

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School, U.S. Army

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL, Charlottesville, Virginia 22903-1781.

Family Law Note

Relocation After Initial Custody Determination

When most military families plan a permanent change of station (PCS), they do not usually add getting a court's permission to their checklist of things to do in preparation. Depending on where the family is located, this may be a legitimate concern that is often overlooked. Relocation of children who are subject to court ordered custody arrangements is a hot family law topic in the 1990's. An increasingly mobile society, dual career couples, the prevalence of joint legal custody, and fathers taking a more active role in their children's lives result in an increasing number of court cases that decide whether children will move with the custodial parent.¹ Each parent potentially faces a horrible consequence in relocation issues. The custodial parent risks either not being able to move or losing custody. The non-custodial parent risks losing the relationship and time with the child. As is the case in most family law issues, the laws of the state in which a parent lives can produce different outcomes.

There is no uniform approach to relocation. Some states have a statute that requires notice to the court and the noncustodial parent of an intent to remove the child from the state.² Other states govern the issue through court decisions. There are undeniable constitutional implications. Restrictions on a parent's right to travel interstate must be evaluated under strict

scrutiny.³ Some states side-step the constitutional question by ruling that a relocation restriction does not infringe the parent's right to travel interstate at all.⁴ A majority of states, however, rule that furtherance of the best interests of the child constitutes a compelling state interest that justifies reasonable relocation restrictions.⁵

Complicating the relocation issue, the petition to relocate often leads to an attempt to relitigate custody by way of a modification case. The standards for relocation and modification are different. Relocation cases turn solely on the best interest of the child standard. In contrast, modification of custody requires not only a showing of the best interest of the child, but also a showing of a substantial change of circumstances since the prior court order.⁶ Not all states recognize the intent to relocate as a substantial change in circumstances so as to warrant a hearing on custody modification.

The only constant among states is the desire to achieve a custody arrangement that is in the child's best interest. States use different methods to reach this objective. State courts weigh a series of factors that affect the relocation issue; these factors are listed in statutes or are defined by case law. While the particular phrasing may vary, the most quoted and followed relocation factors are set out in *D'Onofrio v. D'Onofrio*.⁷ Generally, the court weighs: (1) the prospective advantages of the move in terms of its likely capacity to improve the general quality of life for both the custodial parent and the children; (2) the integrity of the custodial parent's motives in seeking the move to determine whether removal is inspired primarily to defeat or to frustrate visitation by the noncustodial parent; (3) whether the custodial parent is likely to comply with substitute visitation; (4) the integrity of the noncustodial parent's motives in resisting removal; and (5) if removal is allowed, whether there will be a realistic opportunity for visitation in lieu of the weekly pattern that can provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent.⁸

1. Nadine E. Roddy, *Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent*, 8 DIVORCE LITIG. 141, 142 (1996).

2. See, e.g., 750 ILL. COMP. STAT. 5/609 (West 1993); NEV. REV. STAT. § 125A.350 (1992); MASS. GEN. LAWS ch. 208, § 30 (1987); N.J. STAT. ANN. § 9:2-2 (West 1993); CAL. FAM. CODE § 7501 (West 1994); TEX. FAM. CODE ANN. § 153.001 (West 1994).

3. The United States Supreme Court held that the right to travel interstate was a fundamental right and thus subject to the highest scrutiny before a state could impose restrictions on that right. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

4. See *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986).

5. See, e.g., *In re Marriage of Cole*, 729 P.2d 1276, 1280-81 (Mont. 1986).

6. Roddy, *supra* note 1, at 148.

7. 365 A.2d 27 (N.J. 1976).

Which party has the burden of proof differs among the states as well. Often, whether the burden falls on the custodial or non-custodial parent shifts the outcome of the case.⁹ The most restrictive states place the burden on the custodial parent to show that the move is in the child's best interest. Other states place the burden on the noncustodial parent to establish that the move is not in the best interest of the child.¹⁰ In the latter case, there may be a presumption that the relocation is in the best interest of the child. The trend is for courts to allow more freedom of relocation.¹¹

Louisiana recently passed a new restrictive statute on relocation.¹² Louisiana's statute covers an intent to relocate not only outside the state but also within the state if the intrastate move is more than one hundred and fifty miles from the other parent.¹³ This statute applies to orders of custody or visitation issued on or after 15 August 1997.¹⁴ It also applies to orders issued before 15 August 1997, if the original order did not address relocation.¹⁵ A parent who wishes to relocate must provide sixty days notice of the intended move to the other parent.¹⁶ If notice is not given and the child is relocated, the lack of notice is a factor in the determination of relocation and can be the basis for ordering the return of the child to the state pending the court's resolution of the issue.¹⁷ More importantly, relo-

cating without notice or in violation of a court order may constitute a change of circumstances that warrants modification of custody. Complying with the notice requirements is not a change of circumstance.¹⁸

The noncustodial parent has twenty days from receipt of the notice of intent to relocate to file an objection.¹⁹ If an objection is filed, the state appoints a mental health professional to render an opinion as to whether the relocation is in the best interest of the child.²⁰ The burden of proof is squarely on the relocating parent to show that the move is made in good faith and is in the best interest of the child.²¹

In addition to the factors mentioned in *D'Onofrio*, Louisiana includes the following two additional factors: (1) the nature, quality, extent of involvement, and duration of the child's relationship with the parent who is proposing to relocate and with the noncustodial parent, siblings, and other significant persons in the child's life; and (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.²²

8. *Id.* at 29-30.

9. Norma L. Trusch, *A Panoramic View of Relocation*, 20 FAM. ADVOC. 18 (1997).

10. *Compare In re Marriage of Johnson*, 660 N.E.2d 1370 (App. Ct. Ill. 1996), with *Ormandy v. Odom*, 459 S.E.2d 439 (Ct. App. Ga. 1995). Illinois places the burden on the relocating parent. In *Johnson*, the court refused to allow a mother to remove her eight-year-old daughter from Illinois to accompany her new husband and their child to Texas due to employment requirements. *Johnson*, 660 N.E.2d. at 1375-76. Georgia places the burden on the parent who opposes the relocation. In *Ormandy*, the Georgia court allowed a father to relocate with his children for employment purposes over the objections of the mother. *Ormandy*, 459 S.E.2d at 441.

11. Trusch, *supra* note 9, at 18. California and New York both had very restrictive relocation standards. In 1996, both states significantly eased their approaches to relocation by case law. See *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996); *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).

12. LA. REV. STAT. ANN. §§ 9:355.1-9:355.17 (West 1997). The Louisiana statute is the first state statute based on a model relocation statute proposed and drafted by the American Academy of Matrimonial Lawyers. See Pamela Coyle, *A Parent's Moving Checklist*, A.B.A. J., Feb. 1998, at 26. Other states, including Texas and Michigan, expect to introduce similar legislation in their upcoming legislative sessions. *Id.* at 27.

13. LA. REV. STAT. ANN. § 9:355.1(4).

14. *Id.* § 9:355.2(1).

15. *Id.* § 9:355.2(2).

16. *Id.* § 9:355.4A(1). Notice must be in the form of registered or certified mail to the last known address of the noncustodial parent. If the custodial parent cannot reasonably give sixty days notice, the statute requires a minimum of ten days notice. The notice, whether it is ten days or sixty days, must provide: (1) the intended new residence, including specific address, if known; (2) the new mailing address, if not the same; (3) the home telephone number, if known; (4) the date of the intended move or proposed relocation; (5) a brief statement of the specific reasons for the proposed relocation of the child; and (6) a proposal for a revised schedule of visitation with the child. A parent has a continuing duty to provide the information as it becomes available.

17. LA. REV. STAT. ANN. § 9:355.6A & B.

18. *Id.* § 9:355.11.

19. *Id.* § 9:355.8A.

