Virginia State Bar Military Law Section Newsletter

Military Law News

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Military Law News Spring 2008

WHEN SOLDIERS SPEAK OUT: A SURVEY OF PROVISIONS LIMITING FREEDOM OF SPEECH IN THE MILITARY

by JOHN LORAN KIEL, JR. *© 2007 John Loran Kiel, Jr.*

From *Parameters*, Autumn 2007, pp. 69-82. *Reprinted by permission of the author and the U.S. Army War College.*

"The war in Iraq violates our democratic system of checks and balances. It usurps international treaties and conventions that by virtue of the Constitution become American law. The wholesale slaughter and mistreatment of the Iraqi people with only limited accountability is not only a terrible moral injustice, but a contradiction to the Army's own Law of Land Warfare. My participation would make me a party to war crimes."
— Lieutenant Ehren Watada[1]

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."
— Justice Oliver Wendell Holmes, Jr.[2]

As America continues surging troops into Baghdad, a number of active-duty service members have publicly condemned President George W. Bush and criticized his handling of the war in Iraq. Remarks against the President have become more prevalent among service members because they communicate through a host of mediums unfathomable to yesterday's generation (69/70) of fighting men and women. Soldiers frequently post digital journals, cell phone photos, and music videos on popular Internet sites such as YouTube and MySpace. A few techno-savvy troops even manage their own milblogs, or online personal diaries where they can communicate in cyberspace about virtually anything to virtually anyone. In fact, some military blogs and videos have become so popular that they garner tens of thousands of visits each day.

One byproduct of Internet-related technology is the growing number of soldiers, sailors, airmen, and Marines who use these tools as a means to publicly express their disapproval of the President and his foreign policy agenda. For instance, one particularly astute group of active-duty war protesters came to Capitol Hill to formally present a petition titled "Appeal for Redress" to Representatives Dennis Kucinich (D-Ohio) and Jim McGovern (D-Mass.). The group created their own Web site where they explained their purpose and posted a short petition calling for the immediate withdrawal of American military forces from Iraq. Over the course of three months, approximately 1,000 active-duty personnel, reservists, and National Guardsmen signed the online petition.[3]

In addition to Web-based technology, service members continue to rely on traditional methods of communication to vent frustrations. For example, members of the group Appeal for Redress appeared on the CBS program *60 Minutes* to discuss why they oppose the war and support a timeline for redeploying all US forces from Iraq. Army Lieutenant Ehren Watada is scheduled to be courts-martialed later this year for a series of damning statements he made about President Bush at an antiwar convention in Seattle, Washington, last year. Watada also published a series of

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1. Ehren Watada, "Statement of Lt. Ehren Watada," 7 June 2006, http://www.couragetoresist.org/x/content/view/82/39/.
2. *Schenk v. United States*, 249 U.S. 47, 52 (1919).
3. Noam N. Levey, "Military Members Make an Antiwar Plea on Capitol Hill," *Los Angeles Times,* 17 January 2007, A8.

MESSAGE FROM THE CHAIR...

— Richard Prevost

We use birthdays and anniversaries as one of several means to take stock in where we are and in where we are going. For example, a marriage anniversary might be used to take stock in the marriage, note the accomplishments and reaffirm one's commitment to the marriage. A golden or silver wedding anniversary is often recognized with great fanfare and couples look back upon their marriage and look forward to their future.

Now some people might also take a keen interest in the anniversary event itself. I usually cringe when my wife asks me whether I remember what we did for our anniversary the previous year. It is amusing to her, I hope, that I often do not get the answer to that question right; even though by now I know the question is coming!

The anniversary of our Declaration of Independence is celebrated every July Fourth and is certainly seized by many of us as an opportunity to join with family and friends in a social setting. On this holiday we take time to reflect on the significance of our Founding Fathers' actions. We are proud of our Nation's accomplishments and continuing evolution.

In a similar manner we might recognize the birthdays of our friends and loved ones as we reflect on their journey through life. Again certain birthdays are accorded more fanfare. A baby's first birthday, birthdays that indicate the passage to adulthood and the birthdays that reflect decades of life come to mind.

Our Section, one of the newest within the Virginia State Bar, recently had its twelfth anniversary. Our Bylaws were established in February, 1996. I recently took the time to go back to the Bylaws and review what the founders thought most important to the Section. I note that my predecessors have acted in a manner consistent with the Section's purpose.

Section 2 of the Bylaws states the Section's purpose and is set out below:

> To further the objectives of, and promote active participation in, the Virginia State Bar;
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> To enhance communication and the exchange of ideas and information on military-civilian issues which affect the practice of law in Virginia;
>
> To foster unity between members of the Section by providing a forum where Section members can share research, source materials and experiences;
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> To sponsor programs and projects of special interest and relevance to the members of the Section and the Virginia State Bar in the field of military law;
>
> To foster unity between the active duty Armed Forces Attorneys and the members of the Section by providing opportunities for the exchange of professional updates of relevant laws affecting active duty service members, veterans, and the public at large.
>
> To conduct continuing legal education programs, publish and distribute educational and professional materials and undertake other activities which shall enhance the competence and skills of lawyers and improve their ability to deliver the highest quality of professional legal services;
>
> To further promote public understanding of the field of military law.
>
> To facilitate the practice of Virginia attorneys practicing worldwide with the military and that of non-Virginia attorneys practicing in the Commonwealth in conjunction with military service.

This year we have focused on continuing to provide outstanding legal education opportunities for our members, the Bar membership at large and military attorneys serving in Virginia. This year's CLE will be at Quantico on 9 May from 9 – 12:30. We anticipate there will be three hours of credit to include one hour of ethics. As in the past, there is no charge for this CLE.

Also this year, with the help of key employees at the State Bar, we have established and improved the Section's website. On it you will find, among other things, our recent Board minutes, a calendar of events, names and addresses of the Board of Governors and, our Bylaws. Board member Chris Dunne has accepted the assignment of managing and providing an interface between the Section and the Bar concerning web content. This is our web address. http://www.vsb.org/site/sections/military We welcome comments from the membership to help us make this web site and our section more responsive to the needs of the members. Website comments should be suggested to:

Christopher Dunne; Chief, Coast Guard Legal Assistance
2100 2nd Street SW, Washington, DC 20593
(202) 372-3782; Christopher.M.Dunne@uscg.mil

I would be remiss to not mention that two of our Board members, Matt Smith and Gary Bowman, are currently in uniform serving overseas with our armed forces. Every American generation finds citizens who step forward to serve their nation in the military. In doing so they set aside the comforts of home, suffer economic hardship and, perhaps most significantly, suffer the separation from their families and loved ones. Matt and Gary are examples of such Americans. Through its efforts this Section is dedicated to those servicemembers and their families. I ask all of you to take an interest in your Section and seek the addition of Bar members to our ranks. The membership form is on our website.

Finally I make a special note of appreciation to Dolly Shaffner, our liaison with the Virginia State Bar. Dolly goes the extra mile in ensuring the Board is responsive to the Bar and to our membership. She is a pleasure to be around, anxious to serve and very dedicated to the membership.

Richard Prevost, Chair

The Military Law Section is pleased to feature excerpts from a new book by Army Major Kyndra Rotunda, *Honor Bound: Inside the Guantanamo Trials,* scheduled for publication by the Carolina Free Press this spring. Major Rotunda, a member of the U.S. Army Reserve Judge Advocate General's Corps, is a Phi Beta Kappa graduate of the University of Wyoming, where she also earned her law degree. There, she served as comments editor of the *Land and Water Law Review,* and was named the outstanding graduate of her law school class. She began her legal career as an active duty Judge Advocate Officer, where after a number of duties, she was appointed to serve as prosecutor with the Military Commissions Prosecutor Team at Guantanomo Bay. Her book offers a bold, frank inside view of the prosecution of detainees at Guantanamo Bay. Here are some extracts.

CHAPTER THIRTY: SHOULD THE U.S. GOVERNMENT ALLOW DETAINEES TO REPRESENT THEMSELVES?

