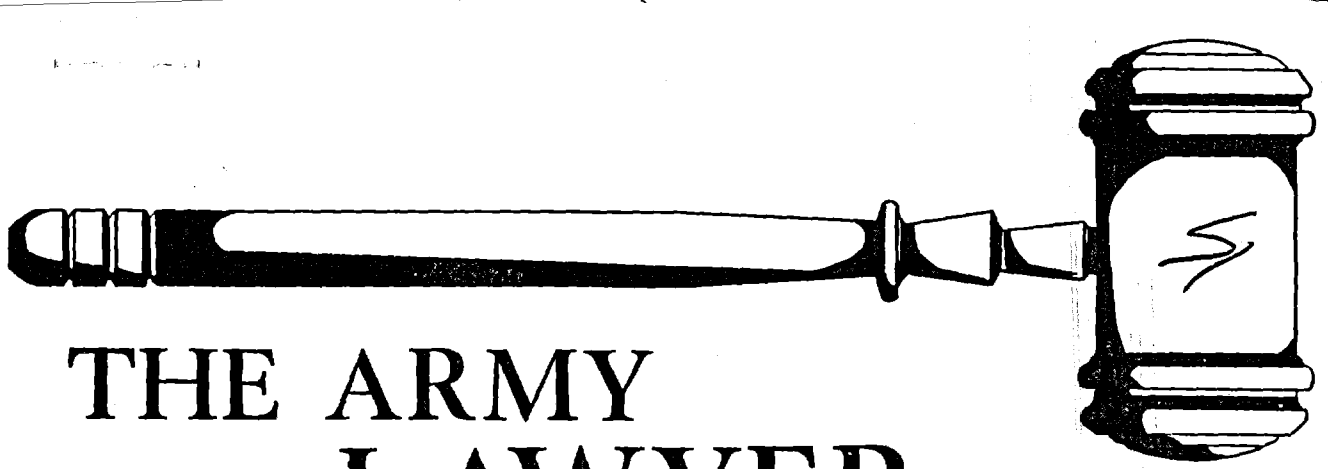

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The Survivor Benefit Plan

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I. The Purpose of the Survivor Benefit Plan

The Survivor Benefit Plan (SBP or Plan) was enacted by Congress on 21 September 1972 as Public Law 92-425.[1] This statute has been amended several times[2] to attempt to make it more attractive to military retirees. SBP is a voluntary annuity plan designed to protect designated survivors of military retirees and those of active duty members who remain on active duty for more than twenty years. SBP replaced the less attractive Retired Serviceman's Family Protection Plan (RSFPP)[3] that was enacted by Congress in 1961 to serve this same purpose.

Although the spouses and family members of many military retirees are unaware of this fact, military retirement pay ends at the death of the retiree.[4] The surviving spouse of a military retiree is entitled to receive social security benefits to care for dependent children until

[1] 86 Stat. 706 (1972) (codified at 10 U.S.C. §§ 1447-1455 (1982)).
[2] Pub. L. No. 94-496, 90 Stat. 2375 (1976); Pub. L. No. 95-397, 92 Stat. 843 (1978). Pub. L. No. 96-402, 94 Stat. 1705 (1980); Pub. L. No. 97-252, 96 Stat. 718 (1982).
[3] 10 U.S.C. §§ 1431-1446 (1982).
[4] *Id.* §§ 1401-1408.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

02 AUG 1984

DAJA-ZA

SUBJECT: Legal Assistance For OER/EER Appeals — Policy Letter 84-2

ALL STAFF JUDGE ADVOCATES

1. The evaluation reports which are prepared for the Army's officers and enlisted personnel are critical to each individual's career and to informed decisionmaking by the Department of the Army. Effective immediately, each staff judge advocate will ensure that military members who request advice about the preparation or submission of OER or EER appeals are provided such advice by judge advocates or civilian attorneys of the Judge Advocate General's Corps.

2. The circumstances of the individual case will shape the professional advice which is appropriate. However, our lawyers should be aware that a request by the member for a commander's inquiry or intervention under paragraph 5-30, AR 623-105, or paragraph 2-18, AR 623-205, may be an appropriate means to address alleged OER or EER irregularities before the evaluation report is included in official files and thus may obviate the need for appeals in some cases.

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

the youngest child reaches age sixteen.[5] The surviving spouse would then not be entitled to further social security payments until, at the very earliest, reaching age sixty.[6] This intervening "blackout period" of no social security and no retirement pay typically exists for eight or ten years for the average former spouse of a military retiree with twenty years service.

SBP was created primiarly to allow the typically relatively young retiree to pay for an annuity with a portion of retired pay to protect his or her surviving spouse and dependent children during this "blackout period" and beyond into later retirement. SBP protects the survivors of retirees who were formerly protected by Dependency and Indemnity Compensation (DIC) when the retiree was on active duty.

II. Eligible SBP Participants and Beneficiaries

The following four general categories of persons may participate in SBP:

1. Retired service members who served on active duty more than twenty years and are entitled to retired or retainer pay.[7]

2. Service members retired from active duty with less than twenty years service as a result of disability, whose disability rating is determined by the Veterans' Administration to be 30% or greater, are entitled to retired pay and are included in the definition of those eligible to participate.[8]

3. Service members qualified to retire from a reserve component[9] and eligible for retired pay for non-regular service.[10]

4. Finally, persons on active duty with more than twenty years of service are, by definition, entitled to retired pay and are automatically covered by SBP if they are married or have a dependent child.[11]

SBP also provides four possible beneficiary designations:

1. The surviving spouse of an eligible service member or retiree.[12] To meet the definition of a qualified surviving spouse, one must have been married to the service member at the time he or she became eligible for retired or retainer pay. Alternatively, if a retiree marries after retirement, this marriage must have been in existence for at least one year prior to the death of the retiree before the surviving spouse is eligible to draw the annuity. This one year rule for post-retirement marriages is not applicable if the survivor is the mother or father of a child born to the marriage.[13] Should the surviving spouse of a post-retirement marriage not qualify as an eligible beneficiary because of the rules discussed above, any amounts deducted from the retired pay of the deceased will be refunded to the widow or widower.[14] The retiree who marries or acquires dependent children after retirement has only one year in

[5] 42 U.S.C. § 402(d), (e), (f) (1982).
[6] *Id.* § 402(a).
[7] 10 U.S.C. § 1448(a)(1)(A) (1982).
[8] *Id.* §§ 1201(3)(B), 1448 (a)(1)(A).
[9] *Id.* § 1332(a), (b).
[10] *Id.* §§ 1331, 1448(a)(1)(B).
[11] *Id* § 1448(d).
[12] *Id.* § 1450(a)(1).
[13] MacConnell v. United States, 217 Ct. Cl. 33 (1978); 10 U.S.C. § 1447(3), (4) (1982).
[14] 10 U.S.C. § 1450(c), (e), (k) (1982).

Editor
Captain Debra L. Boudreau
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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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which to notify the U.S. Army Finance and Accounting Center (USAFAC or Finance Center) in writing of this occurrence to acquire SBP coverage for these new beneficiaries.[15] If the surviving spouse remarries before age 60, the annuity will be lost. However, if this remarriage is terminated by death or divorce, the former spouse of the retiree is once again eligible for SBP payments.[16]

2. The second possible beneficiary designation is surviving spouse and dependent children.[17] The spouse must meet the same eligibility criteria discussed above. The statute defines a dependent child as a person that is

a. Unmarried; *and*

b. Under 18 years of age, or under 22 years of age if pursuing a full time course of study in a recognized educational institution; *or*

c. Any unmarried child of the retiree incapable of self support because of mental or physical incapacity incurred before the age of 18, or before the age of 22 if pursuing a full time course of study.[18]

Coverage for handicapped children can be particularly significant because the annuity will be paid to this person for life if the incapacity is not cured and the beneficiary remains unmarried.

Under this option, the surviving spouse, and not the dependent children, always receives the annuity as long as the surviving spouse's eligibility is maintained. It is only when the eligible widow or widower dies, remarries before age 60, or otherwise becomes ineligible that the dependent children receive the payments in their own behalf. In *Shaff v. United States*,[19] an Air Force officer who had retired in 1972 elected to participate in the Survivor Benefit Plan. He designated his "wife and children" as beneficiaries in the mistaken belief that his second wife was his legal spouse. However, because his *ex parte* Dominican Republic divorce from his first wife was not recognized in the first wife's home state of California, the divorce was invalid and his second marriage was void. Thus, neither of his wives was entitled to the annuity and his surviving dependent children of his second "wife" became the sole beneficiaries under the plan.

"Eligible chilren" is broadly defined and includes adopted children, stepchildren, and foster children if the foster child resides with and receives more than one-half its support from the retiree and is not being cared for under a social agency contract.[20]

3. A retiree may, for any number of reasons, elect to provide coverage for dependent children only. In this instance, the children must meet the same eligibility requirements discussed above.

4. The final beneficiary option is known as a natural person with an insurable interest. With one exception discussed below, this option may only be selected by a retiree who has no spouse or dependent child. The person so selected must show a financial benefit in the continued survival of the retiree to be an eligible beneficiary under this designation. Close relatives of the retiree are presumed to meet his requirement. However, persons related more distantly than cousin and all unrelated persons must sign a statement certifying proof of financial benefit.[21] The selection of any beneficiary option is irrevocable, except for "natural person" coverage. This election can be cancelled and changed to spouse, or spouse and children, if the retiree marries or acquires children after retirement. This change must be in writing and received by the Finance Center within one year after one of these changes in circumstances occurs.[22]

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[15] *Id.* § 1448(a)(5).
[16] *Id.* § 1450(b).
[17] *Id.* § 1450(a)(2).
[18] *Id.* § 1447(5). The Comptroller General has ruled that a quadraplegic's full time government employment did not warrant suspension of her SBP annuity because she was no longer incapable of self support. 62 Comp. Gen. 193 (1983).
[19] 695 F.2d 1138 (9th Cir. 1983).
[20] 10 U.S.C. § 1450(a)(4) (1982).
[21] U.S. Dep't of Army, Reg. No. 608-9, The Survivor Benefit Plan (SBP), para. 2-1*e* (1 August 1983) [hereinafter cited as AR 608-9.]
[22] 10 U.S.C. § 1448(a)(5) (1982).

In 1981 the Supreme Court announced its decision in *McCarty v. McCarty*.[23] That case prohibited state courts from treating military retired pay as marital property and awarding a percentage of it to an ex-spouse in a divorce proceeding. In 1982 Congress reversed the effect of *McCarty* with passage of the Uniformed Services Former Spouses' Protection Act.[24] This led to amendment of the Survivor Benefit Plan which now allows a divorced retiree to name his or her former spouse as a "natural person" SBP beneficiary, regardless of whether or not the retiree has dependent children or has subsequently remarried. The retiree cannot, however, be compelled by the divorce court under any circumstances to make this election.[25] This former spouse election may later be revoked, or converted to spouse/children coverage, only with the approval of the divorce court or the agreement of the former spouse.[26]

III. SBP Election Dates and Base Amounts

The active duty retiree, including disability retirees, must elect the beneficiaries they desire to protect and the amount of coverage they desire not later than thirty days before retirement. This is accomplished by completing DA Form 4240. Documents attesting to incapacitation of children or the requisite benefit for an insurable interest beneficiary, when required, should be attached to this form. These documents are then sent to the Finance Center by the installation transfer point.[27]

Retirees are automatically enrolled in the SBP at maximum coverage if they have a spouse, dependent children, or both, at the time of retirement. However, they may elect lesser coverage or decline to participate before becoming entitled to retired pay.[28] Simply stated, service members about to retire with dependents must opt out of the Plan. Remember, except for persons retiring without a spouse or dependent children who elect no coverage or natural person coverage, the election made just prior to retirement is irrevocable as to amount and beneficiaries. An exception to the irrevocability rule was added to the statute in the 1980 amendments.[29] A service member who is awarded a 100% service-connected disability rating by the Veterans Administration (VA) for ten or more years, or continuously from date of release from active duty for at least five years, may suspend SBP participation. This is because the spouses of these service members are eligible to receive Dependency and Indemnity Compensation from the VA upon the death of the retiree, even if the death is not due to a service-connected cause. So, if DIC exceeds SBP, the retiree would probably be wise to provide the appropriate finance center with a copy of the disability rating and a letter requesting that SBP be suspended. All SBP deductions previously withheld from retired pay will be refunded to the surviving spouse upon the demise of the retiree.[30]

Finally, the spouse of a retiree who elects no spousal coverage, less than maximum spousal coverage, or children only coverage, will be notified of that election.[31] The statute provides no further specifics on the type of notification or the remedy for the lack of notification. Army Regulation 608-9 specifies that the spouse will be informed in person or in writing of the available options and the member's election.[32] Part IX of DA Form 4240[33] contains a certificate that should be signed by the spouse acknowledging counseling concerning the options available under the SBP and the election made by the retiree. If the spouse refuses to sign DA Form 4240 or receives this counseling by letter and neglects to return the form, the counselor or Retirement Services Officer (RSO) will note this in Part IX and sign in the space provided.[34]

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[23]353 U.S. 210 (1981).
[24]10 U.S.C. § 1408 (1982). *See generally* Hemingway & Daniel, *Legislative and Judicial Developments Under the Uniformed Services Former Spouses' Protection Act*, The Army Lawyer, Jan. 1984, at 1.
[25]Brown v. Brown, 302 S.E.2d 860 (S.C. 1983); 10 U.S.C. §§ 1448(b), 1450(f)(3) (1982).
[26]10 U.S.C. § 1450(f)(2) (1982).
[27]AR 608-9, para. 5-3.
[28]10 U.S.C. § 1448(a)(2)(A) (1982); AR 608-9, para. 2-1*a*.
[29]Pub. L. No. 96-402, 94 Stat. 1705 (1980).
[30]10 U.S.C. § 1452(g) (1982).
[31]*Id.* § 1448(a)(3)(A), (B).
[32]AR 608-9, paras. 2-1*b* and 5-4.
[33]Data for Payment of Retired Army Personnel (Dec. 1980).
[34]AR 608-9, para. 5-4.

