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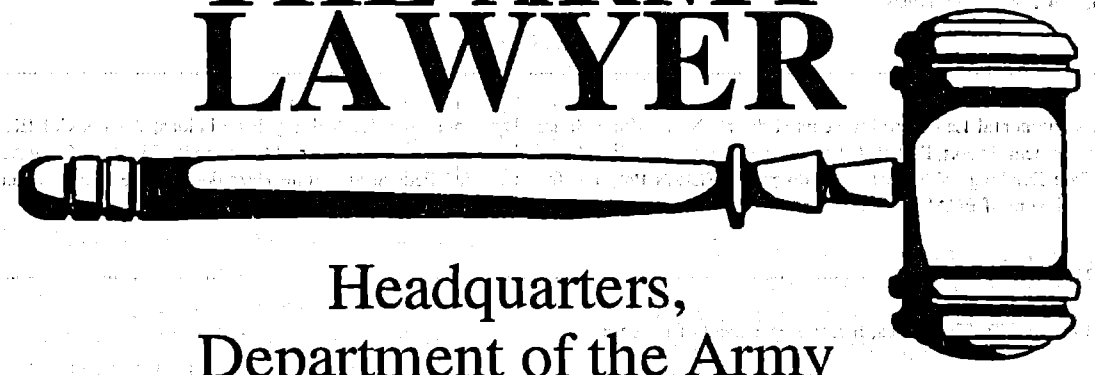

Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-287
October 1996

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as ditch companies, by local water districts, and by states. There is no requirement, however, that water rights be used efficiently or wisely.[7] Additionally, unlike the Doctrine of Riparian Rights favored by eastern states, an appropriator in the West need not have direct access to a stream to perfect his water right.

Under the Prior Appropriation Doctrine, an appropriator can change the beneficial use of the water or transfer a water right to another party. An appropriator can change the point of diversion or the type of use, but only under conditions that would protect the rights of other appropriators.[8] Water rights also may be lost if they are not consistently and beneficially used. Failure to use a water right coupled with an intent to abandon the right constitutes abandonment, leaving the right open for appropriation by another party.[9] In some states, statutes specify that nonuse for a specified period of time constitutes a forfeiture.[10]

Initially, only surface waters were subject to the Prior Appropriation Doctrine, but some states have applied the doctrine, in varying degrees, to groundwater in recent years as well. Approaches are far from uniform, but most western states now at least require some form of permit for use of groundwater.[11]

The Prior Appropriation Doctrine is by no means uniformly applied to surface waters throughout the western states. Nine states have adopted a *pure* form of the prior appropriation doctrine, known as the "Colorado Doctrine."[12] Adding to the confusion, ten states follow a hybrid water law system, which incorporates elements of riparian rights as well as prior appropriation.[13] While federal installations enjoy some distinct advantages over private users in the western states, federal attorneys and engineers should be keenly aware of the water rights systems in their respective states. This is particularly critical at installations where permitted water rights have been obtained by acquiring private lands. Under those circumstances, the federal government must take particular care to ensure that those rights are maintained and protected under state law.

Federal Reserved Water Rights (*Winters* Doctrine)

Origin of the Winters *Doctrine and Federal Reserved Rights*

Federal reservations withdrawn from the public domain by treaty, statute, or executive order are generally entitled to a sufficient quantity of water needed to fulfill the purpose for which the reservation was created.[14] This unique and often controversial entitlement originated in the 1908 Supreme Court decision, *Winters v. United States*.[15] In *Winters*, the Gros Ventre and Assiniboine Indians living on Montana's Fort Belknap Reservation claimed rights and interest in the Milk River, which conflicted with claims of non-Indians who predicated their rights on Montana state law.[16] The Court found that the reservation was created for the purpose of providing the tribes a "permanent home and abiding place," but that without enough water to irrigate these lands, which were of a "dry and arid character," the lands would be practically useless.[17] Further, the Court recog-

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[7] This has been the subject of considerable criticism among those who argue that the Prior Appropriation Doctrine, as applied in most western states, fails to meet the needs of the times. *See, e.g.*, Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, XXIV LAND & WATER L. REV. 1 (1989).

[8] *Id.* at 27-28. For example, an appropriator might change the use of his water right from irrigation to stock watering by filing for a change to his water permit. Other appropriators on that system would then have an opportunity to challenge the change if they thought it would affect the amount of water they would receive.

[9] *Id.* at 28. If an appropriator did not use his water right for a period of years, then other appropriators could claim that water right.

[10] *Id.*

[11] *Id.* at 24.

[12] Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). In addition to Colorado, the states of New Mexico, Wyoming, Montana, Idaho, Utah, Nevada, Arizona and Alaska follow the "Colorado Doctrine."

[13] The hybrid states are Texas, Kansas, Nebraska, North Dakota, South Dakota, Oklahoma, Washington, California, Oregon, and Mississippi. The Army's Fort Bliss spans two states: Texas, a hybrid state, and New Mexico, a pure Prior Appropriation Doctrine state.

[14] *See, e.g.*, United States v. Walker Irrigation District, 104 F.2d 334, 335 (9th Cir. 1939) (waters of stream reserved to extent necessary to supply irrigable lands on reservation).

[15] 207 U.S. 564 (1908).

[16] *Id.* at 575.

[17] *Id.* at 575-76.

nized that water would be necessary to fulfill the government's policy and the Indians' desire to change from a "nomadic and uncivilized people" into a "pastoral and civilized people."[18]

Although no mention of water rights was made when the lands were withdrawn from the public domain and reserved for the tribes, the United States Supreme Court held that setting aside the land for the Assiniboine Indians implied reserved rights to use the water from the Milk River.[19] The Court stated, "the Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization."[20]

The absence of any mention of water rights in the treaty created an ambiguity as to whether Indian reservations were created only to compensate tribes for cessation of aboriginal claims or also for the political purpose of allowing Indian tribes to govern themselves under federal guardianship.[21] The Court reasoned that when land grants establishing reservations were made, certain rights were reserved by the United States for the benefit of the Indians.[22] Such rights have been found to include the water rights appurtenant to the use and occupation of the lands within the reservation as the permanent homeland of the Indian people.[23] These appurtenant water rights, known as "implied reserved water rights," are quantified according to the purpose for which the reservation was created.[24] Where the reservation was created by treaty, the reserved water right is ascertained by examining the history behind the transaction, the surrounding circumstances of climate, terrain and Indian lifestyle, and the subsequent actions and uses of the parties.[25]

The *Winters* Court resolved this ambiguity by applying certain rules of construction:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even of [sic] it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.[26]

Thus, Indian reservations, and subsequently other federal reservations as well, retained appurtenant water rights in quantities sufficient to fulfill the purposes for which the reservations were created.

Quantification Using the Potentially Irrigable Acreage Standard

Arizona v. California

Since *Winters*, numerous cases have followed the "*Winters* Doctrine" in finding an implied reserved water right appurte-

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[18] *Id.* at 575.

[19] *Id.* at 576-77.

[20] *Id.* at 576.

[21] *See generally*, MANSFIELD, DIETERICH & TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS (1977).

[22] *See, e.g.*, United States v. Finch, 548 F.2d 822, 831 (9th Cir. 1976) (purpose of Crow Reservation was to set aside a permanent home for the Crow Indians, and thus all lands within the reservation, including the riverbed, were to be for the exclusive use of the tribe).

[23] *Id.*

[24] *Winters*, 207 U.S. at 576-78.

[25] *Id.* at 575-78.

[26] *Id.* at 576-77.

nant to lands set aside by the federal government for certain federal purposes. In *Arizona v. California*,[27] the states of Arizona, California, Nevada, New Mexico and Utah, and the United States, were parties to a dispute over use of the Colorado River and its tributaries.[28] The United States asserted rights to water in the mainstream of the Colorado River on behalf of five Indian reservations in Arizona, California, and Nevada.[29] The Special Master, appointed by the district court, recognized a reserved water right for the Colorado River Indian Reservation and quantified the water right based on the amount of water required to irrigate all of the "potentially irrigable acreage" on the reservation.[30] The Master determined that the United States intended to reserve enough water to make the reservation lands *useful*, and ruled that the potentially irrigable acreage quantification standard would satisfy the Indians' present and future needs. The Supreme Court in *Arizona*, agreeing with the Master's quantification, followed the *Winters* analysis, stating:

> It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the Indian people and to the animals they hunted and the crops they raised.[31]

The Supreme Court concluded that this method of quantifying the award was "the only feasible and fair way by which reserved water for the reservations [could] be measured."[32] This rule poses a problem for state water administrators, some analysts argue, because reserved rights are largely unquantified and have not been used to their full extent. This makes it difficult to determine what their future effects will be on water consumption patterns that have developed under state and regional laws.[33] The United States assertion of a reserved water right, as with any apropriation of surface or groundwater within a hydrological system, no matter how minute, inevitably affects all of the water users of the stream. Claimants of water rights within any given stream system are all related to one another by the source of the water supply, by the priority date, by the point of diversion, by the place of use and return flow, by the period of use, and by the quantity and quality of the water.[34]

Expansion of the Winters Doctrine into Ground Water and Instream Flows

Cappaert v. United States

Cappaert v. United States[35] expanded the scope of the *Winters* Doctrine by holding that the United States was entitled to specific instream flows[36] of groundwater needed to support a species of wildlife at a national park. This differed from previous decisions that focused on specific, measurable quantities of surface water. The petitioners in *Cappaert* were ranchers who pumped water from an aquifer that was also the source of water for Devil's Hole, an underground spring at Death Valley National Monument.[37] Death Valley was withdrawn from the public domain and reserved as a national monument by Presidential Proclamation in 1952.[38] The Proclamation noted that Death Valley was set aside "for the preservation of the unusual features of scenic, scientific, and educational interests therein contained." The Proclamation also made specific reference to a remarkable underground pool at Devil's Hole and described in some detail the geological history of the pool, as well as the

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[27] 373 U.S. 546 (1963).

[28] *Id.* at 551-52.

[29] *Id.* at 595.

[30] *Id.* at 600.

[31] *Id.* at 698-99.

[32] *Id.* at 601.

[33] AWWA, *supra* note 3, at 82.

[34] 2 WATERS AND WATER RIGHTS 15.01, at 205-06 (1991 ed.).

[35] 426 U.S. 128 (1976).

[36] "Instream use" may be defined as, "Any use of water that does not require diversion or withdrawal from the natural watercourse, including in place uses such as navigation and recreation as well as power generation that requires a continuous flow." 6 WATERS AND WATER RIGHTS at 919.

[37] *Cappaert*, 426 U.S. at 133.

[38] *Id.* at 131-32.

significance of a rare and unusual species of fish living in the pool.[39]

Petitioners and local ranchers appropriated groundwater hydrologically connected to Devil's Hole and began pumping from the aquifer in the late 1960s.[40] In the early 1970s, the National Park Service began to notice a decline in water levels within Devil's Hole and suspected that the reduced water levels were due to the petitioners' pumping.[41] The United States District Court for Nevada subsequently issued an injunction preventing the petitioners from pumping so as to cause water levels to fall below a certain point. The United States Court of Appeals for the Ninth Circuit affirmed, holding that the *Winters* Doctrine applied to both surface and ground water.[42]

On certiorari, the Supreme Court upheld the lower courts and, citing *Winters* and *Arizona*, held that the United States, in reserving public land for a specific purpose, was entitled to all previously unappropriated waters "necessary to accomplish the purposes for which the reservation was created."[43] Finding that the United States purpose in reserving Devil's Hole as part of Death Valley National Monument was preservation of the pool, including the fish living in the pool, the Court held that the petitioners could not pump so much ground water so as to endanger the fish.[44] The Court thus held that the *Winters* Doctrine applied to both surface and ground water (noting that Nevada applied the doctrine of prior appropriation to both).[45] Further, the Court stated that, although the United States has waived sovereign immunity under the McCarran Amendment, "federal water rights are not dependent upon state law."[46] The Court thus left open the possibility for the *Winters* Doctrine to expand into the area of nonappropriated water rights.[47]

In *United States v. New Mexico*,[48] however, the Supreme Court rejected efforts by the United States Forest Service to protect instream flows for aesthetic, recreational, and fish-preservation purposes in the Gila National Forest in New Mexico. In *New Mexico*, the majority of the Court based its decision on the proposition that protection of instream flows for aesthetic purposes was outside the "relatively narrow purposes for which national forests were to be reserved."[49] In dissent, Justice Powell questioned whether "the forests which Congress intended to 'improve and protect' are the still, silent, lifeless places envisioned by the Court . . . the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses."[50] These cases may pose some interesting problems for the modern military, which places significant emphasis on wildlife and natural resources management as well as military training and testing. While the military might point to legislation such as the Sikes Act[51] to support instream flow

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[39] *Id.* at 132.

[40] *Id.*

[41] *Id.* at 134-35.

[42] *Id.* at 136-37.

[43] *Id.* at 139.

[44] *Id.* at 141.

[45] *Id.* at 142-43.

[46] *Id.* at 145.

[47] It is probable, although not entirely clear, that the United States is entitled, under public policy considerations, to *Winters* rights in jurisdictions where water rights are based on such doctrines as absolute dominion, reasonable use, or correlative rights. Also unclear is the extent to which such water rights could be adjudicated in a general stream adjudication. However, it is clear that courts may award rights such as instream flows based on the reserved water rights doctrine even where such rights are not recognized under state law. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (reserved water right award includes supply sufficient to develop and maintain lost fishing grounds); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) (reservation of quantity of water flowing through reservation for dual purposes of supporting agriculture, and maintaining hunting and fishing).

[48] 438 U.S. 696 (1978).

[49] *Id.* at 709. The Court held that national forests were reserved for two principal purposes, timber preservation and enhancement of water supply. The Court also recognized that secondary purposes exist, but the Court would only award reserved water rights for the principal purposes because an award based on both principal and secondary purposes would unduly harm private water users. *Id.*

[50] *Id.* at 719.

[51] 16 U.S.C.A. § 670 (West Supp. 1994). The Sikes Act addresses conservation programs on military reservations. Arguably, Congress adoption of the Sikes Act shows congressional intent to reserve sufficient water to meet the conservation requirements of the Sikes Act.

protection or diversions for wildlife propagation, it is unclear whether such uses would be covered under the *Winters* Doctrine.[52]

The Future of the *Winters* Doctrine

Over the years, Congress has made numerous attempts to limit or eliminate the *Winters* Doctrine.[53] Most recently, Congressman Crapo, Republican of Idaho, with the support of other western Republicans, introduced a bill entitled the "State Water Sovereignty Protection Act."[54] The effect of this bill is to subject the United States to all substantive and procedural state laws whenever it seeks to appropriate water or acquire a water right, and to delegate any congressional authority with respect to the regulation of water to the states.[55] This bill would completely end the *Winters* Doctrine and would subject federal reservations to state water laws "to the same extent as any private person is subject to such laws."[56] Because the bill contains no grandfathering provision, it is likely that its passage would effectively deprive many federal reservations of most, if not all, of their water rights. However, because there has been little movement on this bill, it is likely that the *Winters* Doctrine will survive at least one more session of Congress.

The McCarran Amendment

In general, the Doctrine of Sovereign Immunity, which originates from the Supremacy Clause, bars private suits against the United States unless Congress has clearly and unequivocally waived the government's immunity from suit.[57] There is, however, a limited waiver of sovereign immunity for certain water rights adjudications. A statute known as the McCarran Amendment[58] grants jurisdiction over the United States in any "suit (1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."[59] The statute only applies to "general adjudications," however, involving all the rights of various appropriators on a stream.[60] It does not waive sovereign immunity in suits initiated by individuals brought against the United States or its officials by water users seeking to determine their relative priorities against the United States. Actions brought under this provision, therefore, are normally major adjudications conducted by states. If a single private water user, or even a group of private users, were simply to file against the Army to challenge its water rights, the case would be dismissed.[61]

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[52] On military lands where water is required for aesthetic purposes, however, water may be acquired for those purposes through the appropriation process. At least one federal agency is already required to follow state appropriation requirements with regard to any water rights because not all federal land carries with it a reservation of water. Public domain land, administered by the Bureau of Land Management (BLM), is not reserved land and therefore not subject to Federal Reserved Water Rights. In 1981, the Department of Interior solicitor opined that the BLM was required to acquire water rights in conformance with state law. AWWA, *supra* note 3, at 80. Arguably, the same analysis might apply to military installation resource managers seeking water rights for purposes other than military or direct military support. Fort Bliss, for example, has surface water rights in the state of New Mexico that were acquired with private ranchlands purchased during the 1950s.

[53] *See, e.g.*, Cappaert v. United States, 426 U.S. 128 (1976).

[54] H.R. 2555, 104th Cong., 1st Sess. (1995).

[55] *Id.*

[56] *Id.* § 2(a).

[57] *See, e.g.*, McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1187 (E.D. Cal. 1988). For a discussion of Sovereign Immunity in environmental laws generally, *see, e.g.*, Wilcox, *The Changing Face of Sovereign Immunity in Environmental Enforcement Actions*, ARMY LAW., Aug. 1993, at 3; Lotz, *Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties*, 31 AIR FORCE L. REV. 7 (1989).

[58] 43 U.S.C. § 666 (1996).

[59] *Id.*

[60] Dugan v. Rank, 372 U.S. 609, 618 (1963).

[61] For a broad discussion of McCarran Amendment issues, *see*, White, *McCarran Amendment Adjudications - Problems, Solution, Alternative*, XXII LAND & WATER L. REV. 619 (1987).

A unique feature of the waiver of sovereign immunity under the McCarran Amendment is that it requires the federal government to defend itself in state courts when the required elements are met.[62] This differs from the process familiar to most federal attorneys, which calls for immediate removal to federal district court.[63] Thus, the McCarran Amendment sacrifices the "home court advantage" federal attorneys normally enjoy. The rationale behind allowing state adjudication processes to consider federal water rights within the states was the assumption that states were better equipped to deal with complex water rights questions. Not everyone agrees with this rationale. "There is nothing about the reserved right," one critic wrote, "that cannot be fully and more simply resolved consistent with principles of federalism in a federal court declaratory judgment action, if the parties were willing to see it done that way."[64]

It is now generally recognized that reserved water rights may be adjudicated by state courts in McCarran Amendment proceedings. In *United States v. District Court in and for Eagle County*,[65] for example, the Supreme Court held that the McCarran Act waiver of sovereign immunity includes federal reserved rights.[66] Reserved rights, therefore, could be subject to challenge in state adjudications. In *Arizona v. San Carlos Apache Tribe of Arizona*,[67] however, the Supreme Court emphasized that jurisdiction to consider reserved rights in an adjudication did not mean that the states could disregard federal law.[68] The Court concluded that federal supremacy dictates that state adjudications must recognize the principle of federal reserved rights.[69] Valid federal reserved rights, therefore, must be recognized in state general stream adjudications.

Courts have recently expanded the scope of the McCarran Amendment's sovereign immunity waiver to include certain adjudications administered by state agencies within the definition of suits. In the Ninth Circuit decision *United States v. Oregon*,[70] the United States (on behalf of the Klamath Tribe) challenged a mass water rights adjudication started by the State of Oregon in part because the adjudication was administered by a state agency rather than a court.[71] The United States argued that the adjudication constituted an *administrative proceeding* rather than a *suit* and was therefore outside the scope of the McCarran Amendment.[72] Citing *United States v. Idaho*,[73] the United States urged that a waiver of sovereign immunity must be narrowly read and that the McCarran Amendment only contemplates "traditional lawsuits initiated in court and tried exclusively before a judge."[74]

In holding that the administrative adjudication fell within the scope of the McCarran Amendment waiver of sovereign immunity, the Ninth Circuit examined the relationship between administrative agencies and the courts, and found that the proceedings before an agency "merely pave[d] the way for an adjudication by the court of all the rights involved."[75] The Agency proceedings and subsequent judicial reviews were thus seen as "parts of a single statutory proceeding, the earlier stages of which

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[62] 43 U.S.C. § 666 (1996).

[63] *See, e.g.*, 28 U.S.C. § 2679 (1996).

[64] Membrino, *Indian Reserved Water Rights, Federalism, and the Trust Responsibility*, XXVII LAND & WATER L. REV. 1, 4 (1992).

[65] 401 U.S. 520 (1971).

[66] *Id.* at 524.

[67] 463 U.S. 545 (1983).