The Military Commissions Procedures that the Department of Defense provided greater rights than any that have come before; and they provide more discovery than U.S. defendants receive in U.S. federal courts. However, in one instance, they denied detainees an important fundamental right – the right to self-representation.

The 1975 [case of *Faretta v. California*, 422 U.S. 806 (1975)] is the cornerstone in American jurisprudence that protects a defendant's right to represent himself. This standard is not unique to American law, but instead is recognized internationally. The *Faretta* court observed that no modern-day justice system denies defendants the right to represent themselves. In fact, the only body to do so existed from 1487-1641, a medieval court known for unfair rulings and swift, harsh punishment — the Star Chamber. Even war crimes trials, such as those that occurred in Nuremburg and Rwanda consistently recognized the right of self-representation.

One detainee pending trial before a military commission, Mr. Al Bahlul, asserted this right. His request to represent himself is hardly novel, but one easily granted by reviewing both international and American jurisprudence. Defense counsel in the Al Bahlul case objected to their designation as defense counsel, and requested the Military Commission to honor his request.

The prosecution did not object to Al Bahlul representing himself if the judge appointed stand-by counsel. Therefore, both prosecution and defense *agreed* that the law affords an undeniable right to self-representation. Nonetheless, [the presiding judge] denied the request and ordered detailed defense counsel to represent Al Bahlul – despite the complicating fact that the defendant refused to speak with his assigned defense counsel at all. Under *Faretta*, unskilled self-representation is far superior to any defense that his detailed defense counsel can muster without any cooperation or communication with his client. In this case, Al Bahlul responded to [the judge's] ruling by taking-off his translation headset and "boycotting" the proceedings.

To support his ruling, [the judge] concluded, without evidence, that Mr. Al Bahlul was "incompetent." However, he makes this determination without examining the defendant, or providing any basis for why he believes Al Bahlul to be "incompetent." He only provides remarkably circular reasoning for his decision and states "he is not competent to go pro se because he has said on the record in open court that he is boycotting the proceedings and that he will not participate in the proceedings. Obviously a person who will not participate in the proceedings cannot represent himself."[1] He maintains this basis, despite the fact that defense counsel directs his attention to the obvious – that the defendant boycotted the proceedings because [the judge] denied his request for self-representation.

Finally, late in 2006, the U.S. Congress intervened and granted detainees the right to represent themselves before military commissions.[2] It understood what the Department of Defense did not, that it makes sense to follow longstanding legal principles.

[One of the presiding judges] on various occasions seemed to vacillate between the role of judge and defense counsel. He acted with some trepidation and erred on the side of defense, even when the facts and the law direct otherwise. Another aspect of the of Al Bahlul case demonstrates this point. The government accused Al Bahlul of supporting Al Qaeda and creating propaganda videos encouraging its viewers to kill Americans.

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1 *US v. Al Bahlul*, Trial Transcript at 66, Jan. 11, 2006.

2 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 10 USC 948a, § 949a(1)(D) (2006).

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contemptuous remarks about the President in a number of local newspapers following his refusal to deploy to Iraq.

As service members become more vocal about the war, commanders need to become more familiar with how freedom of speech is applied in a military context. For instance, when a company commander openly questions the futility of serving another tour in Iraq is his conduct heroic or is it conduct unbecoming an officer? When Corporal Smith posts a blog alleging that the war is the result of corporate greed and that none of the troops support it is he simply expressing a personal opinion or does his speech present a threat to the morale and discipline of his unit? Soldiers are citizens in uniform, after all, and the Con- (70/71) stitution they swear to defend bestows upon each of them the freedom of speech. But what happens when that speech has a detrimental impact on the good order, discipline, and morale of a particular unit or individual within the unit?
This article will examine the dilemma of dissension in the ranks—a dilemma that has largely remained dormant for more than 40 years. The last time soldiers lashed out against the President in any noticeable degree was during the Vietnam War. More recently, a number of commissioned officers publicly ridiculed President William J. Clinton after his affair with Monica Lewinsky came to light. The article will discuss these examples and a handful of seminal cases that comprise the body of law governing free speech in the military. What the cases and statutes indicate is that the content of the message itself and the nature in which it was delivered will ultimately determine its lawfulness. The more contemptuous and public the remark, the more likely punishment will be prescribed for the messenger.

DOD Directives

There are two pertinent Department of Defense directives (DODD) that govern political speech in the military. Directive 1325.6 establishes guidelines for dealing with protest and dissident activities, and Directive 1344.10 specifies the types of political activities that may be appropriate for active-duty service members to engage in. The directives establish principles that are intended to help commanders balance the free speech rights of their troops with their own command obligations. For instance, DODD 1325.6 counsels commanders to preserve the service member's right of expression to the utmost extent on the one-hand while on the other they are cautioned not to ignore conduct that could destroy the effectiveness of their units.[4] The directives also presuppose that commanders will exercise calm and prudent judgment when trying to properly reconcile these two interests when they clash.

Although the directives are primarily consulted for the list of activities that they prohibit, they also openly encourage service members to participate in a number of political activities. These activities include voting, contributing money to partisan campaigns and causes, attending rallies, meetings, and conventions as a spectator, joining a political club, and expressing personal opinions on candidates and political issues.[5] Members may also serve as nonpartisan election officials, display a political sticker on their car, and encourage their peers to register and vote.[6] While this list is by no means exhaustive it is representative of the types of civic responsibilities the Department of Defense hopes military members will take advantage of as citizens.

There is, however, one caveat when it comes to engaging in most of these activities. Department of Defense Instruction 1334.01 generally for- (71/72) bids wearing a uniform while participating in any personal, professional, or political activity where an inference of official sponsorship may be drawn.[7] Examples include giving an unofficial public speech or interview and participating in a march, picket, or any other form of public demonstration.[8] A good rule of thumb is that members may never wear a uniform while engaging in any activity that would tend to bring discredit upon the armed forces or create an inference of official endorsement on behalf of the military.

It is also important to note that unlike the *Uniform Code of Military Justice* (UCMJ), the directives do not distinguish service members who publicly criticize a President and oppose a war from those who openly support both. The directives were intended to preserve in part the long-standing tradition that the military remain an apolitical body whose duty is to obey the orders of its civilian leaders. Just as soldiers are prohibited from airing their grievances in public, so too should they refrain from delivering speeches, granting interviews, and publishing statements that tend to show partisan support for any cause and political leader.
There are a number of prohibited activities outlined in the provisions of DODD 1325.6 and DODD 1344.10, but for the sake of brevity this article will focus on the three or four that service members are most likely to violate. The first of these provisions deals with speaking in public at a political gathering. Army Lieutenant Ehren Watada was charged in part because of comments he made in a speech last year to an audience at an antiwar convention in Seattle, Washington. Directive 1344.10 specifically prohibits service members from speaking before any political gathering that promotes a partisan party, candidate, or cause. The directive defines a partisan political activity as one that sup-

ports issues specifically identified with a national or state political party and associated or ancillary organizations.[9] Veterans for Peace, the national organization that sponsored Watada's speech, arguably qualifies as an ancillary organization as defined by the regulation. Even though Watada was ultimately charged for using contemptuous language toward the President, he could have also been charged with violating a lawful general regulation under Article 92 of the UCMJ for delivering the speech to begin with in violation of Army regulations.

The group Appeal for Redress's online petition was proper in the sense that group members have every right to communicate with their legislators without fear of retribution, but their appearance on the CBS news program *60 Minutes* was another matter. Members of the group appeared on the program to discuss their opposition to the Iraq War. Although most of the interviewees spoke in vague generalities, they still violated the provisions of DODD 1344.10 barring participation in any radio or television program as an advocate for or against a partisan political party or cause. Because the group presented its petition to selected Democratic representatives in Congress in the hopes that (72/73) Democrats would deliver on their campaign promise to redeploy forces from Iraq, it was promoting a partisan cause in violation of the directive.