20. *Id.* § 9:355.8B.

21. *Id.* § 9:355.13.

22. *Id.* § 9:355.12.

Military members face this issue in different ways. Status as a military member may be a factor in the initial award of custody. If one parent plans to remain in the state and has stable employment, community ties, and family contacts, and the military member intends to remain in the military, it is an uphill battle for the military member to gain custody. Status as a military member can also affect custody in a way not considered at an initial custody determination. The military member may marry someone who has custody of her children from a previous marriage. When the family PCS's, the noncustodial parent may object to the removal of the children. Legal assistance attorneys need to be aware of the potential restrictions on relocation and advise their clients accordingly. Even in states that favor relocation, there is often a notice requirement. There is no national standard; therefore, legal assistance attorneys must be familiar with the rules of various states on this issue. Major Fenton.

Immigration & Naturalization Note

The INS Continues to Make Fingerprinting More Difficult

A critical item in any application for immigration or naturalization is a set of fingerprints.²³ The Immigration and Naturalization Service's (INS's) fingerprinting requirements have been in flux for several years, primarily due to the INS's efforts to

increase the integrity of the fingerprinting process.²⁴ Just a few months ago, the INS dramatically overhauled its fingerprint policy.²⁵ Based on language in the Department of Justice Appropriations Act for 1998,²⁶ however, the INS is changing its policy again.²⁷ The latest change can be found in an interim rule, effective 29 March 1998.²⁸

The interim rule ends the Designated Fingerprinting Services Certification Process.²⁹ Congress directed that the INS may accept fingerprint cards³⁰ only "for the purpose of conducting criminal background checks on applications and petitions for immigration benefits only if prepared by a Service office" or a few other specified offices that apply in limited circumstances.³¹ Among the other offices that can provide fingerprint services are United States military installations abroad.³² For legal assistance offices overseas, the interim rule has limited impact—overseas legal assistance offices can still provide the fingerprint services, and the INS should accept the cards prepared by those offices. For practitioners within the United States, however, the changes are significant.

All applications for immigration benefits that are filed after 29 March 1998 should *not* contain fingerprints.³³ Instead, applicants must wait until the INS informs them to report to an application service center (ASC)³⁴ for fingerprinting.³⁵ The fingerprinting service costs twenty-five dollars per family member submitting fingerprints.³⁶ Further complicating payment mat-

23. See 22 C.F.R. § 42.67 (1997) (containing immigration requirements); 8 C.F.R. § 316.4 (containing naturalization requirements).

24. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. 12,979, 12,980 (1998) (to be codified in various parts of 8 C.F.R.).

25. See Siskind's Immigration Bulletin, Visa Spotlight: New INS Fingerprint Rules (visited May 4, 1998) <<http://www.visalaw.com/98apr/>> [hereinafter Siskind Bulletin]. Mr. Siskind's bulletin is an excellent resource and is available by e-mail free of charge. To subscribe, send an e-mail message to visalw-request@list-serv.telalink.net, with the body of the message stating "subscribe your e-mail address" and nothing else. Mr. Siskind's web page is consistently rated among the best attorney sites on the Internet for anyone who practices immigration law.

26. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997).

27. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980.

28. *Id.* at 12,979.

29. *Id.* at 12,979-80. The Designated Fingerprinting Services (DFS) program began in an effort to eliminate security problems identified by several audits of the INS's procedures. *Id.* Under the program, the INS certified and registered providers of fingerprint services. *Id.* at 12,890. As long as a provider was registered under the DFS program, the INS could accept fingerprints prepared by the provider. *Id.* It is unclear at this point whether fingerprint providers certified under the DFS will take legal action to protest the elimination of this program and, as a result, their business. See Siskind Bulletin, *supra* note 25.

30. The fingerprint card, known as Form FD-258, is available at all INS application service centers.

31. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980. The other offices authorized to provide fingerprint services are "registered state or local law enforcement agenc[ies], a United States consular office at a United States embassy or consulate, or a United States military installation abroad." *Id.*

32. *Id.*

33. See Siskind Bulletin, *supra* note 25. See also Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980. The INS indicates that the filing of applications without fingerprints actually began on 3 December 1997. *Id.*

34. Key to the INS's new program is the establishment of one hundred application service centers, about forty of which are currently open. Siskind Bulletin, *supra* note 25. The INS also plans to establish mobile fingerprinting centers and offer fingerprinting services at "certain Service field offices and, in less populated areas, [to enter into] co-operative agreements with designated state and local law enforcement agencies . . ." Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980.

ters is a limitation on the INS computer system. According to the INS, its software cannot accept a single check to pay for the fingerprints and the requested action.³⁷ Thus, applicants must provide two separate checks—one for the application fees and one for fingerprints.³⁸

The INS claims that fingerprinting will be scheduled within ninety days of the application.³⁹ It also offers first-come, first-served fingerprinting at its centers on Wednesdays.⁴⁰ Applicants are well advised to bring some form of photo identification (like their military identification cards) and their scheduling notice to the fingerprint service center.⁴¹

Legal assistance practitioners must be aware of this change. They must prepare their clients for the inconvenience that this change may cause, particularly at installations where the closest ASC is some distance away. In fairness to the INS, this change addresses a fairly major issue—under the old system, as many as sixty percent of the submitted fingerprint cards were rejected.⁴² The new system uses electronic fingerprint scanners for better accuracy.⁴³

Immigration law practitioners can only hope that this change will improve service as the INS promises. In any case, legal assistance clients must follow this system if they wish to immigrate and to naturalize into the country. Major Lescault.

Tax Note

Taking Advantage of Recent Tax Changes on the Sale of a Home

The Taxpayer Relief Act of 1997⁴⁴ allows taxpayers to exclude the gain⁴⁵ on the sale of property, provided they meet certain requirements.⁴⁶ The general rule is that the taxpayer must have owned and used the property as his principal residence for two years during the five-year period prior to the date of sale of the property.⁴⁷ The property does not have to be the taxpayer's principal residence on the date of sale, but merely has to have been the principal residence for at least two of the five years prior to the date of sale.

This is a significant difference from the old I.R.C. § 1034 rollover provision, under which the property had to be the principal residence on the date of sale. Not surprisingly, the old requirement created problems for military personnel who rented their homes prior to selling them. They had to show that they had attempted to sell the property and were only renting it temporarily, or they had to show that they always intended to return to the property. If they failed these two tests, they were unable to rollover the gain on the sale of the home because the property was business (rental) property and not their principal residence.⁴⁸

35. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980.

36. *Id.* at 12,981. This fee only applies to applications filed on or after 29 March 1998. Applicants who filed before that date will not have to pay the fee, even if they are scheduled to have their prints taken after 29 March. *Id.*

37. Siskind Bulletin, *supra* note 25.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* The most common causes for rejection were "problems with the biographical information data or the poor quality of the fingerprints." *Id.*

43. *Id.*

44. Pub. L. No. 105-34, 111 Stat. 788 (1997) (codified in scattered sections of 26 U.S.C.).

45. The amount of gain that can be excluded is limited to \$250,000 for most taxpayers. The gain is \$500,000 for taxpayers who meet the following requirements:

- (1) a husband and wife make a joint return;
- (2) either spouse owns the home for the required two years; and
- (3) both spouses use the property for two years.

See I.R.C. § 121(b)(2) (CCH 1997).

46. *Id.* § 121.

47. *Id.* § 121(a).

48. See Major Thomas K. Emswiler, *The Tax Consequences of Renting and Selling a Residence*, ARMY LAW., Oct. 1995, at 3. Unless these service members can meet the new test, they are arguably the only group of taxpayers who were hurt by the Taxpayer Relief Act of 1997.

