheney Ticket November 7*, WASHINGTON TIMES, Oct. 30, 2000, at A3.

[112] Bruce Friedland, *GOP Finds Friends in Military Retirees*, FLORIDA TIMES-UNION, Oct. 7, 2000, at A-1.

[113] Ricks, *supra* note 100. Peter Feaver, a Duke University expert on politics and the military, predicted that Gore would have started with "the worst civil-military relations of any president in recent memory, even behind where President Clinton started."

[114] Towell, *supra* note 92.

[115] Hillen, *supra* note 6.

Military Justice Practicum

Art. 69, UCMJ, Review in the office of the Judge Advocate General: The Best, Little Known Avenue of Appeal

A general court-martial conviction not reviewed by a court of criminal appeals is reviewed in accordance with Article 69, UCMJ, *Review in the Office of the Judge Advocate General*. All records from a general court-martial proceeding that are not reviewed by the Air Force Court of Criminal Appeals are examined in the office of the Judge Advocate General (TJAG) if there is a finding of guilty and the accused does not waive appellate review rights. An accused may also file for Article 69(b) review via application to TJAG. Such an application must be filed within two years of the sentence being approved. AFLOA/JAJM conducts all Article 69 (a) and (b) reviews.

In a recent Article 69(b) case, TJAG dismissed an indecent act charge based upon review and recommendation from JAJM. The case addressed the requisite elements for commission of an indecent act with an individual age 16 or older.

Background

In this particular general court-martial, the accused was initially charged with rape, sodomy, and indecent assault. At his general court-martial proceeding before a military judge sitting alone, the accused pled guilty to consensual sodomy and an indecent act. The Government dismissed the remaining charges after arraignment. The military judge sentenced the accused to confinement for 3 months and forfeiture of $100 pay per month for 3 months. The convening authority approved the findings and sentence. The accused made a timely application under Article 69(b), UCMJ.

The accused was male and 19 at the time of the events. He met "the victim," a 16-year-old female, at a local coffee shop. The two saw one another at the coffee shop several times and were on friendly terms. Eventually, the couple agreed to meet at the mall and see a movie. They met in the mall parking lot, where the accused indicated he did not have enough money to pay for them to go to the movies. He suggested they watch movies at his place. They agreed and went to the accused's dorm room. Once in his room together, the pair watched several DVD comedy movies.

At his court-martial, the accused discussed the events leading to the indecent act charge in the Care Inquiry. He relayed how the couple started to have sex, but he stopped when "the victim" started to cry. The accused then stated, "I still wanted to do something, so I put my penis between her breasts and rubbed it between them while she held her breasts together. We did this for approximately ten minutes until I ejaculated on her chest. I realized that the victim was already upset. She knew I was in the military. These events took place on base in my military dorm room. I understand that this indecent act caused the victim to view the military in a less favorable way."

Issue

In accordance with Article 69(a):

> The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate

> General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

In this case, the issue turned to the providency of the accused's plea in reference to the indecent act charge. For an indecent act, the Government must prove the following:

> 1. That the accused committed a certain wrongful act with the victim in this case by rubbing his penis between her breasts and ejaculating on her chest;
>
> 2. That the act was indecent;
>
> 3. That under the circumstances, the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the Armed Forces or was of a nature to bring discredit upon the armed forces.

Appellate courts have further analyzed indecent act cases involving participants over the age of 16 with an eye towards an open and notorious element.

Standard of Review

Courts have indicated, "[O]therwise lawful sexual activity is indecent if committed in public." *United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002). In other words, to be indecent the sexual conduct must have been "open and notorious," *see United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002); *United States v. Berry*, 6 USCMA 609, 614, 20 C.M.R. 325, 330 (1956). Further, an act is "open and notorious . . . when the participants know that a third person is present." *Berry*, supra, 20 C.M.R. at 330. The courts have also noted that the UCMJ "is not intended to regulate wholly private moral conduct of an individual." *United States v. Synder*, 4 C.M.R. 15, 19 (C.M.A. 1952).

In *United States v. Izquierdo*, 51 M.J. 421 (1999). C.A.A.F. upheld the accused's conviction of committing an indecent act where he had sexual intercourse while his two roommates were in the room, even though he had hung up a sheet to block their view. However, the court dismissed a specification alleging an indecent act where the accused had sexual intercourse in a shared barracks room, with the door closed but unlocked and no one else present in the room.

> [W]e concluded that, even when viewed in the light most favorable to the prosecution, the evidence was legally insufficient to prove that the sexual act, committed in a shared barracks room with no third party present and with the door closed but unlocked, was open and notorious.
> *Id.*, at 423.