Contempt Toward Officials

Using contemptuous language against the President or other officials is a unique proscription within the law that is rarely charged by military prosecutors. Article 88 of the UCMJ is rooted in the British Articles of War of 1765.[10] The British Articles of War forbade any officer or soldier from using traitorous or disrespectful words against the King or members of the royal family.[11] The articles also forbade British troops from behaving with contempt or disrespect toward a general or other commander-in-chief of the British forces and from using words tending to hurt or dishonor them.[12]

In June 1775, the Continental Congress adopted this provision and slightly modified the language to make it applicable to the Continental Army during the Revolutionary War.[13] In 1776, Congress amended the provision to prohibit the use of traitorous or disrespectful words against the United States Congress or any state legislature in which a soldier or officer may be quartered.[14] The provision was modified again in 1806 to preclude the President and Vice President from being treated as objects of disrespect.[15] The provision remained unchanged until Congress incorporated it into Article 88 of the UCMJ in 1950.

In order to secure an Article 88 conviction, the government must prove that the accused was a commissioned officer; that he or she used certain words against the official or legislature specified in the article; that a third party became aware of these words because of an act attributed to the accused; and that the words were contemptuous in themselves or by virtue of the circumstances in which they were used.[16] The government may not charge expressions of opinion made during the course of a private conversation or adverse criticism of a protected official or legislature if it was not personally contemptuous and was done during the course of a political discussion. Punishment for this offense includes dismissal from the service, forfeiture of all pay and allowances, and confinement for one year.
One reason why prosecutions under this article are extremely rare is because of the "you know it when you see it" approach Congress adopted in attempting to define the term "contemptuous." The *Manual for Courts-Martial* asserts that contemptuous language is either so obvious that it amounts to contempt per se or it may be inferred by examining the circumstances surrounding the making of the accused's statement. The *Military Judges' Benchbook* (Department of the Army Pamphlet 27-9) is a companion text to the *Manual for Courts-Martial*, and it provides limited definitions for certain enumerated offenses under the UCMJ. The *Benchbook* defines contemptuous as "insulting, (73/74) rude, disdainful, or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness."[17] Besides the limited guidance these two references provide, the best examples of this offense can be gleaned from cases where officers were

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4. Department of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, 1 October 1996, 2.
5. Department of Defense Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 2 August 2004, 2, 10.
6. Ibid., 10-11.
7. Department of Defense Instruction 1334.01, *Wearing of the Uniform*, 26 October 2005, 2.
8. Ibid.
9. DODD 1344.10, 9.
10. *United States v. Howe*, 37 C.M.R. 429, 434 (U.S.C.M.A 1967).
11. Ibid., 434.
12. Ibid.
13. Ibid.
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14. Ibid., 434-35.
15. Ibid., 435.
16. Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (Washington: US Government Printing Office, 2005), IV-17.
17. Department of the Army, *Military Judges' Benchbook*, Pamphlet 27-9, 15 September 2002, para. 3-12-1(d).

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either courts-martialed or administratively punished for using contemptuous language toward the President.

Approximately 115 general courts-martial were convened during the Civil War and the two World Wars to punish perceived Article 88 violations.[18] During the Civil War, soldiers were convicted for calling President Abraham Lincoln "'a loafer,' 'a thief,' 'a damned tyrant,' and a 'damned black republican abolitionist.'"[19] Soldiers who mockingly referred to President Woodrow Wilson as "the laughing stock of Germany" and "a God damn fool" were also tried and convicted during the First World War.[20] Officers who referred to President Franklin D. Roosevelt during World War II as "the biggest gangster in the world next to Stalin," "Deceiving Delano," and "a crooked, lying hypocrite" were also courts-martialed for using contemptuous language against the Commander-in-Chief.[21]

Since the UCMJ was enacted in 1950 the military has prosecuted only one officer for violating the provisions of Article 88.[22] On 6 November 1965, Lieutenant Henry Howe, Jr., marched in a peaceful war protest in El Paso, Texas, where he joined a group of professors and students who had organized a demonstration against the Vietnam War. On the day of the protest, Howe slipped into the back of a picket line wearing his civilian clothes and carrying a sign that read: "Let's Have More Than a 'Choice' Between Petty, Ignorant, Facists (sic) in 1968" on one side and "End Johnson's Facist (sic) Aggression in Vietnam" on the other.[23] Howe was convicted of using contemptuous words against the President and for conduct unbecoming an officer.

Lieutenant Howe contested his conviction on a number of legal grounds, including an argument that the antiwar rally where he carried his sign constituted a political discussion. The *Manual for Courts-Martial* specifically states that officers may not be prosecuted for adversely criticizing a designated official or legislature if the criticism itself was not personally contemptuous and it was done during the course of a political discussion.[24] The United States Court of Military Appeals rejected this argument on the grounds that adverse criticism could never equate to the kind of contemptuous language prohibited by the article.[25] Furthermore, the court noted that the provision also made perfectly clear, "Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense."[26]

Howe also argued that the charges violated his free speech rights under the First Amendment. After considering the fact that the prohibition (74/75) against using contemptuous language predated the Revolutionary War, the Constitution, and the Bill of Rights, the Court rejected this argument outright. The Court also analyzed Howe's free speech argument in the context of the clear and present danger test set forth in *Schenk v. United States*. The *Schenk* court held, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[27] The Court ultimately determined that the language Howe publicly displayed on his sign constituted such an evil and was therefore afforded no protection under the First Amendment.

Lieutenant Watada is the only other officer to be charged for violating Article 88 since Howe's conviction in 1967. Watada was charged with two specifications of using contemptuous language toward President Bush for making the following remarks in an interview he gave on 7 June 2006: As I read about the level of deception the Bush Administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such time-honored tradition, knowing we waged war based on a misrepresentation and lies?[28]

Watada has thus far vigorously defended his comments on the grounds that he was merely expressing his personal opinion which is considered protected speech under the First Amendment. If Watada is ultimately convicted of this charge, the appellate court may reject this argument given the Supreme Court's holding in the *Howe* case—that punishing Watada for publicly displaying his contempt for the President furthers the government's compelling interest of maintaining good order and discipline in the armed forces. The appellate court may also conclude that Watada's adverse criticism was exactly the kind proscribed by the article and that the public manner in which he delivered his comments aggravates his offense.

In most of these cases, however, officers who unwisely air their grievances in public risk receiving career-ending reprimands in their personnel files. At the height of Kenneth Starr's investigation into the Monica Lewinsky affair, public criticism of President Clinton became so frequent and blatant among the officer corps that both the Air Force and Marine Corps delivered stern warnings about using contemptuous language against the President.[29] Shortly after the Marine Corps issued its warning, Major Shane Sellers, a 20-year Marine veteran, published an article in *The Navy Times* where he said

among other things "what Clinton and Monica did as consenting adults boils down to adultery. And one should call an adulterous liar exactly what he is—a criminal."[30] After several readers complained about Sellers' comments, the Marine Corps issued him a letter of concern and placed it in his personnel file.

(75/76) The most notorious case involving criticism of President Clinton took place in 1993 shortly after his election. Air Force Major General Harold Campbell delivered a speech at a NATO banquet where he called Clinton a "dope smoking," "skirt chasing," and "draft dodging" Commander-in-Chief.[31] For that, General Campbell was reprimanded, fined $7,000, and forced to retire.[32] Lieutenant Colonel Steve Butler called President Bush's decision to invade Iraq "sleazy and contemptible" and asserted, "Of course Bush knew about the impending attacks on America. He did nothing to warn the American people because he needed this war on terrorism. His daddy had Saddam and he needed Osama."[33] Lieutenant Colonel Butler was immediately reprimanded and relieved of his position as Vice Chancellor of the Defense Language Institute, forcing him into retirement after a distinguished 24-year career.[34]

Conduct Unbecoming an Officer and a Gentleman

Article 133 of the *Uniform Code of Military Justice* proscribes officers from engaging in unbecoming conduct. It too was adopted from the British Articles of War of 1765.[35] The British version provided: "Whatsoever commissioned officer shall be convicted before a general courts-martial of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and gentleman, shall be discharged from the service."[36] The Continental Congress adopted this provision in 1775, 1776, and once again in 1786 without making any modifications to the text.[37] In 1806, Congress revised the language by omitting the terms "scandalous" and "infamous," leaving the provision to read: "Any commissioned officer convicted before a general courts-martial of conduct unbecoming an officer and a gentleman, shall be dismissed [from] the service."[38] Congress ultimately incorporated the provision into the UCMJ in 1951 and enacted it as Article 133.[39] The current version of the article renders the provision applicable to officers, cadets, and midshipmen and authorizes any punishment that a courts-martial may direct including but not limited to dismissal from the service.[40]

There are literally dozens of activities that may comprise the conduct prohibited by the provisions of Article 133. Some of these activities include making false official statements or reports to superior officers; insulting or defaming another officer in the presence of other military members; giving false testimony before a courts-martial or board; neglecting to discharge pecuniary obligations; cruelty toward or maltreatment of subordinates; getting drunk in the presence of military inferiors; commission of a felony or crime; and gross disrespect or defiance of civil authorities, to name a few.[41] Much like Article 88, prosecutions for political speech under Article 133 are extremely rare. The last known trial involved an Army doctor who publicly opposed the Vietnam War and openly encouraged enlisted soldiers to disobey their deployment orders.