In *Barber v. United States*,[35] the Court of Claims was faced with the notification issue. Technical Sergeant Barber retired from the Air Force in 1976 while married with one dependent child. He was counseled concerning SBP as required by the statute and Air Force regulation. He initially elected full coverage for his family and executed the necessary forms to accomplish this. A short time later, Sergeant Barber executed a second form electing not to participate in the Plan. Sergeant Barber died some fifteen months after he retired, and his spouse and child applied for an SBP annuity. They were informed of Sergeant Barber's election out of the Plan but alleged that they were never notified of this decision. They further claimed that, since notification is statutorily required, a failure to notify invalidated Sergeant Barber's election not to participate. The United States produced the service member who had counseled Sergeant Barber and assisted him in filling out the paperwork when Barber elected not to participate in SBP. The government also produced Barber's written declination, and the clerk testified that it was his normal routine to send a letter to the spouse of a retiree who declined participation in SBP and, at the same time, attach a copy to the declination. The government could not, however, produce a copy of the declination notification to Mrs. Barber. After examining the legislative history of the Plan, the court held that the lack of notice to the spouse, as required by statute, invalidated the second election of Sergeant Barber and restored full coverage to his spouse and child.[36]

Reservists may participate in the SBP and now have two possible election dates. Prior to the 1978 amendments to the Plan,[37] a reservist could only elect to participate just before starting to receive retired pay at age 60. Reservists who died before age 60 never had an opportunity to receive retired pay nor protect their survivors from this loss with SBP. Now, reservists have ninety days from the date they are notified that they have completed the requisite years of service required for retirement (the so called "20 year letter") to elect one of three types of SBP coverage. The three types of coverage available are discussed in more detail below. Alternatively, a reservist may elect to postpone the SBP decision from the time they are eligible to retire until thirty days prior to receiving retired pay.[38] As is the case with active duty retirees, reservists must opt out of SBP within thirty days prior to the receipt of retired pay or they will be automatically enrolled if they are married or have dependent children.[39] Failure to make an election when eligible to retire (as opposed to eligible to receive retired pay), will not, however, automatically enroll the reservist in SBP. This failure will simply postpone the decision until shortly before receipt of retirement pay.[40]

The amount of annuity provided the retiree's survivors depends on the "base" selected. Both active duty and reserve retirees may select a maximum base equal to the entire amount of retired pay to which they are entitled. The minimum base that may be selected is $300.00 unless retired pay is less than $300.00 in which case the only base available would be full retired pay.[41] Base is significant because the annuity payable to survivors is 55% of the base selected.[42] A person automatically enrolled in SBP due to a failure to opt out always has a base of full retired pay. A service member on active duty who is automatically covered by SBP, *i.e.*, currently eligible to retire, has a base equal to the retired pay to which the member would have been entitled if retirement had occurred rather than death.[43]

IV. Calculating the Cost and Size of the SBP Annuity

A. Active Duty Retirees

1. Spouse Only Coverage

Figuring the cost and amount of the SBP annuity is easy. The annuity payable to the surviving spouse is always 55% of the base

[35]676 F.2d 651 (Ct. Cl. 1982).
[36]676 F.2d at 658, 660.
[37]Pub. L. No. 95-397, 92 Stat. 843 (1978).
[38]10 U.S.C. § 1447(a) (1982).
[39]*Id.* § 1448(a)(2).
[40]*Id.* § 1448(a)(2)(B).
[41]*Id.* § 1447(2).
[42]*Id.* § 1451(a)(1)(A).
[43]*Id.* § 1448(d).

selected. The amount withheld from the retiree's monthly check is 2½% of the first $300.00 of the base selected—or $7.50. Then, 10% of the base selected over $300.00 is withheld to complete the cost calculation.[44] For example:

Monthly retired pay	$1600.00
Base selected	$1600.00
	.55
Monthly SBP Annuity	$ 880.00

First $300.00 of base x .025	$ 7.50
Remaining $1300.00 of base x .10	130.00
Total cost withheld each month	$137.50

2. Spouse and Children Coverage

The cost of covering one's spouse under this option is figured in the same manner as for spouse only coverage. There is, however, a small additional cost to cover dependent children until they reach majority. This additional amount is derived from actuarial tables[45] that compare the ages of both spouses with that of the youngest child (regardless of the number of children).[46] For example:

Retiree age 43
Spouse age 41
Youngest child age 10
Cost factor (from actuarial tables) .0042

Retired pay $1600.00 (Base)
Annuity $880.00
Cost factor .0042 x $880.00 = 3.70

Cost spouse coverage	$137.50
Cost children coverage	3.70
Total cost, spouse and children	$141.20

When all children have reached majority and the Finance Center is notified, withholding from retired pay to provide this coverage ceases. The only time dependent children receive the annuity themselves is when there is no longer an eligible spouse because of death, divorce, or remarriage. In that instance, all eligible children divide the annuity equally.

[44] *Id.* § 1452(a)(1).
[45] U.S. Dep't of Army, Pamphlet No. 600-6, Cost Tables for the Retired Serviceman's Family Protection Plan (1970).
[46] AR 608-9, para. 3-1*b*.

3. Children Only Coverage

The cost for this type of coverage is also based on actuarial tables that compare the age of the retiree and the age of the youngest child.[47] For example:

Retiree age 43
Youngest child age 10
Cost factor .0249
Cost factor × $880.00 = $21.91
Total cost, children only coverage = $21.91

Once again, deductions from retired pay stop when the youngest child is no longer an eligible beneficiary. The annuity is payable to unmarried children until the youngest child is age 18, or 22 if in school. There is no age limit for unmarried, incapacitated children. To figure the cost for disabled children after they reach age 18, age 17 on the actuarial tables is utilized. Thus, for a retiree age 43, the cost factor is .0096. So, for an $880.00 annuity, the deduction from retired pay is only $8.45 per month. This provides excellent life long coverage for the disabled child at very little cost.

4. Persons With an Insurable Interest

This option is by far the most expensive. The cost is 10% of gross retired pay, plus an additional 5% of gross retired pay for each full five years the beneficiary is younger than the retiree. The total cost may not exceed 40% of retired pay. The annuity is also lower than the other options: it is 55% of the base amount selected, after the cost of the annuity has been subtracted from the base.[48] For example:

Retired pay and base		$1600.00
Retiree age	43	
Beneficiary age	37	
.10 × $1600.00		$ 160.00
.05 × $1600.00		80.00
		$ 240.00

Base	$1600.00	
Cost	240.00	
	$1360.00	Adjusted base

.55 × $1360.00 = $748.00 annuity

[47] *Id.* at para. 3-1*c*.
[48] 10 U.S.C. § 1452(c) (1982); AR 608-9, para. 3-1*d*.

B. Reserve Component Retirees

In order to figure the cost of SBP for reserve component retirees, one must understand the three options available.[49] The various eligible beneficiaries are the same as for active duty retirees.

1. Option A

Under this option a retirement eligible reservist may decline early participation in SBP. If this person died before age 60, his or her survivors would not benefit from SBP. Of course, the former reservist would never receive any retired pay because these payments do not begin until age 60. Persons declining early participation in SBP will have a second opportunity to select the amount of SBP and which beneficiaries to protect, or to opt out of the Plan, shortly before reaching age 60 and beginning to draw retired pay.[50] The cost formula for a reservist electing Option A is the same as for the active force and the annuity is 55% of the base amount selected.[51]

2. Option B

Selecting Option B means the annuity to the surviving spouse will start on the 60th anniversary of the retiree's birth, should death occur before age 60. This added protection makes Option B more expensive than A. An actuarial factor is applied to the first $300.00 of the base selected, and another actuarial factor is applied to the remaining base over $300.00. These two sums are added to determine the retiree's reduced retired pay. For example:

Retiree age 55	
Spouse age 52	
Retired pay and base at age 60 -	$500.00
$300.00 × .9448 =	$283.44
$200.00 × .8698 =	173.96
Reduced retired pay	$457.40
Cost per month	42.60

A third actuarial factor compares the age of the spouse and the age of the retiree to determine the amount of the SBP annuity. In this example:

Base $500.00 × (actuarial factor) .5334 = 266.70 SBP annuity

3. Option C

Under this option, the annuity to the surviving spouse starts on the day following the date of death of the retiree, regardless of age. Since this option offers the greatest protection, it is the costliest. The same type of formula is used to compute the cost and amount of the annuity as in Option B. For example, using the same facts as in the Option B illustration:

$300.00 × .9420 =	$282.60
$200.00 × .8670 =	173.40
Reduced retired pay	$456.00
Cost per month	44.00

Base $500.00 × .5319 = $265.95 SBP annuity.

The cost for spouse and children coverage is the same as spouse only coverage. If the spouse becomes ineligible for any reason (death, divorce), the cost and size of the annuity would be recomputed on a children only basis where the actuarial factors compare the ages of the retiree and the youngest child. In Options B and C, a base is not selected by the retiree as in Option A. Under Option B, the base is that amount of retired pay due if the reservist had lived to age 60. In Option C, the base is the retired pay due the reservist as if that person were 60 years old when death occurred. Under both Options B and C, the retiree pays nothing for SBP protection if death occurs before age 60 because the vehicle to pay for SBP is withholding from retired pay, which does not begin until age 60. Persons who elect Options B or C also provide additional benefits for their families. If those retirees die before age 60, their dependents are entitled to medical, dental, commissary, and post exchange benefits on the 60th anniversary of the retiree's birth.[52]

All eligible reserve component personnel have ninety days from receipt of DD Form 1883,

[49] *See generally* U.S. Dep't of Army, Pamphlet No. 360-540, Reserve Component Survivor Benefit Plan (1982) [hereinafter cited DA Pam 360-540]; U.S. Dep't of Army, Reg. No. 135-180, Qualifying Service for Retired Pay Nonregular Service (15 Oct. 1974) [contained in the UPDATE, published quarterly; the current issue as of this writing is 1 May 1984], [hereinafter cited as AR 135-180].

[50] 10 U.S.C. § 1448(a)(1)(B) (1982).

[51] AR135-180, para. 3-4c.

[52] *Id.* at paras. 4-4, 4-5.

Survivor Benefit Plan Election Certificate, to make their election and return the form to the appropriate office. Army National Guard members must return the form to

Chief, National Guard Personnel Center
ATTN: NGB-ARP-CR
5600 Columbia Pike
Falls Church, Virginia 22041.

Army Reserve members will return DD Form 1883 to

Commander
U.S. Army Reserve Components Personnel and Administration Center (RCPAC)
ATTN: DARC-RAS-CB
9700 Page Boulevard
St. Louis, Missouri 63132

Should the service member fail to return the form within the ninety day period, he or she is deemed to have elected Option A. If this person lives to age 60, an election of whether or not to enroll in SBP could be made at that time.[53]

V. Offsets to SBP

Two types of benefit payments to the surviving spouse can result in reduced SBP payments. The first potential reduction, or offset, to SBP occurs when the surviving spouse receives social security payments under certain circumstances. The offset does not, however, always apply with the receipt of social security. When a surviving spouse, regardless of age, has only one dependent child under age 16, SBP will be reduced dollar for dollar by the amount of social security benefits received that are a result of the retiree's active military service after 31 December 1956. However, the reduction in SBP will never exceed 40%.[54] Stated differently, the surviving spouse in this circumstance will always receive all social security to which entitled, and at least 60% of SBP. A surviving spouse, regardless of age, with two or more dependent children will receive the full monthly SBP annuity. When the surviving spouse reaches age 62, or initially begins to receive SBP payments at age 62 or older and has no dependent children, SBP will be offset by the amount of social security received as a result of the retiree's active duty service after 31 December 1956. Again, SBP will never be offset more than 40%. However, SBP payments to this survivor will not be offset by social security not actually received because the survivor is employed and the wages from that job preclude the receipt of social security.[55] The offset to SBP also applies to beneficiaries of the Reserve Component Plan who receive social security, but only by the amount of social security attributable to the reservist's *military* earnings after 31 December 1956. Social security payments resulting from civilian employment—either the spouse's or the reservist's—do not affect, and are not affected by, the SBP payment or any social security payment resulting from the reservist's military earnings.[56] The 9 October 1980 amendment to the SBP statute[57] removed the SBP offset related to service of thirty or fewer continuous days for which social security taxes are withheld and later refunded because the reservist had earnings through private employment that reached the maximum from which social security taxes can be withheld. This amendment applies only to such service occurring on or after 1 December 1980.[58] There is no SBP offset for social security payments to children or natural person beneficiaries.[59] For detailed guidance on calculating the social security offset, the practitioner should refer to appendixes A and B, AR 608-9.

The second reduction in SBP occurs when the surviving spouse receives DIC benefits. DIC is payable to the surviving spouse of a service member who dies while on active duty, active duty for training, annual training, or inactive duty training, or after release from active duty from a service connected cause.[60] The surviving

[53] *Id.* at para. 3-2.
[54] 10 U.S.C. § 1451(a)(2) (1982); AR 608-9, para. 4-6*a*(1).
[55] 10 U.S.C. § 1451(a)(3) (1982); AR 608-9, para, 4-6*a*(3), (4), and (5).
[56] 10 U.S.C. § 1451(a)(3) (1982); DA Pam 360-540.
[57] Pub. L. No. 96-402, 94 Stat. 1705 (1980).
[58] 10 U.S.C. § 1451(a)(4) (1982); AR 608-9, para. 4-6b.(2); DA Pam 360-540.
[59] AR 608-9, paras. 4-6*a*(6), *b*(4)(d).
[60] For a detailed explanation of the conditions of payment of DIC and service connection, *see* 38 U.S.C. §§ 401-423 (1982); 38 C.F.R. §§ 3.1-3.504 (1983), DAJA-AL 1983/2027, 22 Apr. 1983.

spouse would be eligible for both SBP and DIC in two instances. First, a service member on active duty, but eligible to retire (more than twenty years active duty), is automatically covered by SBP. If that soldier were to die on active duty, the surviving spouse, or, if none, possibly the surviving children, parents or siblings, would be eligible to receive both benefits but for the SBP offset. In this instance the spouse would receive all the DIC entitlement and any amount of SBP that exceeds DIC. There is no offset if SBP and DIC are payable to children or natural person beneficiaries.[61] This treatment actually benefits the beneficiary of the entitlement because DIC payments are tax free to the recipient while SBP payments in excess of the amount contributed by the retiree are considered taxable income.[62] Any SBP payments deducted from a retiree's pay will be refunded to the surviving spouse if the retiree later dies of a service connected cause. Also, remarriage at any age disqualifies the spouse from receiving DIC. If this remarriage ends by death or divorce, the spouse is once again eligible for SBP and DIC, after repayment of any SBP amounts earlier refunded to the survivor when DIC was initiated. Unlike SBP, which is administered by the Finance Center, DIC is administered by the Veterans Administration. So, in cases of dual eligibility or where it is necessary to reinstate payments or refund amounts overpaid, application must be made to both these agencies.[63]

VI. The Benefits of SBP

Who should include SBP in their estate plan and enroll in the program? First, all service members contemplating retirement should consider all the benefits of SBP and their personal circumstances before making the important decision of whether or not to enroll in SBP and, if they do enroll, in what amount. Semi-annual group preretirement orientations are conducted by each installation's Retirement Services Office (RSO). Service members with at least nineteen years service must attend at least one of these orientations.[64] Specific retirement benefits and entitlements including SBP will be examined at these orientations.[65] The governing regulation also requires the presence of a legal assistance officer at these presentations.[66] Each potential retiree should, as a minimum, consider the following factors in making the SBP decision:

1. The level of income necessary to provide a reasonable standard of living for one's survivors. The ability to provide this level of income through government-sponsored and commercial life insurance, savings, investments, social security, and SBP should be considered.

2. The ages and educational goals of family members, especially dependent children.

3. The health of family members.

4. Long range financial obligations such as a home mortgage.

5. Immediate financial obligations.

6. The ability of survivors to manage and invest money.[67]

If the retiree appears to need additional financial security, SBP has many advantages over similar commercial survivor annuities. First, SBP costs less than a commercial annuity because it is financially subsidized by the government. It is administered by the uniformed services so there are no administrative costs or commissions built into the cost. Obviously no commercial annuity can offer this feature. Second, SBP protects survivors against inflation through cost-of-living increases in the annuity payable, each time retired pay is so adjusted.[68] Of course, the amount withheld from retired pay is also increased with each cost-of-living increase in retired pay.[69] Widows whose husbands were enrolled in SBP and died shortly after the

[61] 10 U.S.C. § 1450(c) (1982); AR 608-9, para. 4-4*e*.
[62] 26 U.S.C. § 122 (1982).
[63] AR 608-9, para. 4-4.

