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## Legal Training Handbook for the Ukrainian Military

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must we now the law bestir?  
Can we not with more consequential matters deal, I implore?"  
Quoth Colonel Raven, "Nevermore"

"Be that word our sign of parting, sir" I shrieked, upstarting—  
"Get thee back into the tempest and the Night's Plutonian  
shore

The issue's dead; leave no woe as your token that thy soul has  
spoken.

Leave our complacency unbroken—quit the office and my  
door

Take thy gaze from out my heart and take thy plea from my  
PC.

Of CD-Roms, and TV witness testimony remote; of annual  
*Manuals*,

That is today—be no bore!

Enough!"

Quoth Colonel Raven, "Nevermore"

Colonel Raven, shade never flitting, still is sitting  
on my desk near to my office door

Says he with visage ever piercing:

"Judicial Independence we must implore  
with mid-career tenure as our floor

Can there justice be without belief?  
Can those we judge in our findings find relief?

What of credible judicial oaths?  
Will they our sentences believe or proxy lackeys see with  
boasts?

What of *faith*—theirs and ours?"

"So," I said, with heart arising—

"We must the Uniform Code amend?  
To establish justice actual—and perceptual

—of image pure, and credible"

And the heart light from him streaming, vanquishes his shad-  
ow from the floor

and our judicial souls from out that shadow, that lies in history  
alone

Shall be lifted—Evermore!

Fredric Lederer<sup>112</sup>

## *International and Operational Law Notes*

### **Legal Training Handbook for the Ukrainian Military**

Coinciding with President Clinton's May 1995 visit to  
Ukraine, a first of its kind democracy building project

between The Judge Advocate General of Ukraine and United  
States Army lawyers was completed in Kiev. Over the course  
of this eight-month project, from September 1994 to May  
1995, United States Army judge advocates from the Interna-  
tional and Operational Law Division, Office of The Judge  
Advocate General,<sup>113</sup> worked directly with Colonel Alexander  
Bokov, Chief, Legal Service of the Ministry of Defense of  
Ukraine (the highest judge advocate position in the Ukrainian  
military) in developing a handbook for Ukrainian soldiers  
entitled, "Code of Conduct for Participants in Military Opera-  
tions."<sup>114</sup> This handbook now serves as the primary training  
guide for instructing Ukrainian soldiers in the basics of law of  
war, human rights, and professional ethics.

Although more expansive in content, the Ukrainian hand-  
book is patterned after the very successful Peruvian Human  
Rights handbook developed by Army lawyers for the Peruvian  
armed forces in 1993.<sup>115</sup> The Ukrainian handbook is pocket  
sized, made of durable paper, and has been officially adopted  
by the Ukrainian Ministry of Defense as the standard training  
text for the Ukrainian armed forces.

Using a Ukrainian printing company, 100,000 copies of the  
handbook were produced at a cost of approximately  
\$25,000.<sup>116</sup> Once the handbooks were printed, United States  
judge advocates assisted in both training a cadre of Ukrainian  
judge advocates to teach the subject matter of the handbook to  
their soldiers and in developing a systematic plan as how best  
to distribute the handbook.

The handbooks are now a part of the core instruction at  
each major military training center, and a Ukrainian judge  
advocate conducts this training for all soldiers who have more  
than six months of active service remaining on their enlist-  
ments. United States Army judge advocates observed the first  
such training session from 18 to 22 April 1995, at the Ukrain-  
ian city of Lviv, the training center for the Western sector of  
Ukraine.

As with all initiatives undertaken to assist the militaries of  
emerging democracies, the success of the United States effort  
to assist in institutionalizing the law of war and human rights  
training in the Ukrainian armed forces must be tempered by  
the fact that this training can be effective only to the degree  
that it is fully embraced by the military. With a standardized  
training handbook that is truly its own, a legal department  
trained to teach law of war and human rights, and an armed  
force that regularly receives such training, the Ukrainian

<sup>112</sup>Chancellor Professor of Law Marshall-Wythe School of Law & Director, Courtroom 21, College of William & Mary in Virginia; Colonel, JA (USAR).

<sup>113</sup>Colonel Ihor Kotlarchuk (JAGC, USAR) was instrumental in assisting on this project.