(76/77) Captain Howard Levy refused to set up a program for training Special Forces medics in simple dermatology procedures in preparation for their deployment to Vietnam. Upset that Levy had disobeyed his original order, the hospital commander ordered Levy a second time to conduct the training. Levy refused and then began making public statements denouncing the Vietnam War and Special

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18. John G. Kester, "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice," *Harvard Law Review*, 81 (June 1968), 1720-21.
19. Ibid., 1722.
20. Ibid., 1724-25.
21. Ibid., 1730-31.
22. See *United States v. Howe*, 37 C.M.R. 429 (1967).
23. Ibid.
24. Ibid., 444. Citing the *Manual for Courts-Martial*.
25. Ibid.
26. Ibid.
27. *Schenk v. United States*, 52.
28. Department of the Army Form 458, *Charge Sheet*, http://seattletimes.nwsource.com/news/local/charge_sheet.pdf.
29. Steven Lee Myers, "Military Warns Soldiers of Failure to Hail Chief," *The New York Times,* 21 October 1998, A22.
30. Ibid.
31. Ibid.
32. Ibid.
33. Kevin Howe, "DLI Official Removed for Criticizing Bush," *Monterey County Herald*, 3 June 2002, http://www.mindfully.org/Reform/2002/Bush-Critic-Suspended5jun02.htm.
34. Ibid.
35. William Winthrop, *Military Law* (Washington: Press of Thomas McGill & Co., 1886), 1020.
36. Ibid.
37. *Parker v. Levy*, 417 U.S. 733, 745 (1974).
38. Ibid., 746.
39. Ibid.
40. *Manual for Courts-Martial United States*, IV-94, 95. The maximum punishment authorized for this offense is a dismissal from the service; total forfeiture of all pay and allowances; and confinement for one year or for a period not in excess of that authorized for the most analogous offense punishable by the UCMJ.
41. Ibid., 1025-32.

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Forces personnel in front of several enlistees assigned to Fort Jackson, S. C., for basic training. Levy was prosecuted for violating his commander's orders and for making intemperate, defamatory, disloyal, and provoking statements in violation of Articles 133 and 134 of the UCMJ.[42]

Levy's commander originally considered issuing him an Article 15 but decided to courts-martial him instead largely because of the public nature and circumstances surrounding his statements.[43] Levy stood in front of a group of black enlisted personnel and openly encouraged them to refuse to deploy to Vietnam because of perceived racial discrimination.[44] He also told a group of enlisted soldiers that he would not train Special Forces personnel because he considered them "liars and thieves," "killers of peasants," and "murderers of women and children."[45] On another occasion, Levy unapologetically told a group of soldiers, "I hope when you get to Vietnam something happens to you and you are injured."[46]

The United States Supreme Court ultimately reviewed Levy's conviction in 1974. Levy argued to the Court that the provisions of Articles 133 and 134 were unconstitutionally vague in the sense that he could not reasonably be expected to realize that his conduct was proscribed by law. The Court rejected this argument on the grounds, "His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."[47]

Levy also argued that the provisions were overly broad to the extent that they violated his First Amendment rights. In the process of rejecting this assertion, the Court made a series of statements that indicated its willingness to give great deference to the military when it comes to First Amendment protections. Justice William H. Rehnquist, writing for the majority, stated that the unique nature of the military requires a different application of free speech protections than civilians generally enjoy.[48] The Court held, "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[49] The military must rely on a command structure that is crucial to commanding troops in combat and affects overall national security, Rehnquist reasoned.[50] He also noted that while disrespectful and contemptuous speech may be tolerated in the civilian community, it may undermine the effectiveness of response to command in (77/78) the military.[51] The Court concluded that the free speech protections contemplated by the Constitution did not extend to Captain Levy's conduct.

Lieutenant Watada was also charged for conduct unbecoming an officer and gentleman for publicly disparaging President Bush in the statement he issued 7 June 2006, the same comments that formed the basis of his Article 88 charge. If convicted of this charge, Watada will likely appeal on the ground that his comments are protected speech because they simply reflect his personal opinion. Considering the extreme deference the Supreme Court gave the military in *Parker v. Levy*, the appellate court may reject this argument after taking into account that Watada is a commissioned officer, that he had command responsibility for a platoon of soldiers, and that his conduct undermined the fundamental necessity of discipline, obedience, and the effectiveness of response to command in his unit.

Conduct Prejudicial to Good Order and Discipline

Although Congress limited the application of Articles 88 and 133 to commissioned officers, enlisted personnel who publicly attack the Commander-in-Chief, the United States, or its policy aims are also subject to prosecution under the UCMJ. It would make little sense to allow a first sergeant or squad leader to make statements that have a detrimental impact upon the morale and discipline of the soldiers serving around them. For instance, what should become of the staff sergeant who calls the President a war criminal in a sermon he delivers at the local parish while home on leave from Iraq? How should the command handle the corporal who claims on a major newspaper's Web site that the soldiers fighting in Iraq no longer support the war and urges readers to put pressure on their elected representatives to bring the troops home? What should happen to the group of privates who don their uniforms and march in an antiwar rally on the National Mall?

One possible course of action is to punish these troops for violating the provisions of the Department of Defense directives discussed earlier as they have been incorporated by their respective services' regulations. Another is to punish them for violating the tenets of Article 134 of the UCMJ. Article 134 is commonly known as the "general article" in that it typically serves as a "catch-all" provision for charging a wide array of criminal offenses. Military prosecutors will typically rely on Article 134 to charge crimes that are not otherwise covered in other provisions of the UCMJ. In order to secure a conviction under the arti-

cle, prosecutors must prove that the accused's conduct under the circumstances "was to the prejudice of good order and discipline in the armed forces" or "was of a nature to bring discredit upon the armed forces."[52] The prosecutor may literally bring charges against an accused for engaging in any political activity or speech that he can prove (78/79) amounted to either one of those two things. Arguably, the sermon, speech, and antiwar rally discussed above could qualify as service-discrediting conduct and under certain circumstances may also amount to conduct prejudicial to good order and discipline in the armed forces.

One of the provisions of Article 134 is the offense of making disloyal statements. An accused may generally commit this offense by making a statement disloyal to the United States with the intent to promote disloyalty or disaffection by any member of the armed forces. For instance, praising the enemy, denouncing America's form of government with the intent to promote disaffection or disloyalty among military members, and attacking the war aims of the United States are types of disloyal statements specifically contemplated by the provision.[53] The following two cases illustrate this provision.

The first case involves a soldier who was opposed to the idea of waging a "cold war" against the Soviet Union. Private First Class Allen McQuaid was assigned to Elmendorf Air Force Base, Alaska, in October 1952 when he made a series of damning statements about the United States and its foreign policy objectives. McQuaid claimed among other things that the war was waged by the banking industry to make money at his expense and to protect an economic system that he considered unfair and unjust.[54] McQuaid also inferred that service members who excelled in the military did so not by merit but by compromising their integrity while pandering to the "capitalists and their henchmen" who stood to gain the most from the war.[55] He then actively encouraged members who were disaffected with the service to "follow the dictates of their own consciences."[56] McQuaid uttered these statements vocally on a number of occasions and later posted them in writing on the front door of the officers' club and on the bulletin board of the Air Base Group headquarters.