In *Sims*, the Court of Appeals for the Armed Forces (C.A.A.F.) found the Army Court of Criminal Appeals (A.C.C.A.) erred in affirming appellant's conviction of indecent acts when the appellant with consent, momentarily touched the breasts of a female when the consensual act occurred in the privacy of the appellant's room with no third party present and with the door closed. C.A.A.F. rejected as improvident a guilty plea to an indecent act by an accused to the alleged indecent act of touching a woman's breast in the closed room, albeit party attendees might have entered at any time. In response to a comment by the dissenting judge, the majority in *Sims* noted,

"appellant pleaded guilty to a consensual act. The alleged unlawfulness of the act was based on its public nature, not the co-actor's lack of consent." *Sims*, 57 M.J. at 421. In the *Sims* case, the court was analyzing whether the possibility of a door being opened equaled "open and notorious" conduct. During the plea inquiry, the accused had said there was nothing to stop anyone from coming in. The court rejected that plea as improvident finding the appellant's "stipulation, without any additional facts to distinguish this case from *Izquierdo*, is inadequate to establish a factual predicate for "open and notorious" sexual conduct. *Sims*, 57 M.J. at 422. Furthermore, the court, again addressing a point raised by the dissent, reiterated "[w]e have applied well-established law providing that otherwise lawful sexual conduct is indecent if committed in public, and we have held, on a case-specific basis, that the factual predicate elicited from appellant in this case was inadequate to establish that his conduct was 'public.'"

In another case, A.C.C.A. and C.A.A.F. once again affirmed that for sexual intercourse between consenting adults to be indecent it must be "open and notorious."

In *U.S. v. Leak*, 58 M.J. 869 (A.C.C.A. 2003), an accused's conviction for indecent acts was overturned. In that case, the accused was initially charged with rape, but members found him guilty of the lesser-included offense of indecent acts. The military judge did not instruct the members that if they found appellant's sexual activity to be consensual, they must also find that appellant's sexual conduct was open and notorious in order to find him guilty of indecent acts. Private heterosexual intercourse between consenting adults is not intrinsically indecent. *See United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994); *United States v. Hickson*, 22 M.J. 146, 148-50 (C.M.A. 1986) (discussing history of military adultery and fornication prosecutions and stating private sexual intercourse between unmarried persons is not punishable), overruled in part on other grounds by *United States v. Hill*, 48 M.J. 352 (C.A.A.F. 1997) (summary disposition); *United States v. Snyder*, 1 U.S.C.M.A. 423, 427, 4 C.M.R. 15, 18 (1952) (holding Article 134, UCMJ, not intended to set standard for private conduct). Under the circumstances, the court found appellant's consensual sexual intercourse not open and notorious and thus not "indecent." *See Sims*, 57 M.J. at 422; *Izquierdo*, 51 M.J. at 423.

C.A.A.F. reviewed *Leak* at 61 M.J. 234 (2005). C.A.A.F. set aside the A.C.C.A. decision for other reasons and returned the record of trial to the Judge Advocate General of the Army with instructions to the court to clarify its decision. Nevertheless, it is instructive that in *Leak*, C.A.A.F. did not fault the A.C.C.A. for its decision "that the intercourse that occurred on that date was not open and notorious and thus it was not "indecent." *Leak*, 61 M.J. at 248.

The military clearly sets the bar at 16 years of age for indecent acts. Therefore, a factor normally bearing on the question of indecency is the age of the partner. *U.S. v. Frazier,* 51 M.J. 501, (C.G.C.C.A. 1999). An act that may not be considered indecent between consenting adults may well be made indecent because it is between an adult and a child. *U.S. v. Strode*, 43 M.J. 29, 32 (1995), *U.S. v. French*, 31 M.J. 57, 59 (C.M.A. 1990); *U.S. v. Tindoll*, 16 U.S.C.M.A. 194, 195 (1966).

Conclusion

Although it is not clear from the numerous court decisions when an accused's actions do cross the line into the "open and notorious" realm, it was apparent under the facts of this particular case and subsequent Article 69(b) application that the sexual activity did not traverse the "open and notorious" boundary. Each case will hinge on the facts involved in the commission of the indecent act.

However, the sexual activity described in the present case required an "open and notorious" element. This requirement has been established in the *Berry, Sims* and *Izquierdo.* Further, it is clearly established in case law that a sexual act is "open and notorious" when the participants know that a third person is present while the sexual activity is being performed. There has been further discussion where the court has suggested the risk of having another individual see the sexual activity may be enough to bring the act into the "open and notorious" realm as in the *Sims* case. However, a third party was not present nor was there a risk of presence in the current case. The entire sexual activity occurred in a private dormitory room with no other party's present to witness the activity either by sight or sound.

Upon submission of an Article 69(b) application, the accused's sexual conduct was found not to be an indecent act under the particular facts of this case because the court-described "open and notorious" element was simply not present. The accused's guilty plea to an indecent act was found improvident by TJAG. RCM 910(e) Manual for Courts-Martial, provides, "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." In order to establish the adequate factual predicate for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself that objectively support the plea." *United v. Davenport*, 9 M.J. 364 (C.M.A. 1980). It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty. *United States v. Outhier*, 45 M.J. 326, 331 (1996).