[68] *Id.* at 570.

[69] *Id.*

[70] 44 F.2d 758 (9th Cir. 1994).

[71] *Id.* at 765.

[72] *Id.*

[73] 508 U.S. 1 (1993).

[74] United States v. Oregon, 44 F.2d at 765.

[75] *Id.*

are before the board and the later stages before the court."[76] Therefore, this administrative adjudication was found to be a "suit" within the meaning of the McCarran Amendment's waiver of sovereign immunity.[77] The court stated in dicta that, in the future, the United States could be subject to similar administrative adjudications in such states as Arizona, California, and Nevada where state water agencies play roles similar to their counterpart in Oregon.[78] Further, the Ninth Circuit indicated that it would not make a material distinction between an adjudication initiated in a state agency and later reviewed by a court from an adjudication initiated in a court and later referred to an agency for an administrative proceeding.[79]

Army Policy on Water Rights

On 25 November 1995, the Deputy Assistant Secretary of the Army (Installations and Housing) and the Deputy General Counsel (Civil Works and Environment) issued policy guidance for maintaining water rights at Army installations.[80] The new guidance provides a logical framework for responsible staff elements to track water rights issues. Accordingly, installation attorneys and engineers responsible for protecting water rights should be familiar with this policy guidance.

According to the introductory memorandum, the guidance was badly needed because attorneys and engineers at some federal installations were woefully ignorant of the importance of maintaining records to protect water rights.[81] Under the guidance, "the Army will comply with the applicable laws of the States pertaining to the use of water" when they are consistent with federal law and military requirements.[82] The guidance also emphasizes close coordination with major commands and the Environmental Law Division.[83] Installations are directed to notify states when new uses of water are pursued under federal reserved rights and to apply for water rights when water in excess of a judicially quantified federal water right is required.[84] On acquired land, installations are urged to apply for water rights under state law unless the process will adversely affect the Army's ability to perform its mission or the state fails to recognize valid existing water rights.[85] In emergencies, the guidance suggests that purchase of water rights or condemnation are options to explore.[86] The guidance also urges commanders to ensure that detailed and accurate water rights records are kept by the responsible officers on the installations.[87] In general, the guidance emphasizes an approach that accounts for the needs of states and other appropriators but recognizes that the needs of national defense must be superior. It also establishes a basic common sense approach to managing water rights. The new guidance, if followed, will likely be an outstanding tool for attorneys and engineers in the western states.

Conclusion

In the arid west, water is life. Survival of one's business—be it ranching, farming, recreation or military training—depends on water. Because of the excellent hand Congress has dealt to the federal government, the military's needs for water should always be met on installations reserved from the public domain. The success of the military's water maintenance programs, however, depends on playing those cards wisely. Western neighbors jealously view the Army's abundant supplies of water. Close coordination and careful recordkeeping within the Army, as urged in the Army's recent policy guidance on water rights, can be the key to long-term success in the West. Careful planning is required to ensure that the Army's future water needs are met. Availability of water must not be taken for granted.

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 767.

[79] *Id.*

[80] Memorandum, Paul Johnson and Earl Stockdale, subject: Policy Guidance on Water Rights at Army Installations in the United States (25 Nov. 1995).

[81] *Id.* at 3.

[82] *Id.* at B-1; B-2.

[83] *Id.*

[84] *Id.* at B-2.

[85] *Id.*

[86] *Id.* at B-3.

[87] *Id.* at C-1; C-2.

Taxation of Payments for Temporary Duty

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Introduction

As a general rule, temporary duty (TDY) payments received by members of the Armed Forces are not taxed. Temporary duty payments include reimbursements for meals, lodging, incidental expenses, and travel. The Defense Finance and Accounting Office does not reflect TDY payments on the service member's Internal Revenue Service (IRS) Form W-2 and the service member does not report receipt of TDY payments as income. The key to tax free treatment is that the TDY payments must be for travel while the service member is temporarily away from home. In 1992, Congress created a bright line rule defining when one is temporarily away from home.[1] Under this rule, any absence from the service member's tax home at a single location for more than twelve months is nontemporary.[2] Consequently, service members ordered TDY for over one year may find that all payments for that TDY constitute taxable income.[3] This article discusses the rules on taxation of TDY payments and focuses on the problems associated with TDY travel exceeding one year.

When Are Travel Expenses Deductible?

Internal Revenue Code (I.R.C.) § 162 allows taxpayers to deduct:

> [A]ll the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business . . . .[4]

To deduct travel expenses, the taxpayer must incur the expenses while away from home. "[A] taxpayer's 'home' for purposes of section 162(a)(2) is the vicinity of his principal place of business or employment, and not where his personal residence is located, if such residence is located in a different place from his principal place of employment."[5]

Where Is a Service Member's Home?

Under I.R.C. § 162, an active duty service member's home is his permanent duty station[6] and all daily travel expenses incurred in and around his permanent duty station constitute nondeductible personal living or family expenses.[7] This is true even if the service member's family does not accompany or live at the permanent duty station because of personal convenience[8] or some other prohibition.[9]

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[1] The bright line rule was enacted as part of the Energy Policy Act of 1992. *See* H.R. CONF. REP. No. 102-1018, 102d Cong., 2d Sess. 430 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472, 2521. The primary purpose of the amendment seems to have been to raise revenue. The amendment is codified at section 162(a) of the Internal Revenue Code. I.R.C. § 162(a) (1994).

[2] I.R.C. § 162(a) (1994). The Department of Defense has submitted a legislative initiative to change this to twenty-four months for members of the Armed Forces who are serving on "contingency operations" as defined in Title 10, United States Code, section 101(a)(13).

[3] Service members who are deployed for over one year could have tax liability for payments received for meals, lodging, and incidental expenses. The average soldier deployed to Bosnia receives a meals and incidental expense allowance totaling $7.75 per day. An unexpected tax liability for a year's tax liability would be burdensome, but not devastating. Some soldiers also are receiving per diem (because they are staying in hotels in major cities). An unexpected tax liability for a year's worth of these payments (*e.g.*, $300 per day x 365 = $109,500—28% tax rate = $30,660 in taxes owed) would be devastating.

[4] *Id.* § 162(a)(2).

[5] Mitchell v. Commissioner, 74 T.C. 578, 581 (1980); Kroll v. Commissioner, 49 T.C. 557, 561-62 (1969); Garlic v. Commissioner, 34 T.C. 611, 614 (1960).

[6] Commissioner v. Stidger, 386 U.S. 287, 296 (1967).

[7] I.R.C. § 262 (1994).

[8] Mayne v. Commissioner, 65 T.C.M. (CCH) 2552 (1993), *aff'd*, 43 F.3d 679 (11th Cir. 1994) (expenses incurred by Coast Guard member who attended master's program were not deductible).

[9] *Id.*

Consequently, to deduct TDY travel expenses, the service member must incur the expense while away from his permanent duty station. Absence from the permanent duty station is a prerequisite for receiving TDY travel allowances.[10]

The home of a Reserve service member who has a regular place of civilian employment and who is called to temporary active duty in the Ready Reserve is his regular place of employment.[11] Consequently, he can deduct TDY travel expenses while serving on temporary active duty provided he incurs the expense outside of the "general area" of his civilian employment.[12]

What Is a Temporary Absence?

Travel expenses incurred for temporary absences from one's permanent duty station are deductible. In 1992, Congress amended I.R.C. § 162 by adding the following language: "For purposes of paragraph (2) [*i.e.*, the paragraph pertaining to business travel deductions], the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year."[13] This amendment affects travel costs incurred after 31 December 1992.[14]

Under amended I.R.C.§ 162, any expense incurred in an absence exceeding one year is not deductible. Additionally, any employer reimbursements for travel expense constitute gross income even if the taxpayer used these reimbursements for travel expenses.

I.R.C. § 134 Does Not Appear to Be a Solution

The I.R.C. § 134, which provides that "[gross] income shall not include any qualified military benefit," does not appear to afford any relief.[15] When Congress enacted I.R.C. § 134, it listed in the legislative history the benefits it considered nontaxable.[16] Payments for TDY away from the permanent duty station were not listed.[17]

If a benefit was unintentionally omitted from the list, Congress authorized the Secretary of the Treasury to expand the list.[18]

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[10] 37 U.S.C. § 404(a)(1) (1994). Additionally, to deduct travel expenses while away from home, the taxpayer must be absent long enough to require sleep or rest. United States v. Correll, 389 U.S. 299 (1967).

[11] Rev. Rul. 63-64, 1963-1 C.B. 30.

[12] *Id.* at 32. However, the Reservist, unlike the active duty member, may only deduct such expenses to the extent they exceed nontaxable allowances for quarters and subsistence. *Id.* at 31-32. Revenue Ruling 55-572 provides that active duty members need not count nontaxable quarters and subsistence allowances against travel expenses because they are "granted by law independently of whether the member is required to travel and are entirely unrelated to expenses incurred in travel." Rev. Rul. 55-572, 1955-2 C.B. 45, 46. A Reservist receives these nontaxable allowances "in connection with performing his duties at his principal duty station." Rev. Rul. 63-64, 1963-1 C.B. 30, 32. Because the principal place of duty is the location where a Reservist incurs travel expenses, the Reservist may deduct travel expenses only to the extent they exceed any nontaxable quarters and subsistence allowances the Reservist receives. *Id.*

[13] I.R.C. § 162(a) (1994).

[14] H.R. CONF. REP. No. 101-1018, 102d Cong., 2d Sess. 430 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472, 2521.

[15] I.R.C. § 134 (1994).

[16] "The conferees understand that the allowances which were authorized on September 9, 1986, and excludable from gross income on such date are limited to the following: veteran's benefits authorized under 28 U.S.C. sec. 3101 [sic—should be 38 U.S.C. § 3101]; medical benefits authorized under 50 U.S.C. sec. 2005 or 10 U.S.C. secs. 1071-1083; combat zone compensation and combat related benefits authorized under 37 U.S.C. sec. 310; disability benefits authorized under 10 U.S.C. chapter 61; professional education authorized under 10 U.S.C. secs. 203, 205, or 141; moving and storage authorized under 37 U.S.C. secs. 404-412; group term life insurance authorized under 38 U.S.C. secs. 404-412; premiums for survivor and retirement protection plans authorized under 10 U.S.C. secs. 1445-1447; mustering out payments authorized under 10 U.S.C. sec. 771a(b)(3); subsistence allowances authorized under 37 U.S.C. secs. 209, 402; uniform allowances authorized under 37 U.S.C. secs. 415-418; housing allowances authorized under 37 U.S.C. secs. 403, 403a, or 405; overseas cost-of-living allowances authorized under 37 U.S.C. sec. 405; evacuation allowances authorized under 37 U.S.C. sec. 405a; family separation allowances authorized under 37 U.S.C. sec. 427; death gratuities authorized under 10 U.S.C. secs. 1475-1480; interment allowances authorized under 10 U.S.C. secs. 1481-1482; travel for consecutive overseas tours authorized under 37 U.S.C. sec. 411; emergency assistance authorized under 10 U.S.C. secs. 133 and 37 U.S.C. chapter 1; family counseling services authorized under 10 U.S.C. sec. 133; defense counsel authorized under 10 U.S.C. secs. 133, 801-940 or 1181-1187; burial and death services authorized under 10 U.S.C. sec[s]. 1481-1482; educational assistance authorized under 10 U.S.C. 141 and 37 U.S.C. secs. 203, 209; dependent education authorized under 20 U.S.C. sec. 921 and 10 U.S.C. sec. 7204; dental care for military dependents authorized under 10 U.S.C. secs. 1074 or 1078; temporary lodging in conjunction with certain orders authorized under 37 U.S.C. sec. 404a; travel to a designated place in conjunction with reassignment in a dependent-restricted status authorized under 37 U.S.C. sec. 406; travel in lieu of moving dependents during ship overhaul or inactivation authorized under 37 U.S.C. sec. 406b; annual round trip for dependent students authorized under 37 U.S.C. sec. 430; travel for consecutive overseas tours (dependents) authorized under 37 U.S.C. sec. 411b; and travel of dependents to a burial site authorized under 37 U.S.C. sec. 411f." H.R. CONF. REP. No. 99-481, 99th Cong., 2d Sess. 548 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4075, 4636-37.

[17] *Id.*

[18] *Id.*

Although the Department of Treasury has previously ruled that per diem and mileage allowances for TDY travel constitute gross income,[19] one could argue that this was inadvertently omitted. The Treasury has never formally considered this argument.[20]

Application to Military Travellers

In the most common application of these rules to a military traveller, which involves TDY travel of less than or equal to one year, the Defense Finance and Accounting Service does not report travel reimbursements as gross income because they are paid as part of an "accountable plan."[21] In this regard, whenever a taxpayer promptly reports his travel expenses to his employer and is either reimbursed (or paid an advance) for actual expenses under a published per diem schedule, the travel reimbursements are considered part of an "accountable plan." When reimbursements match expenses and accounts are promptly reconciled, the IRS does not require reimbursements to be reported as gross income.

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[19] Rev. Rul. 55-572, 1955-2 C.B. 45.

[20] To constitute a qualified military benefit, the allowance must have been "excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice which was in effect on such date (other than a provision of this title)." I.R.C. § 134 (1994).

In *Jones v. United States*, the Court of Claims rendered the seminal decision on the nontaxability of military allowances. 60 Ct. Cl. 552 (1925). The court distinguished "pay" from "allowances." It ruled "pay" to be of a compensatory character; quarters, because provided in-kind or as a quarters allowance, were not "pay," but rather constituted an "allowance," which is a reimbursement and is not compensation. The court concluded that the allowance for quarters resembled reimbursements for traveling expenses "which it was not even suggested . . . constituted compensation [pay]." *Id.* at 567. The court was "quite firmly convinced that not only are they not allowances of a compensatory character, but they are not income as well." *Id.* In reaching this decision, the court examined allowances paid to Federal judges while away from home. It stated that "[a]llowances of this character are clearly intended as reimbursements and *form no part of the judge's compensation*. *Id.* at 567 (*emphasis added*). The court also looked to other government employees who "receive traveling expenses and fixed sums in lieu of subsistence when away on government affairs." *Id.* It stated that "[c]learly such allowances are for purposes of reimbursement." *Id.* The IRS followed the *Jones* decision when it issued Mim 3413, U-1 C.B 29 (1926) ruling that the per diem meal allowance consituted a subsistence allowance that was not includible in gross income. Inexplicably, however, in Rev Rul. 55-572, 1955-2 C.B. 45, the IRS reversed its position and ruled that per diem was a taxable travel allowance because it was "not . . . within the ambit of the Clifford Jones case." *Id.* Inasmuch as the *Jones* decision was predicated on the nontaxability of per diem and traveling allowances, this ruling was wrong. In 1967, however, in a decision consistent with *Jones*, the Supreme Court stated that "per diem payments when the serviceman is declared in a travel status," paid under 37 U.S.C. §§ 404, 405-412, are excluded from gross income. Commissioner v. Stidger, 386 U.S. 287, 294 (1967).

In addition to the *Jones* and *Stidger* cases, Treasury Regulation § 1.162-17, which was in effect on 8 September 1986, provides that an employee is not required to report travel allowances as income on his return where he accounts to this employer for such expenses and they do not exceed his travel expenses. IRS Publication 463, *Travel Entertainment and Gift Expenses*, as in effect on 8 September 1986, contained essentially the same provision. Additionally, by administrative practice, the Department of Defense has never treated per diem payments as includible in gross income to the extent those payments do not exceed travel expenses. This establishes an administrative and regulatory practice, in effect on 9 September 1986, to exclude payments for military travel from gross income.

I.R.C. § 134 is not superseded by the recent amendment to I.R.C. § 162. I.R.C. § 134 provides that "[g]ross income shall not include any qualified military benefit." I.R.C. § 162 disallows any deduction for traveling expenses while away from home for more than one year. I.R.C. § 134 is concerned with exclusions from gross income; it does not relate to provisions of the I.R.C. which concern deductions. As a result, if per diem payments to military taxpayers are excludable from gross income, an amendment to I.R.C. § 162(a), which relates solely to the deductibility of "travel" expenses, would not supersede I.R.C. § 134. I.R.C. § 134 was an attempt to catalog the ways the military is treated differently and, as such, is much more specific than § 134. According to general rules of statutory construction, § 134, being more specific, takes precedence. In fact, only a subsequent amendment to other I.R.C. sections that address exclusions from gross income could preempt I.R.C. § 134.

In enacting I.R.C. § 134(b)(1)(B) (1994), Congress meant to exclude from gross income certain military benefits that were not otherwise excludable under a provision of the I.R.C. The reference to other provisions of the I.R.C. ensures that § 134 could not be interpreted to perpetuate the nontaxability of military benefits that were excluded from gross income under the authority of some provisions of the I.R.C. that were in effect on 8 September 1986, but that were subsequently repealed, altered, or revised. It also ensures that qualified military benefits do not cease to be qualified military benefits when other provisions of the I.R.C. are enacted that arguably address benefits that are in some respects similar to qualified military benefits. Congress "believ[ed] that rules for the tax treatment of military benefits should be consolidated and set forth in one statutory provision." H.R. Conf. Rep. No. 99-481, 99th Cong., 2d Sess. 548 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4636. It would have been pointless for Congress to create a specific statutory rule for military benefits and to also allow other provisions of the Internal Revenue Code to override it. Section 134 should be viewed as overriding other I.R.C. sections, notably I.R.C. § 61 (which provides "gross income means all income from whatever source derived"). These other sections (unless unequivocally on point), should never be construed to override it. This is consistent with pre-134 cases which held that military allowances remained nontaxable unless "*manifestly* . . . there is some . . . legislative expression that Congress intended to reach out and tax what has continuously been regarded as an allowance . . . ." *Jones*, 60 Ct. Cl. at 552. In addition, had Congress intended the parenthetical language to indicate that other I.R.C. sections would automatically take precedence over § 134, the language should have read: "unless otherwise includible in gross income by any provision of this title."

[21] *See generally* I.R.C. § 62(a)(2)(A) (1994) (allowing employees to deduct certain reimbursed expenses); Treas. Reg. § 1.62-2 (as amended in 1992) (providing the criteria for an "accountable plan").

In the less common application[22] of these rules to a military traveller involving TDY travel of more than one year, all travel reimbursements could constitute gross income and none of the expenses would be deductible.[23] The rules applicable to accountable plans no longer apply when the reimbursement or advance cannot be deducted by the employee.[24]

Blurring the Bright Line—IRS Supplementation of I.R.C. § 162

The IRS has supplemented the bright line rule of I.R.C. § 162 with some guidance that provides, in part, as follows:

> [I]f employment away from home in a *single location* is realistically expected to last (and does in fact last) for 1 year or less, the employment will be treated as temporary in the absence of facts and circumstances indicating otherwise.
>
> If employment away from home in a *single location* is realistically expected to last for more than 1 year or there is no realistic expectation that the employment will last for 1 year or less, the employment will be treated as indefinite, regardless of whether it actually exceeds 1 year.
>
> If employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes.[25]

The Single Location Test

Revenue Ruling 93-86[26] discusses employment at a single location and appears to limit the one-year rule of the statute to those TDYs involving duty at a particular place. That is, under Revenue Ruling 93-86, it appears that employment away from home could exceed one year and still be treated as temporary provided the employment is performed at more than one location. All three examples discussed in Revenue Ruling 93-86, however, involve employment at a single location.

The statute, I.R.C. § 162, does *not* distinguish between employment at a single location and employment at several locations. It simply states, "For purposes of paragraph (2) [which relates to deductions for employment related travel], the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year."[27]

However, the legislative history of the amendment to I.R.C. § 162(a) does make the distinction. It provides the following:

> The conference agreement treats a taxpayer's employment away from home in a *single location* as indefinite rather than temporary if it lasts for one year or more. Thus, no deduction would be permitted for travel expenses paid or incurred in connection with such employment. As under present law, if a taxpayer's employment away from home in a single location lasts for less than one year, whether such employment is temporary or indefinite would be determined on the basis of the facts and circumstances.[28]

A Private Letter Ruling indicates that the IRS recognizes that the one-year rule applies to TDYs performed at a single location

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[22] Although less common, the consequences are more significant as all payments for travel could be deemed gross income without the benefit of any offsetting deduction. Additionally, the potential adverse tax consequence for the service member could force commanders to factor the effect of the I.R.C. into their military decisions. Consequently, the Department of Defense has proposed legislation to allow deployment of military members and civilian employees to temporary duty (TDY) on contingency operations for up to twenty-four months—without facing potential adverse tax consequences.