Now, a taxpayer who sells property needs to show only that he owned and occupied the property for two years in order to exclude the gain on the sale of the property. For example, if a taxpayer owned and lived in a home from 1 June 1994 to 1 June 1996, the taxpayer would be able to exclude the gain on the sale of that property, so long as the taxpayer sells the property prior to 1 June 1999. This is true even if the taxpayer rents the property from 1 June 1996 until 31 May 1999. This is important because many service members rent property that they own because of frequent changes in assignment. Thus, many service members who currently own property that they previously lived in and have not been renting for very long can take advantage of this new change in the law.⁴⁹

The number of taxpayers who can take advantage of this new change in the law grows substantially due to some exceptions to the requirement to own and to occupy the home for two years. The amount of gain excludable is prorated⁵⁰ when the taxpayer sells the property because "of a change in place of employment, health, or to the extent provided in regulations, unforeseen circumstances."⁵¹ This provision provides relief to taxpayers who sell their current homes in which they have lived for less than two years, when they have to move due to permanent change of station orders. Unfortunately, this provision does not benefit taxpayers who are currently renting property that was previously their principal residence.

Fortunately, under certain circumstances, the amount of gain on the sale of a home can be prorated even when the sale of the home is not due to "a change of employment, health, or to the extent provided in regulations, unforeseen circumstances."⁵² This exception provides relief to a taxpayer who owned a home on the date the Taxpayer Relief Act of 1997 was enacted and sells the home within two years of that date.⁵³ The Taxpayer Relief Act of 1997 was enacted on 5 August 1997. If a taxpayer owned a home on that date, the taxpayer can exclude a prorated amount of the excludable gain, provided: (1) the property was the taxpayer's principal residence for some period during the

five-year period prior to sale and (2) the taxpayer sells the home prior to 5 August 1999. For example, if a single taxpayer who owned and occupied a home from 1 June 1994 to 1 June 1995 sold the home on 31 May 1999, the taxpayer would be able to exclude up to \$125,000 of gain.⁵⁴ This exception to the two-year rule is not receiving much publicity, and tax law practitioners need to make taxpayers aware of the exception.⁵⁵

Another way that military taxpayers can take advantage of this new tax law is to reoccupy their rental property. Obviously, if they live in it for two years, they will be able to exclude all of the gain. In addition, they will be able to exclude a prorated amount of the allowable gain, so long as they either owned it on 5 August 1997 and sell it before 5 August 1999 or sell it due to a change in place of employment, health, or for some unforeseen circumstances to be provided in future regulations. For example, if a taxpayer reoccupies his rental property for six months and sells it under the aforesaid changes in circumstances or for any reason before 5 August 1999, the taxpayer can exclude one-fourth of the allowable gain.

Legal assistance attorneys need to be aware of these rules so that they can properly advise clients on these issues. Many military personnel can take advantage of this new law and avoid paying taxes on the gain from the sale of their qualifying property. Lieutenant Colonel Henderson.

SSCRA Note

Federal Court Rules That Military Members Have a Private Cause of Action Under the Soldiers' and Sailors' Civil Relief Act

In the recent case of *Moll v. Ford Consumer Finance Co., Inc.*,⁵⁶ the U.S. District Court for the Northern District of Illinois ruled that service members may sue creditors who violate

49. Taxpayers who have rented property will have to recapture any depreciation taken on that property after 7 May 1997. I.R.C. § 121(d)(6).

50. It is the allowable gain that is prorated. If a taxpayer were single and could normally exclude \$250,000 of gain, that allowable gain would be prorated. For example, if a single taxpayer owned and occupied a home for only one year and sold it due to a permanent change of station move, the taxpayer would be allowed to exclude up to \$125,000 of gain. This would result in most service members being able to exclude all of the gain they might have on the sale of a home.

51. I.R.C. § 121(d)(2)(B). As of the date of this note, there are no regulations describing what these unforeseen circumstances might be.

52. *Id.*

53. Pub. L. No. 105-34, § 312(d)[(e)](3) (1997).

54. The taxpayer would have owned and occupied the home for one year, which is one-half of the two-year requirement. Thus, the taxpayer would be allowed to exclude up to one-half of the \$250,000 allowable exclusion, which would be \$125,000. (If the taxpayer meets the requirements to exclude \$500,000 of gain, he could exclude up to \$250,000 of gain. See *supra* note 45.)

55. In fact, the taxpayer must disregard some of the instructions on Form 2119 (the form used to exclude the gain). These instructions imply that a taxpayer can only prorate the gain when the sale is due to change of employment, health, or some future IRS provided unforeseen circumstances. While this is true for all sales after 4 August 1999, it is not true for sales from 5 August 1997 to 4 August 1999.

56. No. 97 C 5044, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. Mar. 23, 1998).

§ 526 of the Soldiers' and Sailors' Civil Relief Act⁵⁷ (SSCRA). Section 526 of the SSCRA states:

No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a person in military service before that person's entry into military service shall, during any part of the period of military service, bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section, the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.⁵⁸

This provision of the SSCRA is commonly known as the "six percent interest cap" provision.⁵⁹

In July 1986, Gary Moll, an Air Force Reserve member, obtained a fifteen-year loan secured by a second mortgage on his home, with a variable annual interest rate of 10.25 percent. On 25 February 1991, Moll was ordered to active duty to serve in support of Operation Desert Storm. Once activated, Moll notified Ford, his lender, of his military status and requested reduction of his loan interest to six percent, pursuant to 50 U.S.C. App. § 526. He provided all of the documentation that the lender requested, which showed that his military service materially affected his ability to pay his loan. Despite the fact that Moll followed the SSCRA procedure for interest rate relief,

Ford never adjusted his interest rate to six percent while he was on active duty.

On 16 July 1997, Moll filed a class action suit, in which he alleged that the lender failed to comply with § 526 of the SSCRA.⁶⁰ The lender moved to dismiss the action for failure to state a claim. The court denied the lender's motion as to the issue of whether a private cause of action exists under the SSCRA.⁶¹

The court recognized that § 526 provides a six percent loan interest rate cap for activated military members on preservice loans. The court further recognized a lender's right to petition the court for a determination that the military member's active duty did not materially affect his ability to pay the loan.⁶² Moll claimed that, since he properly asserted his rights under the SSCRA, the lender should have reduced his loan interest to six percent and that Ford's failure to do so violated the SSCRA.⁶³

Ford, for purposes of the motion to dismiss, did not dispute Moll's interpretation of the meaning of § 526, the protections it provides for activated reservists, or that Moll's military service materially affected his ability to pay the loan.⁶⁴ Instead, Ford claimed that the SSCRA does not provide service members with a private right to sue to enforce the SSCRA. Ford claimed that the SSCRA provides only "defensive relief," that is, that § 526 would only protect the service member if Ford attempted to enforce the loan upon default.

The court dismissed Ford's argument, observing:

Such an interpretation of [the] SSCRA is not only illogical, but would severely limit the relief available under § 526, since it is quite unlikely that any mortgagor will default on his obligation for the sole purpose of taking advantage of a moderate interest rate reduction during his period of military service.⁶⁵

57. 50 U.S.C. App. §§ 501-593 (1994).

58. *Id.* § 526.

59. See Major James Pottorff, *Protection for Active and Reserve Component Soldiers*, ARMY LAW., Oct. 1990, at 48; Major James Pottorff, *A Look at the Credit Industry's Approach to the Six Percent Limitation on Interest Rates*, ARMY LAW., Nov. 1990, at 49; James Pottorff, *Soldiers' and Sailors' Civil Relief Act Protection for Reserve Component Servicemembers Called to Active Duty*, VA. L. REG., Dec. 1990, at 7; Larry Carpenter, *The Soldiers' and Sailors' Civil Relief Act: Legal Help for the Sudden Soldier*, 25 ARK. LAW. 42 (1991); Joseph Chappelle, *Legal Primer for Advising the Deployed Servicemember*, 34 RES GESTAE 494 (1994); Kathleen H. Switzer, *Benefits for Reserve and National Guard Members Under the Soldiers' and Sailors' Civil Relief Act of 1940*, 110 BANKING L.J. 517 (1993); Major Mary Hostetter, *Using the Soldiers' and Sailors' Civil Relief Act to Your Client's Advantage*, ARMY LAW., Dec. 1993, at 34, 36-37.

60. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *2-3. Moll also alleged a violation of the Illinois Interest Act, but that allegation will not be discussed in this article. See 815 ILL. COMP. STAT. 205/0.01 (West 1997).

61. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *1, *3.

62. *Id.* at *4.

63. *Id.*

64. *Id.* at *5-6. Ford stated that it did reduce Moll's interest rate, but Moll denied this. *Id.* at *7 n.2.

65. *Id.* at *7.

If the service member made timely payment on his mortgage loan, he would have no recourse under Ford's "defensive relief" theory. The court pointed out that mortgage holders generally foreclose only when a borrower fails to pay his loan in a timely manner.⁶⁶ In most cases, unless the service member was in serious monetary default, the lender would not want to raise the six percent interest cap issue by initiating foreclosure proceedings.

The court reviewed the case law that interprets the SSCRA⁶⁷ and emphasized that "Congress intended the SSCRA to be liberally construed in favor of the military person and administered to accomplish substantial justice."⁶⁸ Looking at the equities in six percent interest cap cases, the court dismissed Ford's "defensive relief" argument. The court reasoned that Congress could not have intended to encourage lenders to ignore six percent interest requests by providing no way for borrowers to enforce the six percent interest cap provision.⁶⁹

The court then addressed Ford's argument that the SSCRA does not expressly provide for a private cause of action to enforce § 526 or any other section of the Act. Noting that no court has previously considered whether a military member may assert a claim against a lender who fails to comply with § 526,⁷⁰ the court applied the four-part test established by the United States Supreme Court in *Cort v. Ash*⁷¹ to determine whether there is an implied right to sue under a federal statute.⁷² Under *Cort*, the court must determine:

- (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted;
- (2) whether there is any implication that Congress intended to create or [to] deny such a remedy;
- (3) whether an implied remedy is consistent with the underlying purpose(s) of the statute; and
- (4) whether the cause of action is one traditionally relegated to state law.⁷³

The court noted that the Supreme Court has chiefly concentrated on the second factor, Congress' intent to create a private right to sue.⁷⁴ The court then examined Congress' intent to allow military members to sue to enforce § 526.

The court examined the legislative history of § 526 and determined that Congress intended to give special relief to activated military members.⁷⁵ Relying on *McMurtry v. City of Largo*,⁷⁶ Ford argued that § 526 does not confer any special benefit to military members that is not available to civilians.⁷⁷

In *McMurtry*, the City of Largo declared a building a public nuisance, condemned it, and destroyed it. The building was owned by a service member who was overseas on active duty. Upon his return from active duty, the service member sued the city to recover the costs of the building and condemnation.⁷⁸ Although the statute of limitations on appealing the condemnation decision was tolled by § 525 of the SSCRA⁷⁹ while Mr.

66. *Id.* at *8 n.3.

67. *See* LeMaistre v. Leffers, 333 U.S. 1, 6 (1948); Hellberg v. Warner, 48 N.E.2d 972, 975 (Ill. App. 1943).

68. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *7.

69. *Id.*

70. *Id.* at *8.

71. 422 U.S. 66 (1975).

72. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *8.

73. *Id.* at *8-9. *See Cort*, 422 U.S. at 78, *as cited in* Long v. Trans World Airlines, Inc., 704 F. Supp. 847, 853 (N.D. Ill. 1989).

74. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *8 (citing Suter v. Artist M., 503 U.S. 347, 364 (1992); Thompson v. Thompson, 484 U.S. 174, 178, (1988)).

75. *Id.* at *10 n.4 (citing 88 CONG. REC. 5364 (1942) (comments of Representative Sparkman) ("[T]he primary purpose of this legislation is to give relief to the boy that is called into service."); Patrikes v. J.C.H. Serv. Stations, 41 N.Y.S.2d 158, 165 (N.Y. City Ct. 1943) ("The underlying purpose of the SSCRA is to provide the soldier with relief in meeting his financial obligations that he incurred prior to his military service.")).

76. 837 F. Supp. 1155 (M.D. Fla. 1993) (holding that the SSCRA does not provide for a private cause of action in federal court). *See Tolmas v. Streiffer*, 21 So. 2d 387 (La. Ct. App. 1945).

77. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *10.

78. *McMurtry*, 837 F. Supp. at 1156-57.

79. 50 U.S.C. App. § 525 (1994) (tolling the statute of limitations on actions or proceedings by courts, boards, and government agencies while a service member is on active duty status, if the action accrued prior to or during active military service).

McMurtry was overseas, he failed to appeal the decision in a timely manner upon his return. The court found that Mr. McMurtry had no federal cause of action under the SSCRA, since civilians in Mr. McMurtry's situation must exhaust state statutory remedies before seeking federal relief.⁸⁰ The court held that the SSCRA did not provide service members with a specific federal court remedy when they failed to file a lawsuit properly under state law.⁸¹

The court in *Moll* distinguished *McMurtry* on the grounds that Moll was seeking to enforce a specific right provided by § 526 of the SSCRA.⁸² Unlike Mr. McMurtry, Gary Moll had no state remedy. Moll was relying solely on a federal statute to cap loan interest at six percent while on active military duty. The court further observed that § 526 provides military members "an undeniable benefit not enjoyed by other citizens."⁸³ The court pointed to the enactment of § 518(2)(B) of the SSCRA in 1991. Congress passed this section to amplify that "[r]eceipt by a person in military service of . . . [a] suspension pursuant to the provisions of this Act in the payment of any . . . civil obligation or liability of that person shall not itself . . . provide the basis for . . . a change by the creditor in the terms of an existing credit arrangement."⁸⁴

The court recognized that § 518 specifically prohibits creditors from altering the terms of an obligation strictly because of

the six percent interest cap.⁸⁵ Since the creditor cannot defer any interest above six percent without changing the terms of the obligation, the court reasoned that § 526 bestows a benefit on military members not available to civilians.⁸⁶ The court further reasoned that Congress must have intended a private cause of action to enforce the provisions of § 526, "because otherwise the relief would [be] of no value at all."⁸⁷

Finally, the court looked at the three other factors in *Cort*⁸⁸ that, if satisfied, would allow an implied federal cause of action. First, the plaintiff, as an Air Force reservist, was a member of the class for whose benefit the SSCRA was enacted.⁸⁹ Second, the implied remedy of a federal lawsuit is consistent with the underlying purposes of the SSCRA—to provide military personnel with relief in meeting their preservice financial obligations.⁹⁰ Third, § 526 provides service members with relief that is not typically found in state law, and it is based on Congress' constitutional war powers.⁹¹

Moll opens up a new avenue for military legal counsel to assert the six percent interest cap with lenders who refuse to voluntarily comply with § 526. The potential threat of possible legal action short of foreclosure should increase creditor compliance with § 526. The court also warns creditors that they may not avoid the six percent interest cap by adding extra principal payments or balloon interest rates.⁹² This case further

80. *McMurtry*, 837 F. Supp. at 1157-58.

81. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *11.

82. *Id.* at *12.

83. *Id.*

84. SSCRA Amendments of 1991, Pub. L. No. 102-12, § 7, 105 Stat. 38 (1991) (codified as amended at 50 U.S.C. App. § 518).

85. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *13-14.

86. *Id.* at *14 n.5. The court cited Senator Biden's comments regarding the passage of § 518, which indicated that it was a reaction to creditors who failed to grant the relief provided by § 526.