In accordance with Article 69, UCMJ, if the findings or sentence are found to be unsupported in law or if a reassessment of the sentence is appropriate, the findings or sentence or both may be modified or set aside. The record was insufficient as a matter of fact and law regarding the charge and specification of an indecent act. The finding as to the indecent act was set aside and pursuant to Article 69(c) the sentence was reassessed and found sufficient. Therefore, Article 69(b) has been time tested and proven as an established avenue of appeal for an accused not entitled to review of their case by an appellate court due to the sentence imposed. Both trial and defense counsel would be wise not to overlook the potential significance of such an application.

This Just In…

Is Senator and Reserve Colonel Lindsey Graham's appointment as a judge on the Air Force Court of Criminal Appeals permissible under the Constitution?

See United States v. Lane, http://www.armfor.uscourts.gov/opinions/2006Term/05-0260.pdf

Do military members have a reasonable expectation of privacy in their government e-mail accounts?

See United States v. Long, http://www.armfor.uscourts.gov/opinions/2006Term/05-5002.pdf

Legal Assistance Notes

Tax Season

Last year, Air Force legal office tax programs filed over 150,000 returns, saving clients over $21 million in filing fees. These are figures to be proud of and to keep in mind as we start into the upcoming tax season.

April 16th is barely on our clients' horizon, but offices can be planning VITA Training dates, contacting volunteers from past seasons, and gaining Unit Tax Monitors for this season, among a host of other early steps.

The AF-wide Tax Program POC is Maj Lance Mathews. He may be reached at lance.mathews@maxwell.af.mil and at DSN 493-2802.

Divorce & Military Retirement

Military retirement is a major item of interest for most of the divorcing clients we counsel. Articles, web sites, and other media are drawing attention to the fact that no federal law dictates how military retirement may be divided -- and no federal law caps the amount that may be awarded.

The issue is entirely one of state law. DFAS will only allot up to 50% of disposable retired pay to a former spouse through the direct payment program. Some clients misinterpret this as a ceiling -- not realizing that a court can order any percentage, forcing a client to directly pay anything over the 50% DFAS allotment if necessary.

Payday Loan Alert

Legal assistance attorneys should expect an increase in clients with "payday loan" issues. A Pentagon report has just been released citing extraordinary facts, including that the average borrower pays back $834 for a $339 loan -- with interest rates of 390% to 780%! The report is already receiving national attention, including front page coverage in major newspapers.

As you prepare for more clients in this area, consider ways you can prevent new clients! We are entering the holiday season, when some people are tempted to overspend. Five minutes speaking at a Commander's Call or a half-hour putting an article in the base paper may save dozens of hours helping clients after they are ensnared in a financial trap.

AFJAGS' Legal Assistance Mission

The focal point for legal assistance issues within TJAGC has shifted to The Judge Advocate General's School. JACA helped the entire Air Force JAG Corps help our legal assistance clientele across many decades. JACA was continually at the forefront of shaping policy, creating information, and using innovative technology to connect with legal assistance professionals throughout the Air Force and beyond.

Bringing the legal assistance mission to The Judge Advocate General's School will build upon JACA's rich heritage of service. The School is the crossroads of the Corps, attracting experts from many fields and translating policy into action. Your ideas, suggestions, and materials will continue to help every professional in our Corps meet the legal assistance mission!

The entire school is dedicated to this effort, with Maj Brad Mitchell as the POC. He may be reached at bradley.mitchell@maxwell.af.mil and at DSN 493-2802.

Heritage to Horizon

And You Thought Your JASOC was Tough…

Then-Captain Albert M. Kuhfeld attended the Army's Judge Advocate General's School in Ann Arbor Michigan in 1943. He later become the second Judge Advocate General of the Air Force.

(**right**) A page from Captain Kuhfeld's schedule for the week of 15-20 March 1943.

(**below**) Title page from Capt Kuhfeld's Notebook.

(**opposite page**) A page from the schedule of JASOC 06 C, Week 31 July – 4 Aug 2006.

Historical documents are stored in The Heritage Room at The Judge Advocate General's School

A. M. Kuhfeld
Captain, Inf.
Judge Advocate Generals' School
Ann Arbor, Michigan.

TRAINING SCHEDULE No. 46. (10th Class, 1st Week) THE JUDGE ADVOCATE GENERAL'S SCHOOL WEEK OF MARCH 15 - 20, 1943.
Ann Arbor - Michigan