[23] Whether all or part of the TDY reimbursement is taxable and whether none or some of the TDY expenses incurred are deductible depends on whether the service member could reasonably have foreseen that the TDY would exceed one year when he departed or could not have foreseen that the TDY would exceed one year until after the TDY had commenced. *See infra* note 25 and accompanying text.

[24] Treas. Reg. §1.62-2(d)(1) (1992).

[25] Rev. Rul. 93-86, 1993-2 C.B. 71, 72 (Emphasis added).

[26] *Id.*

[27] I.R.C. § 162(a) (1994).

[28] H.R. CONF. REP. NO. 102-1018, 102d Cong., 2d Sess. 430 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472, 2521 (Emphasis added).

but not to TDYs performed at more than one location.[29] In Private Letter Ruling 9536012,[30] the National Office of the IRS stated:

> Taxpayers who are employed away from home in more than one location are not subject to the 1-year rule of § 162(a). In order for an employee to be considered employed in more than one location, the facts and circumstances must clearly demonstrate that the employee *is required to work regularly* in more than one location.[31]

The *Joint Travel Regulation* is consistent with the IRS's determination in Private Letter Ruling 9536012. It provides that "[a] TDY/TAD [naval equivalent of TDY] assignment at one location for more than one year is considered by the I.R.S. to be permanent in nature and any reimbursement received by the member is taxable income."[32] Additionally, the service member's assignment by temporary duty order to a different location should satisfy the private letter ruling's requirement "that the employee is required to work regularly in more than one location."[33] However, merely sending a service member on a short-term TDY to a different location, followed by a return to the original TDY location, would not likely satisfy this requirement.

What Does Single Location Mean?

No cases nor IRS rulings have defined a "single location" under either current or prior law.[34] Defining a "single location" to mean a city or metropolitan area is supportable by analogous precedent.

Cases decided before the amendment to I.R.C. § 162 generally held that employees who accepted sequential temporary employment in the same geographic area had acquired a new tax home. Consequently, even though *each job* in the geographic area *was temporary*, because the taxpayers performed these jobs in the same geographic area, the employment was not away from home.

In one of these cases, a taxpayer left his residence in Mohawk, New York, to work over a period of about two years at four separate construction sites all within a fifteen mile radius of Passaic, New Jersey.[35] The Tax Court ruled that the taxpayer's principal place of business was Passaic, New Jersey.[36] In so holding, it emphasized that "a mere geographical relocation from one construction site to another does not of itself automatically give rise to a new, separate and distinct job."[37] As a consequence, the taxpayer was not away from home and his expenses in Passaic were not deductible.[38]

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[29] Priv. Ltr. Rul. 95-36-012 (June 7, 1995). Internal Revenue Code § 6110(j)(3) provides that Private Letter Rulings may not be used or cited as precedent. I.R.C. § 6110(j)(3) (1994). Nevertheless, private letter rulings do provide an indication of how the IRS is likely to decide a similar matter and their failure to decide future cases in a similar manner could give rise to a due process and equal protection complaint. The Constitution trumps a statute.

[30] Priv. Ltr. Rul. 95-36-012 (June 7, 1995).

[31] *Id.* (emphasis added).

[32] 1 Joint Fed. Travel Regs. para. U2150 (1 Nov. 93).

[33] *Supra* note 31.

[34] The IRS first announced the single location rule in May of 1993. I.R.S. Notice 93-29, 1993-2 C.B. 311, *amplified by* Rev. Rul. 93-86, 1993-2 C.B. 45. It stated that it intended to provide further guidance and requested comments. *Id.* Several individuals wrote the IRS and asked what was meant by a single location. *See Public Comments on Proposed Regulations*, TAX NOTES TODAY, July 13, 1993, at 28; *Public Comments on Proposed Regulations*, TAX NOTES TODAY, July 16, 1993 at 21; and *Public Comments on Proposed Regulations*, TAX NOTES TODAY, Nov. 5, 1993, at 21. However, when the IRS issued clarifying guidance, the guidance addressed only travel at a single location. *See supra* note 25 and accompanying text. Consequently, I have relied on pre-amendment cases and rulings and one current Private Letter Ruling to determine what "single location" means. No other authority exists.

[35] Garlock v. Commissioner, 34 T.C. 611 (1960).

[36] *Id.* at 616.

[37] *Id.* at 615. *See also* Rev. Rul. 60-189, 1960-1 C.B. 60, 62-63, *amplified by* Rev. Rul. 83-82 1983-1 C.B. 45, *obsoleted in part by* Rev. Rul. 93-86, 1993-2 C.B. 71 "The 'home' of a construction worker is ordinarily at his principal or regular post of duty, which is usually the city or general area in which he customarily or most frequently works." *Id.*

[38] Other cases reaching similar conclusions include *Edge v. Commissioner*, 20 T.C.M. (CCH) 421 (1961) (taxpayer working in Chicago area), and *Wine v. Commissioner*, 29 T.C.M. (CCH) 877, 879 (1970) (taxpayer working in Cleveland area).

In another case, a taxpayer left his tax home and was employed at various sites for approximately two years. In the first year, he was employed for four weeks at Paducah, Kentucky, and for ten weeks at Montague, Michigan. In the second year, he was employed for nineteen weeks at Portsmouth, Ohio, and for eight weeks at Madison, Indiana.[39] The IRS conceded that the taxpayer was away from home temporarily for each of these jobs and challenged only the amount of the deduction claimed.[40]

These cases demonstrate that taxpayers who take sequential temporary jobs within the same general geographic location are not away from home and may not deduct their living expenses (meals, lodging, other ordinary and necessary expenses of conducting business). Similarly, taxpayers who take temporary jobs at different geographic locations are considered away from home and may deduct their living expenses.

Because the IRS has looked to sequential employment at the same general location to determine whether employment is temporary, it should also look to the same general geographic location to determine whether employment is at the same location for purposes of applying the one-year rule of I.R.C. § 162(a).

Consequently, if a soldier is sent TDY to one location for eight months (and reasonably expects to be there no more than one year) and after that eight month period is sent to another TDY site in a different geographic area (that is, at least to a different city not within commuting distance of the first location) with a reasonable expectation of being at the second location for a period of one year or less, payments received for the TDY should continue to be considered made under an accountable plan and should be nontaxable.

In Private Letter Ruling 9536012,[41] the IRS appears to have adopted this standard. In holding that the one-year rule of I.R.C. § 162(a) did not apply to taxpayers who are away from home in more than one location, it allowed a taxpayer to deduct travel expenses incurred in the two cities in which he regularly worked. The ruling spoke only in terms of hypothetical cities and did not discuss the distance between them. However, this letter ruling and prior case law support the proposition that geographically separate cities, which are at least beyond commuting distance of each other, constitute separate duty sites.[42]

Conclusion

Temporary duty payments received by members of the armed forces generally do not constitute taxable income. Because TDY payments are made under an accountable plan, they are not reflected on a service member's IRS Form W-2 and the service member does not report them as income.

Contingency operations, however, present special problems for the military traveller. Service members are frequently ordered TDY on contingency operations. Although service members may expect to return within one year, the needs of the operation may require them to remain at the TDY location for more than one year.

The one-year rule of I.R.C. § 162(a) provides that any absence from home (permanent duty station), at a single location for over one year, is not temporary. If the absence is not temporary, all reimbursements are taxable and none of the expenses incurred are deductible (at least from the point that the TDY was reasonably likely to exceed one year).[43]

Consequently, service members sent TDY for over one year at a single site may find that all payments for TDY constitute taxable income. Commanders (and their legal advisers) must be sensitive to this potential tax burden and whenever possible recommend that a service member's TDY at one location not exceed twelve months. If, for unanticipated reasons, it appears that a service member's TDY will exceed twelve months, commanders (and their legal advisers) should strongly consider sending the soldier to a different geographic area beyond the commuting distance of the original TDY site to perform the remainder of the TDY mission.

As can be seen, the tax code has the potential to affect military decisions. To remedy this, the Department of Defense has submitted a legislative initiative to change the one-year rule of I.R.C. § 162 to allow members of the armed forces to serve on temporary duty in contingency operations for up to twenty-four months without facing these adverse tax consequences. Although commanders need to be aware of these potential consequences, military necessity, not the potential tax liability of the service

[39] Steele v. Commissioner, 18 T.C.M. (CCH) 793 (1959).

[40] *Id.*

[41] Priv. Ltr. Rul 95-36-012 (June 7, 1995) (involving employees elected to serve as representative to a union).

[42] *Id.*

[43] *See supra* note 23 and accompanying text.

member, should control any decision. Nevertheless, commanders are still likely to consider I.R.C.§ 162 in making some decisions and this will likely lead to some interference with military missions.

The twelve month limitation in the current law will cause service members to report all reimbursements for lengthy TDYs as income. The same limitation causes the expenses incurred by the service member to be nondeductible. Consequently, even though the service member was reimbursed only for actual expenses and has no extra money to pay taxes with, he will be taxed as if the reimbursements constituted military pay. If the service member has been receiving per diem while living in a high cost area for over a year, his reimbursements could total over $100,000. Requiring him to pay tax on that income at rates of twenty-eight percent or higher will be devastating. Additionally, military members leave family behind during such absences and continue to pay the expenses incurred by that family (rent, utilities, etc.) during the period of temporary absence. To suddenly be faced with the additional tax burden caused by the one-year rule of I.R.C. § 162(a) will magnify this hardship.

For the service member, a lengthy deployment on a contingency operation is a temporary absence from home and merits allowing the service member to deduct TDY expenses incurred during the absence.

Arguably, the unique nature of military duty fully justifies expanding the period treated as a temporary absence from home to twenty-four months so that service members are not unfairly burdened by additional tax liability imposed by current law and that military missions are not affected by provisions of the I.R.C.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Requiring Experts for the Obvious: CAAF Calls for Expert Testimony to Establish MRE 412 Relevance

The Sixth Amendment right of confrontation[1] was dealt another blow recently in a case involving Military Rule of Evidence (MRE) 412,[2] commonly called the "rape-shield" rule. In *United States v. Sanchez*,[3] the United States Court of Appeals for the Armed Forces (CAAF)[4] took a restrictive view of the type of evidence which is "constitutionally required" to be admitted as an exception to MRE 412.[5] Though there were two concurring opinions, all the judges agreed that the evidence proffered by the defense did not qualify for admission and the trial court did not err in declining to conduct a hearing in excluding the evidence.

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[1] The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (1995 ed.) [herinafter MCM]. The rule generally prohibits the introduction of evidence of a sexual offense victim's past sexual behavior except in limited circumstances. It was designed to counteract the trend in sexual offense cases of trying the victim by asking embarrassing and harassing questions. The rule also avoids confusing the fact finder with irrelevant evidence and wasting the court's time. STEPHEN A. SALZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 520 (1991 ed).

[3] 44 M.J. 174 (1996).

[4] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub.L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review (codified at 10 U.S.C. § 941 n. (1995) and 10 U.S.C. § 866 n. (1995), respectively). The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals.

[5] As the court pointed out, the version of the rule in effect at the time of trial was the version contained in the 1994 edition of to the *Manual for Courts Martial*. *Sanchez*, 44 M.J. at 177 n.4. All references in this discussion will be to the 1994 version of the rule; subsequent changes to the rule do not affect the issue involved here. For an excellent discussion of the changes to Military Rule of Evidence 412 as a result of the Violent Crime Control and Law Enforcement Act of 1994, see Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offenses and Child Molestation Cases*, ARMY LAW., Mar. 1996, at 82.

Military Rule of Evidence 412 has three subsections. The first section sets out the general rule that reputation or opinion evidence of a victim's past sexual behavior is not admissible in any nonconsensual sex case. MCM, *supra* note 2, MIL. R. EVID. 412(a) (1994 ed.). The second section describes those exceptions where evidence of a victim's past sexual behavior other than reputation or opinion evidence, is admissible. *Id.* MIL. R. EVID. 412(b). The final section of the rule describes the procedures to follow in order to admit such evidence. *Id.* MIL. R. EVID. 412(c).

One of the exceptions to the general rule proscribing past sexual behavior evidence involves evidence that "is constitutionally required" to be admitted. *Id.* MIL. R. EVID. 412(b)(1).

The facts essentially resemble a "date rape" scenario.[6] The accused, who was married, was friends with a female service member. He socialized with her on several occasions and often drove her home from the NCO club.[7] One night he drove her back to her barracks and followed her into her room.[8] They spoke for a few moments and then the victim asked the accused to leave. After he refused and locked the door instead, the accused made sexual advances, which the victim rebuffed. The victim then entered her adjoining bathroom to take a shower and told the accused to leave.[9]

Upon her return, she found the accused still there. The accused threw her on the bed, removed her underwear, and raped her.[10] After the rape, the accused fixed his clothes, laid down beside the victim and fell asleep.[11] The victim then called a male friend, Sergeant Brooks, and went to his room. The victim told Sergeant Brooks only that the accused would not leave her room. Sergeant Brooks called the security police who found the accused in the victim's room.[12]

The defense theory was that the sex was consensual. The accused testified that he and the victim had kissed on several previous occasions. He also indicated that they had discussed their feelings for each other and that the victim had told him that he was not ready for her yet. On this night, the accused maintained, the victim said that the accused was "ready for her."[13] The defense of consent was further bolstered by the accused's testimony that they had intercourse several times that night, including one occasion when the victim was on top. After they completed their lovemaking, the accused said he took a shower and got dressed. At this point, the accused claimed that the victim started to harass him about the fact that he was married. The accused responded that the sex was no big deal. According to the defense theory, this both annoyed and shamed the victim. She then sought sympathy from Sergeant Brooks who called the police. Once the police responded, she allegedly lied about the rape to protect her reputation and her ego.[14]

To advance its theory, the defense sought to admit the following: (1) the victim had one-night stands with five to ten other airmen and the majority of the time they met at the NCO club; (2) afterwards, the victim would call friends and express regret over her poor self-image; (3) the victim had sex with Sergeant Brooks the week before; and (4) after sex with the accused, the victim went to Sergeant Brooks looking for sympathy but did not report a rape.[15] The defense contended that this evidence showed a pattern to the victim's behavior. The victim would sleep with various people indiscriminately, suffer feelings of guilt, and then confide in friends. After sleeping with the accused, when she was faced with his cavalier attitude that this was just a one-night stand, she again responded with self-pity. When Sergeant Brooks unexpectedly called the security police, she fabricated the rape to protect her reputation and portray herself as a victim.[16]

The military judge found insufficient evidence in the defense's offer of proof to justify admission of evidence of the victim's one-night stands. He held that the information about the one-

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[6] "Date rape" is a term often used to "describe forced, coercive sex occurring between persons who know each other." Allison West, *Tougher Prosecution When the Rapist is Not a Stranger: Suggested Reform to the California Penal Code,* 24 GOLDEN GATE U.L. REV. 169, 172 n.4. (1994).

[7] *Sanchez,* 44 M.J. at 175. They often talked and danced together at the club where they initially met one month prior. United States v. Sanchez, 40 M.J. 782, 783 (A.F.C.M.R. 1994).

[8] *Sanchez,* 44 M.J. at 175. According to the victim, she did not invite the accused into her room.

[9] *Id.* After showering, the victim put on underwear, a nightgown, and a bathrobe.

[10] *Id.* at 176.

[11] *Sanchez,* 40 M.J. at 785.

[12] *Sanchez,* 44 M.J. at 176.

[13] *Id.*

[14] *Id.* at 181-82.

[15] *Id.*

[16] *Sanchez,* 40 M.J. at 783-84.

night stands was vague[17] and that there was no showing that the accused knew about it before he had sex with the victim.[18] The judge convicted the accused of rape and the Air Force Court of Military Review affirmed.[19]

The CAAF focused its opinion on the balancing between the purpose of the "rape-shield" rule in protecting victims from harassment and invasions of privacy, and the dual guarantees of the Sixth Amendment to confront witnesses and to have compulsory process to obtain witnesses.[20] The CAAF then discussed several situations where limitations on the Sixth Amendment were rejected.[21] The CAAF compared the situation at bar with cases where the defense wanted to introduce evidence simply to portray the victim as a "loose woman."[22]

Judge Crawford concluded the lead opinion by pointing out that just because a woman has sex with others does not make it any more likely that she consented to sex with the accused.[23] She added, however, that if this prior sexual behavior were more similar to the events in the case at bar, then the result might be different. Because the acts sought to be admitted by the defense were not similar to the incident with the accused, nor were they distinctive in any manner, the evidence was not constitutionally required to be admitted.[24]

Expert Testimony Lacking

Senior Judge Everett wrote a concurring opinion to explain in greater detail how the defense offer of proof failed.[25] Judge

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[17] *Sanchez*, 44 M.J. at 176. The victim had not alleged rape before. Also, in response to the judge's question concerning the time frame of the one-night stands, the defense said that they were within the previous six to eight months.

[18] *Sanchez*, 40 M.J. at 786. The basis for the judge's ruling is not altogether clear, as the Air Force Court of Military review pointed out. *Id.* at 785. In response to the defense argument that the information affected the victim's credibility, the judge concluded cryptically that "credibility alone 'does not flow well.'" *Sanchez*, 44 M.J. at 176. On the other hand, the judge allowed the defense to present evidence about any previous conversations the victim and the accused had concerning sexual activities. The judge also allowed the defense to cross-examine Sergeant Brooks about his relationship with the victim, under the rationale that this could show potential bias on his part. *Id.*

[19] *Sanchez*, 40 M.J. at 786.

[20] *Sanchez*, 44 M.J. at 178. The court pointed out that the Supreme Court recognized that states can enact rape-shield rules to provide more protection to rape victims. *Id.* (citing Michigan v. Lucas, 500 U.S. 150 (1991)). Such rules may be upheld despite some infringement of the accused's Sixth Amendment right to confront witnesses and present a defense. *Id.*

[21] *Id.* at 179 (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974); United States v. Gray, 40 M.J. 77 (1994)). In *Chambers v. Mississippi*, the Supreme Court held that it was error to exclude statements made by another man to his friends confessing to a murder with which the defendant was charged. 410 U.S. 284, 302 (1973). Additionally, prohibiting the defense from cross-examining this man about his confession and repudiation of it, based on a state rule barring impeachment of one's own witness, violated the right of confrontation. *Id.* at 298. In *Davis v. Alaska*, the trial court prohibited the impeachment of a government witness using his juvenile record and probation status. 415 US 308, 311 (1974). The defense wanted to show that the witness incriminated the defendant to shift attention away from himself as a suspect or from police pressure and concern over a revocation of his probation. *Id.* Finding a violation of the defendant's right to confrontation, the Court held that the interest of the state in protecting records of juvenile offenders was outweighed by the defendant's constitutional right of confrontation in the form of cross-examining an adverse witness for bias. *Id.* at 320.

In *United States v. Gray*, the Court of Military Appeals held that it was error for the judge to exclude evidence that the nine year-old victim of indecent acts had previously engaged in oral sex with another girl. 40 M.J. 77, 80 (C.M.A. 1994). The defense contended that such acts illustrated how the girl had obtained sexual knowledge that might otherwise be blamed on the accused's conduct.

On the other hand, the United States Court of Appeals for the Armed Forces (CAAF) pointed out that evidence was constitutionally required in cases where the past sexual behavior evinced a motive to fabricate out of feelings of anger or revenge or to explain to a boyfriend why the victim was with another man. *Sanchez*, 44 M.J. at 174 (citing United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983); Olden v. Kentucky, 488 U.S. 227 (1988)).

[22] The CAAF compared the facts to those present in United States v. Greaves, where the defense sought to introduce evidence that the victim "worked at a Japanese bar, dressed provocatively, and made good money." 40 M.J. 432 (C.M.A. 1994), *cert. denied*, 115 S.Ct. 907 (1995). Such evidence was irrelevant on the issue of whether the accused believed the victim consented to have sex. *Id.* at 438.

[23] *Sanchez*, 44 M.J. at 179. Judge Crawford noted that this is exactly why MRE 412 was designed. *But see* United States v. Jensen, 25 M.J. 284 (C.M.A. 1987) (evidence that victim previously engaged in sex with another soldier corroborated accused's belief that sex with the other soldier on this night was consensual and that victim was willing to have sex with him as well).