[64] U.S. Dep't of Army, Reg. No. 608-25, Retirement Services Program, para. 3-2*a* (1 May 1980) [hereinafter cited as AR 608-25].
[65] AR 608-25, para. 3-1*i*.
[66] *Id.* at para. 3-2*b*(4).
[67] *Id.* at para. 5-2*b*.
[68] 10 U.S.C. § 1451(c) (1982).
[69] *Id.* § 1452(h).

law was passed in 1972 have now received approximately a 150% cost-of-living increase in payments. Third, SBP is available to all retiring members regardless of their age or health; it provides guaranteed insurability. If the retiree loses a beneficiary through death or divorce, withholding from retired pay for that beneficiary is suspended, not terminated. If the retiree remarries or acquires a dependent child, the coverage selected for the first beneficiary is reinstated for this new beneficiary. A surviving spouse drawing SBP can remarry after age 60 and still retain the annuity. Fourth, as was shown in the previous example, the cost for adding dependent children to spouse only coverage is very low. Children acquired after retirement by those who elected children coverage are added without an increase in cost. Disabled children draw the annuity for life, as long as they remain unmarried. Fifth, although SBP is offset by social security, the reduction will never exceed 40% of SBP and the offset will not begin until the spouse reaches age 62. This portion of the SBP annuity lost would be taxable income to the recipient but is replaced by tax-free social security survivor payments.[70]

Participation in SBP has significant tax advantages. The amounts withheld from retired pay are not subject to federal income tax.[71] This feature also decreases the actual cost of SBP. For persons in the 30% and above tax brackets, these tax advantages are particularly significant and benefit many retirees working in a second career.[72] Also, any SBP annuity valued at $100,000.00 or less is excluded from the gross estate of the retiree for federal estate tax purposes.[73] In all states except Oregon, SBP annuities are exempt from state inheritance or estate taxes. Even in Oregon there is a $200,000 exemption. Whether or not the annuity is subject to state income tax depends upon where the beneficiary resides. The chart below summarizes state law tax treatment of SBP.[74]

[70]26 U.S.C. § 86 (1982).

[71]*Id.* § 122.

[72]A person in the 30% tax bracket paying $70.00 a month for SBP protection, is effectively paying only $49.00 ($70.00 - $21.00). *See* U.S. Dep't of Army, Pamphlet No. 360-539 C, Survivor Benefit Plan for the Uniformed Services (1 Jan. 1982).

[73]26 U.S.C. §§ 2039(c), (g). For retiree deaths occurring after 1984, there is no $100,000 exclusion, due to the repeal of 26 U.S.C. § 2039(g), in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984), *reprinted in* U.S. Code Cong. & Ad. News Special Tax Pamphlet (July 18, 1984).

VII. State Tax Information on SBP/RSFPP Annuities

Based on information provided by each state and the District of Columbia, the following chart shows whether annuities under the Survivor Benefit Plan and the Retired Serviceman's Family Protection Plan are subject to the state taxes indicated. For more specific details write to state tax authorities.

In Alabama, Arkansas, Mississippi, and New Jersey, taxable retired pay is not reduced by the cost of SBP/RSFPP participation. Gross taxable retired pay (before deduction of annuity cost) is subject to state income tax. In all other states, taxable retired pay is reduced by the annuity cost, the same as on federal income tax returns. Forms W-2P, issued by the Finance Center, shows net taxable retired pay (after deduction of the annuity cost).

SBP is an excellent, but often misunderstood, benefit for retired service members. The Retired Officers Association[75] strongly recommends SBP participation for the average military retiree because these estates normally do not assure sufficient survivor coverage. In the words of the Association:

> We strongly believe that SBP is an individual family decision. The Social Security offset should not be used as a "convenient" excuse to decline coverage. SBP provides excellent coverage for most retirees and together with Social Security survivor payments, can guarantee a safe and sound financial future to the families of retired military personnel.[76]

In the legal assistance officer's role as a personal affairs advisor and estate planner, SBP should be thoroughly understood and emphasized to clients seeking advice on retirement and estate planning.

[74]The Retired Officer, Feb. 1983, at 28.

[75]201 North Washington Street, Alexandria, Virginia 22314.

[76]SBP Made Easy 19 (The Retired Officers' Association 1982).

State	Income Tax	Inheritance Estate Tax
Ala.	Yes[9]	No
Alaska	None[1]	No
Ariz.	Yes	No
Ark.	Yes	No
Calif.	Yes	No
Colo.	Yes[3]	No
Conn.	None[1]	No
D.C.	Yes	No
Del.	Yes	No
Fla.	None[1]	No
Ga.	Yes	No
Hawaii	No	No
Idaho	Yes[6]	No
Ill.	No	No
Ind.	Yes[10]	No
Iowa	Yes	No
Kan.	Yes	No
Ky.	Yes	No
La.	Yes	No
Maine	Yes	No
Md.	Yes	No
Mass.	Yes	No
Mich.	Yes	No
Minn.	Yes	No
Miss.	Yes[4]	No
Mo.	Yes	No
Mont.	Yes[5]	No
Neb.	Yes	No
Nev.	None[1]	None[1]
N.H.	None[1]	No
N.J.	Yes	No
N.M.	Yes[11]	No
N.Y.	Yes	No
N.C.	Yes	No
N.D.	Yes[2]	No
Ohio	Yes[7]	No
Okla.	Yes	No
Ore.	Yes	Yes[8]
Pa.	No	No
R.I.	Yes	No
S.C.	Yes	No
S.D.	None[1]	No
Tenn.	None[1]	No
Texas	None[1]	No
Utah	Yes	No
Vt.	Yes	No
Va.	Yes	No
Wash.	None[1]	No
W. Va.	No	No
Wisc.	Yes	No
Wyo.	None[1]	No

Footnotes:

1. No tax imposed
2. $5,000 exemption at age 60 (reduced by Social Security benefits)
3. $15,000 exemption if over age 55.
4. $5,000 annual exemption
5. $3,600 annual exemption
6. Variable exemption at age 65 (62 if disabled). See current state instructions.
7. $4,000 annual exemption
8. $200,000 exemption
9. $4,750 annual exemption ($8,000 beginning 1/1/83)
10. $2,000 exemption age age 60 (if not claiming tax credit for elderly)
11. $6,000 exemption if age 65 or older $3,000 if under 65 and spouse was age 62 or older. If not, exemption begins when decedent would have reached age 62.

Appendix

Summary of Significant Decisions of The Comptroller General Concerning the Survivor Benefit Plan

Purpose

This summary is designed to provide the judge advocate with significant decisions of the Comptroller General concerning the Survivor Benefit Plan. These decisions were in response to factual situations that are in some cases relatively common. This summary alerts judge advocates to the existence of Comptroller General decisions concerning SBP, and is provided to assist legal assistance officers in advising clients with questions concerning the Plan.

The summary was extracted from a more comprehensive digest of opinions compiled by the Office of the General Counsel of the United States General Accounting Office in its Military Personnel Law Manual (1983). Judge advocates should of course refer to the actual decision before advising a client if the precise language or reasoning of the decision is needed.

Organization of This Summary **Page**

I. Coverage Generally
A. Beneficiaries

1. Children Coverage

Foster child. A minor grandchild of a service member can qualify as a foster child, subject to the support requirement and limitations on dependency contained in 10 U.S.C. § 1447(5) (A) and (B). 53 Comp. Gen. 461 (1974).

Military personnel: status. A child under 18 years of age and serving on active duty, or under 22 years of age and attending a service academy, or enrolled in an institute of higher learning under a military subsistence scholarship program, is considered an eligible dependent within the meaning of 10 U.S.C. § 1447 (5), even though he is provided quarters and subsistence by the Government. 53 Comp. Gen. 420 (1973).

Posthumous children. A service member who was married and had children elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried; but died prior to the first anniversary of the remarriage. His surviving spouse who was pregnant when he died later gave birth to his posthumous child. Not only does the birth of a posthumous child qualify the surviving spouse as the eligible widow for annuity purposes, but this child immediately joins his other children in the class stipulated in 10 U.S.C. § 1450(a)(2) as potential eligible beneficiaries to share the annuity should the eligible widow thereafter lose eligibility by remarriage before age 60 or death. 60 comp. Gen. 240 (1981).

2. Spouse Coverage

Undissolved first marriage: status. Where a service member marries a second wife without dissolving his first marriage, the second wife is not legally married to him and does not qualify as the beneficiary of his SBP annuity. Since the first wife was legally married to him at the time of his death, she is his "widow" and is the proper beneficiary of the SBP annuity in spite of the second ceremonial marriage. Comp. Gen. B-194469 (May 19, 1979).

Mexican divorce. A member of the Reserve component of the Air Force was a participant in

the Survivor Benefit Plan. Two women claimed the annuity as widow. The member's first marriage was allegedly terminated by a Mexican divorce which the first wife challenged. Because such divorces are not generally recognized by state courts, a ruling by a court of competent jurisdiction as to the validity of the relationships involved is usually required. 55 Comp. Gen. 533 (1975).

Length of marriage qualification. Where a service member marries his second wife prior to validly divorcing his first wife and his marriage to his first wife was not dissolved until eight months before his death, his second wife did not qualify as his "widow" under 10 U.S.C. § 1447(3)(A) as she had not been legally married to him at the time he became eligible for retired pay and had not been married to him for at least one year immediately before his death. Comp. Gen. B-189133 (Sept. 21, 1977).

Posthumous child, qualifying widow. A service member elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify under 10 U.S.C. § 1447(3)(A) for any annuity at the time of his death because they had not been married at least one year, she was pregnant and later gave birth to his child. On that basis she qualifies as the eligible widow for annuity purposes effective the date of the child's birth. 60 Comp. Gen. 240 (1981).

Common-law remarriage after divorce. After entry of a final decree of divorce on November 6, 1975, the wife alleges that she and the service member immediately resumed marital cohabitation and were husband and wife under the common law of Colorado when the husband died on November 21, 1975. While common law remarriage after divorce is possible in Colorado, for SBP annuity purposes the existence of a common law marriage on this record is too doubtful to authorize payment. Comp. Gen. B-194497, (May 1979).

3. Natural Person Coverage

Limitation on numbers. Under 10 U.S.C. § 1448(b) coverage, only one person with an insurable interest may be named. 52 Comp. Gen. 973 (1973).

B. Elections

Administrative error. Revocation of any election based upon "administrative error" is a secretarial prerogative under 10 U.S.C. § 1454. It may be exercised to revoke or modify SBP coverage based upon a finding that the service member received erroneous or insufficient information and that such information caused him to make an election he would not otherwise have made. 55 Comp. Gen. 158 (1975).

Guardian or committee election. Where a court of competent jurisdiction determined that a service member was mentally or physically incapable of managing his own affairs under state law, and a guardian or committee was appointed to manage all his affairs, an SBP election made by the guardian or committee before the service member's death was valid and became effective when received by the Secretary concerned. 54 Comp. Gen. 285 (1974).

Civil service survivor annuity elections. A retired service member, having elected coverage under the SBP, and thereafter retired from the Civil Service, waived receipt of military retired pay for Civil Service retirement purposes and did not decline survivor coverage under the Civil Service Retirement system. Under 10 U.S.C. 1452(e), SBP coverage charges are suspended so long as that waiver is in effect. Comp. Gen. B-192490 (Jan. 3, 1978).

C. Administrative Requirements

Detailed explanation of SBP required. The legislative history of the SBP discloses that administrative officers are required to fully explain the details and benefits of the Plan to retiring personnel and their spouses if full coverage not selected; a responsibility that implies the requirement to determine whether there is an eligible spouse or dependent child. 53 Comp. Gen. 192 (1973).

Records examination. Where a member states that he does not have a spouse or child eligible for an annuity, the service records of the member should be examined to verify that representation. If there is no contrary evidence, the

member's election may be accepted. 53 Comp. Gen. 192 (1973).

II. Annuity Adjustments

A. Civil Service Survivor Annuity

SBP annuity when retired pay waived. The SBP annuity was elected by a retiree who later waived military retired pay to use military credits to increase his Civil Service retirement benefits. SBP was not payable unless the retiree elected not to participate in the Civil Service retirement survivorship plan. 53 Comp. Gen. 857 (1974).

B. Social Security

No claim made for social security benefits. An offset against the Survivor Benefit Plan annuity, computed solely on the military service of the deceased spouse, is imposed when the annuitant reaches age 62. This offset may be reduced if the annuitant would have social security survivor benefits reduced because of work even though no claim has been made for social security benefits. Comp. Gen. B-202625, (Dec. 31, 1981).

Military service only. The setoff of the amount of the SBP annuity representing the social security benefit payable to the widow at the age 62, or a widow with one dependent child, must be calculated on the basis of wages attributable to the service member's military service only. The formula used to calculate wages attributable to military service may not include wages from nonmilitary employment. 53 Comp. Gen. 733 (1974). *See also* 58 Comp. Gen. 795 (1979).

Widow's v. widower's benefit. For purposes of the social security setoff, the widower's benefit is not subject to the same reduction as the widow's benefit when there is one dependent child, since a widower receives no benefit comparable to the "mothers benefit" under the social security laws. 53 Comp. Gen. 758 (1974).

III. Recovery and Waiver

Waiver. Waiver of erroneous payments under SBP pursuant to 10 U.S.C. § 1453 should be similar to the criteria for waiver under 5 U.S.C. § 5584; 10 U.S.C. § 2774 and 32 U.S.C. § 716. Therefore, although waiver may not be granted unless collection would be contrary to the purpose of the Plan and against equity and good conscience, proof of financial hardship will not be required if waiver is otherwise in order. 55 Comp. Gen. 1238 (1976).

Debts of deceased member. General debts of a deceased retired service member are not the responsibility of his widow. Such debts may not be setoff against an SBP annuity payable to such widow. 54 Comp. Gen. 493 (1974).

Insufficient SBP cost charge. Where the debt of a deceased retired service member arises from an insufficient reduction of retired pay to cover the cost of SBP, annuity payments may be reduced to cover the added cost. 54 Comp. Gen. 493 (1974).

Underpayment of annuities/over-reduction of retired pay. Amounts due service members or beneficiaries for over-reduction of retired pay or underpayment of annuities, should be paid to persons entitled thereto. 55 Comp. Gen. 1432 (1976).

Collection of overpayment of annuity. Collection of the overpayment of an SBP annuity because of retroactive payment of DIC, may be effected by withholding the amount of overpayment from the premium refund due upon recalculation of the SBP annuity as authorized by 10 U.S.C. § 1453 Comp. Gen. B-192223 (Dec. 19, 1978).

Termination of entitlement. Annuity payments due a beneficiary under section 4, Public Law 94-425, but unpaid at the beneficiary's death either because annuity checks were not negotiated or because payments had not been established, may be paid to the estate of the deceased beneficiary. 54 Comp. Gen. 493 (1974).

The Tax Reform Act of 1984 and Divorce Taxation

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I. Introduction

On 18 July 1984, the President signed into law the Tax Reform Act of 1984 (the Act).[1] The Act makes numerous changes to the tax treatment of payments and property transfers made pursuant to a divorce or separation. The most significant changes involve the definition of alimony, tax treatment of property transferred between spouses or former spouses, and rules concerning allocation of the dependency exemption for children of divorced or separated spouses. This article discusses those provisions of the Act which concern divorce or separation and contrasts the new and old law. Additionally, the article offers advice to legal assistance officers on tax considerations in drafting separation agreements and negotiating settlements. Many of the changes significantly alter past tax characterization and treatment of support payments and property transfers and thus must be understood by legal assistance officers.

II. Alimony

The Act retains the old rule which makes qualified alimony payments deductible by the payor when computing adjusted gross income, and includable as income to the payee spouse.[2] Congress recognized, however, that the alimony rules were not sufficiently objective and often resulted in different treatment due to variations in state law. Accordingly, the Act attempts to redefine alimony in a manner which will produce uniform results throughout the nation and which will conform to common understandings of what constitutes alimony.[3] A brief summary of the present law is helpful to understand the changes.