The Air Force Board of Review concluded that McQuaid's statement about the banking industry profiting from the war was disloyal and disaffecting because it falsely portrayed the aims and objectives of the defense effort, it unjustly maligned the American economic system, and it tended to discourage faithful service to the United States by members of the armed forces.[57] The court held that the comment about certain service members compromising their ideals and oaths to further their careers was disloyal in that it undermined confidence by members of the armed forces in some of its other members.[58] Lastly, the court held that McQuaid's statement urging members to follow the dictates of their consciences was self evidently disloyal as it openly fostered disobedience.[59] The court ultimately concluded that none of the statements were protected by the First Amendment because of their seditious nature.

Another case involved two Army privates who authored a manifesto outlining their reasons for protesting the Vietnam War. Privates Daniel Amick and Kenneth Stolte published some 200 leaflets in the base library and (79/80) then posted them in various locations around Fort Ord, California. The leaflets contained a number of statements alleging among other things that the war was stupid, illegal, and foolish. The privates wrote, "We are tired of all the lies about the war, the false ideals, the empty reasoning. We see the reality of war; it is pointless, meaningless, and [a] tragic battle between two differing factions of human beings."[60] The manifesto concluded by urging those who wanted to work for peace and freedom to join them in their opposition to the war. The two signed the statement identifying themselves by name, rank, unit, and serial number.

The trial court sentenced both soldiers to confinement for four years and to be dishonorably discharged from the service.[61] On appeal, the Army Board of Review held that soldiers have to expect that there are certain free speech restrictions that must be imposed on them because

See "WHEN SOLDIERS SPEAK OUT" on Page 10

42. *Parker v. Levy*, 739.
43. Ibid., 737.
44. Ibid., 739.
45. Ibid.
46. Ibid.
47. Ibid., 761.
48. Ibid., 758.
49. Ibid.
50. Ibid., 759.
51. Ibid.
52. *Manual for Courts-Martial United States*, IV-95.
53. Ibid., IV-104. The *Manual* provides that the disloyalty involved must be to the United States as a political entity and not to one of its departments or agencies that are part of its administration.
54. *United States v. McQuaid*, 5 C.M.R. 525, 528 (A.F.B.R. 1952).
55. Ibid., 530.
56. Ibid.
57. Ibid.
58. Ibid.
59. Ibid.
60. *United States v. Amick*, 40 C.M.R. 720, 722 (A.B.R. 1969).
61. Ibid., 721.

When Soldiers Speak Out —

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of the unique nature of the military. The court observed, "An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[62] The court concluded that the duo specifically intended to undermine the war effort by fostering dissent and by jeopardizing the discipline required of an effective fighting force.[63]

Conclusion

As President Bush and the Congress continue jousting over the decision to withdraw US forces from Iraq, some service members will continue to publicly voice their disdain for the President and opposition to the war. In light of such events, commanders need to have a better understanding of the free speech restrictions imposed upon service members by the UCMJ. Senior leaders rarely courts-martial service members for voicing their political views in public for any number of reasons. Perhaps the most important reason is that commanders understand that their soldiers enjoy, for the most part, the same free speech rights that civilians are afforded under the Constitution.

Major Sellers, Colonel Butler, and General Campbell never spent a day behind bars for the things that they said about Presidents Clinton and Bush, but their commanders sent a clear message that such conduct will not be tolerated by commissioned officers serving on active duty. The private, corporal, and sergeant who publicly refer to the President as a liar, a war criminal, or worse should also be punished appropriately for their inappropriate conduct. Much like any other criminal matter, commanders have a host of options when it comes to disposing of these types of cases. Options range from doing nothing to recommending a general courts-martial. The proper response likely lies somewhere in between. Commanders can always resort to (80/81) letters of reprimand and poor evaluation reports to get the desired response without the crippling stigma of jail time or a federal conviction. Of course, administrative measures like these may also be used in conjunction with a courts-martial or an Article 15. Article 15s would be appropriate where the accused's comments were flagrant enough to warrant loss of pay, rank, or other privileges, including confinement up to 30 days. Officers may also receive Article 15s, usually, from a general officer whereby they may be fined or placed under house arrest.

Harsher measures like a courts-martial should be reserved for egregious offenders who take their criminal conduct to greater heights. Lieutenant Watada, for example, would likely have received a formal reprimand for expressing his contempt for the war and for President Bush had he gotten on a plane and deployed to Iraq. Instead, he opted to intentionally miss movement with the rest of his brigade and thus risks the possibility of a conviction at a general courts-martial. Because Captain Levy's comments presented a clear and present danger to the morale and readiness of black soldiers preparing to deploy to Vietnam, his commander appropriately chose to prosecute rather than give him the Article 15 originally intended.

Regardless of the form of punishment a particular commander may choose to impose on a service member for unlawfully expressing political views, all commanders should remember to prudently balance and preserve the free speech rights of their soldiers with their own professional command obligations, ensuring one never jeopardizes the other. When a commander does determine that certain speech or behavior is having a detrimental impact on unit discipline, readiness, and morale, the UCMJ provides plenty of tools to ensure that timely, fair, and appropriate discipline is administered in the best interests of justice.

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62. Ibid., 723. Citing to *In re Grimley*, 137 U.S. 147, 153 (1890).
63. Ibid.

NOTES

Major John L. Kiel, Jr., is attending the Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, where he is a candidate for an L. L. M. degree in Military Law. Major Kiel's last assignment was at the United States Military Academy as an Assistant Professor of Law teaching courses in Constitutional Law and Military Justice. He is a graduate of Brigham Young University and the Florida State University College of Law.

Honor Bound —

Continued from Page 3

When brought before the commission for his preliminary hearing in 2004, he voluntarily attempted to confess his crimes before the court, on the record. He stated, "I am from al Qaida, and the relationship between me and September 11th —— "[3] But before the accused could finish his statement, [the judge] interrupted him, telling him to stop and explaining to the members, "none of this is evidence in any way."[4] The prosecution objected. Then [the judge] told Al Bahlul to go on, but Al Bahlul had lost his train of thought and did not finish his sentence or otherwise explain his relationship to September 11th.

Three times [the judge] silenced the defendant and at one point tellingly stated, "I'm not going to allow you to hurt yourself in my courtroom." Although the defendant understood the risks and consequences of his statements and knew that he was on trial for alleged war crimes, [the judge] stopped him from doing what defendants do every day in U.S. courtrooms — confess! At one point the defendant even *thanked* [the judge] for helping him, and asked [the judge] to hold up his hand and signal to the defendant each time he was about to say something suggesting his guilt. [The judge] did not object to this role, and the defendant proceeded to express nine reasons why he believed the Military Commission process was unfair and why he wanted to represent himself. The prosecution showed remarkable restraint and did not object to the judge's obvious the hand-signal agreement between the judge and the defendant. Even the defendant understood that he was being aided by the judge, hence his expression of gratitude.

CHAPTER THIRTY-ONE: SETTING THE RECORD STRAIGHT

While the government expended time drafting new rules, responding to unusual requests from the [presiding judge], negotiating with other agencies to get evidence declassified, and providing extensive discovery to defense counsel, defense lawyers tried their case in the media. They captured media attention and repeatedly criticized the military for its "kangaroo courts." When prosecutors failed to correct inaccuracies, the defense's allegations intensified and became more frequent.

Defense attorneys received legal support from scores of private litigators, including Neil Kaytal, a known and prominent Constitutional Law Professor at Georgetown University, and top notch "well-heeled lawyers with America's premier corporate firms" who are "at the top of their profession."[5] Manhattan's Constitutional Rights Center leads a team of more than 400 attorneys representing detainees in court; Mayer, Brown Rowe & Maw, the 11th largest law firm who grossed $911 million in 2005 consider representing detainees to be their "cutting edge work"[6]; Blank Rome, one the 100th largest law firm in the world and grossed $247.5 million in 2005 represent detainees[7] among others.[8] One attorney in the prominent office of Covington and Burling has donated $27,600.00 of legal work to represent detainees. Another contributed over $200,000.00 of free legal work to defend a charged detainee.[9]

The defense counsel did not act as though they were outnumbered. Despite their outside teaching and speaking obligations, the defense team inundated the court with motions in each case – numbering over sixty.