Creditors [are] not granting the relief promised by the Act, especially with regard to interest rates. Section 526 of the Act clearly limits interest on debts incurred prior to being activated to 6 percent for the full period of active duty. Yet, qualifying applicants have been asked by creditors to make up payments or higher interest charges in the future. In my view, those practices are contrary to both the spirit and the letter of the law.

101 CONG. REC. S 2142 (1991) (comments of Senator Biden).

87. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *14.

88. *Cort v. Ash*, 422 U.S. 66 (1975).

89. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *14. Air Force Reservists are covered by the SSCRA. *See* 50 U.S.C. App. § 511(1) (1994).

90. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *14.

91. *Id.* at *15.

92. While not addressed by the court, creditor violations of § 526 may also subject them to violations of the Truth in Lending Act (TILA) disclosure provisions. *See* 15 U.S.C. §§ 1601-1667 (1994). Specific credit disclosure violations include: (1) failure to adjust the interest rate to six percent upon proper request by an activated Reservist, resulting in violation of the creditor's duty to disclose the proper interest rate [15 U.S.C. § 1637(b)(6)]; (2) failure to properly adjust any finance charge to reflect the six percent interest cap [15 U.S.C. § 1637(b)(4)]; and (3) failure to credit retroactively to the date of entry of active duty the reduced interest rate and resulting finance charges, resulting in erroneous disclosure of the balance due on the loan or credit transaction [15 U.S.C. § 1637(b)(2)].

allows Reserve Component service members, upon return from active duty, to go back to noncooperative lenders who failed to honor the six percent interest cap to seek reimbursement for interest wrongly paid. Lieutenant Colonel Conrad.

Contract and Fiscal Law Note

Allowable Cost: Contractor Can Claim Legal Costs Even Though It Lost Wrongful Discharge Case

Introduction

In *Northrop Worldwide Aircraft Services, Inc.*,⁹³ the Armed Services Board of Contract Appeals (ASBCA) decided that a contractor is entitled to charge the government for the legal costs incurred in defending itself against the wrongful termination actions of former employees, even though a jury verdict was rendered against the contractor. The ASBCA ruled that the jury verdict was not determinative of whether the costs are allowable.⁹⁴

Northrop is the culmination of significant prior litigation between the two parties.⁹⁵ In its earlier summary judgment ruling, the ASBCA held that the reasonableness of Northrop's incurred legal costs must be determined by examining the following key issues:

[W]hether the claimed costs were "necessary to the overall operation of the business" (i.e., were allocable under FAR 31.201-4) and whether they were the type of costs which "would be incurred by a prudent person in the conduct of competitive business" or which

are "generally recognized as ordinary and necessary for the conduct of [the] contractor's business" (i.e., were reasonable under FAR 31.201-3(a) and 9(b)).⁹⁶

Essentially, the ASBCA concluded that the "reasonableness of an incurred cost may depend, in large part, on the circumstances at the time the cost was incurred. Here, for example, it may be appropriate to examine the contractor's position in the state lawsuit, its proffered evidence, et cetera."⁹⁷

Background

On 9 June 1987, the Army awarded a cost-reimbursement award fee contract to Northrop. The contract required Northrop to provide the maintenance, supply, and transportation functions of the Directorate of Logistics operations at Fort Sill, Oklahoma.⁹⁸ During contract performance, three Northrop employees, Charles Cook, Melvin Miller, and Charlie Lewis, were fired from their jobs as quality control inspectors.⁹⁹ Northrop terminated these three individuals due to their abusive and threatening behavior towards other Northrop employees as well as their poor duty performance.¹⁰⁰

On 9 May 1990, Cook, Miller, and Lewis filed a civil wrongful termination lawsuit against Northrop.¹⁰¹ The lawsuit alleged that "they had been wrongfully terminated for refusing to follow directions in inspecting vehicles that would have made them participants in acts of fraud against the government, which they maintained had an effect on public policy and the public interest."¹⁰² Specifically, the plaintiffs made three allegations of wrongdoing and fraud against Northrop. First, all of the quality control inspectors were asked to sign inspection

93. ASBCA Nos. 45216, 45877, 1998 ASBCA LEXIS 53 (Mar. 26, 1998).

94. *Id.*

95. See *Northrop Worldwide Aircraft*, ASBCA Nos. 45216, 45877, 95-1 BCA ¶ 27,503 (addressing cross summary judgment motions); *Northrop Worldwide Aircraft Servs., Inc.*, ASBCA Nos. 45216, 45877, 96-2 BCA ¶ 28,574 (second motion for summary judgment); *Northrop Worldwide Aircraft*, ASBCA Nos. 45216, 45877, 97-1 BCA ¶ 28,885 (involving a similar wrongful termination case involving four different former government employees).

96. Earlier, the parties moved for summary judgment, which the ASBCA denied. See *Northrop Worldwide Aircraft*, 95-1 BCA ¶ 27,503 at 137,057.

97. *Id.* at 137,059.

98. *Northrop*, 1998 ASBCA LEXIS 53, at *1. The instant contract award was the result of OMB A-76 cost study. These services had been previously performed in-house by federal employees but were later contracted out to Northrop.

99. *Id.* at *4. Cook, Miller, and Lewis were three former government employees who worked as quality control inspectors for the Fort Sill Directorate of Logistics and were performing the same type of work as when they were employed by the government. The instant contract contained a "right of first refusal of employment" clause, which forced Northrop to hire these three former government employees.

100. *Id.* at *8-9. Mr. Lewis was cited for failing to stay at his duty station during normal working hours and other violations of company rules and regulations. Mr. Miller was terminated when he refused to perform his duties as an inspector. Northrop terminated Mr. Cook when he violated company rules against fighting, threatening, and harassing other employees. Collectively, these three individuals were known as the "Three Amigos."

101. *Id.* at *11. The lawsuit was filed in the District Court of Comanche County, Oklahoma.

102. *Id.*

forms without inspecting the vehicles. Second, Northrop hid the logbooks that contained the inspection forms. Further, Northrop asked the plaintiffs to hide these logbooks from government inspectors, and the plaintiffs actually witnessed other Northrop employees hiding the logbooks. Third, Northrop allowed a mechanic's helper to perform the duties of a mechanic, which resulted in either a violation of the contract or excessive billing.¹⁰³ Prior to their termination, however, the plaintiffs never alleged that Northrop committed or required them to participate in defrauding the government.¹⁰⁴

During their employment with [Northrop], neither Mr. Lewis, Mr. Cook, nor Mr. Miller raised any allegations of any improprieties on the part of [Northrop] when they received contact reports or discussed their personnel evaluations with Ms. Whitworth. On no occasion did they state to appellant that they were being fired for refusal to engage in illegal conduct or [to] commit fraud.¹⁰⁵

When Northrop initially notified the government of its decision to defend the wrongful termination case, both parties concluded that the incurred legal fees would be reasonable.¹⁰⁶ In September 1990, when the contracting officer was formally notified of the impending lawsuit, she stated, "[w]e have a document that shows litigation exists, but it does not justify the cost. I don't know how I could determine if it was reasonable or not. Our attorney cannot either."¹⁰⁷ The parties eventually agreed to resolve the issue of the legal fees after the conclusion of the case.¹⁰⁸

On 20 September 1991, the jury in the civil case found for the plaintiffs and awarded them \$1.8 million in damages.¹⁰⁹ When the contracting officer learned of the jury verdict, she

issued a final decision disallowing Northrop's legal fees. Northrop appealed the contracting officer's final decision to the ASBCA.