DATE	TIME	SUBJECT	INSTRUCTOR	PLACE	UNIFORM
ONDAY	0810-0900	ORIENTATION	LT.COL.KIDNER	CLASSROOM 2	A
	0910-1000	MILITARY COURTESY & DISCIPLINE: LECTURE	LT. CLARE	CLASSROOM 2	A
arch	1110-1200	ORGANIZATION OF COMPANY & SECTIONS	MAJOR D.RR	QUAD.	A
	1310-1400	ORGANIZATION OF THE W.R DEPARTMENT: LECTURE	LT.COL. BURKE	CLASSROOM 2	A
15	1410-1500	CLOSE ORDER DRILL: SQUAD AND PLATOON	MAJOR D.RR	QUAD.	A W/
	1520-1650	CLOSE ORDER DRILL: SQUAD & PLATOON	MAJOR D.RR	QUAD	LEGGINGS
	1745	RETREAT FORMATION		QUAD	
	1915-2215	MILITARY JUSTICE: Read "THE ARMY COURT-MARTIAL SYSTEM, by KIRK			
ESDAY	0810-0900	MILITARY JUSTICE: LECTURE	LT. FARR	CLASSROOM 2	A
	0910-1000	MILITARY AFFAIRS: LECTURE	LT.COL.MILLER	CLASSROOM 2	A
March	1110-1200		& CAPT.GARRETT		
	1310-1400	ORGANIZATION OF THE ARMY: LECTURE	LT.COL. BURKE	CLASSROOM 2	A
16	1410-1500	CLOSE ORDER DRILL: SQUAD & PLATOON	MAJOR D.RR	QUAD	A W/
	1520-1650	PLOTTER MARCH	MAJOR D.RR	QUAD	LEGGINGS
	1745	RETREAT FORMATION		QUAD	
	1915-2215	MAP READING: STUDY FM 21-25, par. 6-19, 21-24; FM 21-30, pp.1-7,20,21,27-32			
	0810-0900	CLAIMS: LECTURE	CAPT. WILSON	CLASSROOM 2	A
EDNESDAY	0910-1000				
	1010-1100	MAP READING: LECTURE & SEMINAR	LT. CLARE	CLASSROOM 2	A
rch	1110-1200				
	1310-1400	ORGANIZATION OF THE WAR DEPARTMENT: LECTURE	LT.COL. BURKE	CLASSROOM 2	A
	1410-1500	CLOSE ORDER DRILL: SQUAD & PLATOON DRILL	MAJOR D.RR	QUAD	A
	1520-1650	AT DISCRETION OF THE COMMANDANT			
	1916-2215	MILITARY JUSTICE: READ FRAGERTS 1 & 48, MCM			

JASOC 06C

Week 3	Monday 31-Jul	Tuesday 1-Aug	Wednesday 2-Aug	Thursday 3-Aug	Friday 4-Aug	Week 3
0630		Faculty-Led Group PT (Hash Run) *(All Faculty)*			Student-Led Flight PT	0630
0700						0700
0740	JASOC Staff Meeting **0740-0810**		JASOC Staff Meeting	Legal Review # 1 Due		0740
0800			Government Contracts *Vernon*	Lorenz on Leadership *Lt Gen Lorenz AU/CC*		0800
0820	Paralegals *Chief Hobza*				JASOC Staff Meeting	0820
0900		JASOC Staff Meeting		Stipulations of Fact & Expected Testimony *Carr*	Pleas & Providency *Powell*	0900
0930		Joint Ethics Regulations *Mitchell*				0930
1000	Seminar Leadership *L/O Faculty*		Immunity *Wells*	Post-trial Responsibilities and Actions *Carr/Schuchs-Gopaul*	Pre-Trial Procedures *Schuchs-Gopaul*	1000
1030						1030
1100			Seminar JER & PO		Trial Procedure (Convening CM - Arraingment) *Leavey*	1100
1130	Lunch	Lunch				1130
1200			Lunch	Lunch	Lunch	1200
1230	Magistrate Court *Keiper*					1230
1300		Judge James E. Baker CAAF	Pretrial Agreements & Plea Bargaining *Carr/Schuchs-Gopaul*	Exercise Post-trial Actions *MJ Faculty*	Justice Seminar	1300
1330	FOIA & PA *Olson*					1330
1400			Seminar FOIA & PA	Evidence II (700, 800, 900 & 1000 series) *Wells*	Exam I Review Session *All Faculty*	1400
1430	Evidence I (100, 200, 400 & 600 series) *Wells*	Private Organizations *Olson*				1430
1500			Crud Practice *Mitchell (All Faculty)*			1500
1530						1530
1600						1600
1630						1630
1700						1700

Notes taken by then-Captain Kuhfeld
The Judge Advocate General's School, Ann Arbor, Michigan, 1943

Military Justice.

Books to be used

MCMs; ARs; Winthrop; Dig. Ops + Bulletins.

I. General Court may be appointed by:

A. President as Commander-in-Chief.

B. Sup't of Military Academy

B. Commander of an Army

D - Commander of Corps

F - Commander of a Division

F - Commander specifically authorized by President

G - Service Commander empowered by President

I. Service command not a territorial division with AW 8.

H - Commander of a separate brigade.

II. Who may sit on G.Ct:

A. Any Army Officer:

1. Excludes WAACs and nurses and warrant officers.

2. Lt Col appted on Ct had sent in his resignation

a. He is eligible until resignation accepted

b. After resignation has been accepted, he proceeds to sit as case for trial.

1. Case must be busted by civil courts - incompetent.

c. Retired officer may be called in to sit on a court

3. Eligibility to sit:

a. One who initiates the does not sign charges not eligible; he is accuser

b. Accusers not eligible - one who signs charges is accuser normally. Exception when signed merely to clear

c. If an ineligible officer sits, sentence is invalid same as if incompetent.

d. Any one who is specifically declared by AW as incompetent or ineligible cannot be on court.