[24] *Sanchez*, 44 M.J. at 180. Chief Judge Cox joined with Judge Crawford in the lead opinion. In a concurring opinion, Judge Sullivan limited himself to the narrow issue in the case whether the evidence was constitutionally required. He agreed with Judge Crawford that it was not, because the prior sexual conduct did not include any allegations of rape. Judge Sullivan criticized the broad sweep of the lead opinion. *Id.* at 180-81 (Sullivan, J., concurring).

[25] *Id.* at 181-83 (Everett, S.J., concurring). Judge Gierke joined with Senior Judge Everett.

Everett pointed out that the defense failed to show how the victim's prior sexual acts supported its theory that the victim had a motive to fabricate a rape claim. Support could have been provided by an expert, according to Judge Everett, echoing a theme espoused by the lower court.[26] He concluded that, although the defense theory was clear, it was too speculative without expert testimony to tie it together.

The "constitutionally required" exception to MRE 412 has been the most contentious aspect of the rule, to a great extent because the term is not well defined. Some also have observed that it is unnecessary because any rule that runs afoul of the Constitution will be deemed invalid.[27] The *Sanchez* opinion provides some of the guidance missing from the rule. As such, *Sanchez* should assist practitioners in determining when evidence of prior sexual conduct can be admitted.[28]

One of the lessons of *Sanchez* relates to the offer of proof. Defense counsel seeking to introduce MRE 412 evidence should clearly articulate how the evidence directly supports their theory of the case.[29] Appellate courts should not have to speculate, as they did in *Sanchez*, about the theory of admissibility. When arguing for admission of such evidence, counsel also should consider alternative theories. Defense counsel who do not consider, at a minimum, how the sexual acts could relate to motive to fabricate, bias, or could be used as impeachment, have not fully explored ways to avoid the limitations of MRE 412.

Another important aspect of *Sanchez* is the CAAF's emphasis on the absence of expert testimony to rule that the defense made an inadequate showing of admissibility. Defense counsel must now use *Sanchez* to request that the government hire an expert to provide the testimony the CAAF found lacking. A scenario in which a woman has a series of unfulfilling one-night stands, expresses regret after each one, is similarly ashamed of her latest liaison with a married man, and the sexual encounter is reported to authorities, is not uncommon. Defense counsel might be tempted to argue that common sense suggests that such a woman could have a strong motive to falsify a rape claim. *Sanchez* tells us that such an argument is too speculative without supporting expert testimony. An expert in the field of psychology who specializes in sexual behavior must make this connection.

Trial counsel, on the other hand, should listen carefully to the defense theory of admissibility of prior sexual acts evidence. If it does not make sense or if the theory has inadequate support, challenge the defense argument that the prior acts do not relate to what the accused did and thought in this particular case. Recall that the victim's prior sexual conduct is only relevant in the relatively rare circumstances when it was known to the accused and it affected the accused's perception of the victim or it reflects the victim's motive to fabricate. Force the defense to justify the hiring of the expert, and if that fails, line up your own expert to rebut the defense testimony.

It is clear that encanting the talismanic "constitutionally required" language of MRE 412 will no longer be accepted by courts increasingly protective of victims' rights. Counsel must have a cogent explanation of how the victim's prior sexual acts relate to what the accused did and was thinking with the victim. Expert testimony may very well be needed, and the government can expect to see an increase in requests for experts to testify about human behavior. Defense counsel must remember that only aggressive development of all the facts on the record may salvage the accused's dwindling right to confront the witnesses against him. Major Wright.

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[26] *See Sanchez*, 40 M.J. at 784 ("expert testimony is essential to establish the relevance between the motive to lie and the prior consensual behavior").

[27] SALZBURG, *supra* note 2, at 522 (noting, however, that inclusion of such language puts practitioners on notice of the constitutional implications).

[28] Additional guidance can be found in *United States v. Dorsey* where the Court of Military Appeals set out the following test to determine the impact of excluding MRE 412 evidence: (1) Is the information relevant to prove a fact asserted by the defense? (2) Is the information material, or of consequence, to the question of guilt or innocence? (3) Is the information favorable to the defense? (4) Does the probative value of the evidence outweigh the danger of unfair prejudice? 16 M.J. 1 (C.M.A. 1983). Although the court used the test in *Dorsey* as an appellate tool to determine whether the accused's constitutional rights were violated by the exclusion of the evidence, the analysis also may provide a helpful framework for structuring arguments at the trial level.

[29] Note that the latest change to MRE 412(c)(2) now requires that notice be in writing and be given 14 days before trial. *See* MCM, supra note 2, MIL. R. EVID. 412(c)(2) (1995 ed.); Henley, *supra* note 5, at 84.

The Cost of Presenting "Good Soldier" Evidence:

Testing the Foundation of Character Testimony on Cross Examination

Military Rule of Evidence 404(a) codifies the basic rule that evidence of an accused's character or character traits is not admissible to prove that he or she acted in conformity with that trait on a particular occasion.[30] Not all evidence of the defendant's character, however, is excluded. Rule 404 also sets forth important exceptions where the basic rule does not apply. One exception is that the accused can call witnesses to testify concerning his own pertinent character traits to show that he is unlikely to have committed the charged offense.[31]

Military courts have considered evidence of such pertinent character traits as impulsivity, low tolerance of frustration, subaverage anticipation of consequences,[32] truthfulness,[33] morality,[34] lawfulness,[35] heterosexuality,[36] peacefulness,[37] sobriety,[38] trustworthiness,[39] and law-abidingness.[40]

The accused's good military character may also be a pertinent trait if there is a nexus, however strained or slight, between the circumstances of the crime and the military.[41] The defense often will present a "good soldier" defense by offering evidence of the accused's military service. This evidence can, if effectively presented, be extremely persuasive.[42] However, in *United States v. Brewer*,[43] the United States Court of Appeals for the Armed Forces (CAAF) has again cautioned counsel that such "good soldier" evidence may come at a high price.[44]

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[30] Military Rule of Evidence 404 provides, in part:

> *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion.

MCM, *supra* note 2, MIL. R. EVID. 404(a) (1995 ed.).

[31] Evidence of a pertinent character trait of the accused offered by the accused is admissible to prove that he or she acted in conformity therewith on a particular occasion. *Id.* at 404(a)(1).

[32] United States v. Viola, 26 M.J. 822 (A.C.M.R. 1988).

[33] United States v. Everage, 19 M.J. 189 (C.M.A. 1985).

[34] United States v. Stanley, 15 M.J. 949 (A.F.C.M.R. 1983).

[35] United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984).

[36] United States v. Gagan, 43 M.J. 200 (1995).

[37] United States v. Shields, 20 M.J. 174 (C.M.A. 1985).

[38] United States v. Reveles, 41 M.J. 388 (1995).

[39] United States v. Eliot, 23 M.J. 1 (C.M.A. 1986).

[40] United States v. Clemons, 16 M.J. 44 (C.M.A. 1983).

[41] "The Drafter's Analysis makes clear that, whatever the term 'trait' means, 'good military character' is a 'trait.'" United States v. Vandelinder, 20 M.J. 41, 44 (C.M.A. 1985). Further, in light of *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), and the Court of Military Appeals' conclusion that conduct committed under the enumerated articles is per se either prejudicial to good order and discipline or is service discrediting behavior, an argument can be made that this nexus requirement is now satisfied in every case.

[42] In *United States v. Wilson*, Judge Sullivan observed: "The well-recognized rationale for admission of evidence of good military character is that it would provide the basis for an inference that an accused was too professional a soldier to have committed offenses which would have adverse military consequences." (Citations omitted). 28 M.J. 48, 49 n.1 (C.M.A. 1989).

[43] 43 M.J. 43 (1995).

[44] *See, e.g.*, United States v. Baldwin, 37 C.M.R. 336 (1967) (to test the basis of their testimony, a defense character witness may be interrogated with respect to rumors or reports of particular acts imputed to the accused); United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982) (government may cross-examine a witness about his knowledge of an accused's prior acts of misconduct without introducing evidence of their existence).

The charges against Air Force Major Jay Brewer arose from his sexual relationship with a female enlisted airman and his attempt to cover it up.[45] At trial, Brewer did not contest the existence of his personal relationship with the enlisted airman but did deny that he attempted to cover it up.[46] To refute the allegation that Brewer had impeded the investigation, the defense called three witnesses to testify concerning his character and his exceptional professional performance. Trial counsel sought to impeach one of these character witnesses, Lieutenant Colonel Carrier, by exposing Carrier's limited knowledge of Brewer's conduct after the time they served together.

On appeal, Brewer raised issues which pertained to the trial counsel's cross-examination of Carrier.[47] On direct examination, Carrier testified that he had daily contact with Brewer when he was Brewer's squadron commander in Korea from 1987 to 1988. Carrier testified that, *during this time*, Brewer "did a superb job" and that he had observed no problems in Brewer's duty performance.[48]

On cross-examination, trial counsel established that Carrier had no contact with Brewer since their service together ended in 1988, that Carrier did not know that Brewer was a squadron

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[45] *Brewer*, 43 M.J. at 44. Brewer had entered into this clandestine affair beginning in November 1990; it lasted until discovery in January 1991. While Brewer admitted the relationship, he denied impeding the criminal investigation and further denied telling a subordinate to keep his knowledge of the tryst secret. Brewer was convicted of conduct unbecoming an officer and making a false official statement. The adjudged sentence of a dismissal and a $1000 fine was approved by the convening authority. *Id.*

[46] *Id.*

[47] The issues addressed by the CAAF were: (1) whether trial counsel can cross-examine a defense character witness about alleged conduct not falling within the time period for which the witness based his opinion and (2) whether a defense counsel's direct examination about an accused's favorable duty performance opens the door to cross-examination on specific acts bearing on overall good military character. *Id.* at 43-44.

[48] Defense counsel's direct examination of Carrier, a veteran with 19 years of service, proceeded, in part, as follows:

> Q. And how did he perform his duties during that period?
>
> A. He did a superb job.
>
> Q. Weren't there any problems at all noted in his duty performance?
>
> A. None whatsoever.
>
> Q. During the contact - during the time that you knew him, did you form an opinion as to his character for telling the truth?
>
> A. I felt he was extremely honest and of high moral character.

Id. at 44.

commander, and that Carrier did not know that Brewer's wife had divorced him. Trial counsel then attempted to elicit additional concessions from Carrier by asking whether he knew that Brewer had socialized excessively with other female enlisted members during the summer of 1990.[49]

Defense counsel objected to this question on the ground that it was beyond the scope of direct examination.[50] Defense coun-

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[49] Trial counsel's cross-examination to test the "quality and accuracy" of Carrier's favorable character evidence proceeded as follows:

Q. And your opinion concerns his officership and truthfulness and good military character, is that right?

A. That's right.

Q. Were you aware, or did you know that Major Brewer was faced with similar problems when Colonel Peterson was the wing commander —

DC: I am going to object, Your Honor, this goes clearly beyond anything brought out in direct examination.

TC: That's the basis for the opinion, Your Honor, they opened the door to good military character.

DC: We opened the door for the period in which this witness knew him. This witness has already—

MJ: Well, Captain Bartlemay, if we are going to limit his testimony to that period, it's not relevant, unless you are trying to connect it to him today.

DC: Your Honor, the witness has further already testified he hadn't had any contact with the accused during the time frame that the trial counsel is going into.

MJ: I will overrule the objection.

TC: Did you know that Major Brewer was faced with a similar situation last summer when Colonel Peterson was the wing commander?

WIT: No. I stated that I have had no contact with Major Brewer since I left Korea in 1988.

Q. Are you aware of the difficulties that he had concerning excessive socializing with enlisted members and a subordinate officer since removal from his squadron last summer, were you aware of that?

A. No.

Q. If you knew that went on, would that change your opinion about his good military character?

A. I would have to know that that's a fact.

Q. And did you know—if you knew that he was in fact socializing with an enlisted woman, not in his squadron, that they worked out together regularly at the gym; that he met her for meals on base and off base; that he met her at parties where other enlisted members were present; that they hugged and kissed at these parties; that they had sexual intercourse at his house on several occasions; that he met her or encountered her at a bar one night; that they had sexual intercourse in his truck in a residential area; if you knew that, would that affect your opinion about his good military character?

DC: I'm going to object again, Your Honor. I only asked him concerning his duty performance during 1987 and 1988. I did not ask any general officership questions of this witness.

TC: His duty performance is only relevant to the issue of good military character and they have opened the door by that line of questioning.

MJ: Well, it is true that the direct was limited to duty performance and for truthfulness.

TC: The duty performance is not relevant

MJ: I will overrule the objection.

TC: Please answer the question.

WIT: Okay, I'll tell you, the truth, it probably wouldn't affect my opinion too much.

Q. So, even if you knew all that, you'd still have the same opinion about his officership?

A. For the time frame that he worked for me.

Q. That really doesn't answer the question. Do you have an overall opinion of him or do you have an opinion or do you have an opinion that is separated into time frame?

A. Well, I have . . . my opinion is based on the time period that I knew Jay Brewer.

Q. Okay. If you base your opinion on the time frame that you knew Jay Brewer and the additional matters that I have presented to you, then what would your opinion be?

A. It wouldn't change much. I still think he is a fine man.

Id. at 45-46.

[50] *Id.*

sel argued that he had opened the door to cross-examination only with respect to the period of time during which Carrier had served with Brewer.[51] The CAAF admonished the trial counsel's use of a hypothetical question incorporating the circumstances of the charged offense to test a good character witness's opinion, noting that it is not permissible to challenge defense character testimony by asking whether the charge then before the court-martial would affect the witness's opinion. Because the defense did not object to this line of questioning, the issue was waived.[52]

Defense counsel also objected on the basis that any cross-examination should be limited to questions relating to duty performance because he asked only about duty performance on direct examination.[53] Trial counsel responded that Brewer's duty performance was relevant only to the extent that it reflected his good military character. The trial counsel argued that the government was, therefore, entitled to inquire as to the basis for Carrier's knowledge of Brewer's character.[54] The military judge overruled both objections and Carrier testified that he was unaware of the additional allegations.[55]

On appeal, Brewer first claimed that trial counsel cannot, in testing the foundation of good character testimony,[56] refer to specific instances of conduct not committed during the period on which the witness bases his or her opinion.[57] The CAAF rejected this "artificial limitation"[58] of character witness cross-examination to the time during which the witness knew the accused. The court noted that the character with which Military Rule of Evidence 405 is concerned is the accused's character at the time of the commission of the crime.[59] The CAAF held, therefore, that instances of an accused's conduct occurring between the time the character witness knew the accused and the time the crime was committed are relevant "on the question whether, as the direct testimony would imply, [an accused] had the same character traits when the charged crime occurred as when the witness knew him."[60] In this context, specific instances of conduct that occur between the time of the crime and when the witness knew the accused are relevant.[61]

Brewer also claimed that the evidence of excessive socializing with enlisted members was not relevant to Carrier's testimony regarding Brewer's duty performance. "Defense counsel argued that he had limited his questioning to duty performance and did not ask any general officership questions of the witness."[62] The CAAF noted, however, that the only possible relevance of duty performance testimony in this case would have been "the extent to which that translate[d] into good military character, both generally and as an officer."[63] That being the case, trial counsel's questions on cross-examination concerning

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[51] *Id.* at 45.

[52] *Id.* at 47 n.2.

[53] *Id.* at 45.

[54] TC: The duty performance is not relevant to any charges before this court, except that it bears upon his good military character and officership, and by attempting to prove good military character and officership they have opened the door through questioning this witness about the basis of his opinion about Major Brewer's character.

Id.

[55] In the end, notwithstanding trial counsel's persistent cross-examination, Carrier would not change his opinion stating, "I still think [Major Brewer] is a fine man." *Id.* As a practical matter, Carrier's unwillingness to concede was inconsequential; the trial counsel had already elicited sufficient evidence to argue that Carrier's opinion lacked any objectivity, was unrealistic, and, indeed, was not worthy of any weight.

[56] Generally, once a proponent introduces good character evidence, opposing counsel may challenge the foundation of that witness's reputation or opinion testimony by asking whether he or she is familiar with or aware of specific acts that logically bear upon the character trait at issue. MCM, *supra* note 2, MIL. R. EVID. 405(a) (1995 ed.).

[57] Here, Carrier's testimony concerned Brewer's duty performance in 1987-88. The alleged excessive socializing with enlisted members occurred in 1990.

[58] *Brewer*, 43 M.J. at 47.

59 *Id.* (citing SALTZBURG, *supra* note 2 at 496). In overruling this objection at trial, the military judge had said that Carrier's favorable opinion of Brewer was "not relevant, unless [the defense counsel] was trying to connect it to [Brewer] today." *Id.* at 45. The theory of relevance would be that Brewer was a top-notch officer in 1987-88, remained a top-notch officer thereafter, and top-notch officers do not lie and deceive. *Id.* at 46.

[60] *Id.* (citation omitted).

[61] *Id.*

[62] *Id.*

[63] *Id.*

excessive socializing were relevant. By eliciting testimony from Carrier regarding Brewer's duty performance, defense counsel opened the door to cross-examination regarding Brewer's good military character and overall officership.

The holding in *Brewer* restates an important lesson[64] for the trial practitioner. The defense may pay a high price for testimony regarding the accused's duty performance and other evidence of good character. Such evidence may open the door to damaging cross-examination despite a careful attempt to limit the scope of the questions on direct examination. Once the door is open, trial counsel can inquire as to the basis of good character testimony by asking whether the witness is aware of uncharged misconduct committed by the accused *after* the period during which the witness formed his opinion.[65] Trial counsel's cross-examination will not be limited to the time period that was the subject of the testimony on direct examination.[66] Further, it now appears that trial counsel can cross-examine defense witnesses on general military character and officership even where defense counsel limited his direct examination to favorable testimony regarding duty performance[67]

Judge advocates should read *Brewer* both to understand the trial counsel's broad latitude to inquire into specific acts of misconduct in impeaching a character witness and to receive an excellent overview of the use of character evidence in courts-martial.[68] Majors Long and Henley.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Notes

The Fair Debt Collection Practices Act Applies to Bad Checks

In a recent letter ruling, the Federal Trade Commission (FTC) reaffirmed its position that the Fair Debt Collection Practices Act (FDCPA) applies to collection actions based on checks returned for insufficient funds, the so-called "bad checks."[69] The petition to the FTC involved a law firm that offered debt collection services. The firm had moved to quash civil investigative demands (CIDs) issued by the FTC.[70] One of the grounds for quashing the CIDs was that the FDCPA did not apply to the collections in question because the actions related to bad checks. The firm argued that bad checks were not debts under the FDCPA because the businesses had no intention to extend credit to the consumers when they accepted the checks.

The FTC Commissioner decided that the case relied on two FDCPA definitions. The first is the definition of a creditor, which is a person or entity who either "offers or extends credit creating a debt *or* to whom a debt is owed."[71] The second is the definition of a debt, which is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes."[72] Combining these definitions, the FTC Commissioner held that "a creditor is one to whom a consumer

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[64] *See, e.g.*, United States v. Pearce, 27 M.J. 121, 124 (C.M.A. 1988) (cross-examination of defense character witness concerning events occurring in between the time the witness knew the accused and the date of the charged offense is permissible).

[65] It should be noted that a trial counsel may still not introduce extrinsic evidence of an accused's misconduct if offered solely to rebut an accused's character testimony. MCM, *supra* note 2 at, MIL. R. EVID. 404(A) (1995 ed.). As such, other than conviction of a crime, a trial counsel is bound by a witness's answer concerning awareness of uncharged acts committed by the accused and may not prove such conduct through extrinsic evidence unless the acts show bias, prejudice, or a motive to misrepresent. *Id.* MIL. R. EVID. 608(B)-(C). United States v. Pruitt, 43 M.J. 864 (A.F. Ct. Crim. App. 1996).

[66] *Brewer*, 43 M.J. at 50.

[67] The outcome of *Brewer* is not surprising in light of the United States Supreme Court's recognition that "[t]he price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 479 (1948).

[68] Judge Crawford's concurring opinion provides an especially good discussion of character evidence and its use in courts-martial practice. Among the issues she attempts to clarify are the scope of character evidence, the methods of proving character, and the forms of the questions used to impeach character witnesses. *Brewer*, 43 M.J. at 48-51.