A. Alimony: The Present Law

As explained above, the law has been and remains that qualified alimony payments are deductible by the payor spouse and includable as income to the payee.[4] To qualify for alimony treatment under current law, payments must satisfy three requirements. First, the payment must be made in discharge of a legal obligation which is either imposed on or incurred by the spouse because of the marital or family relationship.[5] Second, the payment must be pursuant to a decree of divorce or separate maintenance,[6] or pursuant to a written separation agreement between the parties.[7] Third, the payments must be periodic.[8]

The lack of uniformity in the current law originated in the definition of "periodic." Under the existing statute, a payment is not periodic if it discharges a principal or lump sum which is specified in the decree or instrument, unless the payments may extend for a period exceeding ten years from the date of the divorce, decree, or agreement.[9] If the payments obtain alimony treatment because they may extend for more than ten years, no more than ten percent of the principal sum can be treated as alimony in any one year.[10] Additionally, payments in the nature of support will be considered periodic and obtain alimony treatment, although not extending beyond ten years, if the payments are subject to a contingency.[11] The

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[1]Tax Reform Act of 1984, Pub. L. No. 98-369, *reprinted in* [478 Code & Regs] Fed. Taxes (CCH) (July 1984).
[2]I.R.C. §§ 71,215 (1982); Tax Reform Act of 1984, § 422(a) (amending I.R.C. § 71 (1982)), *reprinted in* [478 Code & Regs] Fed. Taxes (CCH) ¶ 1042 (July 1984).
[3]H.R. Rep. No. 432 (Part 2), 98th Cong., 2d Sess. 1495 (1984).
[4]I.R.C. §§ 71, 215 (1982); Tax Reform Act of 1984, § 422(b).
[5]I.R.C. § 71(a)(1) (1982).
[6]*Id.* § 71(a)(2).
[7]*Id.* § 71(a)(3).
[8]*Id.* § 71(a), (c).
[9]*Id.* § 71(c).
[10]*Id.*
[11]Treas. Reg. § 1.71-1(d)(3)(i), T.D. 6270, *republished in* T.D. 6500 (Nov. 25, 1960).

contingency may be provided by the decree or agreement, or by state law.[12] Because the contingency can be provided by state law, identical agreement provisions interpreted in different states could result in different federal income tax treatment. The new law attempts to remedy this problem and provide uniformity of treatment.[13]

B. Alimony: The Tax Reform Act of 1984

Section 422 of the Act completely revises section 71 of the Internal Revenue Code (I.R.C.). It eliminates the requirements that alimony payments be periodic and arise out of a marital obligation of support.[14] The Act defines alimony as follows:

> (1) IN GENERAL.—The term "alimony or separate maintenance payment" means any payment in cash if—
>
> (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
>
> (B) the divorce or separation instrument does not designate such payment as a payment which is not includable in gross income under this section and not allowable as a deduction under section 215,
>
> (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
>
> (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse (and the divorce or separation instrument states that there is no such liability).[15]

Thus, for payments to qualify as alimony under the Act, they first must be in cash and received under a divorce or separation instrument, which is defined broadly as

> (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, or
>
> (B) a written separation agreement, or
>
> (C) decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.[16]

Additionally, to qualify as alimony there can be no obligation to extend the payments beyond the death of the payee spouse, nor can there be an obligation to make substitute payments if the payee spouse dies.[17] This provision was apparently incorporated to preclude the parties from effectively disguising as alimony, and thus deducting, what is really a property settlement.[18] The Committee Reports indicate, however, that amounts payable under a life insurance contract on the life of the payee spouse will not preclude the payments from being classified as alimony.[19] The important point for the drafter is that the instrument should expressly provide that there is no liability for payments after the death of the payee spouse.[20]

Payments otherwise qualifying for alimony treatment will be denied characterization as alimony if any of the following rules are violated. First, if the parties file a joint return the payments will not be eligible for alimony treatment.[21] This is of little consequence since there would be no tax savings in this situation because one spouse would merely be transfering the income to the other spouse, who would nevertheless be reporting it on the joint return.

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[12] *Id.* § 1.71-1(d)(3)(ii).

[13] H.R. Rep. No. 432 (Part 2), 98th Cong., 2d Sess. 1495 (1984) [hereinafter cited as H.R. 432].

[14] [1984] 31 Stand. Fed. Tax Rep. (CCH) ¶ 113 (July 18, 1984).

[15] Tax Reform Act of 1984, § 422(a).

[16] *Id.* Although this is not a change in the law, it should be noted that payments will not qualify as alimony if the parties are merely separated without a written agreement or decree.

[17] Tax Reform Act of 1984, § 422(b)(1)(D).

[18] H.R. 432, *supra* note 13, at 1495.

[19] *Id.*

[20] [1984] 31 Stand. Fed. Tax Rep. (CCH) ¶ 115 (July 18, 1984).

[21] Tax Reform Act of 1984, § 422(e).

Separation agreements should continue, when practical, to include a provision requiring the parties to cooperate in filing a joint return because filing a joint return will always be advantageous from a tax standpoint while the parties are married.[22]

Second, payments in excess of $10,000 during any calendar year will only be treated as alimony if the payments are to be made in each of the six post-separation years.[23] Additionally, the Act provides that if the payments in any of the first six years following separation or divorce are less than the prior year's payment by an amount in excess of $10,000, the amount in excess of $10,000 is recaptured as ordinary income to the payor and deductible to the payee in the subsequent year.[24] For example, if alimony payments in year one were $20,000, and in year two are $5,000, then the amount by which the difference in the payments ($20,000 - $5,000 = $15,000) exceeds $10,000 ($15,000 - $10,000 = $5,000) will be recaptured in year two as ordinary income for the payor. This rule precludes parties from obtaining alimony treatment for what is in effect a property distribution.

Third, alimony treatment will be denied in the case of individuals who are legally separated from one another under a decree of divorce or separate maintenance if the parties were members of the same household at the time of the payment.[25] The Committee Reports indicate, however, that the parties will not be treated as members of the same household and thus denied the alimony treatment if the taxpayer is preparing to leave the other spouse's household shortly.[26] There is no similar limitation on the parties residing in the same household if they are separated pursuant to a written separation agreement or a temporary decree requiring one spouse to make support payments to the other spouse.[27]

An additional and significant rule is that the agreement or decree may not designate that the payments are not includable in the gross income of the payee and not deductible to the payor.[28] Thus, if the parties have provided in their agreement that the payments will not be treated as alimony for tax purposes, that provision will be binding and preclude the payor from taking the deduction. This is significant because in the past the parties' characterization has not been binding on the Internal Revenue Service, (IRS).[29] Under the new rule, the parties can elect to either allocate the tax benefit or deduction to the payor by granting alimony treatment for the payment, or deny the deduction for an otherwise qualifying payment, giving the recipient the proceeds tax free.[30] This designation will be binding on the parties for tax purposes.[31] The election need not be permanent as the Act seems to permit the election to be altered by a later amendment or modification to the decree.[32]

If the alimony payment was made by assignment of an annuity contract, the entire annuity payment would be taxable to the payee spouse under the current law.[33] The new law permits the payee spouse to recover the payor's investment in the annuity contract under the existing annuity provisions of I.R.C. section 72.[34]

The new alimony provision should be complimented as it generally will add predictability to the system and avoid needless litigation. Counsel negotiating for clients should be aware that it is possible to, in effect, obtain tax-free sup-

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[22]Ward, *Marital Dissolution Tax Planning*, Preventive L. Rep., June 1984, at 171. Note, however, that if the date of divorce can be planned for tax purposes, the parties may obtain a tax advantage by terminating their marital status prior to the last day of the tax year so they can file as either unmarried or head of household. *Id.*

[23]Tax Reform Act of 1984, § 422(f)(1).

[24]*Id.* § 422(f)(2); H.R. 432, *supra* note 13, at 1496.

[25]Tax Reform Act of 1984, § 422(b)(1)(C).

[26]H.R. 432, *supra* note 13, at 1496.

[27]The limitation on cohabitation by persons legally divorced or separated is probably to preclude sham divorces obtained to gain preferential tax treatment by filing separate returns and thereby shifting income through the alimony payments to the spouse with the lesser income. *See supra* text accompanying notes 15 and 16.

[28]Tax Reform Act of 1984, § 422(b)(1)(B).

[29]Bardwell v. Commissioner, 318 F.2d 786 (10th Cir. 1963).

[30][1984] 31 Stand. Fed. Tax. Rep. (CCH) ¶ 122 (July 18, 1984).

[31]*Id.*

[32]*Id. at* ¶ 122.

[33]*Id.* at ¶ 129.

[34]*Id.*; I.R.C. § 72 (1982).

port payments for a spouse, or, in other words, one can now have the cake and eat it too.

III. Child Support Payments

A further limitation on the deductibility of alimony payments is found in the definition of child support. The Act provides:

> (c) PAYMENTS TO SUPPORT CHILDREN.—
>
> (1) IN GENERAL.—Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.
>
> (2) TREATMENT OF CERTAIN REDUCTIONS RELATED TO CONTINGENCIES INVOLVING CHILD.—For purposes of paragraph (1), if any amount specified in the instrument will be reduced—
>
> (A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or
>
> (B) at a time which can clearly be associated with a contingency of a kind specified in paragraph (1), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of the children of the payor spouse.[35]

As can be seen, payments characterized as child support are not considered to be alimony and therefore remain nondeductible to the payor and are not included in the gross income of the recipient.[36] This is not a change in the law.[37] The Act, however, significantly alters the *method* of determining what portion of a payment will be characterized as child support or alimony. Previously, for a payment to be considered as child support rather than as alimony, the decree or instrument had to specifically designate the payment as child support.[38] If the agreement or decree designated a lump sum payment for the support of the spouse and minor children, without specifically fixing the amount to be characterized as child support, the entire payment was treated as alimony.[39] In *Commissioner v. Lester*,[40] the Supreme Court determined that the entire lump sum payment would be treated as alimony even though the decree provided that the payments would be reduced upon a contingency relating to the children.

The Act changes this rule by providing that any reduction in a payment due to contingencies involving a child will prevent the payment from being characterized as alimony.[41] For example, under the Act if an agreement or decree specifies that the husband is to pay $250 per month in support of the wife and minor child, but that the payments would be reduced by $100 per month when the child reaches age eighteen, then $100 of each payment will be treated as child support and $150 per payment will be characterized as alimony. The new law retains the old rule that when both alimony and child support payments are called for by the agreement or decree and less than the full amount called for is paid, the amount paid will be applied first towards child support.[42] The obvious result of this rule is that later payments of amounts in arrears will all be characterized as alimony and thus will be includable in the gross income of the recipient.

The new law again attempts to add predictability to the system by honoring the clear language and intent of a decree or instrument which specifies a portion of a payment as child support. This provision reverses *Lester* and corrects the confusion and unnecessary litigation it caused. Although the provision adds predicta-

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[35]Tax Reform Act of 1984, § 422(c).
[36]*Id.*; [1984] 31 Stand. Fed. Tax. Rep. (CCH) ¶ 125 (July 18, 1984).
[37]I.R.C. § 71(b) (1982).
[38]Treas. Reg. § 1.71-1(e), T.D. 6270, *republished in* T.D. 6500 (Nov. 25, 1960).
[39]*Id.*
[40]366 U.S. 299 (1966).
[41]Tax Reform Act of 1984, § 422(c)(2).
[42]*Id.* § 422(c)(3); Treas. Reg. § 1.71-1(e), T.D. 6270, *republished in* T.D. 6500 (Nov. 25, 1960).

bility, it has been criticized because it may remove flexibility from the system and may work contrary to the interests of women.[43] It is argued that the Act will deter the common practice of granting larger initial support payments to cover the needs of both the spouse and children, with a provision to subsequently reduce the payments upon a contingency related to the children, because the full payment will no longer receive alimony treatment.[44] Further, large rehabilitative support payments, *e.g.*, to enable a spouse to attend college, may not be fully deductible due to the recapture provision if a payment in one of the first six post-separation years exceeds a subsequent payment by more than $10,000.[45] The ABA Tax Section has criticized these provisions as unnecessarily complex and will lobby to delay the effective date of the alimony rules.[46] Otherwise, the alimony and child support provisions of the new law will apply to divorce and separation instruments executed after 31 December 1984, and to earlier decrees or instruments if subsequently modified to make the new law apply.[47]

IV. Dependency Exemption

Although the Act leaves some of the old law unchanged, it substantially changes the allocation of the exemption for minor children. These changes must be understood by counsel negotiating and drafting agreements for separating or divorcing parties.

A. Dependency Exemption: The Current Law

Under the present law, the dependency exemption is generally allocated to the spouse who has custody of the child for the greater period of time.[48] The general rule may be altered in two circumstances. First, if the decree or separation agreement allocates the dependency exemption to the spouse who does not have custody for the greater period (noncustodial spouse) and that spouse pays at least $600 during the year for support of the child, he or she may claim the exemption.[49] Second, regardless of the decree or agreement, the noncustodial spouse may claim the exemption if that spouse provides at least $1200 of child support per year per child, unless the custodial spouse clearly establishes that he or she provided more.[50] If the dependency exemption is claimed under this latter provision, both spouses are entitled to receive an itemized statement of support expenditures.[51] While the $600 and $1200 figures have been important in the past, they will not be of significance under the new law for decrees and agreements executed after 1984.[52] Obtaining the dependency exemption under the present law gives the taxpayer not only the $1,000 deduction but also, in part, determines eligibility for rates as head of household, earned income credit, and credit for household and dependent care.[53] Thus, obtaining the dependency exemption under the present law is critical.

B. Dependency Exemption: The Tax Reform Act of 1984

The Tax Reform Act of 1984 retains the general rule that the spouse having custody for the greater period of time will receive the dependency exemption but simplifies the exceptions to that rule.[54] The Act amends section 152(e) of the I.R.C. as follows:

> (1) CUSTODIAL PARENT GETS EXEMPTION.—Except as otherwise provided in this subsection, if—
>
> (A) a child (as defined in section 151(e)(3)) receives over half of his support during the calendar year from his parents—

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[43]Quinn, *New Tax Law on Divorce Can Both Help and Hurt Parting Couples*, Wash. Post, July 30, 1984, at 51, col. 2.

[44]*Id.*

[45]*Id.*; Tax Reform Act of 1984, § 422(f)(2).

[46]*American Bar Association Holds Meeting in Chicago*, 10 Fam. L. Rep. 1552 (1984).

[47]Tax Reform Act of 1984, § 422.

[48]I.R.C. § 152(e) (1982). Note that this rule does not apply to multiple support agreements. Rather, it only applies if the parties collectively provide over half of the child's support and collectively have custody of the child for over half of the year.

[49]I.R.C. § 152(e)(2)(A) (1982).

[50]*Id.* § 152 (e)(2)(B).

[51]*Id.* § 152(e)(2)(B).

[52]The $600 figure will remain relevant for pre-1985 decrees and agreements when determining the dependency exemption. Tax Reform Act of 1984, § 423(a)(4).

[53]H.R. 432, *supra* note 13, at 1498.

[54]Tax Reform Act of 1984, § 423(a).

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such parent shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) EXCEPTION WHERE CUSTODIAL PARENT RELEASES CLAIM TO EXEMPTION FOR THE YEAR.—A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if—

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.[55]

Under the new law, the spouse with the greater period of custody will be entitled to the exemption unless that spouse signs a written declaration of waiver releasing any claim to the exemption.[56] Importantly, this waiver can be made either on a permanent basis or annually. In either case, the declaration or waiver must be attached to the tax return of the noncustodial parent who is claiming the exemption.[57] The ability to make the release annually, and the requirement to attach the declaration annually, gives the custodial spouse a potential lever to insure receipt of child support payments.[58] This provision should be of great utility to counsel representing a custodial spouse. The new law does not affect decrees and agreements executed before 1985 which allocated the exemption to the noncustodial spouse who provides at least $600 per year per child in child support, unless those decrees or agreements are subsequently modified to make the new law applicable.[59]

The Act also includes technical amendments to clarify the relationship between the dependency status and other I.R.C. sections. First, either spouse may claim the child as a dependent for purposes of medical expense deductions.[60] Of greater practical significance to military members, as explained by the Committee Reports, is that

> the definitions of marital and head of household status, the earned income credit (sec. 43), and the child and dependent care credit (sec. 44A) are amended to provide that any custodial parent who releases a claim to a dependency exemption under the above rules will be treated as entitled to the dependency exemption for the purpose of these sections.[61]

Thus, under the new law, the custodial spouse can release the dependency exemption to the noncustodial spouse without forfeiting the right to file as head of household and claim the earned income and dependent care credits.[62] This

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[55] *Id.*

[56] *Id.* Note, however, that this provision does not apply to multiple support agreements. Tax Reform Act of 1984, § 423(a)(3).