The ASBCA Decision

Northrop argued that its incurred legal costs in defense of the wrongful termination case were reasonable and that the government should reimburse the legal costs, notwithstanding the unfavorable jury verdict.¹¹⁰ The government argued that, because the nature of the legal fees incurred is founded on illegal and fraudulent conduct, all costs that flow from such illegal or fraudulent activities are unreasonable, unallocable, and unallowable.¹¹¹ To support its claim of contractor fraud, the government submitted to the ASBCA the Oklahoma state court verdict and the underlying evidence in the wrongful termination action.¹¹²

Unfortunately for the government, neither the trial transcripts nor the jury verdict provided the ASBCA with conclusive evidence of contractor fraud or other improprieties. Administrative Law Judge Lisa Anderson Todd stated:

The jury verdict does not determine our disposition of these appeals. The jury did not make findings that any [Northrop] activities were either illegal or intended to defraud the government. The jury was presented with government contracting issues but not a government contract and in that context arrived at a verdict. In this regard, we note that "the complexities of military contracts and regulations are beyond conventional experience."¹¹³

103. *Id.* at *15-18. Since the contract was a cost plus award fee contract, Northrop was entitled to an award fee based on the quality of its performance. Part of the award fee was based on maintaining a daily non-tactical vehicle operational readiness rate above 90 percent.

104. *Id.* at *9.

105. *Id.* at *9. A contact report is a form used by Northrop to document an employee's misconduct or violation of company rules and regulations. Ms. Whitworth is the Superintendent of Human Resources.

106. *Id.* at *12

107. *Id.*

108. *Id.* at *13. Initially, the contracting officer did not know that the plaintiffs in the civil suit had alleged fraud. When she discovered the basis of the wrongful termination lawsuit, she notified Northrop that the allowability of the legal fees would be determined at a later date.

109. *Id.* at *21. The Oklahoma appellate court denied the subsequent appeal, and the Supreme Court of Oklahoma denied Northrop's petition for certiorari.

110. *Id.* at *32.

111. *Id.* This allegation was based primarily on the allegations of the plaintiffs.

112. Northrop disputed the underlying evidence presented by the plaintiffs. The jury made only general findings, not special findings of fraud or other illegal action. *Id.* at *21.

113. *Id.* at *37 (citing *United States v. General Dynamics Corp.*, 828 F.2d 1356 (9th Cir. 1987)).

The ASBCA concluded that the mere fact that the Army Criminal Investigation Division conducted an investigation and “titled”¹¹⁴ the contractor for false statements and false claims did not amount to a finding of fraud.¹¹⁵ Further, “no action was taken, and the reason for no action was the lack of evidence.”¹¹⁶

The ASBCA concluded that there was “no substantial evidence that appellant was engaged in conduct to defraud the government or otherwise issued improper directives to the plaintiffs.”¹¹⁷ The ASBCA held that Northrop’s actions in incurring costs to “defend the litigation were reasonable, and the costs that are reasonable in their nature and amount are held allowable.”¹¹⁸

Conclusion

Does this case change how the government should review allowable costs? The answer is probably no. It will not change how the contracting officer would normally determine a contractor’s incurred costs, but it forces the government to look beyond the verdict of any case when determining the allowability of incurred legal costs. Major Hong.

Criminal Law Note

The Supreme Court Upholds the Constitutionality of M.R.E. 707: Polygraph Evidence Still Banned

Introduction

114. *Id.* at *20. The ASBCA concluded that “[t]o ‘title’ someone means to place one’s name in the subject block of a criminal investigation report.” *Id.* See U.S. DEPT OF DEFENSE, INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE (14 May 1992).

115. *Northrop*, 1998 ASBCA LEXIS 53, at *34-35.

116. *Id.* at *20. The U.S. Attorney declined to prosecute Northrop, and no other investigation was conducted.

117. *Id.* at *20-21.

118. *Id.* at *39.

119. 118 S. Ct. 1261 (1998). See *United States v. Scheffer*, 41 M.J. 683 (A.F. Ct. Crim. App. 1995), *overruled by*, 44 M.J. 442 (1996), *cert. granted*, 117 S. Ct. 1817 (1997), *rev’d*, 118 S. Ct. 1261 (1998).

120. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (1995) [hereinafter MCM]. Military Rule of Evidence 707 states:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Id. The President promulgated MRE 707 pursuant to Article 36(a) of the Uniform Code of Military Justice (UCMJ). The stated reasons for the ban were: (1) the lack of scientific consensus on the reliability of polygraph evidence; (2) the belief that panel members will rely on the results of polygraph evidence rather than fulfill their responsibility to evaluate witness credibility and make an independent determination of guilt or innocence; and (3) the concern that polygraph evidence will divert the focus of the members away from the guilt or innocence of the accused. *Id.* analysis, app. 22, at A22-49.

121. *Scheffer*, 41 M.J. at 685-86.

In *United States v. Scheffer*,¹¹⁹ the United States Supreme Court reversed the United States Court of Appeals for the Armed Forces (CAAF) by holding that Military Rule of Evidence (MRE) 707,¹²⁰ which excludes polygraph evidence from courts-martial, does not unconstitutionally abridge an accused’s right to present a defense. As a result, defense counsel are now prohibited from introducing exculpatory polygraph evidence to bolster their clients’ in-court testimony.

Despite this ruling, the Court left several questions unanswered. One remaining issue is the degree of scientific consensus required before a per se ban on polygraph evidence is no longer justified. The majority opinion also failed to address concerns that the promulgation of MRE 707 violates Article 36(a) of the Uniform Code of Military Justice (UCMJ).

Facts

Airman Edward Scheffer was stationed at March Air Force Base, California. In March 1992, he volunteered to assist the Air Force Office of Special investigations (OSI) with several ongoing drug investigations. Scheffer agreed to undergo periodic drug testing and polygraph examinations as a member of the investigating team. On 7 April 1992, one of the supervising OSI agents asked Scheffer to provide a urine sample. Scheffer agreed, but stated that he could not immediately provide a specimen because he urinated only once a day. He submitted a sample the next day. On 10 April, Scheffer took a polygraph examination. According to the examiner, Scheffer’s polygraph charts indicated “no deception” when he denied using drugs since joining the Air Force.¹²¹

On 14 May, the OSI agents learned that Scheffer's urine specimen had tested positive for methamphetamine. Scheffer was subsequently charged with wrongful use of methamphetamine, among other offenses. At trial, Scheffer informed the court that he intended to testify and to offer an innocent ingestion defense. Scheffer moved to introduce the results of the polygraph test to corroborate his in-court testimony. Citing MRE 707, the military judge refused to allow Scheffer to introduce, or even to attempt to lay a foundation for the introduction of, the polygraph examination results to corroborate his innocent ingestion defense.¹²² Scheffer was subsequently convicted of wrongful use of methamphetamine.