[69] Priv. Ltr. Rul. 952-3127 (Apr. 30, 1996), *reprinted in* Consumer Credit Guide (CCH) ¶ 83,707 (Jun. 18, 1996) [hereinafter "Letter Ruling"].

[70] Civil Investigative Demands are a form of compulsory process granted to the Federal Trade Commission in the Federal Trade Commission Act, 15 U.S.C.A. § 45 (1973 & Supp. 1996). They allow the FTC to force the release of information needed for its investigations.

[71] 15 U.S.C. § 1692a(4)(1988) (emphasis added).

[72] *Id.* § 1692a(5).

owes a monetary obligation for goods or services intended for household or personal use. To the extent that an NSF check [Nonsufficient Funds Check] was written by a consumer for goods or services intended for household or personal use, the continuing obligation to pay constitutes a debt under the FDCPA, and . . . actions to collect such debts are covered by the FDCPA."[73]

This position is not new. Previously, the FTC cited as an example of a debt under the FDCPA, "[a] dishonored check that was tendered in payment for goods or services acquired or used primarily for personal, family, or household purposes."[74] Still, the ruling is significant because it specifically answers a challenge to the position expressed in the FTC's nonbinding commentary.

For the practitioner, the FTC's ruling establishes that all FDCPA protections apply to the collection of obligations arising from bad checks if the requirements of the FDCPA are met. These requirements are: (1) that the person conducting the collection is a "debt collector;"[75] (2) that the obligation in question is to pay money; and (3) that the underlying transaction is for money, property, insurance, or services which are primarily used for personal or household purposes.[76]

The decision is particularly useful to the legal assistance practitioner because many of the debts that soldiers incur result from checks returned for insufficient funds. If the obligation has been turned over to a debt collector, legal assistance attorneys should use the FDCPA to help protect their clients' interests. Remember, however, that the definition of "debt collector" under the FDCPA specifically excludes "any officer or employee of the United States or any State" so long as "collecting or attempting to collect [the debt] is in the performance of his official duties."[77] While this excludes collections by the Army and Air Force Exchange Service from the provisions of the FDCPA, the Act still offers valuable protections in collection actions originated by off-post check cashing services and other businesses. Major Lescault.

Mailing Lists Are Not Necessarily "Consumer Reports"

A decision by the United States Circuit Court for the D.C. Circuit questions whether certain mailing lists created by credit reporting agencies (CRAs) are "consumer reports" as defined by the Fair Credit Reporting Act (FCRA). In *Trans Union Corporation v. Federal Trade Commission*,[78] the court held that the "mere inclusion of a fact in a report prepared for credit eligibility purposes" does not establish "that the fact satisfies the statutory test" for determining what information is a "consumer report" under the FCRA.[79] Consequently, the court found that Trans Union had raised "a genuine dispute of material fact about the purposes for which the data [in the mailing lists] were collected."[80] It then remanded the case to the Federal Trade Commission (FTC).[81]

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[73] Letter Ruling, *supra* note 69, ¶ 83,711.

[74] *Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097, 500102 (1988).

[75] A debt collector is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (1988).

[76] *Id.* § 1692a(5).

[77] *Id.* § 1692a(6)(C).

[78] 81 F.3d 228 (D.C. Cir. 1996).

[79] *Id.* at 229.

[80] *Id.* at 232-33.

[81] The court issued the following guidance to the FTC:

> On remand, if the FTC wishes to classify existence-of-tradeline information as a consumer report, it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline, as distinguished from payment history organized thereunder, to serve as a factor in credit-granting decisions, or, of course, that someone used or expected it to be used for that purpose. Evidence—lacking here—that credit decisions could be made, even in part, on such "existence" information might be probative of Trans Union's intent.

Id. at 233.

The case addressed a subsidiary business of Trans Union Corporation where information from its credit database was used to generate mailing lists.[82] "The lists are sold to companies wishing to send sweepstakes entries, catalogs, circulars, and other solicitations to classes of customers that they believe will be particularly responsive to their pitches."[83] "The mailing lists are simply collections of names and addresses;"[84] however, "Trans Union has used special criteria to cull [the names] from its database."[85] In this case, a consumer had to have two "tradelines" (credit accounts) to be listed. Thus, the buyer of the list also knew that those listed had at least two credit accounts.[86]

Because of this "implicit credit information" given by virtue of inclusion on the mailing lists, the FTC classified the mailing lists as credit reports, applied the FCRA, and ruled that the reports were issued for an improper purpose.[87] The court disagreed and, applying the definition of "consumer report" from the FCRA to the facts presented, found that the mailing lists did not meet the definition.[88] The court noted that "mere *existence* of the two accounts is all that matters for inclusion in the base list."[89] The nature of the *performance* on the credit account was not considered.

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[82] Interestingly, the FTC had settled a similar case with another major CRA, TRW Corporation. According to the court, "the Commission [FTC] permitted TRW to market lists from its credit reporting database based on such 'identifying information' as name, zip code, age, social security number or 'substantially similar identifiers.'" *Id.* at 232, *citing* Letter from Federal Trade Commission to TRW, Sept. 24, 1992. The FTC attempted to distinguish between identifying information and other information in explaining its differing positions regarding the two CRAs. The court did not see the distinction, stating that "the proposition that some information can be classed as 'identification information' does not lead as a matter of simple logic to the conclusion that all other information is necessarily transmitted for the purpose of serving as a factor in determinations of credit eligibility." *Id.*

[83] *Id.* at 229.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 229-30.

[87] *Id.* at 229. The FCRA allows release of credit information only in very specific following circumstances:

> (1) In response to a court order or federal grand jury subpoena;
>
> (2) In accordance with written instructions from the consumer the information relates to; or
>
> (3) Release to a person the CRA has reason to believe,
>
> A. intends to use it in connection with a credit transaction;
>
> B. intends to use it for employment purposes;
>
> C. intends to use it in connection with underwriting insurance;
>
> D. intends to use it in connection with granting of a license by a governmental agency which is required by law to consider financial responsibility or status; or
>
> E. otherwise has a legitimate business need for the information in connection with a business transaction with the consumer.

See 15 U.S.C. § 1681b (1988 & Supp. 1993).

[88] The FCRA defines a "consumer report" as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title.

Id. § 1681a(d). The court derived a two-part test from this language. The information "must (A) 'bear on' at least one of seven factors and (B) be used, expected to be used, or collected for one of three types of purposes." *Trans Union,* 81 F.3d at 230.

[89] *Trans Union,* 81 F.3d at 229. It is interesting to note that Trans Union also offers "a rich variety of sublists based on additional data in the base list, leading to such titles as 'Empty Nesters,' 'Urban Ethnics,' and 'Suburban Elite.' (Trans Union even offers a 'hotline' list of consumers who have responded to a credit card solicitation within the past month or so, and are thus, presumably, especially ready, eager and able to consume.)" *Id.*

In the court's view, the mere inclusion of a fact that might appear on a "consumer report" did not make *every* document where that fact is transmitted a "consumer report."[90] The court remanded the case to the FTC. The FTC, on remand, is attempting to establish that the lists could be used for one of the statutorily mandated purposes, such as establishing eligibility for credit or employment. The case is currently pending before an administrative law judge.

For the legal assistance practitioner, the key learning point is to be careful when pursuing credit reporting violations. Not every release of information by a CRA—even information that implicitly bears on the client's credit—is covered by the FCRA. Before the FCRA's protections can be invoked, the information released must meet the definition of a "consumer report." Major Lescault.

Tax Law Notes

New Tax Legislation

On 20 August 1996, the President signed the Small Business Job Protection Act of 1996.[91] While this bill is more widely known because it increases the minimum wage, it is essentially an overhaul of the tax code. Many of the provisions of this bill apply to small businesses, to include Subchapter S corporations, but several provisions are of interest to military practitioners.

First, taxpayers can no longer exclude $5000 of employee death benefits.[92] Survivors of military personnel receive a death gratuity of $6000.[93] Previously, $5000 of this payment was tax free because the death gratuity is an employee death benefit. The remaining $1000 had to be included in the recipient's gross income.[94] As a result of this new legislation, the recipients of the death gratuity can no longer exclude $5000 because it is an employee death gratuity.

Although recipients of the death gratuity can no longer exclude $5000 of the death gratuity because it is an employee death benefit. They can still exclude $3000 of the death gratuity.[95] The Internal Revenue Service (IRS) ruled in 1955 that the then $3000 death gratuity was not taxable because it was a gift.[96] The Tax Reform Act of 1986 added Internal Revenue Code (I.R.C.) § 134, which provides that any military benefit that was not included in gross income on 9 September 1986 under "any provision of law, regulation, or administrative practice which was in effect on such date," shall be excluded from gross income.[97] Because $3000 of the death gratuity was excluded from gross income on 9 September 1986, $3000 remains excluded from gross income.

Although the death gratuity was increased to $6000 in 1991, I.R.C. § 134 does not extend its favorable tax treatment to increases in the benefits that are not directly tied to inflation and are made after 9 September 1986.[98] As a result, $3000 remains excluded under that section now that the greater protection of I.R.C. § 101 has been lost.

This portion of the bill is effective 20 August 1996, so recipients of death gratuities paid for deaths occurring after that date can only exclude $3000 from their gross income under I.R.C. § 134. The remaining $3000 is includable in their gross income. Recipients of death gratuity payments for deaths occurring on or before 20 August 1996 can still exclude $5000 from gross income under I.R.C. § 101. The remaining $1000 must be included in their gross income.

Second, homemakers are now eligible for full Individual Retirement Account (IRA) deductions.[99] This provision is not effective until tax year 1997, so it does not apply to IRA contributions made for tax year 1996. Married individuals will be able to deduct fully up to $4000 so long as they file a joint return. Previously, married couples were limited to $2250 if only one spouse had income.[100] Unfortunately, the phase-out provi-

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[90] *Id.* at 232.

[91] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (codified as amended in scattered sections of 26 U.S.C.).

[92] 26 U.S.C. § 1402 (1996) (to be codified at I.R.C. § 101).

[93] 10 U.S.C. § 1475 (1988).

[94] I.R.C. § 101(b) (RIA 1996).

[95] Rev. Rul. 55-506, 1955-2 C.B. 34.

[96] *Id.*

[97] Pub. L. No. 99-514, § 1168, 100 Stat. 2085, 2512 (1986) (codified at I.R.C. § 134) (1988).

[98] I.R.C. § 134(b)(3) (1988).

[99] Pub. L. No. 104-188, § 1427, 110 Stat. 1755, 1801 (1996) (to be codified at I.R.C. § 219).

[100] I.R.C. § 219(c) (RIA 1996).

sions for the deductibility of IRA contributions have not changed. Thus, married military personnel will have their deduction limited if their gross income exceeds $40,000 and will not be entitled to any deduction if their gross income exceeds $50,000.[101]

Third, there is a new credit for adoption expenses.[102] The maximum amount of the credit cannot exceed $5000 for the adoption of most children and $6000 for the adoption of children with special needs. The credit is allowed in the year following the year in which the adoption expenses are incurred or in the year in which the adoption is completed. The credit begins to be phased out when the taxpayer's adjusted gross income exceeds $75,000 and is not available when the taxpayer's adjusted gross income exceeds $115,000. The adoption credit is not available until after 1996.

Finally, punitive damages and damages that are not attributable to physical injury or sickness are no longer excludable from gross income.[103] This change will have a profound impact on the structuring of tort settlements. Prior to this legislation, five appellate courts already held that punitive damages were not excluded from gross income;[104] however, the United States Court of Appeals for the Sixth Circuit held that punitive damages were excluded from gross income.[105] This legislation makes clear that punitive damages are taxable income. This amendment also makes clear that emotional distress is not to be treated as a physical injury or physical sickness. Major Henderson.

Telephone Numbers on Information Returns

The Taxpayer Bill of Rights 2 requires institutions to provide a telephone number on certain statements.[106] The forms at issue that are of interest to legal assistance practitioners are primarily IRS Forms 1099-INT (Interest statements from banks, credit unions, and other financial institutions) and 1099-DIV (Dividend statements). Unfortunately, the IRS has waived penalties for taxpayers who fail to provide telephone numbers on information returns for 1996.[107] As a result, institutions are legally required to provide a telephone number but they will not be penalized should they fail to do so. The IRS has waived any penalties because the 1996 forms were already prepared prior to the enactment of this legislation. As a result, there is no place on the forms to place a phone number. Nonetheless, the IRS also states that "the institutions are encouraged to enter the telephone number anywhere they choose on the recipient statements."[108] The result is that many taxpayers may not benefit from this portion of the Taxpayer Bill of Rights 2 until 1997. Major Henderson.

Substantiation of Taxpayer Deductions

Taxpayers are responsible for substantiating any deduction taken on a tax return.[109] Failure to maintain appropriate records to substantiate a deduction will result in the denial of that deduction. Two recent cases dealing with taxpayers who were accountants demonstrate this result.

In *Thomas v. Commissioner*,[110] the taxpayer sought to deduct the business use of his automobile. The taxpayer kept a daily calendar with dates and the names of clients visited. The court found that this was inadequate substantiation for the business use of his vehicle because he failed to indicate the mileage involved with visiting each client or the business purpose of the visit.[111]

In *Miller v. Commissioner*,[112] the taxpayer was engaged in a tax preparation business and sought to deduct the cost of a printer, office rental expense, utilities, and software. The taxpayer only presented receipts for a portion of the amount claimed for the cost of the printer. The taxpayer presented no receipts for the office rental, utilities, or software. The court allowed a deduction for a portion of the cost of the printer for which the taxpayer had receipts, but the court denied any deduction for the office rental, utilities, and software.

Legal assistance attorneys should advise that their clients to maintain adequate records to substantiate any deductions taken on the client's tax return. Major Henderson.

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[101] *Id.* § 219(g).

[102] Pub. L. No. 104-188, § 1806, 110 Stat. 1755, 1895 (1996) (to be codified at I.R.C. § 23).

[103] Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838 (1996) (to be codified at I.R.C. § 104).

[104] O'Gilvie v. United States, 66 F.3d 1550 (10th Cir. 1995); Wesson v. United States, 48 F.3d 894 (5th Cir. 1995); Hawkins v. United States, 30 F.3d 1077 (9th Cir. 1994), cert. denied, 115 S. Ct. 2576 (1995), Reese v. United States, 24 F.3d 228 (Fed. Cir. 1994); and Commissioner v. Miller, 914 F.2d 586 (4th Cir. 1990).

[105] Horton v. Commissioner, 33 F.3d 625 (6th Cir. 1994).

[106] Pub. L. No. 104-168, 110 Stat. 1452, 1469 (1996).

[107] I.R.S. Ann. 96-88, 1996-38 I.R.B. (Aug. 27, 1996).

[108] *Id.*

[109] I.R.C. § 6001 (RIA 1996).

[110] T.C. Memo. 1996-403 (1996).

[111] *Id.*

[112] *Id.* at 1996-402.

Notes from the Field

Rules for Departing DOD Personnel

Introduction

Upon retirement or separation, Department of Defense (DOD) personnel often pursue second careers with companies doing business with the federal government. As a result, conflict of interest problems sometimes occur. Avoiding such problems is necessary to maintain the public trust in government. To keep this confidence, various employment restrictions apply to both military and civilian employees. These restrictions include statutory prohibitions as well as those promulgated by Office of Government Ethics (OGE) and DOD regulations.

In recent months, the statutory framework surrounding post-government employment has been substantially altered. Passage of the Federal Acquisition Streamlining Act of 1994, coupled with its implementing regulations, and the Federal Acquisition Reform Act of 1996 have modified post-employment rules significantly. Gone are the selling restrictions applied to retired officers and many of the conflict of interest prohibitions.

To meet the challenge of providing clear, concise, and current advice to clients, the following "Twenty-One Basic Rules for Personnel Leaving the DOD" were developed from the 200 rules prepared in 1994 by Major Mark F. Stone, United States Air Force. They represent the twenty-one most important precepts applicable to departing personnel. They provide the statutory or regulatory authority upon which each is based and they show the formats necessary to accomplish any required action.

The rules are current as of 1 May 1996. They reflect the changes made by the repeal of 10 U.S.C. §§ 2397-97c and 18 U.S.C. § 281 in the Federal Acquisition Reform Act of 1996 and by the DOD Standards of Conduct Office in Change 2 to the *Joint Ethics Regulation* (JER). The changes that will be made by implementation of the new procurement integrity provisions no later than 1 January 1997 in the *Federal Acquisition Regulation* are not yet published; therefore, it is important to recognize that several of these rules (3, 4, 5, 15 and 16) will be modified in the near future. Nevertheless, it is important to have a current set of rules for use.

Discuss these rules with your clients because handing the rules to the clients, especially non-lawyers, should not be a substitute for face to face ethics counselor advice. Amplify areas that are of concern to them. Encourage them to discuss "transition assistance benefits" (rule 7) with the transition office. Provide a copy of the rules and their attachments to the clients *together with a caveat that they should seek ethic counselor assistance* on any area they question. Your counsel and these rules will provide the necessary guidance for your client's smooth transition from the DOD to the private sector.*

Twenty-One Basic Rules for Personnel Leaving DOD

The following twenty-one rules assume you are currently working for the DOD and plan to seek employment with a non-federal entity. They were derived from the "200 Rules on Outside Income, Job Hunting and Post-Government Employment" by Major Mark Stone, a United States Air Force Judge Advocate. The categories of personnel to whom each rule applies and its statutory or regulatory authority appear at the end of each rule. The rules are current as of 1 May 1996, including the 25 March 1996 changes to the JER. *Formats for accomplishing the necessary actions are provided to ease your transition into the private sector. Remember to seek ethics counselor advice on any rule that needs amplification.*

Restrictions on Seeking Employment

Rule 1: You are prohibited from *taking action* in your official capacity concerning a person or company that has a financial interest in a matter in which you are participating while you are negotiating with that person or company. The financial interests of your spouse, your minor child, or your partner may also trigger this prohibition. 18 U.S.C. § 208(a)—Officers and Civilians; DEP'T OF DEF., DOD 5500.7-R, JOINT ETHICS REGULATION (JER), paras. 8-200 to 8-201—Officers, Enlisted, and Civilians [hereinafter JER].

Rule 2: While you are participating in a matter that has a direct and predictable effect on the financial interest of a person or company, you are prohibited from *seeking* employment (including pre-negotiation activity) with that person or company. 5 C.F.R. §§ 2635.601-2635.604; JER para. 2-204c & d—Officers, Enlisted, and Civilians.

Comment: The first rule is statutory; the second is regulatory and it expands the prohibition to cover any form of seeking employment. If you want to seek a job with a specific company, you must determine if any official action you could take would have a direct and predictable effect on the person or company's financial interests. If you are participating in a matter affecting the company, you must provide a *written* memorandum to your supervisor stating that you are disqualified from future participation in the matter. (See Format 1 for a sample disqualification memorandum.) Written disqualification is required before send-

* Readers desiring to reprint the rules locally may wish to download the rules from *The Army Lawyer* section of the LAAWS Bulletin Board. The rules will be in the file containing this issue of *The Army Lawyer*. Instructions for downloading files are contained in the Current Materials of Interest section of this issue.

ing resumes or engaging in "informal" discussions with specific companies. Disqualification is not required before discussing opportunities with a "headhunter" as long as the identity of the potential employer(s) is not disclosed to you. If you are not participating in any matters affecting the company, no disqualification is required.

Rule 3: If you are or were a "procurement official," you are prohibited, until the contract action is completed, from discussing employment with any company that is competing or likely to compete for the contract. Procurement Integrity, 41 U.S.C. § 423(b); FEDERAL ACQUISITION REG. 104-6; JER paras. 8-300, 8-301—Officers, Enlisted and Civilians.

Comment: If you have participated personally and substantially in drafting a solicitation (including the Statement of Work/ Specification), in selecting a contractor in a contract that has not yet been awarded, or in other capacities such as developing a purchase request, reviewing and approving a specification, or performing requirements computations at an inventory control point, you may not try to get a job from any company that is competing or is reasonably likely to compete for the contract until the contract is awarded, until the procurement is canceled, or until you have been "recused" from the procurement. (See Format 2 for a sample recusal memorandum.)