Further, in military courts martial, the prosecution is responsible for nearly every logistical aspect of trial, from coordinating travel for witnesses to ensuring that technical equipment functions as it should. These duties apply in military commissions as well. In fact, prosecution coordinates clothing for the defendant and Judge Brownback admonished prosecutors when one detainee opted to wear a t-shirt to his trial. Other duties fall to the prosecution that ordinarily wouldn't.

For instance, officials in Guantanamo Bay were uncooperative in serving charges on detainees, claiming it made them appear impartial. Because the U.S. detention camp refused to cooperate with U.S. prosecutors trying detainees held there, a prosecutor was forced to fly from Washington, D.C. to Guantanamo Bay for the explicit purpose of hand-delivering charges to detainees. This unnecessary trip cost the prosecution valuable time and resources. It sent a full time lawyer to Florida, and then on to Guantanamo Bay just to hand the detainee a charge sheet! In any other situation, prison officials would simply deliver the charges.

See 'Honor Bound' on Page 12

[3] *U.S. v. Ali Hamza Ahmad Sulayman Al Bahlul*, Trial Transcript at 11, August 26, 2004.

[4] *Id.* at 11.

[5] Deroy Murdeock, *National Review Online*, January 25, 2006, expanding a piece that appeared in the December 5, 2005 issue of *National Review*.

[6] *Id.*

[7] *Id.*

[8] *Id.* They include Covington and Burling; Dorsey and Whitney, Holland and Hart, Hunton and Williams; and Paul Weiss.

[9] Fergus Shiel, Hicks' lawyer denied legal aid funding, January 10, 2006. (explaining that a request for additional funding was denied, but explaining that his firm had contributed $200,000.00 of legal work for the detainee.)

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Colonel Davis speaks Up – Accused No Boy Scout

"Well I woulda been here sooner, except that I fell asleep on the train and woke-up somewhere in the middle of D.C." he said, through a friendly smile, smoothing his rain soaked hair. Colonel Morris Davis "Mo" joined the prosecution office as the chief prosecutor in fall 2005, when criticism against the military was at an all time high. On ethics he said, "Just do the right thing, take the high ground, and you can't go wrong."

Colonel Davis jointed the prosecution team with a solid air force record. The air force commended him for handling a high-profile sexual harassment cases at the Air Force Academy, where he served as the legal advisor. He had experience with the press, and understood first-hand how journalists can "spin" a story into a tale.[10]

When Colonel Davis assumed the position, he began responding to one-sided stories and correcting the facts. For instance, one article appeared in the LEGAL TIMES accusing some prosecutors of misconduct based on allegations from a former prosecutor. Colonel Davis responded in writing to clarify that the government had thoroughly investigated the allegations and didn't find any support for them.[11] The response was an important step because it corrected misinformation and cleared prosecutors of alleged wrongdoing. The media and defense team had unfairly and falsely accused military prosecutors of misconduct. But, the government did not allow junior prosecutors to talk to the press. These prosecutors were grateful when Colonel Davis told their side of the story and set the record straight.

In January 2006, Colonel Davis accompanied some of the prosecutors to Guantanamo Bay for preliminary hearings in the cases involving detainee Kadhr and detainee Al Bahlul. Prosecutors accused Kadhr, who was 15 years old at the time of his crime, of attacking and killing an American soldier. Prosecutors accused Al Bahlul of making propaganda videos for Al Qaeda.

Colonel Davis, in an unprecedented move for military commission prosecutors, held a press conference for members of the media who had traveled to Guantanamo Bay in order to observe the hearings. In the conference, he called defense's characterization of Kadhr as a fresh-faced boy scout "nauseating" and further explained that Kadhr was not "tying knots and making s'mores," but, instead was making bombs to kill American soldiers. He defended the commission process, calling it full and fair and at one point stated, "damned if you do and damned if you don't." It was a rare and important step for the prosecution team, who before that took the blows but didn't fight back.

Defense team, realizing that they had awakened a sleeping giant, moved quickly to silence prosecutors by filing a motion claiming that Colonel Davis had committed "prosecutorial misconduct" with his statement and requesting a public retraction of his "inflammatory" statements. Defense argued that the procedural rules bind prosecutors to higher standards, and prohibit them from saying anything bad about the accused. It said that special more lenient rules should apply for defense counsel at Guantanamo Bay. It argued for a double standard.[12]

The prosecution argued that it had sat idly by for almost two years while Defense counsel attacked the prosecution and the procedures at trial. It had a client too – the U.S. government – and a right to defend the proceedings. The prosecution argued that it had "sat quietly while the defense has been doing a public relations battle and assault against us." [13] He went on, "This was the first time that he [Colonel Davis] stood up and decided to say, Hey, I need to say something back to some of these inflammatory remarks. Your Honor, you are not presiding over a kangaroo court."[14]

The judge decided that procedural rules allow Colonel Davis to respond to defense counsel's inaccurate statements and attacks. Importantly, the chief prosecutor had spoken, and the judge had confirmed his right to do so. At this moment, the judge leveled the playing field.[15]

Colonel Davis' stand was an important moment for military prosecutions not only on the ground in Guantanamo Bay, but also miles away in our Washington, D.C. office. Surprisingly, the prosecution team had muted itself for so long that the office hummed with concern about Colonel Davis' remarks. "He's gone too far," some claimed, stating the prosecutors have a higher responsibility to the public. One of the higher-ranking prosecutors even suggested that Pentagon officials would reprimand Colonel Davis for his comments. Without visiting the governing rules, prosecutors were too quick to accept defense's position – that they could talk but the prosecution couldn't.

By March 2006, having lost the argument in court, attorneys affiliated with the defense team petitioned the D.C. bar to revoke Colonel Davis' license to practice law within D.C. They seem to prefer a one-sided debate.

Eventually, the D.C. bar dismissed the complaint, confirming that prosecutors may respond to defense's troubling allegations. After all, prosecutors have a client too – the U.S. government.

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[10] Colonel Morris D. Davis, *Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age*, AIR AND SPACE POWER CHRONICLES, 5 November 2004.

[11] *Military Prosecutors Took Proper Action*, LEGAL TIMES, Vol. 17, No. 43, Oct. 4, 2005.

[12] *U.S. v. Omar Ahmed Kadhr*, Official Trial Transcript, Vol. 7 at 202 , Jan. 11-12, 2006. The Presiding officer stated, "I think we are in agreement that rule, 3.6, [rules governing statements made outside of trial] applies equally to the defense and the government." Defense counsel responded, "No, sir. Respectfully, we are not in agreement."

[13] *U.S. v. Omar Ahmed Kadhr*, Official Trial Transcript, Vol. 7 at 211 , Jan. 11-12, 2006.

[14] *U.S. v. Omar Ahmed Kadhr*, Official Trial Transcript, Vol. 7 at 214-215, Jan. 11-12, 2006.

[15] *U.S. v. Omar Ahmed Kadhr*, Official Trial Transcript, Vol. 7 at 228-229. Jan. 11-12, 2006.

SPECIAL FEATURE FROM THE REGIMENTAL HISTORIAN & ARCHIVIST U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL

COL (RET) FREDERIC L. BORCH, III

Our history: Phyllis L. Propp-Fowle was truly a trial blazer in our Regiment: the *first* female judge advocate; *first* female post judge advocate; *first* female judge advocate to earn a combat patch and overseas combat stripes; and the *only* female judge advocate to serve overseas in World War II. No one—-male or female—-is likely to have so many "firsts" again!

Born in Jasper County, Iowa on March 8, 1908, Propp-Fowle obtained her law degree from the University of Iowa in 1933. She was the only woman in her graduating class.