1. This does not apply in cases of challenges or grounds for challenge.

E. Suppose Ct made up of 2nd Lts.

1. This is OK notwithstanding that there are often officers of higher rank available.

2. Two year rule is directory only.

3. Officers "inferior in rank" is directory only.

BEWARE OF POTENTIAL CHALLENGES TO INTEGRATED NATURAL RESOURCES MANAGEMENT PLANS (INRMP)

By Patrick Dolan,* Major, USAF

The National Defense Authorization Act ("NDAA") for Fiscal Year 2004 made significant amendments to the Endangered Species Act ("ESA") concerning the designation of critical habitat for threatened and endangered species on DoD lands.[1] Notably, the 2004 NDAA amended section 4(a)(3) of the ESA to preclude the Fish Wildlife Service ("FWS") and the National Oceanographic and Atmospheric Administration ("NOAA") Fisheries Service from designating critical habitat on military lands when those lands are covered by an Integrated Natural Resources Management Plan ("INRMP") provided that the FWS determines that the plan provides a benefit to the species for which critical habitat is proposed for designation.[2] The Department of Defense ("DoD") sought the change in the law as part of its Readiness and Range Preservation Initiative ("RRPI"), a set of legislative proposals that seek to maintain training flexibility on military lands.[3] So far, the amendment to section 4(a)(3) has fulfilled its objective and resulted in the exclusion of numerous military installations from designation of critical habitat for several species.

Although the amendment to section 4(a)(3) has been a success, the use of INRMPs in lieu of critical habitat designation may subject INRMPs to greater scrutiny from the public and even legal challenges under the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA"). In order to anticipate the context of potential challenges to INRMPs — and how to protect against them — it is necessary to briefly review the statutory requirements for these plans.

The Sikes Act Improvement Amendments of 1997

The Sikes Act Improvement Amendments ("SAIA") of 1997 required the Secretary of each military department to prepare and implement an INRMP for each military installation in the United States under the jurisdiction of the Secretary, unless the Secretary determined that the absence of significant natural resources on a particular installation made preparation of a plan inappropriate.[4] Additionally, the SAIA required DoD installations to prepare and begin implementing their INRMPs by November 18, 2001.[5] The SAIA also requires that INRMPs be prepared in cooperation and consultation with the FWS and the head of

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[1] 16 U.S.C. §§ 1531 to 1544 (2006).

[2] Pub. L. No. 108-136, § 318(a)(3), 117 Stat. 1392, 1433 (2003) (codified at 16 U.S.C. § 1533(a)(3)(B)(i)).

[3] *See, e.g.*, *Environmental Laws: Encroachment on Military Training? Hearing Before the S. Comm. on Public Works*, 108th Cong. 69 (2003) (statement of Hon. Benedict S. Cohen, Deputy General Counsel for Environment and Installations, Department of Defense) ("Unlike Sikes Act INRMPs, critical habitat designation can impose rigid limitations on military use of bases, denying commanders the flexibility to manage their lands for the benefit of both readiness and endangered species.")

[4] 16 U.S.C. §§ 670a(a)(1)(B).

[5] National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 2905(c), 111 Stat. 2019 (1997) (reprinted as a statutory note to 16 U.S.C. § 670a).

each fish and wildlife agency of the state where each installation is located.[6] Thus, "the resulting plan for the military installation shall reflect the mutual agreement of the parties concerning conservation, protection, and management of fish and wildlife resources."[7]

The SAIA states that the Secretary of each military department shall carry out the INRMP program for the purpose of conserving and rehabilitating natural resources on military installations consistent with the use of military installations to ensure the preparedness of the armed forces.[8] The SAIA requires that plans, "shall, to the extent appropriate and applicable, provide" for:

ANDERSEN AIR FORCE BASE, Guam (AFPN) -- Dana Lujan (left), Jeff Quitugua and Chris Jones (right) discuss the endangered Marianas crow. Mr. Lujan is the liaison for the Guam Department of Agriculture, which has a partnership with the base to re-introduce the Marianas crow back to the island. *Air Force Link.*

> (A) fish and wildlife management, land management, forest management, and fish-and wildlife-oriented recreation; (B) fish and wildlife habitat enhancement or modifications; (C) wetland protection, enhancement, and restoration, where necessary for support of fish, wildlife, or plants; (D) integration of, and consistency among, the various activities conducted under the plan; (E) establishment of specific natural resource management goals and objectives and time frames for proposed action; (F) sustainable use by the public of natural resources to the extent that the use is not inconsistent with the needs of fish and wildlife resources; (G) public access to the military installation that is necessary or appropriate for the use described in subparagraph (F), subject to requirements necessary to ensure safety and military security; (H) enforcement of applicable natural resource laws (including regulations); (I) no net loss in the capability of military installation lands to support the military mission of the installation; and (J) such other activities as the Secretary of the military department determines appropriate.[9]

The SAIA also requires that INRMP parties review their plans regularly for "operation and effect."[10] Such reviews must be carried out at least every 5 years.[11]