Note: An amendment to the Procurement Integrity law, which will become effective thirty days after publication of new implementing regulations, but not later than 1 January 1997, will replace the above obligation with a new requirement. The anticipated rule will require a person who is participating personally and substantially in a procurement to report in writing any contact with an offeror regarding employment and either reject any employment offer or disqualify himself from any further participation in the procurement.

Rule 4: If you were a "procurement official" and you leave before completion of the procurement action, you must certify that you understand your continuing obligation not to disclose any proprietary or source selection information. 41 U.S.C. § 423(e)(4)—Officers, Enlisted and Civilians.

Comment: The required certification is at Format 3.

Note: The implementing regulations for the new Procurement Integrity revisions will remove this certification requirement. Check with your ethics counselor concerning the current status of the required certification.

Rule 5: You are prohibited from communicating inside information to prospective employers. JER para. 8-400b—Officers, Enlisted and Civilians. **This includes the disclosing of proprietary (contractor's bid or proposal information) or source selection information, even though you may not have been a "procurement official."** 41 U.S.C. § 423; FAR 3.104-5—Officers, Enlisted, and Civilians.

Rule 6: Once you have a job, you may not participate in any matter that affects the financial interests of the company with whom you have the employment arrangement. 18 U.S.C. § 208(a)—Officers and Civilians; 5 C.F.R. § 2635.606; JER paras. 5-300 to 5-303—Officers, Enlisted, and Civilian.

Rule 7: You may not use government resources (except for authorized transition assistance benefits) in job hunting. 5 C.F.R. § 2635.704; JER para. 2-301 (equipment and telephones); 5 C.F.R. § 2635.705 (time); 5 C.F.R. § 2635.203(b)(7) (frequent flyer miles from official travel); 31 U.S.C. § 1344 (vehicles) and; DOD Manual 4525.8 (use of official mail)-Officers, Enlisted, and Civilians.

Comment: Some minor relaxation of this rule may occur in the case of a federal government downsizing, *e.g.*, JER para. 2-301a(2) permits use of government communications systems (telephone and computers) for job-searching if done on personal time, does not burden the communications system, etc. Additionally, certain military members may use permissive temporary duty for seeking employment and finding new residences.

Rule 8: Even though a prospective employer is a government contractor or other "prohibited source," you may accept meals, lodging, transportation, and other benefits normally provided by the prospective employer in connection with bona fide employment discussions. 5 C.F.R. § 2635.204(e)(3)—Officers, Enlisted, and Civilians.

Comment: To avoid a violation of the rules prohibiting your acceptance of gratuities from a prohibited source, make certain the prospective employer provides the same job interview travel benefits to all potential candidates for the same or similar positions.

Rule 9: You may obtain a letter of recommendation *from other government employees* on official letterhead if: (1) the letter is based on the employee's personal knowledge of your ability or character and (2) either (a) the employee has dealt with you in the course of his or her government employment or (b) you are applying for federal employment. 5 C.F.R. § 2635.702(b)—Officers, Enlisted and Civilians. **You may obtain a letter of recommendation *from a DOD contractor employee* so long as you do not use your government position to coerce or induce the person to write the letter.** 5 C.F.R. § 2635.702(a)—Officers, Enlisted, and Civilians.

Rule 10: While still employed by the DOD, you are prohibited from acting as a representative for anyone, including your new employer, before any federal agency. 18 U.S.C. § 205; JER para. 5-403 — Officers and Civilians.

Rule 11: While on terminal leave, you remain a government employee and all of the above rules still apply.

Comment: Most Agencies or Agency Designees have implemented the requirement in JER para. 2-303, which requires you to file a request for off-duty employment before working during terminal leave.

Restrictions on Post-Government Employment

Rule 12: You face a lifetime ban on attempting to influence federal officials (except members of Congress and their legislative staffs) on behalf of someone regarding a matter on which you participated personally and substantially as a government employee. 18 U.S.C. § 207(a)(1); JER paras. 9-300, 9-400—Officers and Civilians.

Comment: A "matter" for most government employees means a particular government contract. The lifetime ban therefore normally exists only so long as the specific contract in which the employee participated is still in existence. A "matter" also can be broader or narrower than a particular contract, depending on the extent of the employee's participation.

Rule 13: You face a two-year ban on attempting to influence federal officials (except members of Congress and their legislative staffs) on behalf of someone regarding a matter that was under your official responsibility during your last year of government service. 18 U.S.C. § 207(a)(2); JER paras. 9-300, 9-400—Officers and Civilians.

Comment: A matter is under your "official responsibility" if you have the power, either directly or through a subordinate, to approve, disapprove, or otherwise direct a government action.

Rule 14: You face a one-year ban on representing, aiding, or advising "the other side" (*i.e.*, any other person except the United States) in trade or treaty negotiations in which you participated personally and substantially during your last year of government service. 18 U.S.C. § 207(b)—Officers and Civilians.

Rule 15: If you were a "procurement official," you are prohibited for a period of two years from your last significant action on the acquisition from: (1) working for the contractor on the awarded contract and (2) negotiating on behalf of the contractor concerning any award, modification, or extension of that contract. Procurement Integrity, 41 U.S.C. § 423(f); FAR 3.104-7; JER para. 9-600—Officers, Enlisted and Civilians.

Comment: You can still go to work for the contractor, but it must be on another contract. You also can wait for the two-year period to expire and go to work on the awarded contract. The rule generally applies to subcontracts as well. You can request a procurement integrity ethics advisory opinion if you were a procurement official and you are concerned with the duties proposed by your new employer (Format 4).

Note: An amendment to the Procurement Integrity law, which will become effective thirty days after publication of new implementing regulations, but not later than 1 January 1997, changes the period to one year and establishes a $10 million threshold before the statute applies. Seek ethics counselor guidance on the final rules and the effective date of the new provisions.

Rule 16: You are prohibited from converting to your use or the use of another any government records or things of value. This includes "inside information" obtained while in government service. 18 U.S.C. § 641—Officers, Enlisted, and Civilians. **The specific prohibition against disclosing proprietary information, including contractor bid or proposal information, source selection information, and other information submitted to the government outside of a bid or proposal, also continues after you leave federal employment.** 41 U.S.C. § 423; FAR 3.104-5—Officers, Enlisted, and Civilians.

Comment: Inside information is any information not available to the general public that you obtained by reason of your official DOD duties. It includes contractor bid and proposal information and source selection information.

Rules Relating to Work for Foreign Employers

Rule 17: You may not work for a foreign government or for a corporation or institution owned or controlled by a foreign government *without prior approval.* 37 U.S.C. § 908; JER para. 9-701—Retired Officers and Retired Enlisted.

Rule 18: You must register as an agent of a foreign principal if you wish to represent certain foreign activities in the United States. Foreign Agents Registration Act, 22 U.S.C. §§ 611-621; 28 C.F.R. pt. 5; JER para. 9-701c—Officers, Enlisted, and Civilians.

Additional Rules for Senior Officials

Rule 19: You must file a final Standard Form 278 within thirty days after, but not earlier than fifteen days before, the date of termination of your federal employment (*i.e.*, the end of your terminal leave). 5 U.S.C. app. 6 §§ 101-111; JER paras. 7-200 to 7-209—O-7 & above, Senior Executive Service (SES) employees.

Rule 20: You are prohibited from attempting to influence your former DOD component (*i.e.*, Air Force, Army, Navy, DLA, etc.) regarding any official action for a period of one year (frequently called the "one-year no contact" rule). If your last job is at the DOD level, the restriction applies to attempts to influence DOD level organizations (*e.g.*, defense agencies) rather than your component. 18 U.S.C. § 207(c); 5 C.F.R. pt. 2641; JER para. 9-300—O-7 & above and SES-5 & above.

Rule 21: You are prohibited, within one year of leaving your government position, from representing, aiding, or advising a foreign entity with the intent to influence a United States government decision. 18 U.S.C. § 207(f); JER para. 9-300—O-7 & above and SES-5 & above.

Alan E. Sommerfeld, Counsel, Joint National Test Facility, Ballistic Missile Defense Organization. The twenty-one rules are extracted from a draft pamphlet prepared by Mr. Sommerfeld, for NORAD, United States Space Command and Air Force Space Command, while Mr. Sommerfeld was serving as a Lieutenant Colonel, United States Army Reserve.

Format 1 — Sample Disqualification Memorandum

(Office Symbol) (Date)

MEMORANDUM FOR (Your Supervisor)

FROM: (Your Name)

SUBJECT: Disqualification — Employment Discussions

1. My (approved) (contemplated) date of (retirement) (separation) is _____. I expect to commence terminal leave on _____. I contemplate entering into employment discussions with certain contractors prior to my (retirement) (separation). Pursuant to 18 U.S.C. § 208(a) and 5 C.F.R. § 2635.604, I hereby submit the following notice of disqualification.

2. Both the Joint Ethics Regulation (DOD 5500.7-R) and the Standards of Ethical Conduct for the Executive Branch (5 C.F.R. § 2635) require me to conduct my personal affairs in a manner that upholds the public's trust and confidence in our government workforce. Because 18 U.S.C. § 208(a) requires me to disqualify myself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person or organization with whom I am negotiating or have any arrangement concerning prospective employment, I hereby give formal notice that I plan to conduct employment discussions with the companies named below. Until further notice, I am requesting disqualification from taking any official action that might have an impact on them.

(Firms)

3. I will accomplish this disqualification by avoiding any involvement in matters affecting these companies. In the event that any matter brought to me for action may have a direct or predictable impact upon these companies, I will immediately inform you and make arrangements to ensure that I am not involved.

_____
(Your Signature Block)

cf:
(your section)

Format 2 — Sample Recusal Memorandum

(Office Symbol) (Date)

MEMORANDUM (FOR) or (THRU) (Supervisor in grade of O-6/GM-15 or higher) (Head of Procurement/Contracting Activity or his Designee)

FROM: (Your Name)

SUBJECT: Request for Recusal for Purposes of Post-Separation Employment Discussions

1. I wish to engage in employment discussions with _____, who I believe is, or may reasonably be, a competing contractor on the _____ procurement. To date, I have had the following involvement in this procurement: _____. This involvement occurred from _____ to _____, 19__.

2. To avoid any possibility of a conflict of interest and to permit an orderly transition of responsibilities, I request to be excluded from, and relieved of, all matters and responsibilities regarding the _____ procurement. This request is made pursuant to 41 U.S.C. § 423(c) and the provisions of the Federal Acquisition Regulation 3.104-6.

3. If this request is approved, I will conduct all employment discussions while on leave or during off-duty time.

_____
(Your Signature Block)

(supervisor's office symbol) (Your Office Symbol/Date of Memorandum) 1st End (Date)

I have reviewed the information in the above request and find it an accurate portrayal of the duties and responsibilities of _____ during the conduct of subject procurement.

_____
(Supervisor's Signature Block)

(Head of Procurement/Contracting Activity Office Symbol) (date)
(Your Office Symbol/Date of Memorandum) 2nd End
SUBJECT: Request for Recusal for Purposes of Post-Separation Employment Discussions

Approved. It is incumbent upon you to ensure that your employment discussions do not create a conflict of interest or the appearance of such a conflict. You will not take part in your governmental capacity, through decision, approval, disapproval, recommendation, giving advice, investigation, or otherwise, regarding any matter involving a contractor with whom you are discussing employment. Should any question arise regarding the propriety of your employment discussions, you are to immediately seek advice from the office of the Staff Judge Advocate.

(OR)

Disapproved. I have determined that you are not eligible for recusal as you have participated personally and substantially in _____ on the _____ procurement. As such, you may not have any employment discussions with _____ or any other contractor who is, or is reasonably likely to be, a competing contractor on the _____ procurement until such time as the contract is awarded, canceled, or you have separated from the Service, whichever comes first.

_____
(Head of Procurement/Contracting Activity or His Designee)

cf:
1. Immediate Supervisor
2. Legal Advisor to HPA/HCA

Format 3 — Certificate by a Procurement Official Leaving Federal Employment

I certify that I understand that I have a continuing obligation not to disclose proprietary information* or source selection information.**

_____ Date:_____
Signature of certifying official

_____
Typed name of certifying official

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES, AND THE MAKING OF A FALSE, FICTITIOUS OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATE CODE, SECTION 1001.

* Proprietary information is defined at paragraph 3.104-4(j) of the *Federal Acquisition Regulation.*

** Source selection information is defined at paragraph 3.104-4(k) of the *Federal Acquisition Regulation.*

Format 4 — Sample Request for Procurement Integrity Ethics Advisory Opinion

(Office Symbol) (Date)

MEMORANDUM (FOR) or (THRU) (Contracting Officer/Source Selection Authority) (Ethics Counselor)

FROM: (Your Name and Home Address)

SUBJECT: Request for Procurement Integrity Advisory Opinion

1. Pursuant to *Federal Acquisition Regulation* (FAR) 3.104-8, I hereby request an ethics advisory opinion as to whether I am a "procurement official" under the provisions of 41 U.S.C. § 423 and whether the conduct proposed below is permitted.

2. As required by FAR 3.104-8(e)(2), I am providing all available information concerning this request.

a. The Procurement: (Provide all information about the procurement, including contract or solicitation numbers, date of solicitation or award, and a description of the goods or services procured or to be procured.)

b. My Participation: (Provide information about your participation in the procurement, including the dates or time periods of the participation and the nature of your individual duties or responsibilities.)

c. The Competing Contractors: (Provide information about the competing contractors who would be parties to the conduct proposed below and the nature of the competing contractor's interest in the procurement.)

d. The Proposed Conduct: (Provide specific information concerning the particular duties to be performed on behalf of the competing contractor. Where the issue concerns whether employment with a competing subcontractor is permissible, provide information about the subcontract level and dollar amount, the subcontractor's role in assisting the prime contractor in negotiating the prime contract, and your role, if any, in directing or recommending the subcontractor to the prime as a source for a subcontract or reviewing and approving the award or modification of the subcontract.)

3. If you need further information, please call me at _____ (office) or _____ (home). Please provide your response to me at the following address:

_____
(Your Signature Block)

(Cont Off/SSA office symbol) (Your Office Symbol/Date of Memorandum) 1st End (Date)

MEMORANDUM FOR (Ethics Counselor)

I have reviewed the information contained in _____'s request for a "procurement integrity" ethics advisory opinion. I find it an accurate and complete portrayal of subject procurement and of his or her duties and responsibilities therein.

_____
(Contracting Officer/Source
Selection Authority Signature Block)

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the third quarter of Fiscal Year 1996 are shown below. For comparison, the previous two quarters and Fiscal Year 1995 processing times are also shown.

General Courts-Martial

	FY 1995	1Q, FY96	2Q, FY96	3Q, FY96
Records received by Clerk of Court	827	194	184	224
Days from charges or restraint to sentence	58	62	58	64
Days from sentence to action	78	76	80	96
Days from action to dispatch	7	7	8	8
Days en route to Clerk of Court	8	9	10	9

BCD Special Courts-Martial

	FY 1995	1Q, FY96	2Q, FY96	3Q, FY96
Records received by Clerk of Court	161	38	33	60
Days from charges or restraint to sentence	35	36	49	51
Days from sentence to action	63	72	103	82
Days from action to dispatch	6	9	3	4
Days en route to Clerk of Court	8	8	12	7

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 3, number 12, dated September 1996, is reproduced below.

Editor's Note

The United States Air Force has announced the following schedule for its upcoming Maxwell Air Force Base, Alabama, environmental law courses:

Advanced Environmental Law Course:	9-11 December 1996
Update Environmental Law Course:	10-12 February 1997
Basic Environmental Law Course:	5-9 May 1997

The Air Force allows the Army a specific number of students for each course. Additional information on availability for Army personnel and registration will be provided through the *Bulletin*

as it is received from the Air Force. There is no tuition charged for the courses; however, the attendee is responsible for travel and per diem. Point of Contact for class quotas is Ms. Gant, and POC for information on course curriculum is Mr. Nixon, both of whom can be reached at (703) 696-1230, DSN 426-1230, or facsimile number extension 2940. Ms. Fedel.

Major Source Determinations for Military Installations

On 2 August 1996, the United States Environmental Protection Agency (USEPA) issued guidance to regulatory agencies that allows increased flexibility in making source determinations for military installations under the Title V Operating Permit, New Source Review, and Hazardous Air Pollutant (HAP) programs.

Some USEPA regions and states were inflexibly treating military installations as single sources for air permitting purposes. The authority to treat military installations as single sources derives from the regulatory definition of "major source." The Regulations define "major source" as any stationary sources that (1) are on contiguous or adjacent property, (2) under common control, and (3) belong to a single major industrial grouping as described in the Standard Industrial Classification (SIC) manual. Military activities fall under one industrial grouping (SIC of 97).[1]

The Services have argued that this classification was inappropriate because military installations include a wider variety of functions and activities, such as housing, parks, churches, etc., compared to most major sources. These activities normally are associated with a municipality rather than the common idea of an industrial plant.

The USEPA's guidance states that it is appropriate to treat military installations as combinations of functionally distinct groupings of pollutant-emitting activities that may be identified and distinguished the same way that industrial and commercial sources are distinguished—on the basis of a "common sense notion of a plant." This allows military installations to separate sources along control and major industrial groupings.

Common Control Determinations

This guidance treats the different Services, the various National Guards, other federal agencies (which are treated as one source), and state agencies as separate sources. It also treats leased activities as separate sources unless they perform contract-for-services activities or support another activity that is owned or operated by the installation. Contract-for-services activities that support the military installations are part of the source that they support. For activities that contract only part of their output to a military controlling entity that is located at the military installation, a common control determination would be made on a case-by-case basis.

Industrial Groupings and Support Facility Determinations

Pollution-emitting activities may be desegregated further based on appropriate industrial groupings and the support facility test. Industrial groupings at military installations can be assigned appropriate two digit SIC codes and classified into primary and support activities. Support activities would be aggregated into the primary activities regardless of their SIC codes. Research and development facilities can be treated as separate sources.

Installations also can treat activities that are located on military installations for the convenience of military personnel, their dependents, and Department of Defense civilian employees working on the base as separate sources. This includes residential housing, schools, daycare centers, churches, recreational parks, theaters, shopping centers, grocery stores, gas stations, and dry cleaners.

Treatment of Hazardous Air Pollutants

Hazardous Air Pollutant (HAP) sources can be grouped by SIC code for Title V purposes to determine Title V major source applicability. For determination of Title III major source applicability, installations must aggregate all HAP emissions from the installation. Thus, an installation could be considered a major source under Title III but not under Title V.

Permitting Authority Discretion To Follow Guidance

Permitting authorities have the discretion not to follow this guidance if they have a rational basis for doing so. Permitting authorities should not refuse to separate sources on an installation simply because they have not done so in the past.

Multiple Permits for Administrative Reasons

An installation that is a major source may have multiple permits for administrative purposes so long as it ensures that all applicable requirements are included in the permits. This is useful to ensure that the certifying official also is the individual who has responsibility for the organization.

This guidance will allow installations more flexibility under the Title V program and may allow some installations to escape Title V requirements. Some installations, after evaluating the benefit of dividing into several sources, may not wish to take advantage of this guidance. For example, installations that are starting or modifying activities may want to treat the entire installation as one source in order to take advantage of the netting provisions allowed under the New Source Review program.

This guidance may be downloaded from USEPA's Technology Transfer Network (TTN), an electronic bulletin board. The

[1] State Operating Permit Programs, Definitions, 40 C.F.R. § 70.2 (1992).

TTN can be accessed by dialing (919) 541-5742. It is located in the Clean Air Act Information Area, file name DODGUID.WPF. This document also may be downloaded from the Environmental Forum on LAAWS BBS, message # 98417, file name DODGUID.TXT. Lieutenant Colonel Olmscheid.

Did you know? . . . The United States established its first wildlife refuge in 1903 at Pelican Island, Florida.

Analysis of EPA FY95 Enforcement Report, Part II

Debate continues over interpretation of the USEPA's long-awaited Enforcement Accomplishments Report for Fiscal Year 1995 (FY95 Report).[2] The FY 95 Report was released by the USEPA's Office of Enforcement and Compliance Assurance (OECA) the week of 5 August 1996.