[57] Tax Reform Act of 1984, § 423(a)(2)(B).

[58] H.R. 432, *supra* note 13, at 1499.

[59] Tax Reform Act of 1984, § 422(a)(4).

[60] *Id.* § 423(a)(4).

[61] H.R. 432, *supra* note 13, at 1500.

[62] *Id.*

will be of great advantage to the custodial spouse by limiting the adverse tax impact of releasing the exemption to the noncustodial spouse.

V. Property Transfers Between Spouses and Former-Spouses

In *United States v. Davis*[63] the Supreme Court ruled that the transfer of appreciated property to a spouse in exchange for the release of marital claims was a taxable transaction resulting in capital gains to the transferor. This rule can work tremendous hardship on the unwary transferor of greatly appreciated property such as a home which has been held for many years. The capital gains tax is also often imposed at a time when the parties can least afford to pay it. Application of the *Davis* rule, however, has been varied and largely avoided as the rule has been held not to apply to equal divisions of community property or jointly held property.[64] The Committee Reports reflect that the rule has not worked well and has resulted in unnecessary litigation.[65] Perhaps, more significantly, Congress has recognized that it is generally inappropriate to tax transfers between spouses.[66] Accordingly, the Act reverses *Davis* and provides:

> (a) GENERAL RULE.—No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of)—
>
> (1) a spouse, or
>
> (2) a former spouse, but only if the transfer is incident to the divorce.
>
> (b) TRANSFER TREATED AS GIFT: TRANSFEREE HAS TRANSFEROR'S BASIS.—In the case of any transfer of property described in subsection (a)—
>
> (1) for the purposes of this subtitle, the property shall be treated as acquired by the transferee by gift, and
>
> (2) the basis of the transferee in the property shall be the adjusted basis of the transferor.
>
> (c) INCIDENT TO DIVORCE.—For purposes of subsection (a)(2), a transfer of property is incident to the divorce if such transfer—
>
> (1) occurs within 1 year after the date on which the marriage ceases, or
>
> (2) is related to the cessation of the marriage.
>
> (d) SPECIAL RULE WHERE SPOUSE IS NONRESIDENT ALIEN.—Paragraph (1) of subsection (a) shall not apply if the spouse of the individual making the transfer is a nonresident alien.[67]

This new provision will appear at section 1041 of the I.R.C. and generally pertain to transfers of property after 18 July 1984 unless made pursuant to an agreement or decree executed before that date.[68] Note, however, that spouses can elect to have this section apply to transfers after 31 December 1983.[69] The new law treats transfers between spouses, and transfers between former spouses if incident to divorce, as gifts.[70] Thus, the transfer does not result in any gain or loss to the transferor.[71] Further, the transferee will receive the property at the transferor's basis (Carry-over basis) regardless of whether the property has appreciated or depreciated.[72]

Any transfer between spouses will be treated as a gift.[73] Transfer between former spouses will obtain gift treatment only if "incident to the divorce."[74] A transfer will be treated as "in-

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[63]370 U.S. 65 (1962).
[64]H.R. 432, *supra* note 13, at 1491.
[65]*Id.*
[66]*Id.*

[67]Tax Reform Act of 1984, § 421.
[68]*Id.*
[69]*Id.* The Act also provides special rules which will apply to any transfer after 31 December 1983 if the parties so elect. It will also apply to transfers after 18 July 1984 made pursuant to a decree or agreement executed prior to 18 July 1984 if the parties elect to have the new law apply. *Id.*
[70]*Id.*; [1984] 31 Stand. Fed. Tax. Rep. (CCH) ¶ 101 (July 18, 1984).
[71]H.R. 432, *supra* note 13, at 1492.
[72]*Id.*
[73]Tax Reform Act of 1984, § 421(a)(1).
[74]*Id.* § 421(a)(2).

cident to the divorce" if made within one year after the date of divorce, or if it is "otherwise related to the cessation of marriage."[75] This latter provision is not defined or explained, but it would seem logical that any transfer made pursuant to the divorce or separation instrument should be considered as "related to the cessation of the marriage."[76] The new rule applies not only to transfers for relinquishment of marital rights but also to any transfer between the spouses.[77]

A limitation on the new section, which should be of particular interest to legal assistance officers, is that it does not apply if the spouse to whom the property is transferred is a nonresident alien.[78] Thus, if a taxpayer transfers property to a nonresident alien spouse, the transfer may result in recognition of gain under the *Davis* rule. The limitation does not appear to apply to transfer to former spouses who are nonresident aliens.[79] Accordingly, if recognition of gain or loss is a concern, the transfer should be timed to occur after the date of the divorce.

Parties divorcing or separating this year should be concerned with this section and the tax planning it permits. The transferor of appreciated property would obviously want to make the new law apply since it would preclude recognition of any gain to the transferor.[80] The transferee, of course, would not want the new section to apply since the property would be received at the lower, transferor's basis and would, therefore, result in greater gain if subsequently sold.[81] Similarly, the transferor of property which has depreciated would not want to elect application of the new law because that would preclude recognition of the loss.[82] Additionally, because the transfer is treated as a gift, it would not trigger recapture of depreciation or investment credit provisions.[83] Accordingly, the transferee spouse may become liable for the recapture if the property is later disposed of.[84] When divorcing or separating parties plan to transfer appreciated property during this transition period, counsel must consider the tax ramifications and planning available under this section.

The Act also relaxes some of the definitional requirements for the various filing statutes. Under the current law, to qualify for filing as "married living apart" the taxpayer's spouse may not have been a member of the taxpayer's household at any time during the tax year.[85] The Act reduces the time, specifying that the taxpayer's spouse must not have been a member of the taxpayer's household during the last six months of the year.[86] Thus, many spouses will be able to benefit from the more favorable tax tables for married individuals filing separate returns. Recall also that the Act changes the definition of married individuals living apart to enable a spouse to file under that section although the taxpayer has waived the dependency exemption for the child who lives in that taxpayer's home.[87]

Under current law, to file as "head of household" the taxpayer must maintain a household which, for the entire year, was the principal place of abode of a son, stepson, daughter, or stepdaughter, who is either unmarried or, if married, is the taxpayer's dependent under section 151 of the I.R.C.[88] The Act similarly reduces the period that the home must constitute the principal abode of the child to more than six months.[89] Further, if the child is married, the taxpayer will not, under the new law, forfeit the right to file as head of household by waiving the right to claim the child as a dependent under I.R.C. section 152(e).[90]

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[75]*Id.* § 421(c).
[76]*Id.*; [1984] 31 Stand. Fed. Tax. Rep. (CCH) ¶ 101 (July 18, 1984).
[77]H.R. 432, *supra* note 13, at 1492.
[78]Tax Reform Act of 1984, § 421(d).
[79]*Id.*
[80]Ward, *Marital Dissolution Tax Planning*, Preventive L. Rep., June 1984, at 173.
[81]*Id.*
[82]*Id.*
[83]H.R. 432, *supra* note 432, at 1492.
[84]*Id.*
[85]I.R.C. § 143 (1982).
[86]Tax Reform Act of 1984, § 423(c)(1).
[87]*Id.*
[88]I.R.C. § 2(b)(1) (1982).
[89]Tax Reform Act of 1984, § 423(c)(2).
[90]*Id.*

VII. Conclusion

The Tax Reform Act of 1984 provides significant and needed reform to the tax laws affecting divorcing or separating spouses. Although the provisions are complex, they should generally add predictability to the tax treatment of support payments and thus reduce needless litigation. The definition of alimony is changed. To be classified as alimony, payments must be in cash and made under a divorce or separation instrument which does not deny the payments alimony treatment and which specifies that there is no further liability for the payments after the death of the payee. Thus, the parties can now designate the tax treatment of the support payment. If the instrument either designates a payment as child support or reduces a payment upon a contingency relating to a child, that payment, or a portion thereof, will not be treated as alimony. These provisions generally apply to agreements or decrees executed after 31 December 1984. Transfer of property between spouses (except nonresident aliens), or between former spouses if incident to divorce, will be treated as gifts. Thus, there will be no recognition of gain or loss and the property will carry the transferor's basis. This new rule generally applies to transfers after 18 July 1984. The spouse who has custody of the dependent child for the greater period of time will be entitled to the dependency exemption, regardless of the amount of child support provided by the noncustodial spouse unless the custodial spouse makes a written release of the right to the exemption. The release can be made permanently or annually. This provision generally applies to decrees and agreements executed after 31 December 1984.

A Helping Hand: The Victim and Witness Protection Act of 1982

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Seeking "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process"[1] and "to ensure that the Federal Government does all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant,"[2] Congress enacted the Victim and Witness Protection Act of 1982.[3] In addition to filling gaps in the existing criminal laws concerning tampering with witnesses and victims,[4] the Act required the Attorney General to promulgate guidelines to meet ten specified congressional objectives, all of which were designed to guarantee that the victim would not be the

[1]Pub. L. No. 97-291, § 2(b)(1), 96 Stat. 1249 (1982) (codified at 18 U.S.C. § 1512 (1982) (note)).

[2]Pub. L. No. 97-291, § 2(b)(2). The Act was also to "provide a model for legislation for State and local governments." *Id.* at § 2(b)(3).

[3]Pub. L. No. 97-291, 96 Stat. 1249 (1982) (codified at 18 U.S.C. §§ 1512-1515, 3579-3580 (1982)).

[4]Congress cited several shortcomings of the then-existing provisions for the prosecution of those who had tampered with witnesses. First, current law had required a "high threshold of seriousness for the commission of a crime." Activity such as corruption, bribery, or use or threats of force were required. Less serious acts designed to hinder or delay the assistance of a witness in a criminal case were not covered. In addition, it was not a federal crime to intimidate a victim or witness who desired to report a parole violation. S. Rep. No. 97-532, 97th Cong., 2d Sess. 14 (1982), *reprinted in* 1982 U.S. Code Cong., & Admin. News 2515, 2520 [hereinafter cited as Senate Report].

In addition, courts had defined "witness" to mean a person expected to testify in a proceeding. Thus, intimidation of one who provides information to the police, but who will not be called to testify or whose testimony would be inadmissible under the rules of evidence, would not be a

"'forgotten person' in the criminal justice system."[5] Recently, the Army instituted a victim and witness assistance program in the newly-effective Army Regulation 27-10,[6] a program that was singled out as a matter of concern by The Judge Advocate General.[7] This article will survey the Act, review the Attorney General's guidelines, and discuss the new Army program.

The Victim and Witness Protection Act of 1982

In 1982, Congress noted the basic dilemma of the criminal justice system: while the cooperation of victims and witnesses was essential to the successful prosecution of criminal miscreants, the system could offer few services and little protection to the victim or witness.[8] Indeed, in the case of the victim, "[a]ll too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim."[9] While the system is solicitous in jealousy safeguarding the rights of the accused, the victim is relegated to months of uncertainty, fear, postponed court dates, and the personal expense and inconvenience involved with cooperating with those charged with prosecuting his or her malefactor.[10]

Consequently, to maximize the cooperation of the victim or witness, while minimizing the trauma to which the victim or witness is subjected, Congress directed the Attorney General to "develop and implement guidelines" to attain ten objectives. Broadly stated, the objectives are:

1. Services to Victims of Crime. Law enforcement authorities should insure that crime victims receive prompt emergency medical and social services, be advised of applicable victim compensation programs and victim community-based treatment programs, and be instructed concerning the criminal justice process and their role in its various stages.[11] Congress envisioned that the informational aspect of this objective could be satisfied by the simple preparation of written material outlining available services.[12]

2. Notification of Availability of Protection. "A victim or witness should routinely receive information on steps that law enforcement officers and attorneys for the Government can take to protect victims and witnesses from intimidation."[13]

3. Scheduling Changes. Victims and witnesses should be promptly notified of changes in the scheduling of the cases in which they are involved.[14]

4. Prompt Notification to Victims of Major Serious Crimes. If victims and witnesses so desire and furnish federal authorities with current addresses and telephone numbers, they are to be notified in advance of certain benchmarks in the trial process, to include the arrest and in-

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crime. Senate Report, *supra*, at 15. Existing law did not forbid retaliation against associates, friends, or relatives of a victim or witness. *Id.* at 20. Moreover, the Attorney General was statutorily authorized to provide victim or witness relocation services only to those involved with cases concerning organized crime. *Id.* at 23. Finally, existing law was chiefly designed for after-the-fact prosecutions of those who were tampering with a witness. In many cases, however, the harm had already been done and the cooperation or welfare of the victim or witness had been jeopardized. Congress determined that the Attorney General should have the authority to initiate a civil proceeding to restrain violations of the witness intimidation statutes. *Id.* at 27. These and other shortcomings were addressed in section 4 of the Act (codified at 18 U.S.C. §§ 1512-1515 (1982)).

[5]Senate Report, *supra* note 4, at 10.

[6]U.S. Dep't of Army, Reg. No. 27-10, Legal Services - Military Justice, ch. 18 (1 July 1984) [hereinafter cited as AR 27-10].

[7]Letter, DAJA-CL 1984/5405, Office of The Judge Advocate General, U.S. Army, to Staff Judge Advocates, 1 May 1984, subject: Victim/Witness Assistance Program, *reprinted in* The Army Lawyer, June 1984, at 2.

[8]Pub. L. No. 97-291, § 2(a)(1); Senate Report, *supra* note 4, at 10.

[9]Pub. L. No. 97-291, § 2(a)(2).

[10]*Id.* at § 2(a)(5)-(7).

[11]*Id.* at § 6(a)(1).

[12]Senate Report, *supra* note 4, at 40.

[13]Pub. L. No. 97-291, § 6(a)(2).

[14]*Id.* at, § 6(a)(3). Congress intended this simple courtesy to save the victim or witness the inconvenient and frequently costly trip to the situs of the trial, only to find that the court date had been postponed. Senate Report, *supra* note 4, at 40.

itial appearance of the accused before a judicial officer, the pretrial release of the accused, the trial or entry of a plea of guilty, and sentencing proceedings against an accused.[15] Congress thereby sought to protect the "legitimate interest" of victims and witnesses in the processing of cases in which they are involved.[16]

5. Consultation With Victim. The victim of a serious crime[17] is to be consulted by prosecutorial authorities concerning dismissal of charges against the accused, the pretrial release of the accused, any ongoing plea negotiations with the accused, or the inclusion of the accused in a pretrial diversion program.[18] While such consultation is not designed to increase the workload of prosecutors, limit prosecutorial discretion, or inevitably result in harsher punishments for the accused, it was thought that the victim would at least appreciate the opportunity to provide input into the system and that, ideally, such consultation might provide new information "about which the prosecutor is grateful to learn, and is influenced to handle the case in a more appropriate manner."[19]

6. Separate Waiting Area. "Victims and other prosecution witnesses should be provided prior to court appearance a waiting area that is separate from all other witnesses."[20]

7. Property Return. Property of a victim that has been held for evidentiary purposes should be returned to the victim as soon as feasible.[21]

8. Notification to Employers and Creditors. Upon the request of a victim or witness, the employer of such a party should be informed of the cooperation of the employee with prosecutorial authorities in an effort to minimize the employer's resort to such sanctions as withholding of wages or discharge for time lost in the course of such cooperation.[22] If the victim or witness has suffered financial hardship as a direct result of either the crime itself or because of cooperation with law enforcement authorities, the creditors of that party should be informed by the government of the circumstances surrounding the financial hardship.[23]

9. Training. Victim assistance education and training should be provided to both federal law enforcement personnel and government attorneys.[24]

10. General Victim Assistance. "The guidelines should also ensure that any other important assistance to victims and witnesses, such as the adoption of transportation, parking, and translator services for victims in court be provided."[25] Congress intended by this general provision to encourage a "spirit of inquiry among those drafting, promulgating and working within the guidelines" to creatively search for ways to assist the victims or witnesses that

[15]Pub. L. No. 97-291, § 6(a)(4).