On appeal, the Air Force Court of Criminal Appeals rejected Scheffer's claim that MRE 707 is unconstitutional.¹²³ The court said that the President had legitimate reasons for banning polygraph evidence. Further, the ban was not unconstitutional because it applies equally to the prosecution and the defense and because it does not limit an accused's ability to testify in his own behalf.¹²⁴

In a three-two decision, the CAAF reversed the Air Force court's decision, holding that MRE 707 violated Scheffer's Sixth Amendment¹²⁵ right to present a defense.¹²⁶ The CAAF adopted the Supreme Court's rationale in *Rock v. Arkansas*,¹²⁷ in which the Court stated that a legitimate interest in barring unreliable evidence does not extend to a per se exclusion that may be reliable in an individual case.¹²⁸ The CAAF concluded that the trial court should rule on the admissibility of polygraph evidence on a case-by-case basis and remanded the case to the

trial court for an evidentiary hearing on the admissibility of Scheffer's polygraph results.¹²⁹ The government appealed, and the Supreme Court granted certiorari.¹³⁰

Supreme Court Analysis

On 31 March 1998, the Supreme Court reversed the CAAF, holding that MRE 707's exclusion of polygraph evidence does not unconstitutionally abridge the right of accused members of the military to present a defense.¹³¹ Justice Thomas wrote for the eight-person majority, which held that rules that prohibit the accused from presenting relevant evidence do not violate the Sixth Amendment, so long as the rules are not arbitrary or disproportionate to the purposes they are designed to serve.¹³²

The Court examined the reliability of polygraph evidence and found that there was no scientific consensus on the reliability of polygraph evidence. The Court noted that most state courts and some federal courts still have a per se ban on polygraph evidence. Additionally, even in jurisdictions without a per se ban, courts continue to express doubts concerning the reliability of polygraph evidence.¹³³ Given the widespread uncertainty concerning the reliability of polygraph evidence, the Court held that the President did not act arbitrarily or disproportionately in promulgating MRE 707.¹³⁴

The Court distinguished the per se ban on polygraph evidence from other situations where it has held per se bans on evidence unconstitutional.¹³⁵ Unlike a ban on impeaching a party's own witnesses¹³⁶ or a ban on post-hypnosis testimony,¹³⁷ MRE

122. *Id.* at 686.

123. *Id.* at 683.

124. *Id.* at 691.

125. U.S. CONST. amend. VI.

126. *United States v. Scheffer*, 44 M.J. 442, 445 (1996). The court assumed that the President acted in accordance with UCMJ Article 36(a) when he promulgated MRE 707, but it did not address the issue.

127. 483 U.S. 44 (1987). In *Rock*, the Court struck down Arkansas' per se ban on post-hypnotic testimony.

128. *Id.* at 61.

129. *Scheffer*, 44 M.J. at 449.

130. *United States v. Scheffer*, 117 S. Ct. 1817 (1997).

131. *United States v. Scheffer*, 118 S. Ct. 1261, 1263 (1998).

132. *Id.* at 1264.

133. *Id.* at 1266.

134. *Id.*

135. *See Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

136. *Washington*, 388 U.S. at 14.

707 does not prevent the accused from testifying or from introducing factual evidence on his own behalf. Military Rule of Evidence 707 prevents the accused from introducing only a specific type of expert testimony to bolster his credibility.¹³⁸ The Court held that the President's interest in excluding unreliable evidence from courts-martial outweighs the accused's interest in bolstering his own credibility. Seven justices joined Justice Thomas in this portion of the opinion.¹³⁹

Justice Thomas, joined by three other justices, also said that the President's interests in avoiding collateral litigation and in preserving the panel's function of determining witness credibility were sufficient to justify MRE 707.¹⁴⁰ In a concurring opinion, Justice Kennedy, joined by three other justices, submitted that MRE 707 serves only to prevent unreliable evidence from being introduced at trial. Because of the ongoing debate about the reliability of polygraph evidence, he was unwilling to require all state, federal, and military courts to consider this evidence.¹⁴¹

Justice Kennedy also wrote that, while MRE 707 was not unconstitutional, he doubted that a rule of per se exclusion was wise and that some later case may present a more compelling case for the introduction of polygraph evidence.¹⁴² However, he did not provide any indication or example of a more compelling case. Justice Kennedy also noted, but did not discuss, the tension between a per se ban on scientific evidence and the Court's holding in *Daubert v. Merrell Dow Pharmaceuticals Inc.*,¹⁴³ which provides the trial judge with wide discretion to admit scientific evidence that the court deems both relevant and reliable.¹⁴⁴

Justice Kennedy did not find the other interests served by MRE 707 persuasive. He dismissed any concern about polygraph evidence diminishing the role of the jury, particularly since MRE 704¹⁴⁵ abolished all ultimate issue restrictions on expert testimony.¹⁴⁶

In a stinging dissent, Justice Stevens wrote that the President's promulgation of MRE 707 violates UCMJ Article 36(a)¹⁴⁷ because there is no identifiable military concern that justifies a special evidentiary rule for courts-martial.¹⁴⁸ Justice Stevens also asserted that polygraph evidence is as reliable as other scientific and non-scientific evidence that is regularly admitted at trial.¹⁴⁹ Given this degree of reliability and the sophisticated Department of Defense polygraph program, Justice Stevens stated that it was unconstitutional to deny an accused the use of exculpatory polygraph evidence.¹⁵⁰ Justice Stevens also rejected the assertions that MRE 707 prevents jury confusion and avoids collateral litigation.¹⁵¹

Analysis

Scheffer guarantees that military judges can continue to exclude polygraph evidence from the trial phase of courts-martial. Despite this ruling, the Supreme Court failed to resolve a number of issues. Eight justices held that the President's per se ban is constitutional because there is no scientific consensus about the reliability of polygraph evidence. However, the majority opinion did not provide any guidance concerning the amount of scientific consensus required before the MRE 707 ban would no longer be justified. Furthermore, neither Justice Thomas' majority opinion nor Justice Kennedy's concurrence

137. *Rock*, 483 U.S. at 44.

138. *Scheffer*, 118 S. Ct. at 1269.

139. *Id.* at 1263.

140. *Id.* at 1267.

141. *Id.* at 1269 (Kennedy, J., concurring).

142. *Id.*

143. 509 U.S. 579 (1993).

144. *Scheffer*, 118 S. Ct. at 1269 (Kennedy, J., concurring).

145. MCM, *supra* note 120, MIL. R. EVID. 704.

146. *Scheffer*, 118 S. Ct. at 1270 (Kennedy, J., concurring).

147. *See* UCMJ art. 36(a) (1994).

148. *Scheffer*, 118 S. Ct. at 1272 (Stevens, J., dissenting).

149. *Id.* at 1276.

150. *Id.* at 1270.

151. *Id.* at 1278.

discusses how a per se ban on polygraph evidence squares with *Daubert*, which gives wide discretion to the trial judge to admit or to exclude scientific evidence. Finally, the majority opinion did not address the issue raised by Justice Stevens that the President's promulgation of MRE 707 violates Article 36(a) of the UCMJ. The majority opinion did not discuss or note any unique military concerns that justify a special evidentiary rule for courts-martial.

In spite of the eight-one decision upholding the constitutionality of MRE 707, the Court's support of this "unwise" ban appears lukewarm. Given a more compelling case, four justices may join Justice Stevens and require trial courts to consider the introduction of polygraph evidence.

Advice to Practitioners

For the foreseeable future, MRE 707 binds counsel and military judges. When the government attacks the credibility of a testifying accused, the trial counsel should successfully prevent the accused from attempting to lay the foundation for the admissibility of exculpatory polygraph evidence, even where a government polygrapher administered the test. Practitioners should note, however, that polygraph results, both inculpatory and exculpatory, can still be used pretrial and post-trial to assist the convening authority in determining the appropriate disposition of a particular case. In addition, because the MREs do not control the military judge when ruling on preliminary questions regarding the admissibility of evidence,¹⁵² counsel can still offer polygraph testimony during Article 39(a)¹⁵³ sessions in support of motions to admit or to exclude evidence.

In the future, the constitutionality of MRE 707 is less clear. Given the Court's holding, the apparent weak support for MRE 707, and Justice Stevens' dissent, trial defense counsel and appellate defense counsel may be successful in overturning MRE 707 on one of three bases. First, as state and federal courts use polygraph evidence more frequently, it is likely to gain a higher degree of scientific as well as legal acceptability. Widespread acceptability of polygraph evidence will undermine the Court's rationale for the MRE 707 ban on polygraph evidence. Greater acceptance of polygraph evidence may eventually cause the President to eliminate MRE 707.

Second, the CAAF and the Supreme Court may allow the introduction of exculpatory polygraph evidence in spite of

MRE 707 if defense counsel make a more compelling argument for the constitutional necessity of polygraph evidence as part of their defense. Unfortunately, Justice Kennedy's concurrence was silent about what qualifies as a "more compelling case."