After America entered World War II, Propp-Fowle was one of the first 1,000 women to join the Women's Army Auxiliary Corps (WAAC) in 1942. When Congress gave the WAAC military status as part of the Army and renamed it the Women's Army Corps in September 1943, Propp-Fowle became one of its first members.

Given her legal training, Propp-Fowle began requesting a transfer from the WAAC / WAC to the JAG Department in mid-1942. After two years, her transfer was finally approved and, on May 4, 1944, now CPT Propp-Fowle became the first woman to wear JA insignia on her collar. She immediately requested to attend The Judge Advocate General's School at the University of Michigan—only to be refused because the school did not accept women. Consequently, she was assigned as the Post Judge Advocate at Ft. Des Moines, Iowa. This made sense, given that the WAC headquarters was located there.

CPT Propp-Fowle deployed to Europe in January 1945, becoming the first and only female judge advocate to serve overseas in World War II. She was assigned to the Judge Advocate Section, Headquarters, European Theater of Operations, in Paris. As a result, Propp-Fowle became the first and only female JA to serve overseas in World War II—-and he earned both a right sleeve shoulder patch and three overseas service bars (reflecting a total of 18 months service in a combat theater).

In early 1947, now MAJ Propp-Fowle was still on active duty with the JAG Dept., where she worked as the Chief, Legal Affairs, Judge Advocate Division, U.S. Forces in Europe. At this time, however, the Army decided to discharge all women, and Propp-Fowle was released from active duty in July 1947. She was, however, immediately rehired as a civilian attorney in the U.S. European Command in Heidelberg, Germany. Propp-Fowle subsequently worked in the Military Affairs Branch, where she prepared legal opinions, examined contracts for legal sufficiency, and supervised the legal assistance program for the entire command.

Propp-Fowle remained in Heidelberg until 1951, when she married Mr. Farnsworth Fowle, a newspaper reporter for the New York Times, and returned to the U.S. She subsequently practiced law in New York City. Propp-Fowle remained in the Army Reserve and retired as a LTC in 1968.

In 1999, Propp-Fowle was inducted as a "Distinguished Member of the Regiment." She died on June 12, 2000, aged 92 years. A suite of rooms at TJAGLCS has been dedicated to her memory in grateful recognition of her many contributions to the United States Army and the JAG Corps.

The Regimental Historical Collection at the LCS has Propp-Fowle's Class A service uniform in its possession, as well as other memorabilia relating to her superlative service in our Corps.

TRAUMATIC SERVICEMEMBERS GROUP LIFE INSURANCE

By Steven Chucala, Esquire

Military and civilian attorneys engaged in physical disability or estate counseling often overlook an important source of financial support for military members that become severely injured. Traumatic Servicemembers' Group Life Insurance (TSGLI) created by Congress in 2005, provides payment of money to members of the Uniformed Services who sustain traumatic injury resulting in certain severe physical/medical conditions. The injury insurance compensation for Soldiers became effective on December 1, 2005, with limited publicity and explanation.

Public Law 89-214, effective September 29, 1965, established the Servicemembers' Group Life Insurance (SGLI) program. Several subsequent amendments have increased the dollar values of coverage and expanded limited coverage for certain family members. Veterans Group Life Insurance (VGLI) was added by PL 93-289 in 1974, that permits extension of coverage after the member's separation from active duty. The TSGLI program has many aspects that deserve the attention of all active duty personnel, their next of kin and military or civilian attorneys providing legal services on military matters.

Questions posed to the author by clients during estate planning and physical disability counseling (AR635-40, Chapter 61 Title 10 USC) demonstrate a serious lack of knowledge by Soldiers and their next of kin concerning TSGLI. An overview of TSGLI is presented to address the major issues experienced by Soldiers.

Traumatic Servicemembers Group Life Insurance is a *traumatic injury* rider under the SGLI. It provides for payment of money to members of the Uniformed Services enrolled in the SGLI that sustain traumatic injury resulting in certain severe physical/medical conditions. Since December 1, 2005, every member who has SGLI also has TSGLI. (Retroactive application is provided for injuries incurred on or after 7 October 2001, resulting from Operation Enduring Freedom or Operation Iraqi Freedom.)

The coverage provides monetary benefits ranging from $25,000 to $100,000, depending on the degree of severity directly resulting from the traumatic injury. The payment may be used for whatever purposes the Soldier desires. It is meant to provide financial help during a difficult time. The premium is $1.00 per month that is added to the SGLI premium. Soldiers may not refuse the traumatic injury coverage if they elect to have SGLI.

TSGLI is not available to family members under SGLI or Soldiers under the Veterans Group Life Insurance Program (VGLI). Coverage does not apply to non traumatic illnesses and diseases, attempted suicide, self inflicted injuries and medical or surgical treatments of illness. Recovery will also be denied if the injury is attributable to a traumatic event while being under the influence of an illegal or unauthorized controlled substance or while committing or attempting to commit a felony.

The beneficiary of TSGLI is the Soldier or if incompetent, the guardian/agent on their behalf. Should death ultimately result from the injury, payment is made to the beneficiary listed in the SGLI policy. Traumatic injury events are not limited to combat operations. Coverage is 24/7/365. TSGLI payments are not deducted from SGLI coverage, are not a set off from any Physical Disability awards under AR 635-40, and TSGLI payments are not subject to federal income taxation.

Traumatic event is the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being. The damage caused is referred to as the traumatic injury.

Eligibility requirements for TSGLI are:

- Must be insured by SGLI.
- Must incur one of the listed losses and it must be the direct result of the traumatic injury.
- Must have suffered the traumatic injury prior to midnight of the day of separation from the uniformed services.
- Must suffer a scheduled loss within 1 year (365 days) of the traumatic event. (To be increased to 2 years.)
- Must survive for a period of not less than seven full days (168 hours) from the date of the traumatic injury.

The TSGLI program has a schedule of payments for traumatic losses that lists each medical/physical impairment and its degree with a corresponding dollar amount from $25,000 to $100,000. When last reviewed, 44 types of losses were identified ranging from total loss of sight in both eyes to the inability to carry out activities of daily living directly resulting from a traumatic injury other than an injury to the brain. (Brain injuries are covered under loss item number 37.) Pure mental illnesses are not covered.

Several claims may be necessary for traumatic brain injuries or coma that persist over prescribed periods of time that are payable in $25,000 increments. Should additional losses result from the same event after filing the first claim, another claim is required.

(Example: Loss of one foot followed by a second foot amputation two months latter.) However, recovery may not exceed $100,000 for multiple injuries resulting from the same traumatic event.

Claims should be submitted by the Soldier or someone acting on their behalf by using the TSGLI Certification Form GL.2005.261. (2006 Edition of 10 pages.) It contains three parts. The first is completed by the Soldier or representative. The second by the attending medical professional, and the third by the service branch prior to submission to OSGLI.

The TSGLI program has many other aspects that cannot be generalized in this article. To ensure Soldiers have the latest information, it is recommended that contact with the administrators of the program be accomplished as needed. Additional information, requests for claim forms and appeals of TSGLI determinations are available by calling 1-800-419-1473 or 800-237-1336. E mail request are: osgli.claims@prudential.com. or web site: www.tsgli.army.mil.

The author is a retired Army JAGC LTC with over 43 years of legal practice both in uniform and as a Department of the Army civilian attorney. Mr. Chucala served at every echelon of command from garrison to major Army Command and multi service commands in the Republics of China and Korea. He is a member of the Virginia, DC and New York Bars.

PREDATORY LOANS LIMITED BY LAW

By Steven Chucala, Esquire

On 30 September 2006, Congress passed the Military Personnel Financial Services Protection Act to curtail unreasonable credit interest rates paid by military personnel and to establish mandatory requirements for the sale of insurance and investment advisor services on military installations worldwide.

The law is the result of complaints by money borrowers that are unable to repay loans resulting in dramatically escalating interest rates with each passing due date.

Also known as Pay Day loans by predatory lending practices, the federal government sought to help military personnel by limiting interest rates to no more than 36% APY along with other safeguards and requirements concerning the sale of insurance on military installations.