[16]Senate Report, *supra* note 4, at 40.

[17]"Serious crime" was undefined in the Act. Victims of serious crimes included, in the case of a minor child or a homicide victim, the family of the victim as well. Pub. L. No. 97-291, § 6(a)(5).

[18]*Id.*

[19]Senate Report, *supra* note 4, at 41. The Senate Report also noted that this consultation was nothing more than that which is required by the American Bar Association's Criminal Justice Standard 14-3.1 (1982): "the prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims. . . before reaching a plea agreement." Senate Report, *supra* note 4, at 40. The Act also mandated a change to Federal Rule of Criminal Procedure 32, requiring that presentence reports prepared for the sentencing judge under that Rule include information concerning the effect, financial, physical, and psychological, that the crime has had on the victim. In this regard, the Senate was influenced heavily by the testimony of a particular crime victim that, although her medical bill amounted to over $11,000, she received only $350.00 in court-ordered restitution. The reason: there was no mention of the medical bills in the case file, so the prosecutor only asked for the lesser amount. *Id.* at 12. It is clear that even minimal consultation with the victim would have enlightened the prosecutor. Moreover, the Act specifically authorizes court-ordered restitution as a provision of a sentence. Pub. L. No. 97-291, § 5(a) (codified at 18 U.S.C. §§ 3579-3580 (1982)).

[20]Pub. L. No. 97-291, § 6(a)(6). This provision was designed to alleviate the discomfort and potential intimidation of victims and witnesses who may be required to wait for long periods in the same areas as the malefactors. Senate Report, *supra* note 4, at 41.

[21]Pub. L. No. 97-291, § 6(a)(7). It was believed that "well-documented photographs" could frequently serve the same purpose as retention of the physical property. Senate Report, *supra* note 4, at 41.

[22]Pub. L. No. 97-291, § 6(a)(8).

[23]*Id.*

[24]*Id.* at § 6(a)(9).

[25]*Id.* at § 6(a)(10).

were not specifically listed in the congressional objectives.[26]

The Act became effective on 12 October 1982.[27] The Attorney General was afforded 270 days in which to promulgate his guidelines;[28] he just made it.

The Attorney General's Guidelines

On the 270th day after the effective date of the Act, 9 July 1983, Attorney General William French Smith promulgated an extensive set of guidelines designed to carry out the objectives of the Act.[29] In addition to tailoring the congressional objectives to the specific organization of the Department of Justice,[30] the guidelines defined the terms that were essential to the implementation of the Act. A "victim" was "generally defined as someone who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a crime."[31] "Witness" was defined as "someone who has information or evidence concerning a crime, and provides information concerning his knowledge to a law enforcement agency. . . .The term witness does not include defense witnesses or those individuals involved in the crime as a perpetrator or accomplice."[32] Finally, a "serious crime" was "defined as a criminal offense that involves personal violence, attempted or threatened personal violence or significant property loss."[33]

The guidelines met the congressional objectives—and more. Not only did the guidelines implement the referral,[34] informational,[35] and consultation services.[36] desired by Congress, but also further directions were given to law enforcement personnel. Federal prosecutorial authorities were directed to inform victims and witnesses of serious crimes of the sentence received by the accused and of the date of the accused's eligibility for parole,[37] to afford the victims of serious crimes the opportunity to address the court at the time of sentencing,[38] to resist attempts to defense counsel to obtain the addresses of victims and witnesses,[39] and to "advocate fully the rights of victims on the issue of restitution.[40] Finally, training in the implementation of the guidelines will take place at the FBI Academy, at the Attorney General's

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[26]Senate Report, *supra* note 4, at 42. However, lest an enterprising court interpret the Act to create *enforceable* rights in the victim or witness, section 6(b) provides: "Nothing in this Act shall be construed as creating a cause of action against the United States." Pub. L. No. 97-291, § 6(b).

[27]The provision requiring a victim impact statement in presentence reports was to apply to reports ordered prepared after 1 March 1983, *id.* at § 9(b)(1), and the sections authorizing court-ordered restitution were to apply with respect to offenses occurring after 1 January 1983. *Id.* at § 9(b)(2).

[28]*Id.* at § 6(a).

[29]48 Fed. Reg. 33,774 (25 July 1983).

[30]The responsible official for insuring the application of the provisions of the Act and guidelines is the United States Attorney in whose district the prosecution is pending. If the case is being handled by a litigating division of the Department of Justice, the responsible official is the chief of the section having responsibility for the case. Dep't of Justice, Guidelines for Victim and Witness Assistance, sec. I.*D.*, 48 Fed. Reg. 33,774, 33775 (25 July 1983) [hereinafter cited as AG Guidelines].

[31]*Id.* at sec. I.*C.*1. "Victim" also includes the family of a minor or homicide victim, but excludes departments and agencies of the federal government. If departmental personnel were unsure of whether a party should be classified as a "victim," they were directed to "err on the side of providing rather than withholding assistance." *Id.*

[32]*Id.* at sec. I.*C.*2. Where the witness is a minor, the term should include "an appropriate family member." *Id.*

[33]*Id.* at sec. I.*C.*3.

[34]Departmental personnel were directed to assist victims in obtaining emergency medical and social services, compensation under applicable law, and appropriate counseling or treatment in public or private programs. *Id.* at sec. II.*A.*

[35]Investigative personnel were tasked with informing victims and witnesses of serious crimes of potential protective measures and the arrest and formal charging of an accused. *Id.* at sec. II.B. Prosecutorial personnel were responsible for informing those parties of subsequent judicial activity, such as scheduling changes, entry of a plea of guilty or trial of the accused, sentencing proceedings and the victims' opportunity to address the court at the time of sentencing, and any parole hearing concerning the accused. *Id.*

[36]Victims of serious crimes are to be consulted concerning the pretrial release of the accused, decisions against seeking an indictment or in favor of dismissing charges, the continuance of a proceeding, the terms of proposed plea agreements, pretrial diversion or juvenile proceedings involving the accused, and the availability of restitution and presenting the victim's views to the court at the time of sentencing. *Id.* at sec. II.*C.*

[37]*Id.* at sec. II.*B.*

[38]*Id.* at sec. II.C.9.

[39]*Id.* at sec. II.*D.*1.

[40]*Id.* at sec. IV.

Advocacy Institute, in FBI and Drug Enforcement Administration field training, and, through the coordinated efforts of the Departments of Justice and the Treasury, at the Federal Law Enforcement Training Center.[41] In sum, the guidelines highlighted a vigorous effort by federal law enforcement officials to "ensure that responsible officials, in the exercise of their discretion, treat victims and witnesses fairly and with understanding."[42]

Congress had intended that the Victim and Witness Protection Act and the implementing guidelines serve as a model for the states. Instead, they served as a model for action by other federal governmental agencies. The Department of Defense was among the first to respond.[43]

Department of Defense Guidance

The Department of Defense guidance was designed "to insure that DOD Components mitigate the. . . hardships suffered by victims of crimes investigated by DOD. . . [and] to foster cooperation by victims and witnesses."[44] The DOD program was to apply not only to those who were victims of offenses that would be prosecuted under the Uniform Code of Military Justice (UCMJ),[45] but also to the victims of those offenses under the jurisdiction of other federal or state authorities during any period in which the offenses were being investigated by DOD authorities.[46]

In general, the DOD program adopted the Attorney General's guidelines and tailored them to the military justice process. Two definitions were modified: "witness" was defined to exclude a coconspirator, accomplice, or principal in *an offense*,[47] rather than *the* crime as specified in the Attorney General's guidelines.[48] "Serious crime" was defined in terms of the Manual for Courts-Martial: a crime involving actual or the threat of personal violence qualified as a serious crime of punishable by confinement in excess of one year, and offenses involving the destruction or loss of property constituted serious crimes if the value of the property exceeded $100.00.[49] The remainder of the program directed DOD components to implement the elaborated goals, drawn from the congressional objectives and the Attorney General's guidelines.[50]

Chapter 18, Army Regulation 27-10

The Department of the Army's (DA) response became effective on 1 August 1984 in the new chapter 18 and Appendices D (Victim Infor-

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[41] *Id.* at sec. VI.

[42] *Id.* at sec. I.A.

[43] Also responding to the Act was the Parole Commission of the Department of Justice, which promulgated a rule concerning unsatisfied orders of restitution. *See* 48 Fed. Reg. 22,950 (May 23, 1984) (willful failure to satisfy order of restitution will prevent granting of parole date; if parole granted, satisfaction of order becomes condition of parole). The Bureau of Prisons of the Department of Justice promulgated an interim rule which implements the provisions of the Act and the guidelines that provide for victim or witness notification of the release of a specific inmate. 49 Fed. Reg. 18,385 (Apr. 30, 1984) (to be codified at 28 C.F.R. §§ 551.150 to .153).

[44] U.S. Dep't of Defense, Victim and Witness Assistance, 48 Fed. Reg. 51,490 (Nov. 9, 1983) (to be codified at 32 C.F.R. §§ 95.1 to 95.5 and as Dep't of Defense Dir. 1030.xx) [hereinafter cited by C.F.R. provisions].

[45] 10 U.S.C. §§ 801-940 (1982) [hereinafter cited as UCMJ].

[46] 32 C.F.R. § 95.1 (1983).

[47] *Id.* at § 95.4(b).

[48] AG Guidelines, sec. I.C.2. The DOD definition may be unnecessarily restrictive. For example, suppose if, during the course of a burglary, the occupant of the house was disturbed and he or she got up to investigate. One burgler wanted to run; the other wanted to do bodily harm to the occupant. If the former restrained the latter and was himself injured, this definition would preclude extending assistance to the injured offender, because he would have been the accomplice in *an offense*, the burglary. However, he was not an accomplice in *the crime* concerning which he might testify against the accomplice, *i.e.*, attempted murder or some degree of assault. Moreover, the repenting accomplice might be very susceptible to the same sorts of witness intimidation as would the other witness, the occupant of the house. Under the Attorney General's guidelines, assistance to the repenting accomplice is not precluded; under the DOD guidance, however, all assistance is precluded.

[49] 32 C.F.R. § 95.4(c). *See* Manual for Courts-Martial, United States, 1984, R.C.M. 1003 (Punishments).

[50] 32 C.F.R. §§ 95.5(a)-(c) directs DOD components to implement the referral, informational, and consultation services elaborated in the Act. The DOD guidance further states: "Witnesses on behalf of the suspect or accused should be provided the foregoing information [concerning victim and witness services and consultations] when this is requested by the defense counsel or is otherwise appropriate." This language seems at least to imply that assistance may be available for defense witnesses. *Id.* at § 95.5(c).

mation Packet) and E (Witness Information Packet) of the Army Regulation 27-10.[51] The regulation establishes a Victim/Witness Assistance Program and places the responsibility for its implementation on the staff judge advocate (SJA), investigative personnel, and, to a lesser extent, commanders. In so doing, the regulation has set in place a workable program in greater detail than the congressional objectives, the Attorney General's guidelines, and the DOD guidance.

The regulation largely adopts the policy of both Congress and DOD.[52] The regulation does, however, direct that the "[u]tmost care and compassion" be afforded victims who are children and those who have been sexually assaulted.[53]

The responsibility for implementing the program at the installation level falls largely to the SJA. While DA investigative personnel are to insure the immediate provision of medical services to crime victims[54] and to inform the victim of other available services,[55] the SJA is tasked with:

1. Training. The SJA is to insure that judge advocate and law enforcement personnel are conversant in the details of the program.[56]

2. Victim/Witness Liaison (VWL). The SJA is to designate a Victim/Witness Liaison[57] to serve as a "facilitator" and assist the victim or witness in obtaining services necessary to their particular conditions.[58] The VWL will also advise victims of the apprehension, pretrial release, or trial of the accused.[59]

3. Consultation With Victims. Although commanders are nominally tasked with consulting the victim of a serious crime concerning decisions against preferral of charges, concerning dismissal of charges, the pretrial restraint of the accused, or about the terms of a pretrial agreement,[60] the regulation realistically that the designee of the commander for this purpose should be the SJA or a member of his or her office.[61]

4. Restitution. Where victims have suffered personal injury or property damage as the result of a crime, they should be advised of available means of obtaining restitution or recompense for their injuries, including the possibility of relief under Article 139, UCMJ,[62] claims, or private lawsuits.[63]

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[51]AR 27-10, ch. 18, Apps. D, E.

[52]The regulation notes that the cooperation of victims and witnesses is essential to the effectiveness of the military justice system. Consequently, the regulation directs that such parties be "extended authorized assistance,. . . treated with dignity and courtesy, and. . . subjected to minimum interference with personal privacy and property rights." *Id.* at para. 18-2*a*.

[53]*Id.* at para. 18-2*b*.

[54]*Id.* at para. 18-8*a*.

[55]*Id.* at para. 18-8*b*. Law enforcement personnel should also notify the victim or witness of the name, location, and telephone number of the Victim/Witness Liaison (VWL). *See infra* notes 57-59 and accompanying text.

[56]AR 27-10, para. 18-5.

[57]The VWL is to be a commissioned or warrant officer or a civilian in the grade of GS-11 or above. If such persons are not available, the VWL may be an enlisted member in the grade of E-6 or above or a civilian in the grade of GS-6 or above. The VWL should be familiar with the military justice system and should be able to maintain good relations with both military and civilian law enforcement and service establishments. *Id.* at para. 18-7*b*.

[58]*Id.* at para. 18-7*a*. The VWl is not to render the services personally unless specifically qualified to do so. *Id.* Examples of agencies to which the victim may be referred for help are listed in para. 18-9*b*. If the victim is ineligible for military social services or such services are otherwise unavailable, the VWL will coordinate with civilian agencies to obtain services for the victim. *Id.* at para. 18-9*c*.

[59]*Id.* at para. 18-14*a*. The VWL, upon the appointment of an Article 32 investigating officer or the referral of charges to trial, or earlier, is also tasked with providing victims with a Victim Information Packet, such as that set forth in Appendix D, AR 27-10. The packet explains the military justice process and the victim's role in it. It also concisely informs the victim, as Congress had intended, *see supra* note 12 and accompanying text, of the services and consultations available under the Act. A similar packet is provided for witnesses at Appendix E.

[60]AR 27-10, para. 18-11*a*.

[61]*Id.* at para. 18-11*b*.

[62]Article 139, UCMJ, allows a commander, when complaint is made that willful damage has been done to personal property or if such property has been taken by a member of the armed forces, to convene a board of not more than three nor fewer than one commissioned officer to investigate the claim. If the board assesses damages and the commander approves the assessment, the amount is charged against the pay of the offender. The complainant may then be paid a like amount by a government disbursing agent.

[63]AR 27-10, para. 18-12*b*.