There was no litigation challenging promulgation of INRMPs that were required by the SAIA of 1997. This dearth of litigation may be explained by the fact that potential litigants — and DoD itself — did not realize that INRMPs would be used in lieu of critical habitat designation. However, as hundreds of INRMPs become due for their five-year

[6] National Defense Authorization Act for Fiscal Year 1998, § 2904(a)(2).
[7] *Id.*
[8] 16 U.S.C. § 670a(a)(3)(2006).
[9] 16 U.S.C. § 670a(b)(1).
[10] *Id.*
[11] 16 U.S.C. § 670a(b)(2).

review in the immediate future, potential challengers will be fully aware that INRMPs can serve as substitute for critical habitat designation and thus become more interested and involved in ensuring that the plans are adequate.[12] Thus, it will be important for practitioners at bases with INRMPs that address threatened or endangered species to anticipate potential challenges to the plans.

Potential Challenges to INRMPs and How to Protect Against Them

Challenges for Failure to Conduct Reviews

The Air Force could be challenged under the APA in the event that the parties — DoD, the FWS, and the states — fail to conduct the required INRMP five-year reviews. In the event of such a failure, members of the p ublic could sue the Air Force and the FWS under the APA to compel them to carry out this mandatory and non-discretionary duty.[13] Moreover, failure to review an INRMP could serve as the basis to challenge a decision by FWS and NOAA Fisheries to exclude Air Force lands from critical habitat designation. To preclude such a challenge, installations should make a written record memorializing the five-year review process by the parties. This document should be created and maintained even if the parties ultimately decide that an INRMP does not require revision.

Erik Stenehjem conducts routine pronghorn clearance at the Barry M. Goldwater Range in Phoenix, Ariz., at 4:30 a.m. Monday, April 24, 2006. *Air Force Link.*

Challenges Regarding Public Participation in INRMP Reviews

The Air Force could also be challenged on the issue of public involvement in the five-year review process. The SAIA required that each military department provide an opportunity to comment on each "proposed" INRMP.[14] However, the SAIA does not explicitly require an opportunity for public comment in the five-year review process,[15] and the DoD has taken the position that it is not required.[16] It is possible that plaintiffs could attempt to challenge this interpretation under the APA by arguing that the requirement for public comment on "proposed" INRMPs includes the opportunity to comment on plans up for review. Although the statutory language

[12] At least one DoD guidance document has explicitly acknowledged that the DoD expects INRMPs to come under more public scrutiny due to the amendment to section 4(a)(3) of the ESA. INRMP Comprehensive Strategic Action Plan (Draft) 3 (Aug. 2004), https://www.denix.osd.mil/denix/Public/Library/NCR/Documents/INRMP_STRATEGIC_ACTION_PLAN_020305.doc.

[13] 16 U.S.C. § 1540(g)(1)(c) (2006).

[14] National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 2905(c), 111 Stat. 2019 (1997) (reprinted as a statutory note to 16 U.S.C. § 670a).

[15] *See* 16 U.S.C. § 670a(b)(2) (2006) (stating that the plans "must be reviewed as to operation and effect by the parties thereto on a regular basis, but not less than every 5 years").

[16] Supplemental Guidance for Implementation of the Sikes Act Improvement Act, Additional Guidance Concerning INRMP Reviews, https://www.denix.osd.mil/denix/Public/Library/NCR/Documents/Sikes_Act_Add_INRMP_Giudance_081904.doc.

does not appear to support such an argument, bases with interested stakeholders might choose to solicit written comments from the public concerning the review process to forestall this issue from arising.

Substantive Attacks on Decisions not to Revise Plans

Citizens could also challenge conclusions by parties as to whether INRMPs require revision after their five-year reviews. The SAIA is silent with regard to the scope of the INRMP review by the parties. However, DoD policy has addressed this issue by stating:

> The requirement to "review" the INRMPs "on a regular basis, but not less often than every 5 years" does not mean that every INRMP necessarily needs to be revised. The Sikes Act specifically directs that the INRMPs be reviewed "as to operation and effect," emphasizing that the review is intended to determine whether existing INRMPs are being implemented to meet the requirements of the Sikes Act and contribute to the conservation and rehabilitation of natural resources on military installations. We expect that many existing INRMPs will be determined to be adequate and not in need of revision.[17]

Thus, the DoD has recognized that the five-year reviews should trigger revisions to INRMPs if the plans are no longer meeting the requirements of the SAIA. Once the required reviews are completed, the public could use the APA to challenge the conclusions of DoD and the FWS as to whether revisions are required.