<sup>114</sup>Copies of the handbook and detailed after action reports are on file at the Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

<sup>115</sup>See Jeffrey F. Addicott & Andrew M. Warner, *JAG Corps Poised for New Defense Missions: Human Rights Training in Peru*, ARMY LAWYER, Feb. 1993, at 78.

<sup>116</sup>Funding was provided under 22 U.S.C. § 5901, popularly known as "Nunn Lugar" funds.

armed forces now have a solid methodology for continuing this effort. In this regard, the strategy throughout this project was to establish and maintain the United States role as one of a "helper." The success of the Ukrainian military in the coming years will be due exclusively to its commitment to continue to teach and train its soldiers in these critical areas of the law. Lieutenant Colonel Jeffrey Addicott, International and Operational Law Division, OTJAG.

### Consequences of Violating the Posse Comitatus Act

The following two notes deal with the consequences of violating the Posse Comitatus Act<sup>117</sup> (PCA). Although a criminal statute, no one has ever been prosecuted for violating the PCA. However, both criminal and civil consequences may flow from conduct that courts view as violating the PCA. In the criminal context, defendants have attempted to invoke the Exclusionary Rule, alleging that the involvement of military personnel triggered a PCA violation, which required the evidence to be excluded. The first note examines the cases in which defendants have made this claim, while the second note explores cases in which plaintiffs have brought civil claims against military personnel based on an alleged PCA violation. Both notes caution that, while courts rarely have ruled in favor of the civilian claimant in either situation, judge advocates should be aware of these potential adverse consequences. Lieutenant Commander Winthrop.

### The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act

#### Introduction

With increasing frequency, criminal defendants rely on the PCA in an attempt to suppress evidence. In the typical case, military personnel are involved with civilian law enforcement authorities in the fight against drugs. As a result of these operations, illegal drugs are seized and civilians are brought to trial in federal or state criminal courts. At trial, the defendants allege that, under the Exclusionary Rule,<sup>118</sup> the evidence should be suppressed because it was obtained in violation of the PCA.

<sup>117</sup>U.S.C. § 1385.

<sup>118</sup>The Exclusionary Rule is a judicially created remedy designed to deter "unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>119</sup>*United States v. Banks*, 539 F.2d 14, 16 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *see also* H.R. REP. NO. 97-71, pt. II, 97th Cong., 1st Sess. 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1781, 1785 [hereinafter H.R. REP. NO. 97-71].

<sup>120</sup>The phrase "posse comitatus" is literally translated from the Latin as the "power of the county." It is defined at common law to refer to all those over the age of 15 on whom a sheriff could call for assistance in preventing any type of civil disorder. H.R. REP. NO. 97-71, *supra* note 119, at 1786 (citing 1 W. BLACKSTONE, COMMENTARIES 343-44).

<sup>121</sup>18 U.S.C. § 1385.

<sup>122</sup>*See* 10 U.S.C. §§ 371-378.

<sup>123</sup>*See* H.R. REP. NO. 97-71, *supra* note 119, at 1785.

Although defendants rarely are successful when invoking the PCA, the PCA continues to be a focal point of litigation whenever the military assists civilian law enforcement authorities to combat illegal drugs. Accordingly, this note will: provide a brief overview of the PCA; examine the key federal and state court cases that have addressed the applicability of the Exclusionary Rule to PCA violations; and address the reasons that some courts view the Exclusionary Rule as an inappropriate remedy for PCA violations.

#### Overview of the Posse Comitatus Act

The PCA, originally enacted shortly after the Civil War, was intended to "eliminate the direct active use of Federal troops by civil law authorities" to enforce civil laws.<sup>119</sup> The PCA provides, in its entirety, as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus<sup>120</sup> or otherwise to execute the laws shall be fined or imprisoned not more than two years, or both.<sup>121</sup>

The PCA reflects a national policy to limit the role of the military in civilian life. Nevertheless, Congress has recognized that in some areas of civilian life the military—because of its expertise and specialized equipment—can, and should be, of great assistance to civilian law enforcement authorities. One of these areas involves the fight against illegal drugs.

In 1981, in an effort to further combat drug smuggling into the United States, Congress enacted statutes designed to clarify and liberalize the PCA's restrictions.<sup>122</sup> Pursuant to these provisions, "Congress intended to maximize the degree of cooperation between the military and civilian law enforcement to stem the influx of illegal drugs into the country, while also recognizing the need to maintain the traditional balance of authority between civilians and the military."<sup>123</sup>