5. Property Return. In coordination with law enforcement authorities, the SJA should insure that noncontraband property is returned to the appropriate party as soon as the investigation or prosecution will permit.[64]

6. Victim or Witness Intimidation. The SJA, as well as commanders, law enforcement officials, and the VWL, is to serve as a conduit for information concerning tampering or threats against a victim or a witness.[65] Where the safety of a victim or a witness is in jeopardy, the SJA should insure that law enforcement personnel take adequate protective measures.[66]

Although not specifically allocated to the SJA, certain other tasks will inevitably fall to the legal office of the command. These include the notification of victims and witness of scheduling changes,[67] provision of separate waiting rooms at the courthouse for prosecution and defense witnesses,[68] local supplementation or revision of victim and witness information packets, notification of employers or creditors of the victim or witness of that party's involvement with the military justice process,[69] and the processing of appropriate witness fees and other expenses to which a party might be entitled.[70]

[64]*Id.* at para. 18-12*a*. The VWL is to insure that the victim is informed of applicable property return procedures.

[65]*Id.* at paras. 18-13*a*, *b*. Victims and witnesses are advised in the Victim and Witness Information Packets to call their VWL in cases of threats or harassment and to call the local police if the danger is immediate. *Id.* at Apps. D, para. D-2, E, para. E-4.

[66]*Id.* at para. 18-13*b*,

[67]*Id.* at para. 18-14*b*.

[68]*Id.* at para. 18-13*c*.

[69]*Id.* at para. 18-15.

[70]*Id.* at para. 18-16. Other aspects of the Act, such as the victim impact statement, are unnecessary in the military justice system. In presentence proceedings, even after a contested case, United States v. Vickers, 13 M.J. 403 (C.M.A. 1982), the government may offer evidence in aggravation of the offense. *See* Manual for Courts-Martial, United States, 1984, R.C.M. 1001(b)(4); Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 75. The 1984 Manual specifically allows "evidence of financial, social, psychological, and medical impact or cost to any entity who was the victim of an offense committed by the accused. . ." R.C.M. 1001(b)(4). Case law had also previously authorized such evidence. *See, e.g.,* United States v. Pearson, 13 M.J. 922 (N.M.C.M.R. 1982); United States v. Schreck, 10 M.J. 563 (A.F.C.M.R. 1980).

Conclusions

The Victim and Witness Protection Act of 1982 was an ambitious attempt by an unusually united Congress[71] to readjust the focus of the criminal justice process. While no provision of the Act affected the rights of the criminal defendant, the Act sought to recognize and provide for the legitimate needs of the victim or witness for protection from harm and for assistance in ameliorating the harsher effects of the crime and its judicial aftermath. In the federal arena, both sets of needs are being met. Prosecutions under the protective portion of the Act are forming a nascent body of jurisprudence[72] and the Attorney General's guidelines have provided a workable basis for systematic assistance to the victims and witnesses of crime.

The Army's scheme has reduced the aspirations of Congress and the guidance from Washington to a practical and potentially beneficial program. The extent to which it achieves its worthwhile goals will depend largely upon the enthusiasm and efficiency with which it is implemented at the local level. Many Army programs have come to be administered by rote; innovation and aggressiveness may be stymied by an institutional desire to append the required checkmark to the official checklist. This pro-

[71]The Act was considered by the Senate on 14 September 1982 and by the House of Representatives on 30 September 1982. It passed both houses on 1 October 1982. No House Report was submitted with the legislation.

[72]*See, e.g.,* United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984) (relationship between Act and 18 U.S.C. § 1503, obstruction of justice statute); United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984) (discussing jury instruction concerning the Act); United States v. Beatty, No. 83 Crim. 543 (E.D.N.Y. May 25, 1984) (relationship between Act and 18 U.S.C. § 1503); United States v. Hendey, No. 83-CR-400 (D. Colo. April 30, 1984) (imposition of restitution); United States v. Ware, 582 F. Supp. 267 (N.D. Ohio 1984) (finding of severe victim impact upheld); United States v. Wyzynski, 581 F. Supp. 1550 (E.D. Pa. 1984) (restitution may be ordered in addition to other allowable penalties); United States v. Moore, 582 F. Supp. 1575 (D.D.C. 1984) (discussing venue provisions for trials under the Act); United Sates v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983) (statutory restitution provisions of Act unconstitutional in violation of fifth amendment's due process and equal protection clauses and seventh amendment right to a jury trial).

gram must not suffer such a fate. Instead, the SJA must instill in his or her judge advocates a desire to assist those who are assisting them. VWL duty should not be regarded as another unhappy "additional duty." Rather, the VWL should initially be a member of the office with substantial experience in military justice, capable of training newer judge advocates in the operation of the program. The same sense of professionalism that pervades other aspects of the JAGC mission should be brought to this program.

Trial counsel, not infrequently, argue to the sentencing authority that a particular sentence in a particular case might "send a message" to others who are perhaps disposed to engage in criminal activity. Similarly, the quality of service rendered under the new Victim/Witness Assistance Program will inevitably "send a message" to those who have, as victim or witness, involuntarily become involved in the military justice process. The answer to the question of "to cooperate or not to cooperate" may hinge on the signal received from the program. It is in the humanitarian—and professional—self-interest of the judge advocate to insure that the program works.

Addendum

A phrase was inadvertantly omitted during printing from the Appendix of Fiore, *Vicarious Liability for Conspiracy: Neglected Orphan in a Pandora's Box*, The Army Lawyer, Sep. 1984, at 28, at 33. The fifth sentence of para 7-1.b. should read:

> The instructions normally encompass three parts: instructions on the elements of conspiracy, *instructions on the elements of the substantive offense* [phrase originally omitted], and instructions explaining vicarious liability of coconspirators.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

Opinions of The Judge Advocate General

(Standards of Conduct) **Use of Volunteer Services.** DAJA-AL 1984/1571, 15 April 1984.

The Judge Advocate General opined that the proposed acceptance of volunteer services from a retired sergeant major within The Adjutant General Center would be prohibited by 31 U.S.C. § 1342. This statute prohibits the acceptance of volunteer services to be performed in a position for which compensation is fixed by statute. Positions subject to this prohibition are those which are classified, or classifiable, pursuant to the Classification Act, 5 U.S.C. §§ 5101-5115.

(Standards of Conduct) **Off-Duty Employment of Army Medical Personnel.** DAJA-AL 1984/1057, 27 February 1984.

The Deputy Surgeon General noted that some commissioned officers of the Army Medical Department, as part of their off-duty civilian employment, are directly billing third party fiscal intermediaries, presumably including Medicare, Medicaid, and CHAMPUS. He asked whether this represents the direct receipt of federal compensation.

In a memorandum for the Deputy Surgeon General, The Assistant Judge Advocate General replied that the treatment of CHAMPUS-eligible patients raises two issues: the prohibition against receiving dual compensation from the government (5 U.S.C. § 5536), and the potential violation of DOD standards of conduct. DOD policy statements providing guidance in this area proscribe the outside employment of any DOD medical personnel that would result in

compensation for those medical services from appropriated funds.

For cases involving billing other federally-funded third party fiscal intermediaries (*e.g.*, Medicare, Medicaid), decisions of the Comptroller General indicate that the prohibition of 5 U.S.C. § 5536 against "dual compensation" would be violated by receipt of payment from any third party fiscal intermediary which is funded entirely or in part from appropriated funds. Since Medicaid and Medicare are both funded by appropriated monies, and no specific legal authorization appears to exist to except Army Medical Department personnel from this statutory prohibition, any such payment would appear to violate 5 U.S.C. § 5536.

(Standards of Conduct) **DOD-Related Employment Reports.** DAJA-AL 1984/1290, 14 February 1984.

Clarifying the reporting requirements for defense-related employment required by 10 U.S.C. § 2397 (formerly 50 U.S.C. § 1436), The Judge Advocate General stated that an individual required to file under that statute must file a report for any fiscal year which begins within the three-year period following the termination of government service. No report is required for any fiscal year beginning more than three years after termination of government service.

(Pecuniary Liability) **Federal Drivers Act Inapplicable to Reports of Survey.** DAJA-AL 1984/1725, 14 May 1984.

A major command SJA asked whether the Federal Drivers Act, 28 U.S.C. § 2679(b), applies to the provisions of Army Regulation 735-11, Accounting for Lost, Damaged, and Destroyed Property. The central issue was whether the Federal Drivers Act, which immunizes federal drivers from liability in lawsuits, also prevents the government from imposing pecuniary liability under our administrative system. The Judge Advocate General agreed with the SJA's position that the Federal Drivers Act does not prevent the imposition of pecuniary liability under AR 735-11. This opinion was based on the following analysis. First, the Act provides that in suits against the United States for damages resulting from the negligent operation of a motor vehicle, the injured third party may not bring suit against the individual employee responsible for the accident. Federal courts have upheld this principle. Although the Act does provide for the government to assume financial responsibility for such negligent acts, it does not specifically preclude collection from the employees for damages to government property resulting from the negligent operation of a vehicle. Second, 10 U.S.C. § 4835 provides specific authority for the Army to collect for losses to its property under AR 735-11. This statute was not amended during or after the passage of the Federal Drivers Act. Additionally, no court has prohibited application of AR 735-11 to employees negligently operating a motor vehicle. Accordingly, The Judge Advocate General perceived the two statutory provisions to be mutually exclusive and capable of being implemented consistently.

(Separation from the Service) **Authority to Convene Administrative Separation Boards Under AR 635-200 Clarified.** DAJA-AL 1983/2345, 9 August 1983.

The Office of the Deputy Chief of Staff for Personnel requested an opinion concerning the authority of a special court-martial convening authority (SPCMCA) to convene administrative separation boards under the provisions of AR 635-200. The specific questions were (1) whether the SPCMCA could convene a separation board in all separation actions in which a discharge under other than honorable conditions is *not* warranted, and (2) whether the SPCMCA could convene a board under those circumstances and forward the action to the general court-martial convening authority (GCMCA) for approval if a discharge under other than honorable conditions was recommended by the board.

The Judge Advocate General opined that a SPCMCA could convene administrative separation boards only for actions initiated under the Notification Procedure or based on homosexuality in which a characterization of the service of under other than honorable conditions is not authorized. In actions initiated under the Administrative Board Procedure in which a discharge under other than honorable conditions is

authorized and warranted, the authority to convene the administrative separation board is vested in the GCMCA.

Further, The Judge Advocate General stated that the SPCMCA was not authorized to forward a recommendation for a discharge under other than honorable conditions to the GCMCA for approval in situations where the administrative separation board was convened by the SPCMCA. The Judge Advocate General stated that in cases where such a recommendation is made, AR 635-200 allows the SPCMCA to set aside the findings and recommendations and convene a new board, return the action to the same board for compliance with AR 635-200, or exercise authority under paragraph 2-6*d* and *f* of AR 635-200 and approve a separation of a character more favorable than that recommended.

(Military Installation—Regulations) **Alcohol Impairment Provisions of AR 600-85 Do Not Preclude Local Commander From Establishing More Restrictive Standards.** DAJA-AL 1983/2332, 11 August 1983.

The Office of the Deputy Chief of Staff for Personnel (ODCSPER) requested an opinion concerning the authority of local commanders to establish more restrictive prohibitions on blood-alcohol concentration during duty hours than are currently contained in paragraph 1-9.1, AR 600-85. Specifically, ODCSPER asked whether Fort Hood Regulation 210-65, which prohibits soldiers from having any alcohol in their system or on their breath during duty hours, impermissibly conflicts with paragraph 1-9.1, AR 600-85, which prohibits soldiers from having a .05% or greater blood-alcohol level during duty hours.

The Judge Advocate General opined that the Fort Hood regulation does not conflict with AR 600-85. Although commanders may not establish a less strict prohibition (*e.g.*, a .06% blood-alcohol level standard), they may establish more rigorous prohibitions when the duty and mission of their commands necessitate such standards as long as such standards are not otherwise arbitrary or unreasonable.

(Military Installations—Regulations) **Applicability of the Army's Urinalysis Testing Program to Reserve Component Personnel.** DAJA-AL 1983/1949, 24 June 1983.

The Office of the Deputy Chief of Staff for Personnel requested an opinion concerning the applicability of the Army's current urinalysis testing program to members of the reserve components.

The Judge Advocate General opined that the Army's urinalysis testing program contained in AR 600-85 is applicable only to reserve component personnel who are serving on active duty, initial active duty training, special tours of active duty training, or 45 day involuntary active duty training (*see* paragraph 1-2*a*, AR 600-85). Accordingly, such personnel could be compelled to undergo urinalysis testing under the provisions of AR 600-85. (Chapter 9, AR 600-85 governs reserve component personnel serving on inactive duty training or annual training) and currently does *not* provide for urinalysis testing.

Opinion of DOD General Counsel on Releasability of Security Classification Guides

In response to the receipt of numerous FOIA requests for security classification guides, on 2 May 1984 the Acting DOD General Counsel determined that these documents are exempt from release under FOIA Exemption 2 because they are intended for internal use and their release would risk circumvention of DOD and service regulations.

Arbitrating Reports of Survey

In a recent decision, the Federal Labor Relations Authority upheld an arbitrator's award that set aside a finding of pecuniary liability under AR 735-11. *International Brotherhood of Electrical Workers & U.S. Army Support Command, Hawaii*, 14 F.L.R.A. No. 90 (May 21, 1984). The arbitrator found that there was no substantial evidence in the case to prove by a preponderance of the evidence or otherwise that there was just cause to impose pecuniary liability on the grievant. The Authority sustained the award because of its particular facts and expressly found that the agency failed to

establish that the award infringes in any manner on management's right to determine its internal security practices, or that it precludes the commander from insuring compliance with the statutory and regulatory provision pertaining to accounting for Army property. To overcome the effect of this case, labor counselors should insure that reports of survey under AR 735-11 have been conducted and prepared to meet the specific criticisms of the arbitrator and the Authority in this case. This report of survey investigation was inadequate because: (A) it was cursory; (B) the surveying officer did not conduct a complete investigation and did not determine if there were other witnesses or evidence, but ceased investigation when he felt he had sufficient evidence; and (C) he did not make an objective, impartial, and thorough investigation as required by AR 735-11. The Authority's decision establishes that report of survey actions are grievable and subject to arbitration. The arbitrator has the authority to make the final decision as to pecuniary liability.

Arbitrability of Contracting Out Decisions

A recent arbitration case resulted in a favorable decision for the government and a persuasive rationale for use by the labor counselor in opposing a union argument of arbitrability of contracting out decisions. Labor counselors have been advised to refuse to participate in a grievance/arbitration proceeding, beyond the issue of arbitrability, that challenges a contracting out decision of agency management. (*See* paragraph 3, Labor Counselor Bulletin Number 11, item one, page one.) In *Naval Air Station, Memphis, TN, and AFGE Local 2172*, FMCS 83K/22545, (April 9, 1984), Arbitrator Samuel J. Nicholas, Jr. found contracting out to be a nonarbitrable because of a specific provision in the collective bargaining agreement involved in that case that incorporated a portion of OMB Circular A-76. The clause relied upon by the arbitrator read:

> It is understood by the union and the employer that in the administration of all matters covered by this argument, the union, employer, and unit employees are subject to all applicable existing or future laws and the regulations of appropriate authorities of the Federal government, including but not limited to those policies set forth in the Federal Personnel Manual; by published Department of Defense and Department of Navy policies and regulations in existence at the time this agreement is approved; and by subsequently published Department of Defense and Department of Navy policies and regulations required by law or by the regulations of appropriate agreement at a higher agency level.

This or similar language is contained in many federal sector collective bargaining agreements. The arbitrator found that this clause brought the appeals provision of OMB Circular A-76 into the collective bargaining agreement. He further found that since the agreement was silent on a procedure to review the studies required before a function is contracted out, the circular alone governed this process. The OBM Circular specifically excludes the appeal and review procedure, available after a contracting out decision is made, from being resolved through arbitration. So, the arbitrator found the union's attack on the contracting out decision to be nonarbitrable on a contractual basis.