An effective way to forestall a challenge to the adequacy of an INRMP that is being used as a substitute for critical habitat designation is to ensure that the INRMP continues to provide a "benefit" to any endangered species covered by the plan. Unfortunately, this is not as easy as it might seem as the FWS has not promulgated rules regarding what constitutes a "benefit to the species" for this purpose. Instead, the FWS has, on case-by-case basis, analyzed the adequacy of particular INRMPs in each of its critical habitat designations. Although its criteria for evaluating INRMPs have sometimes been inconsistent, the most common approach used by the FWS has been to judge the adequacy of an INRMP based on three criteria. That is, an INRMP will provide a "benefit to the species" if: (1) the plan is complete and provides a conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions (adaptive management) as necessary.[18] Based on these criteria, a decision not to revise an INRMP serving in lieu of critical habitat will be vulnerable to attack if a species at issue is not showing signs of recovery or if key components of the plan have not actually been implemented. On the other hand, a decision not to revise an INRMP should be immune to challenge if it can be demonstrated that the document addresses current needs and its provisions are actually being implemented.

[17] *Id*.

[18] Final Designation of Critical Habitat for the California Tiger Salamander, Central Population, 70 Fed. Reg. 49380, 49405 (Aug. 23, 2005).

Challenges under NEPA

NEPA may provide another avenue for citizen suits to challenge decisions on the INRMP review process.[19] Specifically, potential plaintiffs could challenge whether DoD and the FWS engage in the proper level of NEPA analysis in conducting reviews. NEPA requires, among other things, that all federal agencies prepare an environmental impact statement ("EIS") regarding all "major Federal actions significantly affecting the quality of the human environment."[20] To determine whether a particular proposed action requires the preparation of an EIS, agencies perform an environmental assessment ("EA").[21] In contrast to an EIS, which can be quite lengthy, an EA is a "concise public document" that contains information pertaining to the need for the proposed action, other alternatives, the environmental impact of the proposal and its alternatives, and other relevant information.[22]

LANGLEY AIR FORCE BASE, Va. -- Tom Olexa (top) and Mitchell Burcham secure an osprey hatchling nesting on top of a birds nest in waters surrounding the base. *Air Force Link.*

DoD policy acknowledges that NEPA will apply to the decision process on whether to revise INRMPs. In fact, DoD policy explicitly states that if revisions to an INRMP are necessary, public comment shall be invited if required by the appropriate level of NEPA analysis.[23] However, DoD policy also states that no opportunity for public comment should be required where only limited revisions to an existing INRMP are necessary and such revisions do not result in biophysical consequences materially different from those related to an existing INRMP that have already been analyzed under NEPA.[24] Thus, DoD policy recognizes a right for public comment on INRMP revisions only when the revisions will be substantial and will result in biophysical consequences materially different from those already analyzed under NEPA in connection with an existing INRMP.[25]

DoD guidance suggests that five-year reviews of INRMPs that result in no significant revisions will not trigger the NEPA process at all.[26] Yet, Council on Environmental Quality ("CEQ") regulations, which implement NEPA, require agencies to prepare an EA "when necessary under the procedures adopted by individual agencies to supplement these regulations."[27] In addition, the CEQ regulations require an agency to prepare an EA if the proposed action was neither categorically excluded or one that would normally require the preparation of an

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[19] 42 U. S. C. § 4321, et seq. (2006)

[20] 42 U. S. C. § 4332.

[21] Heartwood, Inc. v. United States Forest Serv., 230 F.3d 947, 949 (7th Cir. 2000).

[22] *Id*.

[23] Supplemental Guidance for Implementation of the Sikes Act Improvement Act, Additional Guidance Concerning INRMP Reviews, https://www.denix.osd.mil/denix/Public/Library/NCR/Documents/Sikes_Act_Add_INRMP_Giudance_081904.doc.

[24] *Id.*

[25] *Id.*

[26] Sikes Act Workshop Summary 4 (Sept. 2004), https://www.denix.osd.mil/denix/Public/Library/NCR/Documents/April-2004-Sikes-Act-Workshop-Summary.pdf

[27] 40 C.F.R. § 1501.3 (2005).

EIS.[28] The Air Force has not promulgated a categorical exclusion specifically excluding minor revisions of INRMPs from NEPA analysis.[29] Thus, it is possible that bases could face litigation seeking to force them to prepare an EA regarding decisions to make minor revisions to INRMPs after the five-year reviews.

The Air Force could contest such challenges on the grounds that minor revisions of an existing INRMP wouldn't have significant biophysical consequences that require a NEPA analysis.[30] Without case specific facts, it is hard to predict how such challenges might be resolved, but there is precedent for courts ordering agencies to conduct EAs even where the agency had determined that NEPA was not triggered by its proposed action.[31] Accordingly, to defend against these potential challenges, it would be useful for bases to briefly document why a NEPA analysis was not conducted concerning minor revisions of an INRMP. This document could be used to help establish the Air Force's administrative record in a later court challenge.

[28] 40 F.F.R. § 1501.4 (2005).

[29] Department of the Air Force CATEXs, 32 C.F.R. § 989, App. B (2005); Department of the Army CATEXs, 32 C.F.R. § 651, App. B. (2005); and Department of the Navy CATEXs, 32 C.F.R. § 775.6 (2005).

[30] Supplemental Guidance for Implementation of the Sikes Act Improvement Act, Additional Guidance Concerning INRMP Reviews, https://www.denix.osd.mil/denix/Public/Library/NCR/Documents/Sikes_Act_Add_INRMP_Giudance_081904.doc.