Finally, defense counsel may argue that the President's promulgation of MRE 707 violates UCMJ Article 36(a). In his dissent, Justice Stevens noted that the rationale for MRE 707 is not based on issues unique to the military. Under Article 36(a), the President is charged with promulgating evidentiary rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."¹⁵⁴ Because there is no MRE 707 counterpart in the Federal Rules of Evidence, and because MRE 707 was not promulgated to address issues unique to the military, Justice Stevens opined that the President exceeded his statutory authority in promulgating this rule. The parties in *Scheffer* did not brief this issue. Neither the majority opinion nor the lower court decisions addressed this issue. In light of the majority opinion upholding MRE 707 on constitutional grounds, this statutory argument may be the best argument available to defense counsel who seek to admit exculpatory polygraph evidence.

Conclusion

By an eight-one decision, the Supreme Court upheld the constitutionality of MRE 707. For the foreseeable future, polygraph evidence is inadmissible in the trial phase of courts-martial. However, the Court's ruling has not eliminated all of the issues that accompany polygraph evidence. The Court's affirmation of MRE 707 is not as strong as the vote indicates. If polygraph evidence gains a higher degree of scientific acceptability, if an accused is able to present a more compelling need for this evidence, or if defense counsel can successfully argue that the President exceeded his statutory authority in the promulgation of MRE 707, *Scheffer* may be overturned, and military courts could admit exculpatory polygraph evidence. Major Hansen.

International & Operational Law Note

Introduction

152. Military Rule of Evidence 104(a) states:

Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance or the availability of a witness shall be determined by the military judge. In making these determinations, the military judge is not bound by the rules of evidence except those with respect to privileges.

MCM, *supra* note 120, MIL. R. EVID. 104(a).

153. UCMJ art. 39(a) (1994).

154. *Id.* art. 36(a).

This note is the second in a series of practice notes¹⁵⁵ that discuss concepts of the law of war that might fall under the category of “principle” for purposes of the Department of Defense Law of War Program.¹⁵⁶

Principle 1: Military Necessity

“My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far as it is absolutely necessary; everything beyond that is criminal.”¹⁵⁷ With this statement, Napoleon captured the essence of one of the most fundamental principles of the law of war, military necessity. In *Field Manual 27-10*, the United States Army addresses military necessity as follows:

The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.

The prohibitory effect of the law of war is not minimized by “military necessity” which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.¹⁵⁸

Military necessity is the international legal link between a lawful military objective and the actions taken to achieve that objective. This legal link is intended to limit the destructive actions of combatants to only those actions that contribute to

achieving the objective, which in conflict is to force the enemy to submit.

The concept of imposing such limitations on combatants is arguably as ancient as organized warfare itself.¹⁵⁹ However, this principle did not take the form of an order for combatants in the field until 1863.¹⁶⁰ Not until 1868 was this principle codified in a multilateral treaty related to regulating conflict—the St. Petersburg Declaration of 1868.¹⁶¹ Although this declaration does not refer to military necessity explicitly, it embraces the concept that inflicting harm is permissible only when linked to a legitimate military objective. It states that “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy.”¹⁶² In 1907, the drafters of the Hague Convention Respecting the Laws and Customs of War on Land¹⁶³ made this principle a cornerstone of this still binding treaty when they established the rule that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”¹⁶⁴

The essence of the concept of military necessity is that the only legitimate focus of a combatant’s destructive power is the enemy war-making capability, or, in the negative, that war does not justify the intentional infliction of destruction on any person or object within the range of a combatant’s weapon systems. The law of war “goes much farther than this. It rejects the claim that whatever helps to bring about victory is permissible It forbids some things absolutely. They are criminal even if without them the war will be lost.”¹⁶⁵

The test of this “caveat” to the concept of military necessity occurred following World War II during the Nuremberg Tribunals. Several German defendants asserted military necessity as a defense to various charges involving the murder of civilians and the destruction of civilian property in occupied areas.¹⁶⁶

155. See International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., JUNE 1998, at 17.

156. See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). See also CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 AUG. 1996).

157. GEOFFREY FRANCIS ANDREW BEST, WAR AND LAW SINCE 1945, at 242 (1994) (citing 7 MAX HUBER, ZEITSCHRIFT FÜR VOLKERRECHT 353 (1913)).

158. U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3-4 (July 1956).

159. See BEST, *supra* note 157, at 14-15.

160. See Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213 (Apr. 1998).

161. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 1 A.J.I.L. 95-96 (Supp. 1907) (reprinted in THE LAWS OF ARMED CONFLICT 101-03 (Dietrich Shindler & Jiri Toman eds., 3d ed. 1988)).

162. *Id.*

163. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, 36 Stat. 2277, reprinted in U.S. DEP’T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE 5-17 (Dec. 1956).

164. *Id.*

165. SHELDON M. COHEN, ARMS AND JUDGMENT 35 (1989).

The essence of the German defense rested on an assertion of the concept of *Kriegsraison*, which represents an *unlimited* application of military necessity. According to a former President of the American Society of International Law:

The doctrine practically is that if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is to be the sole judge of the necessity, the doctrine really is that a belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage.¹⁶⁷

When the Nuremberg Tribunal convicted the defendants who asserted military necessity as a defense to their conduct, the concept of *kriegsraison* was explicitly rejected. In short, the Tribunal confirmed the notion that, while military necessity serves as a pre-condition to validate destructive conduct during conflict, it does not justify violating or ignoring the law of war. According to the Tribunal:

It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification for their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of the positive rules. International law is prohibitive law.¹⁶⁸

When translating this principle to the context of military operations other than war (MOOTW), one must bear in mind that this principle relates to legally justifying the use of force during military operations. As a result, it is most logically related to the justifying measures necessary to protect friendly forces. While the term “military necessity” is not often used in

relation to force protection issues, it lies at the foundation of any set of rules of engagement intended for that purpose.

Inherent in the analysis of whether the use of destructive force is justified for force protection is the concept that protecting the force is a necessary component of the military mission. However, as with the wartime caveat that military necessity justifies only those measures not otherwise prohibited by the law, military necessity does not justify all actions that arguably enhance force protection. The customary international law prohibitions against state practiced murder; torture; cruel, inhumane, or degrading treatment; and prolonged arbitrary detention¹⁶⁹ serve as limitations to what military necessity may justify during the conduct of MOOTW. To illustrate, the need to extract information from a local civilian for the military necessity of protecting the force does not justify subjecting that individual to torture as a means of obtaining the information. Thus, even without an “enemy” in the classic sense, the principle of military necessity remains relevant in the decision making process for the use of force.

When analyzing the meaning of this principle, it is often easy to overlook the key factor of how to apply it—how to determine what is “necessary.” Ultimately, this remains a key function of command, in both the wartime and MOOTW environments. However, as with virtually all decision-making related principles of the law of war, the law presumes that the commander makes the “necessity” determination in good faith, based on an analysis of all of the information available at the time of the decision.¹⁷⁰ In this regard, therefore, the standard is subject to an “objective” quality control element. In short, the commander who makes arbitrary and ill-informed determinations of military necessity risks condemnation of those decisions when they become subject to subsequent scrutiny. The judge advocate who understands both the meaning of military necessity and the imperatives of the mission is best able to ensure that determinations of what is “necessary” for the mission are made in good faith. Major Corn.

166. See William Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L. L. 251, 253 (1953) (discussing the Nuremberg War Crimes Tribunal decisions).

167. *Id.* (quoting Elihu Root, Address Before the American Society of International Law, April 27, 1921).

168. *Id.*

169. See 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §701 (1986) (discussing customary international law based human rights).

170. See Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 126 (1982) (discussing the need for “good faith” application of the law of war).