While the USEPA's referral of 256 criminal enforcement cases to the Department of Justice (DOJ) during FY95 was up from 220 cases in FY94, the USEPA's FY95 enforcement numbers have dipped precipitously in nearly every other category. The number of administrative penalties assessed by the USEPA dropped from 1476 to 1105, compliance orders dropped from 2016 to 1864, inspections dropped from 7526 to 7309, and administrative civil referrals to the DOJ plummeted from 430 to 214.[3] The USEPA Administrator, Carol Browner, has vigorously defended the agency's new enforcement strategy, emphasizing enforcement quality over statistical quantity. "I knew from the minute I said we'd reorganize the office of enforcement that the historical baseline, the number of cases filed, would change .... Some people will try to use that historical baseline and the change in those numbers as a way to hit me. It is not appropriate in my mind because the point of an enforcement program is not to just file a certain number of cases. It's the effect of the cases you pursue."[4]

The FY95 Report, defending its position that "environmental results are EPA's bottom line," focuses on increased "compliance incentives" and "compliance assistance" measures.[5] The Environmental Audit Policy,[6] the Small Business Incentives Policy,[7] and the Small Communities Flexible Enforcement Policy[8] are cited as examples of the USEPA's compliance incentives. The report lists five categories of compliance assistance: Outreach (*i.e.*, dissemination of information through seminars and services), response to specific requests for assistance, partnering efforts, research, and on-site assistance.[9] Although it is unlikely that federal facilities will realize any tangible benefits from the compliance incentives, installations should challenge the regulators in their regions to follow the USEPA's guidance to share its enforcement information. The open channels of communication could pay big dividends in terms of avoided, or at least forewarned, enforcement attempts.

More importantly, the FY95 Report relies heavily on supplemental environmental projects (SEPs) as a demonstration of its achievement of "environmental results." The OECA reports negotiation of 350 SEPs in FY95 totaling over $103 million dollars.[10] Installations should take advantage of this SEP-friendly enforcement environment when negotiating settlements. With the USEPA obviously struggling to define its enforcement role in terms of environmental benefits achieved versus fines collected, SEPs should be considered immediately, not only as a settlement tool, but as a strategic means to minimize the economic impact of the enforcement action on the command. The USEPA has shown a willingness not only to accept most projects that have true environmental benefits, but to permit, in at least one Army case, use of an already-completed project as an SEP to mitigate the assessed fine.

The FY95 Report also is the first to statistically demonstrate the truly dramatic divergence in both USEPA and state inspection frequencies among the ten USEPA Regions. For example, of the 30,763 Clean Air Act inspections conducted during FY95,

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[2] *Enforcement and Compliance Assurance Accomplishments Report—FY 1995*, USEPA 300-R-96-006 (July 1996) [hereinafter FY95 Report].

[3] *EPA Touts Enforcement Success, While Others Point to Significant Decline*, INSIDE EPA, July 26, 1996, Vol. 17, No. 30 at 8.

[4] *Exclusive: Inside EPA Interview with EPA Administrator Carol Browner*, INSIDE EPA, Feb. 9, 1996, Vol. 17, No. 6 at 8.

[5] FY95 Report, *supra* note 2, at 1-2.

[6] *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706 (1995).

[7] *Interim Policy on Compliance Incentives for Small Businesses*, 61 Fed. Reg. 27,984 (June 3, 1996).

[8] Herman, Steven A., *New EPA Policy Aids State Efforts to Help Small Communities Comply With Environmental Law*, NAT'L ENVTL. ENFOR. J., Dec. 1995/Jan 1996, at 6.

[9] FY95 Report, *supra* note 2, at 5-1.

[10] *Id.* at 3-13.

Region III had 9991 USEPA/state stationary source inspections while Region II had 251; the Regional average was 3076. There were 1128 USEPA Resource Conservation and Recovery Act (RCRA) inspections and 19,636 state RCRA inspections, broken down geographically as follows:[11]

Region 1	USEPA	43,	state	798.
Region 2	USEPA	361,	state	3195.
Region 3	USEPA	20,	state	1559.
Region 4	USEPA	163,	state	6836.
Region 5	USEPA	133,	state	3756.
Region 6	USEPA	30,	state	1539.
Region 7	USEPA	269,	state	711.
Region 8	USEPA	33,	state	484.
Region 9	USEPA	37,	state	385.
Region 10	USEPA	39,	state	373.

In total, the USEPA and the states combined for 90,671 inspections at regulated facilities, of which the USEPA conducted (jointly or independently) 39,854. Because the FY95 Report was the first to break out these figures (the Fiscal Year 1993 Report (FY93 Report) indicates 2980 inspections were conducted[12] and the Fiscal Year 1994 Report (FY94 Report) mentioned only that 2000 EPA multimedia inspections were conducted),[13] future reports will permit an analysis of inspection trends.

It also is interesting to note enforcement trends occurring outside of the federal facility realm. For example, the USEPA reports administrative penalty orders issued to facilities in the following numbers under the listed statutes:[14]

Clean Air Act (CAA):	102
Comprehensive Environmental Response, Compensation, and Liability (CERCLA):	23
Clean Water Act (CWA):	212
Emergency Planning and Community Right-to-Know Act (EPCRA):	244
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA):	60
Resource Conservation and Recovery Act (RCRA):	91
Safe Drinking Water Act (SDWA):	86
Toxic Substances Control Act (TSCA):	187.

Because the federal government's sovereign immunity has only been waived for violations of the solid and hazardous portions of RCRA, and recently the SDWA, Army installations are relatively unfamiliar with enforcement actions initiated under the other major federal environmental statutes. The most heavily-enforced of these statutes are the EPCRA, the TSCA, and the FIFRA.[15] Enforcement under these statutes, rarely seen in Army experience, gives a daunting view of the future should sovereign immunity be waived in most federal environmental statutes, as many expect.

Finally, the FY95 Report gave accolades to the United States Army Alaska, even though the USEPA's commendation appears suspiciously self-congratulatory:

> As a result of [USEPA Region X's enforcement actions against Alaska facilities following passage of the Federal Facility Compliance Act], these facilities have turned their operations around and are now model facilities for RCRA compliance, to the point where no violations were noted during the most recent inspections. Fort Richardson was recently awarded the Green Star Award, recognized by EPA for environmental excellence, by the city of Anchorage for its efforts in recycling. Other Army facilities in Alaska are in the process of receiving similar awards from their communities.[16]

Captain Anders.

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[11] *Id.* at 2-2.

[12] *Enforcement and Compliance Assurance Accomplishments Report—FY 1993*, EPA 300-R-94-003, 2-6 (April 1994).

[13] *Enforcement and Compliance Assurance Accomplishments Report—FY 1994*, EPA 300-R-95-004, 2-2 (May 1995).

[14] FY95 Report, *supra* note 2, at 3-4.

[15] *Id.* at 3-2, 3-5.

[16] *Id.* at 3-10.

Did you know? . . . Sulfur dioxide is the air pollutant most responsible for the corrosion of historical monuments.

Citizen Enforcement Provisions Under the Emergency Planning and Community Right-to-Know Act of 1986

Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA) shortly after the tragedy in Bhopal, India, in which more than 2000 people were killed when a Union Carbide facility released methyl isocyanide into the environment.[17] The EPCRA is intended to help citizens, in cooperation with industry and government, gather reliable information on the presence and release of toxic chemicals. Only about twenty federal cases have been decided under the EPCRA since its enactment.

On 23 July 1996, the United States Court of Appeals for the Seventh Circuit held that private citizens may sue under the EPCRA even after violators have submitted overdue filings.[18] The plaintiff, Citizens for a Better Environment (CBE), a not-for-profit environmental organization, discovered apparent EPCRA violations. The CBE gave notice of intent to sue to The Steel Company, the USEPA, and appropriate state authorities. The notice alleged that The Steel Company used and released toxic chemicals covered by the EPCRA reporting requirements and had failed to submit inventory and toxic chemical release forms. Upon receiving the CBE's notice of intent to sue, The Steel Company filed its overdue forms. The USEPA did not initiate enforcement proceedings within the 60-day notice period and the CBE filed its complaint in federal district court.

The Steel Company moved to dismiss CBE's suit for lack of jurisdiction and failure to state a claim upon which relief may be granted. Its motion asserted that the alleged violations were "wholly" in the past and that the EPCRA did not authorize citizen suits for "historical" violations. The CBE argued that the EPCRA authorized citizen suits to enforce the requirements of the EPCRA, including annual filings on or before the dates set forth in the statute. The district court agreed with The Steel Company and dismissed the case.

The district court relied on the only other court of appeals ruling on this issue, a case that is factually indistinguishable.[19] In both cases, the issue was whether citizens may seek penalties against EPCRA violators who file after the statutory deadline after receiving notice of intent to sue but before a complaint may be filed in the district court. In *United Musical Instruments*,[20] the United States Court of Appeals for the Sixth Circuit held that the EPCRA authorized citizen suits only for failure to "complete and submit" forms, no matter when those forms were completed or submitted. The Sixth Circuit relied on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*[21] in which the Supreme Court interpreted the citizen suit provisions of the Clean Water Act (CWA).[22]

In *Gwaltney*, the Supreme Court held that the CWA's citizen suit provisions did not allow citizens to sue for "wholly past" or "historical" violations. The CWA citizen suit provision requires civil actions against any person alleged "to be in violation" of permits required under the statute. The court found that the "most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation," and concluded that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation."[23]

While examining the statute in light of the criteria of the *Gwaltney* court, the Seventh Circuit first read the statute according to its most plain and natural meaning, which led the Supreme Court to focus on the words "to be in violation" in the CWA. The language of the EPCRA differs from the language of the CWA; the EPCRA authorizes citizens to sue "for failure to" comply with the statute while the CWA authorized citizen suits where a defendant was alleged "to be in violation." The plain language of the EPCRA citizen enforcement provision does not point to the present tense like the CWA.[24] The language of the

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[17] 42 U.S.C. § 11001 (1986).

[18] The court found the specific language of the citizen suit provision encourages private citizens to invest the resources necessary to uncover violations of the EPCRA by allowing courts to award the costs of enforcement to prevailing or substantially prevailing parties. Citizens for a Better Environment v. The Steel Company, No. 96-1136, 1996 U.S. App. LEXIS 18262 (7th Cir. July 23, 1996).

[19] Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc., 61 F.3d 473 (6th Cir. 1995).

[20] *Id.*

[21] 484 U.S. 49 (1987).

[22] 33 U.S.C. § 1251 (1990).

[23] *Gwaltney*, 484 U.S. at 57-59.

[24] Every district court that looked at the citizen suit provisions of the EPCRA prior to *United Musical Instruments* distinguished the case before it from *Gwaltney* and the CWA. *See, e.g.*, Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp., 772 F. Supp. 745 (W.D.N.Y. 1991); Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993); Williams v. Leybold Technologies, 784 F. Supp. 765 (N.D. Cal. 1992).

EPCRA contains no temporal limitation: "failure to do" something can indicate a failure past or present.[25]

Unlike the CWA, the EPCRA's enforcement provisions are not cast in the present tense. The EPCRA does not contain the "is occurring" language of the CWA to indicate that citizens must allege an ongoing violation. The Seventh Circuit Court of Appeals reasoned that the absence of language limiting citizen suits to ongoing violations, and Congress' choice of language specifically referring to past violations that are not ongoing at the time a citizen complaint is filed are strong indicators that a cause of action exists under the EPCRA for violations that are not ongoing at the time a citizen complaint is filed. "If citizen suits could be fully prevented by 'completing and submitting' forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information."[26] The Seventh Circuit Court of Appeals summarized that if citizen suits could only proceed when a violator received notice of intent to sue and still failed to spend the minimal effort required to fill out the forms and turn them in, then EPCRA compliance costs would unfairly shift from the regulated industrial users to the private citizen.

Safe Drinking Water Act Amendments

On 6 August 1996, President Clinton signed the Safe Drinking Water Amendments of 1996 into law. Although the amendments made numerous changes to the Safe Drinking Water Act (SDWA), many of the amendments affect funding for state water system improvements and the development of regulations by the USEPA. A listing of the general sections that were amended and those that were added is available in the Environmental Law Forum via the LAAWS BBS. Because most of the amendments directly affect state water systems and the USEPA, Army compliance with the amendments is not expected to be problematic. Furthermore, SDWA compliance problems in Army water systems are minimal and infrequent. The leading deficiencies identified by the Environmental Compliance Assessment System (ECAS) have been equipment deficiencies, incomplete records pertaining to monitoring, permits, or operation and maintenance, and missing or incomplete emergency contingency plans. Those provisions of the amendments that are likely to have a direct impact on Army installations are discussed below.

One of the most significant changes was the expansion of the waiver of sovereign immunity. This change was addressed at length in the August 1996 Environmental Law Bulletin, also available in the Environmental Forum in the LAAWS BBS. The waiver, as amended, subjects federal facilities that own or operate public water systems or any facility in a wellhead protection area to the provisions of the SDWA and to local safe drinking water laws. Regarding fees and fines assessed under the SDWA via the waiver, installations should be aware of three issues. First, fines may only be paid for legitimate violations occurring *on or after* 6 August 1996. Second, as with any environmental fee paid by the Army, a fee must be reasonable and meet the test of *Massachusetts v. United States.*[27]

In *Massachusetts*, the Supreme Court held that a fee is deemed an impermissible tax when (1) the imposed charges discriminate against state functions, (2) the charges are not based on a fair approximation of use of the regulatory system, and (3) the charges are structured to produce revenues that exceed the total cost to the federal government of the benefits to be supplied. If a fee meets these requirements and is reasonably proportionate to the benefits provided, then the fee is valid. Finally, fines and penalties collected from a federal agency by a state under the SDWA may only be used for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.

Another change with a significant impact is the amendment of public notice provisions in the SDWA. The notice period for violations that could have a serious effect on human health has been reduced from fourteen days to twenty-four hours. The amendments also require that owners and operators of a public water system notify persons served by the system of (1) any failure on the part of the system to comply with an applicable maximum contaminant level or treatment technique requirement of, or a testing procedure prescribed by, a national drinking water regulation; (2) failure to perform monitoring required by the SDWA; (3) failure to comply with a schedule prescribed in accordance with a variance or exemption under the SDWA; (4) notice of the existence of the exemption or variance; and (5) notice of unregulated contaminants, if required by the USEPA.

The USEPA is required to promulgate regulations that prescribe the manner, frequency, form, and content for giving notice under the SDWA. States may adopt their own regulations as well. The form and manner of notifications will depend on the severity of the potential effects of the violation. The target date for the regulations is 6 August 1998. Also due by this date are the regulations addressing the issuing of annual reports by com-

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[25] The EPCRA's citizen enforcement provision authorizes cities to sue "for failure to complete and submit" forms "under" §§ 312 and 313. 42 U.S.C. § 11046(a)(1)(A)(1986). Although the *United Musical Instruments* court found that the use of the words "complete and submit" precluded a citizen suit, the Seventh Circuit disagreed and concluded that Congress included the words "under §§ 312 and 313" because it meant "in accordance with the requirements of" that section. The EPCRA's legislative history indicates that Congress placed great importance on the timing element of the reporting requirements. *See* Senate Committee on Environment and Public Works, Superfund Improvement Act of 1985, S. Rep. No. 11, 99th Cong., 1st Sess., 14-15 (Mar. 18, 1985).

[26] *Citizens for a Better Environment*, No. 96-1136, 1996 U.S. App. LEXIS 18262 at *10.

[27] 435 U.S. 444 (1978).

munity water systems to consumers that notify customers about water contaminants and the health effects of the contaminants.

At the election of the state governor, means of notice to customers may be varied, depending on the size of the system. For systems serving over 10,000 persons, notice will be achieved through direct mailing of individual reports. For systems serving between 500 to 10,000 persons, the notice requirement may be satisfied by publishing the information in local newspapers. For systems serving fewer than 500 persons, the requirement may be satisfied simply by making the information available upon request.

Most Army drinking water facilities service less than 10,000 persons and may be able to take advantage of the less stringent annual report notification requirements. Installations should monitor developments of these guidelines in their area and take advantage of opportunities offered by states during the regulatory process to voice their opinions on appropriate and efficient methods for providing notice to their consumers. Captain DeRoma, Major Springer, and Mr. Scott.

USEPA's Proposal for Integrated Federal and State Hazardous Waste Management

A USEPA staff member in the Office of Solid Waste, Al Collins, proposed to USEPA officials a management plan that would subject only the highest risk hazardous waste to federal control under Resource Conservation and Recovery Act (RCRA) Subtitle C regulations. Under the "RCRA 21" proposal, named for the number of years of RCRA regulation at the beginning of the 21st century, states would regulate most lower risk waste under their Subtitle D programs. State regulation would consist of contingent management based on the level of risk posed by the waste.

This proposal is in line with recent USEPA initiatives such as the Hazardous Waste Identification Rule in proposing deregulation of lower risk waste by moving them from regulation under Subtitle C to Subtitle D. The RCRA 21, however, would include in-state management more industrial solid waste than is currently regulated. Certain oil and gas processing and combustion waste (Bevill waste) would also be subject to RCRA regulation under this scheme. The USEPA would set a national goal for both hazardous and industrial wastes based on risk to human health and the environment. The proposal would result in a much lower percentage of waste managed by the federal program, eliminating lower risk waste from the requirements of federal permitting, land disposal restrictions, and corrective action.

The author of the plan believes RCRA 21 would promote waste minimization, pollution prevention, and flexible treatment with no increased risk to human health and the environment. Although the proposal was well received by top Agency officials, there has been no decision on how or if the concept will be implemented. Major Anderson-Lloyd.

Prudent Disclosure of ECAS Results

Recently, an installation underwent an Environmental Compliance Assessment System (ECAS) review and the results showed a marked improvement in the environmental program. While the results certainly merited praise, the report contained several negative findings, albeit technical and procedural in nature. An individual at the engineering office, without coordinating with the pubic affairs office (PAO) or the staff judge advocate (SJA), orally relayed the ECAS review results to a local reporter to earn the installation some good press. The representations made during the call prompted the reporter to request the actual ECAS findings.

The Freedom of Information Act (FOIA) establishes a presumptive right of individual or corporate persons to request information from a federal agency regarding the activities and operations of that agency.[28] Department of the Army policy on FOIA requests for ECAS results is that the final ECAS report does not fall within FOIA's deliberative privilege exemption and therefore it must be released.[29]

In all likelihood, the newspaper's spin on the story (if there is one) will be congratulatory, and the state environmental agency and the USEPA Region will view the results (if they see them) the same way. These enforcement agencies, however, may now have access to detrimental information they would not otherwise have had. While environmental program improvements are indeed commendable and the installation should seek community recognition and commendation, watch for dormant pitfalls. Voluntary disclosure of such information is fine, so long as the installation PAO and the SJA have had the opportunity to evaluate potential fallout and the commander is willing to accept any risks. Captain Anders.

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[28] 5 U.S.C. § 552 (1986).

[29] *Id.* § 552(b)(5). *See*, Memorandum for Commander, U.S. Toxic and Hazardous Materials Agency, from COL William McGowan, Chief, Environmental Law Division (4 June 1992).

Litigation Division Notes

Scheduled Airlines Traffic Offices, Inc.
v.
Department of Defense

Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense[30] involves a number of issues of interest to government contract, fiscal, and litigation attorneys. In *SATO*, the United States Court of Appeals for the District of Columbia Circuit held that concession fees collected from a contractor on the leisure (*i.e.*, unofficial) travel portion of an appropriated fund contract for travel services must be deposited into the United States Treasury and not into a local morale, welfare, and recreation (MWR) fund as required under contract. The court concluded that this arrangement violated the Miscellaneous Receipts Statute,[31] which requires government agents receiving "money for the government from any source" to deposit such funds in the Treasury. The court's holding also is pertinent to standing and the standard of review applied in scrutinizing the agency's interpretation of the statute.

Background

The commercial travel office (CTO) contract at issue was awarded and administered by the Defense Construction Supply Center (DCSC), a subordinate Defense Logistics Agency (DLA) entity located in Dayton, Ohio.[32] The solicitation required the contractor to offer both "official" travel services (*i.e.*, travel incident to temporary duty, change of station) and "unofficial" travel services (*i.e.*, travel performed for the benefit of and paid for by individual travelers out of their own funds). The contractor was required to pay the government concession fees on both portions, with fees from official travel paid to the Treasury[33] and fees from unofficial travel paid to the local MWR fund.