This article addresses what are often referred to as "Payday Loans" in which civilian and military individuals that are hard pressed for money sign away their future paychecks for loans with high interest rates and then find they are unable to pay back the loan resulting in the escalation of the interest rate in some cases to over 100 percent. It is unclear how widespread this lending practice is with the military but numerous complaints resulted in federal legislative intervention even though no illegal conduct was committed by the lending firms.

The law has the following characteristics:

- It applies to transactions involving the extension of consumer credit to a service member or a dependent and became effective on 1 October 2007.
- Applies to all payday loans and where the Truth in Lending Act applies that includes tax refund anticipation loans, credit card agreements, etc.
- It does not apply to residential mortgages and loans for the purpose of purchasing personal property that secures the loan. (Installment loans for furniture, cars, homes, boats, jewelry, credit card agreements that include taking a security interest in the purchased property, etc., are exempt.)
- Service members called to active duty for a specified period that is 30 days or less, and guard and reserve members who are NOT on active duty, are not covered.

The law limits:

- No interest greater than 36 percent annual percentage rate. (APR)
- No rollovers or renewals to a borrower by the same creditor
- No waiver of the borrower's recourse rights under the law
- No mandatory arbitration provisions
- No use of checks or other methods to access the borrowers savings or bank account
- No use of the title of a vehicle as security (except for purchase money loans)
- No requirement to use an allotment to repay an obligation
- No prohibitions or penalties on prepayment of a loan.

Impact:

- Violations of the statute are punishable as a misdemeanor
- Contracts in violation of the statute are void from their inception
- DOD shall prescribe implementing regulations.

Results?:

Although the statute seeks to curtail unreasonable interest rates, it does not cure the underlying causes that give rise to the over extended financial conditions military members and their families are creating that cause them to seek emergency high interest rate loans.

Since most "pay day" borrowers are financially distressed, have poor credit ratings, and are not likely to qualify for low interest loans from commercial banks or credit unions, it remains to be seen if limiting the interest rate by this law to 36% APY will help or further deny loans to military personnel and result in placing them in greater debt difficulty.

The sure way to end predatory lending is to avoid spending above ones needs and ones ability to repay debts as promised. Limiting loans to 36% APY will not cure the financial results caused by servicemembers, retirees and their family members that continue to compete for the gold in the "Debt Olympics."

A serious related impact concerns security clearances that are needed for most military positions and career personnel. Security background investigations include credit checks that reveal any bad debts, their extent and history. The author has experienced many clients confronted with suspended security clearances with marginal success to justify the client's ability to act responsibly. Therefore, debts may jeopardize a military career.

"Military Law Update"

Military Law Section of the Virginia State Bar

The Military Law Section has put together a diverse Seminar where you can learn how to handle high profile cases; Records Correction/Discharge Reviews/Veterans Claims and Legal Ethics all in one day!

Our featured speakers include:

Richard A. Bednar, Esq., Senior Counsel, Crowell & Moring LLP
Edward L. Davis, COL, USAR, Assistant Bar Counsel, Virginia State Bar
Neal Puckett, Lt. Col, USMC (Ret)

When: Friday, May 9, 2008
Where: Marine Corp Base Quantico, Gray Research Center Auditorium, Building 2040
Time: 9:00 a.m. - 12:00 Noon
CLE: 3.0 hours with 1.0 in ethics (pending)
Cost: Free to all interested practitioners and their staff

X -

REGISTRATION FORM FOR MILITARY LAW SECTION CLE PROGRAM 5/9/08

(Please register by May 7th to allow registration lists to be forwarded to the base)

Name: ____

Address: ____
____

Telephone Number:____________________ **VSB ID Number:** __________

Mail to:
Neal A. Puckett. Lt. Col USMC (Ret)
Jamison Ave. Ste. 1505
Alexandria, VA 22314
(202) 340-0069, Fax (202) 318-7652

Directions to Quantico below:

Marine Corps Base, Quantico is located off of Interstate 95 in Virginia, 36 miles south of Washington D.C. and 20 miles north of Fredericksburg.

From I-95: Take exit 150, Quantico/Triangle. Take route 619 east to the entrance of the base. Marine sentries assist visitors arriving at the base; visitors are issued vehicle passes and given directions to their destination. Proper identification, such as a state driver's license, is required to get onto base.

The two airports closest to MCB Quantico are Dulles International, located in Centerville, Va., and Ronald Reagan Washington National, in Washington, D.C. Shuttle services are available from both. A Greyhound bus terminal is located in nearby Triangle, Va. and The Town of Quantico is a stop for both Amtrak and Virginia Railway Express train services.

DL WILLS MAY BE INCONSISTENT WITH VIRGINIA STATUTE

By Dena Winder, Esq.

A recent issue surfaced concerning use of the Virginia version of Drafting Libraries ("DL") Wills.

The probate clerk in the Circuit Court for the City of Virginia Beach recently rejected a will drafted by our office because she determined that the self-proving affidavit did not meet the requirements of Section 64.1-87.1 of the Code of Virginia (1950) as Amended. The clerk directed the client to complete a Deposition of Witness to Will Without Self-Proving Clause form. That in turn required the client leave the probate office, find a witness and answer some questions in the form of a deposition before the probate clerk would accept the will.

I later had a telephone conversation with the probate clerk. It was the clerk's position that the will was statutorily defective because the DL Wills' self-proving affidavit did not have the witnesses' name in the body of the clause.

The clerk agreed to raise the matter with one of the probate judges. The clerk later called me with the results of that conversation. She told me that they would accept the will because it was drafted by the military. But she remained concerned and reminded me to let our clients know that when they bring a will to probate they should inform the clerk that the will was drafted by the militaryShe also recommended that we use the self-proving affidavit as provided for in the statute.. Based on my conversations with the clerk, and the fact that a will drafted by our office could be rejected again, , we have decided to change our Virginia Wills to comply with the statute.

The DL Wills' self proving clause is set out below:

COMMONWEALTH OF VIRGINIA, AT LARGE, SS:

Before me, the undersigned authority, on this day personally appeared the Testator JOHN SMITH and the witnesses, known to me to be the Testator and the witnesses whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said JOHN SMITH, Testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on their own oath stated to me, in the presence and hearing of the said Testator, that the said Testator had declared to them that said instrument is his last will and testament, and that he executed same as such in their presence, and he wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testator and at his request; that the said Testator was at the time at least eighteen years of age or emancipated, and was of sound mind and under no constraint, duress, fraud or undue influence; and that each of said witnesses was then at least eighteen years of age or emancipated.

____

JOHN SMITH
Testator

____

print:
Witness

____

print:
Witness

Subscribed, sworn to and acknowledged before me by the said JOHN SMITH, Testator, and subscribed and sworn to before me by the above-named witnesses, this ____ day of ____________, 2008.

____

Notary Public

____
____
____

The Code of Virginia's self-proving clause is slightly different:

STATE OF VIRGINIA

COUNTY/CITY OF ....

Before me, the undersigned authority, on this day personally appeared ...., ..., and ...., known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, ..., the testator, declared to me and to the witnesses in my presence that said instrument is his last will and testament and that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will and testament in the presence of said witnesses who, in his presence and at his request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said will, and that the testator, at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory.

....
Testator

....
Witness

....
Witness

Subscribed, sworn and acknowledged before me by ...., the testator, and subscribed and sworn before me by .... and ...., witnesses, this .... day of ...., A.D., ...

SIGNED ....

If similar jurisdictions in Virginia reject our wills based on the same analysis the effect will be detrimental to our clients and our practice. Helping our clients find just one witness who signed the affidavit may take a long time given the fact that this witness may very well be out of the military. The easy answer is to draft all wills as Military Testamentary Instrument's to alleviate the formality problems, but practically speaking, it doesn't work for our office because manning prevents us from having a military legal assistance attorney present at all of our executions.

I can be reached at the following address.

Dena M. Winder, Esq.
Legal Assistance Attorney
Naval Legal Service Office Mid-Atlantic
Norfolk, VA 23511

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