Judiciary Notes

US Army Legal Services Agency

Staff Judge Advocate's Review

In two recent cases, the Army Court of Military Review found it necessary to return a record of trial to the convening authority for a new review and action because the staff judge advocate's review was not signed by either the staff judge advocate or a designated acting staff judge advocate. Instead, the review was signed by an officer "For the Staff Judge Advocate." The convening authority's staff judge advocate (or acting SJA when the SJA is absent) must prepare or adopt the review. United States v.

Gray, 14 M.J. 816 (A.C.M.R. 1982). In this connection, the current UCMJ Art. 61(d) is worded similarly to the former Article 61.

Record of Trial

The Court of Military Appeals recently noted several cases in which, contrary to the fourth note on page A8-13 of the 1969 Manual for Courts-Martial, the charges and specifications on which the accused was arraigned, the name and description of the accused, the affidavit, and the referral to trial were not inserted or copied verbatim into the trial transcript. These must be in the record whether or not the reading of the charges was waived; their absence will require corrective action. Similar guidance will be found in the sixth note on page A13-4 of the 1984 Manual for Courts-Martial.

JAGC Automation

Automated Legal Research (ALR) Services

West Publishing Co. has recently expanded its WESTLAW data base in areas of interest to Army attorneys. The WESTLAW data base now includes

Court-Martial Reports (full coverage),
Military Justice Report (full coverage),
Merit System Protection Board Decisions (from 1979),
Federal Labor Relations Authority Decisions (from 1979),
Federal Labor Relations Authority Administrative Law Judges Decisions (from (1981),
Comptroller General Opinions, Published (from 1921),
Comptroller General Opinions, Unpublished (from 1955), and
Legal Periodicals File.

Mead Data Central has a number of these same data bases on LEXIS. Mead has announced an agreement with the Bureau of National Affairs to add the following BNA publications to LEXIS:

Federal Contracts Reports,
Daily Labor Report,
Government Employee Relations Reporter,
U.S. Law Week,
Environmental Reporter,
Chemical Regulations Reporter,
Energy User's Reporter, and
Patents, Trademarks and Copyright Journal.

Full coverage of the Manual for Courts-Martial, Court-Martial Reports, and the Military Justice Reporter on LEXIS was delayed until September. Further plans for the LEXIS Military Law data base include addition of the Military Law Review and Title 32 of the Code of Federal Regulations.

Terminal selection must be based on an evaluation of *all* uses for the machine, on software selection (if the terminal is a microprocessor), and on local support requirements (maintenance availability, power requirements, air conditioning, *etc.*). One word of caution—equipment should not be acquired unless the ALR vendor certifies that the service will operate without *any* error using the terminal, modem, printers, and software selected. The basic principle is to select the software before selecting the terminal. ALR vendors maintain a list of certified equipment and software.

FLITE

Federal Legal Information Through Electronics (FLITE) is willing to assist users of WESTLAW and LEXIS in formulating queries to those services. The actual search can then be conducted in the SJA office and the results obtained immediately. The FLITE telephone number is (303) 370-7531 or Autovon 926-7531. The ALR vendors each advertise a similar customer service.

Integrated SJA Office System

Many installation automation management officers have been requesting SJA to provide a list of "functional requirements" for their offices. Following is a list of functions found in most SJA offices which the literature suggests can be included in an integrated law office system:

Professional Office System
Mail/Message
Calendar

- Schedule Meeting/Facilities
- Enter/Edit Documents
- Word Processing
- Action Management (Administrative and Contract Law)
  - Assignment
  - Suspense
  - Approval
  - Reporting
- Case Management (UCMJ and Legal Assistance)
  - Calendar
  - Docket/Schedule
  - Reports
- Claims Processing
- Opinion/Brief Bank
- Litigation Support
  - JAGC Litigation Support System
  - Local System(s)
- Automated Legal Research (ALR)
- Automated Research (AR)
- Communications
  - Local Staff/Command Activities
  - JAGC Technical Channels
- Army Administrative Support
- Security

OTJAG, USALSA, TJAGSA, the Claims Service, and several SJA offices are engaged in pilot projects which will further define these requirements. As information is available it will be passed along in *The Army Lawyer* or by memorandum to the field. Questions and suggestions may be addressed to LTC Carpenter at Cdr, USALSA, ATTN: JALS-AM, Nassif Bldg., Falls Church, VA 22041, or by telephoning (202) 756-2115 or Autovon 289-2115.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Distribution of The Army Lawyer

In the past, The Judge Advocate General's School distributed *The Army Lawyer* to USAR and ARNG judge advocates using a mailing list manually prepared and updated at the School. The School has automated the mailing list to insure accurate distribution of *The Army Lawyer*. Addresses of USAR judge advocates residing in the Continental United States are now provided to the School by ARPERCEN on a computer tape. The School cannot correct the tape. USAR judge advocates residing in the Continental United States should report changes of address *by mail* to Commander, US Army Reserve Personnel Center, ATTN; DARP-OPS-JA (MAJ Hamilton), 9700 Page Blvd., St. Louis, MO 63132-5260. *Do not send changes of address to The Army Lawyer.*

The addresses of ARNG judge advocates and USAR judge advocates who reside outside the Continental United States are still maintained and updated by *The Army Lawyer*. Those judge advocates should continue to send changes of address to The Judge Advocate General's School, U.S. Army, ATTN; JAGS-DDL, Charlottesville, VA 22903-1781. All USAR and ARNG judge advocates should allow ninety days for a change of address to become effective.

Enlisted Update

Sergeant Major Walt Cybart

Personnel Shortages

We receive frequent inquiries from the field concerning shortages of 71D personnel, particularly in CONUS installations. Several factors combine to produce this problem. Over the past year, 71D strength has dropped almost 10% worldwide. During this period, MILPERCEN has tried to equitably distribute (cross-level) 71D assets among CONUS MACOMs. TRADOC overstrength was reduced while FORSCOM

understrength was increased to within 2% of TRADOC. Priority of fill continues to go to USAREUR and certain other OCONUS commands. In the face of a resource pool which is not large enough to provide 100% fill for both oversea and CONUS requirements, CONUS installations bear the brunt of shortages. The outlook for increases in the replacement stream is not good. MILPERCEN may only access a given number of new enlistees per year and these limited personnel resources are allocated according to priorities.

As support/admin MOSs typically receive a lower priority than combat MOSs, we will probably see no significant increase in 71D accessions during FY 84, with the impact spilling over into FY 85. Methods to alleviate this problem are constantly under investigation by MILPERCEN. Those installations which are experiencing severe shortages should insure that servicing MILPOs report accurate records of actual personnel status to MILPERCEN.

CLE News

1. The 1985 Government Contract Law Symposium.

The faculty of the Contract Law Division of The Judge Advocate General's School is pleased to announce the following tentative topics for the 1985 Government Contract Law Symposium: "Contract Law Developments—The Year in Review;" "The Competition in Contracting Act Changes;" "Developments at the Boards of Contract Appeals—A Judicial View;" "Developments at the Boards of Contract Appeals—An Agency View;" "Recent Developments in the Federal Courts—An Agency View;" "Developments at the Courts and Boards—A Private Bar Perspective;" "Bankruptcies and Government Contracts;" "A Construction Law Update;" "The Procurement Process as Viewed From Capitol Hill;" "Inspector General Activities—An Update;" "Small Businesses and Government Contracts—A Problem Seminar." The Symposium will also again feature major command seminars led by the respective command legal offices. The annual Gilbert A. Cuneo Lecture in Government Contract Law will also be delivered during the Symposium. The Symposium will be held 7 - 11 January 1985 at TJAGSA.

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN (DARP-OPS-JA), if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To obtain a quota or verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

3. TJAGSA CLE Course Schedule

November 5-9: 6th Legal Aspects of Terrorism Course (5F-F43).

November 5-9: 15th Legal Assistance Course (5F-F23).

November 26-December 7: 101st Contract Attorneys Course (5F-F10).

December 3-7: 28th Law of War Workshop (5F-F42).

December 10-14: 8th Administrative Law for Military Installations (5F-F24).

January 7-11: 1985 Government Contract Law Symposium (5F-F11).

January 14-18: 26th Federal Labor Relations Course (5F-F22).

January 21-25: 14th Criminal Trial Advocacy Course (5F-F32).

January 21-March 29: 106th Basic Course (5-27-C20).

February 4-8: 77th Senior Officer Legal Orientation Course (5F-F1).

February 11-15: 5th Commercial Activities Program Course (5F-F16).

February 25-March 8: 102nd Contract Attorneys Course (5F-F10).

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys Course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JAGSO Team Training.

June 17-28: BOAC; Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

4. Civilian Sponsored CLE Courses

January 1985

7-11: UMLC, Institute on Estate Planning, Miami, FL.

10: IICLE, Life Insurance in Business & Estate Planning, Springfield, IL.

10-11: PLI, Securities Litigation, New York, NY.

11: IICLE, Liability Insurance, Springfield, IL.

14-15: PLI, The Jury, Washington, DC.

15: IICLE, Liability Insurance, Chicago, IL.

18: PBI, Analyzing Medical Records (Video), Wilkes-Barre, PA.

18-19: KCLE, Labor Law, Lexington, KY.

22: IICLE, Valuation of the Closely Held Business, Chicago, IL.

23: IICLE, Valuation of the Smaller Professional Practice, Chicago, IL.

23-25: ALIABA, Trial Evidence in Federal & State Courts, Scottsdale, AZ.

24-25: IICLE, Banking Law Update '85, Chicago, IL.

24-25: PLI, Preparation of the Fiduciary Income Tax Return, New York, NY.

24-25: PLI, Unjust Dismissal: Litigating/Settling/Avoiding, San Francisco, CA.

28: IICLE, Adapting ABA Model Partnership Agreement, Chicago, IL.

28: IICLE, Faculty Training Seminars, Chicago, IL.

29: IICLE, Faculty Training Seminars, Chicago, IL.

30: IICLE, RICO Practice, Chicago, IL.

31: IICLE, Commercial Leases, Springfield, IL.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, DC 20006. Phone: (202) 775-0083.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street, N.W., Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IED: The Institute for Energy Development, P.O. Box 19243, Oklahoma City, OK 73144.

IICLE: Illinois Institute for Continuing Legal Education, 2395 West Jefferson Street, Springfield, IL 62702 (Phone: (217) 787-2080).

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Route, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., N.W., Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004 Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Chase Center for the Study of Public Law, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, KY 41076, Phone: (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute, Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, DC 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

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

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, DC 20036.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65221.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.
UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.
VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.
VUSL: Villanova University, School of Law, Villanova, PA 19085.
WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fische copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD B077550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
AD B077551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD B077552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD B077553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD B077554	Criminal Law, Evidence/JAGS-ADC-83-11
AD B077555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD B078201	Criminal Law, Index/JAGS-ADC-83-13
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/ JAGS-ADA-84-1
AD B077739	All States Consumer Law Guide/JAGS-ADA-83-1

AD B079729 LAO Federal Income Tax Supplement/JAGS-ADA-84-2
AD B077738 All States Will Guide/JAGS-ADA-83-2
AD B078095 Fiscal Law Deskbook/JAGS-ADK-83-1
AD B080900 All States Marriage & Divorce Guide/JAGS-ADA-84-3

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	Title	Change	Date
AR 190-47	MP U.S. Army Correctional System	I04	17 Aug 84
AR 340-18	Army Functional Files Systems		20 Jul 84
AR 340-18	Army Functional Files Systems	1	1 Aug 84
AR 600-21	Equal Opportunity Program in the Army	2	1 Aug 84
AR 635-40	Physical Evaluation for Retention, Retirement or Separation	I04	14 Jul 84
AR 635-100	Officer Personnel	I07	26 Jul 84
AR 640-3	Identification Cards, Tags, Badges		17 Aug 84
DA Pam 27-9	Mental Capacity & Responsibility (Draft Revision of Chapter 6)		22 May 84
DA Pam 310-1	Consolidated Index of Army Publications & Blank Forms		1 Jun 84
DA Pam 360-503	Voting Assistance Guide	1	Jun 84
DA Pam 550-61	Burma, A Country Study		1983
DA Pam 608-4	Guide for the Survivors of Deceased Army Members (S/S Pam 608-4, 15 Apr 82)		15 Jul 84
UPDATE	Enlisted Ranks Personnel Update	Issue 1	5 Jul 84
UPDATE	Officer Ranks Personnel Update	Issue 1	10 Jul 84
UPDATE	Reserve Components Personnel Update	Issue 9	1 Aug 84
UPDATE	All Ranks Personnel Update (Handbook)	Issue 1	1 Jul 84

3. Articles

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Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 J. Crim. L. & Criminology 1147 (1983).

Berdes & Huber, *Making the War Powers Resolution Work: The View From the Trench*, 17 Loy, L.A.L. Rev. 671 (1984).

Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 Cornell L. Rev. 690 (1984).

Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 Cornell L. Rev. 785 (1984).

Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 Brooklyn L. Rev. 191 (1984).

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Glennon, *Liaison and the Law: Foreign Intelligence Agencies' Activities in the United States*, 25 Harv. Int'l L.J. 1 (1984).

Hahn, *An Overview of the Japanese Legal System*, 5 Nw. J. Int'l L. & Bus. 517 (1983).

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Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 Notre Dame L. Rev. 503 (1984).

Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers*, 58 St. John's L. Rev. 1 (1983).

Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. Fam. L. 221 (1983-84).

Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 Duq. L. Rev. 637 (1984).

Packer, *Post-traumatic Stress Disorder and the Insanity Defense: A Critical Analysis*, J. Psychiatry & L., Summer 1983, at 125.

Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 Loy, L.A.L. Rev. 715 (1984).

Reilly, Witlin & Curran, Illinois v. Gates: *Probable Cause Redefined?*, 17 J. Mar. L. Rev. 335 (1984).

Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037 (1984).

Sharpe, *Two-Step Balancing and the Admissability of Other Crimes Evidence: A Sliding Scale of Proof*, 59 Notre Dame L. Rev. 556 (1984).

Taylor, *The Equal Credit Opportunity Act's Spousal Co-Signature Rules: Suretyship Contracts in Separate Property States*, 48 Alb. L. Rev. 382 (1984).

Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 Ohio St. L.J. 185 (1984).

Wardlaw, *Models for the Custody of Mentally Disordered Offenders*, 6 Int'l J. L. & Psychiatry 159 (1983).

Wice, *The Criminal Court Judge: The Act of Judging*, 20 Crim. L. Bull. 189 (1984).

Comment, *A Clash of Cases: Jury Death Qualification and the Fair Cross-Section Requirement*, 22 Duq. L. Rev. 725 (1984).

Note, *Limitations on Impeachment by Contradiction: The Collateral Facts Rule and F.R.E. 403*, 33 Drake L. Rev. 663 (1983-84).

Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. Rev. 187 (1984).

Note, *Reagan's Polygraph Order and the Fourth Amendment: Subjecting Federal Employees to Warrantless Searches*, 69 Cornell L. Rev. 896 (1984).

Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U.L. Rev. 199 (1984).

Note, *The Use of Discovery Sanctions in Administrative Agency Adjudications*, 59 Ind. L.J. 113 (1983-84).

Conference on Extraterritoriality for the Businessman and the Practicing Lawyer, 13 L. & Pol'y in Int'l Bus. (1983).

National Security and Civil Liberties, 69 Cornell L. Rev. 685 (1984).

Supreme Court Review, 74 J. Crim. L. & Criminology 1171 (1983).

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

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Major General, United States Army
The Adjutant General

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