[31] *See* Runway 27 Coalition, Inc. v. Engen, 679 F. Supp. 95, 100 (D. Mass. 1987) (court orders Federal Aviation Administration to prepare EA regarding changes in operations at an airport to determine preparation of an EIS was necessary). *See also* Fritiofson v. Alexander, 722 F2d 1225, 1249 (5th Cir. 1985) (ordering the Army Corps of Engineers to prepare a more thorough EA to determine if preparation of an EIS was necessary).

Conclusion

The new exemption for critical habitat designation under section 4(a)(3) of the Endangered Species Act has been, and has the potential to continue to be, very beneficial to bases that need to balance the needs for training and conserving threatened and endangered species on Air Force lands. However, the use of this exemption is likely to subject INRMPs to much greater public scrutiny than has existed in the past. To protect the interests of the Air Force, environmental practitioners at all levels need to be aware of potential challenges that may be raised concerning future revisions of INRMPs and take steps to help defend against them.

For an in-depth analysis of INRMPS as a substitute for critical habitat substitution, please see the latest edition of the AIR FORCE LAW REVIEW. Lori L. May & Jonathan P. Porier, *It's Not Easy Being Green: Are DoD INRMPS a Defensible Substitute for Critical Habitat Designation?* 58 A.F. L. REV. 175 (2006).

ENDNOTES

Disclose, Disclose, Disclose

Given the amount of time and energy that goes into trial preparation, it would seem easy for a piece of evidence with possible exculpatory impact to be lost in case preparation interview notes, particularly if the prosecutor did not attach exculpatory significance to a witness' statement. In a recent case, the Air Force Court of Criminal Appeals weighed in on exactly such a circumstance. *U.S. v. Winningham*, ACM 36033, (26 July 2006).

In considering this rape case, the Court addressed the issue of whether trial counsel had violated the accused's due process rights by failing to disclose exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). At issue was a statement made by a witness to trial counsel several months after the rape about a conversation the witness had with the victim. The defense claimed the victim, who claimed to suffer an alcohol-induced blackout, had made statements to the witness contradicting those claims and further suggested consensual sex was possible. Both trial counsel and the victim disputed the witness' statement as proffered by the defense. As a result trial counsel did not disclose the witness' name and statement to the defense. In reviewing trial counsel's obligation under R.C.M. 701(a)(6) and *Brady*, the Court found the witness' statement to be evidence of a defense to a charged offense, which had a reasonable probability of altering the result of the trial. The Court further noted that good or bad faith on the part of trial counsel who fails to disclose exculpatory evidence is irrelevant to the discussion.

Avoiding the Temptation….

Picture this, the accused is under oath, freely answering questions in open court and, by happenstance, undermining his defense. Sounds like a trial counsel's dream, right? It could be, unless you are talking about trial counsel's use of the accused's providence inquiry when proving separate litigated charges. In that case, according to the Air Force Court of Criminal Appeals recent and as of yet unpublished opinion in *U.S. v. Craig*, ACM S30607 (5 May 2006), trial counsel must avoid the temptation to offer the accused's *Care* inquiry statements to prove the accused's guilt on a litigated separate charge.

In this case, the accused litigated a larceny charge based on a defense that he believed the property to have been abandoned. Earlier in the case, the accused pled guilty to dereliction of duty and willful destruction of military property. In the course of the military judge's inquiry, the accused stated he realized, at some point in the course of rummaging through the building, that several rooms were secured and that the property in those rooms was also intended to be secured. His pleas were accepted, and the case on the larceny charge began. At the conclusion of the government's case-in-chief, trial counsel replayed the accused's *Care* inquiry answers indicating he knew someone had intended to secure the property. The military judge permitted presentation of the evidence, noting it had been coordinated with defense counsel, but failing to make good on an earlier promise to give the defense an opportunity to object. The Court found the military judge committed plain error by permitting the accused's providency inquiry to be used to prove the larceny offense. The accused simply did not forfeit his right to remain silent as to that offense and the Air Force Court set aside the larceny conviction.

Practitioners should take note that unless you are using a guilty plea to a lesser included offense to establish elements common to both the greater and lesser crimes of a single specification, trial counsel are not permitted to use the accused's own words in a providence inquiry as evidence to prove a separate offense.

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30-31 Oct 2006: Advanced Environmental Law Course, Class 07-A (Off-Site Wash DC Location)

28 Nov-1 Dec 2006: Deployed Fiscal Law & Contingency Contracting Course, Class 07-A

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19-20 Jan 2007: Air Force Reserve Annual Survey of the Law, Class 07-A & B (Off-Site)

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7 Aug-11 Sep 2007: Paralegal Craftsman Course, Class 07-04

13 Aug-25 Sep 2007: Paralegal Apprentice Course, Class 07-06

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17-28 Sep 2007: Trial & Defense Advocacy Course, Class 07-B

25-27 Sep 2007: Legal Aspects of Sexual Assault Workshop, Class 07-A

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