The plaintiff, Scheduled Airline Traffic Offices, Inc. (SATO), was unsuccessful in arguing that depositing unofficial travel concession fees into an MWR fund violated the Miscellaneous Receipts Statute in a preaward bid protest to the Comptroller General.[34] The SATO proceeded to file suit in district court and was similarly unsuccessful.[35] Though the district court found that SATO had standing to maintain the suit, it held that the DCSC's decisions and statutory interpretations were subject only to the deferential standard of review provided for in the Administrative Procedure Act (APA).[36] The district court agreed with the General Accounting Office that, because the unofficial travel fees originated from private funds, they did not constitute "money for the government." Hence, the Miscellaneous Receipts Statute did not apply.

The SATO subsequently pursued these issues on appeal.[37] The Court of Appeals for the District of Columbia reversed the district court, concluding that SATO had standing, that the Miscellaneous Receipts Statute compels depositing the concession fees into the Treasury, and that *de novo* review of the statute's applicability was appropriate.

The Decision

Standing

Before addressing the merits of the case, the court addressed whether SATO possessed standing under Article III of the Constitution and under the APA. The court rejected the government's notion that because SATO was awarded the contract it was not a disappointed bidder and lacked any economic injury. The court noted that SATO was not requesting economic damages. Rather, SATO was seeking injunctive and declaratory relief against the DLA and other Department of Defense (DOD) contracts. The SATO was contending that, unless the provision was stricken,

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[30] 1996 WL 369341 (D.C. Cir. July 5, 1996)

[31] 31 U.S.C. § 3302 (1996). The statute provides, *inter alia*, that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." *Id.*

[32] Although the case involved a Defense Logistics Agency (DLA) contract, it is of special interest to Army attorneys because the DLA adopted the Army's scheme for commercial travel contracts as presently contained in *Army Regulation 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities*, para. 8-14 (29 Sep. 95) (formerly contained in *Army Regulation 215-2*, para. 6-64.) [hereinafter AR 215-1]. More importantly, SATO's Complaint specifically addressed "other recent similar procurements" and noted that unless the court granted relief, "future procurements will be conducted in a comparable unlawful manner." While its Prayer for Relief sought no specific relief for other contracts, the court noted that SATO requested such "other and further relief as the Court deems appropriate." Hence, there is a clear potential for this case to be applied to other DOD procurements.

[33] Despite the court's finding that official travel fees are paid into the Treasury, it is the author's understanding that under most travel service contracts, the government actually receives a discount on official travel equivalent to the fee.

[34] *See* B-257310, Sep 14, 1994.

[35] *See* Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense, No. 94-2128 (D.D.C. Dec. 9, 1994).

[36] 5 U.S.C. § 702 (1995).

[37] Interestingly, the SATO appealed the case even though it was awarded the contract.

smaller companies such as itself would be unable to offer relatively high unofficial travel fees and would be at a competitive disadvantage to larger bidders (whom, presumably, are in a better position to offer larger fees and be more likely to receive contract awards). The court reasoned that one potential result, were SATO to succeed on the merits, would be "the elimination of unofficial travel fees as a factor in the procurement selection process."[38] Hence, SATO's interest in securing a "legally valid procurement process" was sufficient to confer Article III standing.

The court found that SATO had established standing under the APA as well. Noting that, although Congress did not intend to benefit government contract bidders when it enacted the Miscellaneous Receipts Statute, SATO's interests in enforcing the statute were "sufficiently congruent" with the statute's purposes that it was a "suitable challenger . . . to enforce" the law.[39] The court distinguished SATO's case from *Hazardous Waste Treatment Council v. United States Environmental Protection Agency,*[40] *(HWTC IV)* where it found that an organization of companies involved in hazardous waste treatment were not suitable challengers to maintain a suit under the Resource Conservation and Recovery Act (RCRA)[41] to force the Environmental Protection Agency to adopt more stringent (and presumably more expensive) environmental regulations for other companies. The court noted that the trade organization's interest in *HWTC IV* was to increase the profits its members would enjoy under a stricter set of environmental regulations. This was not a purpose Congress intended in enacting RCRA. In the instant case, however, the court concluded that SATO's suit sought to strike down "an agency's scheme to raise money [for local MWR funds] at Treasury's expense" that gave its larger competitors a relative advantage. Applying the Miscellaneous Receipts Statute in the manner urged by SATO would only be of immediate benefit to the public fisc and, therefore, SATO's interest in enforcing the statute was sufficiently similar to the Treasury's as a "suitable challenger" to maintain the suit.

Standard of Review

The district court viewed SATO's suit as a challenge to various government procurement decisions under the APA and that the DCSC's decisions should be overturned only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[42] The appellate court disagreed and concluded that the SATO was in fact seeking a review of the agency's interpretation of the Miscellaneous Receipt Statute. In the appellate court's view, this involved "a pure question of statutory interpretation independent of complex factual determinations or policy judgments particularly within agency's expertise."[43] Accordingly, the appellate court determined that *de novo* review of this issue was appropriate.[44]

The Miscellaneous Receipts Statute

On appeal, the government urged that the Miscellaneous Receipts Statute could not logically apply to unofficial travel fees if interpreted consistently with other statutes, precedents, and regulations that recognize and provide for funding of MWR activities.[45] The appellate court flatly rejected this position. Construing the "plain language" of the statute, the court reasoned that because the unofficial travel fees were received incident to a government contract under which the contractor received substantial support including office space, utilities, and an exclusive presence on the installation, the fees were "money for the Government from any source" that must be deposited into the Treasury.

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[38] The court relied upon its prior holding in *Nat'l Maritime Union of America, AFL-CIO v. Commander, Military Sealift Command*, 824 F.2d 1228 (D.C. Cir. 1987) for the proposition that injury to a bidder's right to a legally valid procurement process is a cognizable harm for Article III standing purposes.

[39] Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense, 1996 WL 369341, *4 (D.C. Cir. July 5, 1996), *quoting* First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin., 988 F.2d 1267, 1275-76 (D.C. Cir. 1993). This doctrine also is referred to as "prudential standing" conferred upon parties who are within the "zone of interests" Congress intended to be protected or regulated by the statute. *See* Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987).

[40] 861 F.2d 277 (D.C. Cir. 1988).

[41] 42 U.S.C. §§ 6901-6992k (1995).

[42] 5 U.S.C. § 706(a) (2) (1995). The district court also relied upon precedents such as *Kentron Hawaii, Ltd. v. Warner*, 854 F.2d 490 (D.C. Cir. 1988), and *M. Steinhal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971), in noting that government procurements present courts with unique and frequently complex situations where agency decisions are due special deference.

[43] *SATO*, 1996 WL at *5.

[44] The court noted that the Miscellaneous Receipt Statute was not specifically entrusted to the DOD to enforce or administer and, therefore, no particular deference was due to the Defense Logistic Agency's interpretation. *See* Professional Reactor Operator Soc. v. United States NRC, 939 F.2d 1047,1051 (D.C. Cir. 1991). Citing, *inter alia, Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201-02 (D.C. Cir. 1971), the court also noted that it was not obligated to defer to the General Accounting Office's interpretation in the course of deciding SATO's preaward bid protest.

[45] Specifically, the government maintained that 10 U.S.C. § 2783, which authorizes the Secretary of Defense to prescribe regulations governing nonappropriated fund instrumentality expenditures and financial management and 10 U.S.C. § 3013(b) (9) and (g) (3) which require the Secretary of the Army to ensure the force's morale and welfare as well as to prescribe regulations to fulfill this duty, necessarily require the services to raise and retain revenues for nonappropriated fund or morale, welfare, and recreation purposes. The *SATO* decision also, unfortunately, makes no mention of the possible effect of 10 U.S.C. § 2421, which authorizes the use of DOD Operations and Maintenance appropriations to support morale, welfare, and recreation activities; this statute appears to support extending appropriated fund support, such as contracting, to nonappropriated fund revenue generating activities.

The court relied upon two cases in arriving at this decision, *Reeve Aleutian Airways v. Rice*[46] and *Motor Coach Industries v. Dole*.[47] *Reeve* involved a solicitation for a contract to operate a travel office at a remote Air Force installation. Under the solicitation in *Reeve*, fees from both official and unofficial travel were to be deposited into the local MWR fund. The United States District Court for the District of Columbia had little trouble concluding that these fees must be deposited into the Treasury. *Motor Coach* involved an effort by the Federal Aviation Administration (FAA) to establish a public trust to finance airport improvements funded from airport user fees. The user fees were public moneys that otherwise would have been deposited into the Treasury. In *Motor Coach*, the United States Court of Appeals for the Fourth Circuit held that the FAA lacked authority to divert the funds into a public trust.

In *SATO*, the government sought to distinguish the contract from the contract in *Reeve* and from the FAA's program in *Motor Coach*. The government argued that the fees did not constitute money from the government because the fees were derived solely from unofficial travel paid for by private funds. The court rejected this argument, concluding that the statute's language embraced "money for the Government from any source," which rendered the source of the funds irrelevant.

The court was critical of the government's position in several other respects. It noted that the MWR fund played no role in the contract being contested—the procurement was administered by a DOD agency under standard appropriated fund procurement regulations and procedures. This situation appeared to undercut, in the court's view, the notion that revenues generated incident to the contract could be anything but money for the government. The court also was extremely critical of the probability that contracting officials will award commercial travel contracts to the offeror who proposes higher unofficial travel fees. This sets the stage for the contract to be awarded to the offeror whose proposal is most beneficial to the MWR fund, not to the offeror whose proposal presents the best overall value to the government.

Discussion

The *SATO* decision is troubling in a number of respects. Most significantly, the case makes no mention of the well-established nature of nonappropriated funds and the historical leeway which the military services have been accorded in their operation. The authority to conduct revenue generating activities outside of the appropriations process in support of nonappropriated fund instrumentalities is recognized in a number of Supreme Court cases decided well after enactment of the Miscellaneous Receipts Statute in 1849.[48]

A strong argument can be made that, contrary to the court's reasoning, the character and origin of the concession fee and MWR fund are relevant to the issue of whether the Miscellaneous Receipts Statute governs the fees disposition. Nonappropriated funds are, by definition, "separate and apart from funds that are recorded on the books of the Treasurer of the United States."[49] The Miscellaneous Receipts Statute was enacted to ensure that executive branch officials did not improperly retain funds in the absence of an appropriation. By definition, then, the statute should have no application to nonappropriated fund revenue generating activities, provided these activities are conducted in compliance with the statutes and regulations that govern MWR programs.

Conclusion

The *SATO* case may have profound implications not only for the Army's CTO program but possibly for the manner in which many other MWR revenue generating activities are conducted. Although the decision appears to leave open the possibility that unofficial travel concession fees could be retained under a nonappropriated fund contract, this conclusion is far from certain.

That the contract at issue was awarded and administered by an appropriated fund activity was only part of the basis for the court's decision. The court also relied upon SATO's permissive occupancy of government office space, SATO's use of common support services, and SATO's enjoyment of exclusive on-site presence. These items of support are provided to contractors incident to nonappropriated fund contracts as well. Taking the *SATO*'s holding to a logical conclusion, all revenues raised by or for nonappropriated fund instrumentalities could constitute "money for the government from any source" that must be deposited into the general Treasury. As a practical matter, no revenues generated by activities (*e.g.*, concession contracts, user fees, club membership dues) that enjoy any level of government support could be applied to local or departmental MWR programs.

Notwithstanding *SATO*'s more dire implications, several observations can be made which provide some guidance to attorneys and contracting personnel responsible for contract travel offices and other contracts that benefit MWR funds. Legislation to specifically authorize contractual and other appropriated fund support for nonappropriated fund revenue generating activities is the best solution. In the absence of legislation, however, the degree of appropriated fund support must be minimized for such contracts to withstand judicial scrutiny. Contracts for unofficial travel should probably be awarded and administered by nonappropriated fund contracting personnel. If this cannot be

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[46] 789 F. Supp. 417 (D. D.C. 1992).

[47] 725 F.2d 958 (4th Cir. 1984).

[48] *See, e.g.*, United States v. Hopkins, 427 U.S. 123 (1976); Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942).

[49] AR 215-1, *supra* note 32, Glossary. *See Hopkins*, 427 U.S. at 127; *Standard Oil*, 316 U.S. at 484-85.

done, the extent of nonappropriated fund involvement in the program (*e.g.*, providing personnel for source selection panels, serving as the contracting officer's representatives, nonappropriated fund reimbursement for office space and utilities) should be carefully documented. These actions should optimize the government's chances of prevailing in any bid protest or postaward dispute based on a purported violation of the Miscellaneous Receipts Statute. Lieutenant Colonel Terry L. Elling, Senior Litigation Attorney, Litigation Division.

Claims Report

United States Army Claims Service

Affirmative Claims Note

Change in Deposit Procedures for Recoveries for Damaged Real Property Under 10 U.S.C. § 2782

The United States owns vast fee interests in real property and improvements, leaseholds, and innumerable items of personal property. As a property owner, the Army is often the victim of torts. Pursuant to the Federal Claims Collection Act,[1] the Army is entitled to recover the reasonable value of damages to Army property resulting from an accident which was caused by the tortious act of a third party.

Section 2821 of the National Defense Authorization Act for Fiscal Year 1996 added section 2782 to Title 10 of the United States Code. This section now allows field claims offices to deposit money recovered for damaged real property into the account available for the repair or replacement of the real property at the time of recovery. Previously, these recoveries were deposited into the miscellaneous receipts of the General Treasury. This change applies to all sums collected on or after the effective date of the Act, 10 February 1996. This authority extends only to damage to real property and does not include damaged personal property.

The new 10 U.S.C. § 2782 provides that "amounts so credited shall be available for use for the same purposes and under the same circumstances as other funds in the account" as provided for "in advance in appropriation Acts." However, as the Fiscal Year (FY) 1996 Authorization Act was enacted after the FY96 Appropriation Act, it appears that no provision in the Appropriation Act would allow installations to spend or otherwise obligate funds recovered and deposited under this new provision.

The United States Army Claims Service (USARCS) is coordinating with other services and those responsible for initiating legislation to secure the necessary authorization to obligate the funds recovered for real property damage. In the meantime, these monies must be deposited in the appropriate account and held until authority to expend is received.

Personnel Claims Notes

Increase in Amount Payable Under the Personnel Claims Act

The 1996 Defense Authorization Act includes a provision amending the Personnel Claims Act (PCA),[2] which increases the amount that claimants can be paid from $40,000 to $100,000. This increased payment authority only applies to claims arising from "an emergency evacuation or . . . extraordinary circumstances." The amendment applies retroactively provided the claimant submits a written request for reconsideration within two years of the date of the amendment (10 February 1996).

Neither the amendment nor the legislative history defines "emergency evacuations" or "extraordinary circumstances." However, the conditions which facilitate the settlement of large claims have been expanded by the 1996 amendment to the PCA. The 1983 amendment limited the settlement of claims between $25,000—$40,000 to those arising from certain types of emergency evacuations. It did not authorize settlement of claims arising from "extraordinary circumstances." The conditions set forth in the 1983 amendment were removed in 1988 when Congress established a $40,000 limit on the settlement of all claims filed under the PCA. The 1996 amendment again establishes conditions, albeit less stringent, for the settlement of large claims.

The USARCS has requested delegation of the authority to pay claims up to the new statutory maximum. Inquiries concerning such claims should be addressed to USARCS. Captain Metrey.

Carrier Inspection Rights

Carriers have the right to timely inspection of damaged household goods. This right is specifically guaranteed to them by the Military-Industry Memorandum of Understanding on Loss and Damage Rules (M-IMOU), which went into effect in January 1992. The M-IMOU authorizes the following, "The carrier shall have 45 calendar days from delivery of shipment or dispatch of each DD Form 1840R, whichever is later, to inspect the ship-

[1] 31 U.S.C §§ 3701-19 (1988).

[2] 31 U.S.C. § 3721(b)(1) (1996)

ment for loss or transit damage or both. If the member refuses to permit the carrier to inspect, the carrier must contact the appropriate claims office which shall facilitate an inspection of the goods. It is agreed that if the member causes a delay by refusing inspection, the carrier shall be provided with an equal number of days to perform the inspection or estimate (45 days plus delay caused by the member)."

Recently, the Army lost an appeal because the claims office failed to provide the carrier with assistance in obtaining an inspection. In *Move U.S.A.*,[3] the carrier made numerous attempts to arrange an inspection in a timely manner. It tried to schedule an inspection directly with the service member but was not successful. It then sent a certified letter to the claims office asking for assistance. The claims office was unresponsive. The carrier then followed with another letter to the claims office, but still got no help in arranging an inspection.

The Comptroller General held that "[the carrier, Move U.S.A] should not have been held liable for damage to the compact discs because it was denied its right to inspect the discs, even though it vigorously pursued that right. The record shows that Move U.S.A. contacted the member to attempt to inspect and contacted the claims office at the local base for aid in inspecting the goods in a timely manner, but obtained no assistance. Where a carrier timely and vigorously pursues its inspection right under the Military Industry Memorandum of Understanding and is denied that right, the carrier is not *prima facie* liable for the items."

"Vigorously pursuing inspection rights" is the term the Comptroller General frequently uses in deciding cases of carrier inspection rights. In *Fogarty Van Lines*,[4] the carrier failed to seek assistance from the Air Force after it perceived that the service member was being uncooperative. The Comptroller General held for the Air Force and noted "that the carrier has a concurrent obligation to pursue its right of inspection vigorously when the property owner does not respond promptly to the government's instruction."

Stevens Worldwide Van Lines[5] involved a shipment that was delivered to Alabama and then the shipper moved most of the shipment to Florida. The shipper left behind a damaged water bed, which the shipper gave to a neighbor in Alabama for his use if he could repair it. The neighbor could not fix the water bed and disposed of it. The Comptroller General held the carrier liable for the shipment that had been moved to Florida, which the carrier could have inspected if he wished. As for the water bed, the carrier was relieved of liability because the carrier had vigorously pursued its inspection rights but was unable to view the property because it had been discarded.

In *American Intercoastal Movers, Inc.*,[6] the carrier attempted to inspect the damaged skis but they were not in the house when the carrier's inspector arrived. The carrier lost the appeal because the Comptroller General asserted that the carrier should have made another attempt to inspect. There was also no indication that the service member intended to deny the carrier its inspection rights. In *Towne Van Lines*,[7] the Comptroller General again noted, "In this case, the record indicates that the carrier did not pursue its inspection rights as vigorously as it might have."

Whenever a carrier contacts a claims office to ask for assistance in arranging an inspection, go out of your way to provide it. This request can come by telephone, letter, or certified letter. Record this request in the Chronology Sheet and actively pursue assistance with the inspection. Call the service member and inform the member that the carrier has the right to inspect and that cooperation is essential. Record this conversation on the Chronology Sheet and then call the carrier to ensure that the inspection has been carried out. We should never lose a case because a claims office fails to assist the carrier with its inspection request. Ms. Schultz

[3] Comp. Gen. B-266112 (May 15, 1996).

[4] Comp. Gen. B-235558 (Dec. 19, 1989).

[5] Comp. Gen. B-251343 (Apr. 19, 1993).

[6] Comp. Gen. B-265689 (Feb. 22, 1996).

[7] Comp. Gen. B-270677 (May 22, 1996).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380.* Major Rivera.

1996-1997 Academic Year On-Site CLE Training

The first On-Site training for 1997 Academic Year, hosted by the 90th Regional Support Command of Dallas, Texas, was a success providing a springboard for a great training year. The On-Site was attended by 328 participants, included 232 officers, 94 enlisted, and 2 civilian attorneys. Congratulations to our host, Colonel Tom Fierke, Commander, 2d Legal Service Organization, and Lieutenant Colonel Linda Sheffield, On-Site coordinator, for a job well done.

On-Site instruction provides an excellent opportunity to obtain Continuing Legal Education credit as well as updates in various topics of concern to military practitioners. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Enlisted training provided by qualified instructors from Fort Jackson also is available during the On-Sites. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army. The Dallas On-Site was attended by Major General Mike Nardotti, The Judge Advocate General, Brigadier General Gerry Thames, Deputy Commanding General, 90th Regional Support Command, Colonel John F. De Pue, Chief Judge Individual Mobilization Augumentee, Sergeant Major Jeffrey Todd, the Corps' Sergeant Major, and Sergeant Major John Fonville, The Judge Advocate General's School Sergeant Major.

During 1997 Academic Year, we are looking forward to greater integration of enlisted personnel training and participation in the On-Sites as well as an expanded emphasis on automation training.

Remember that *Army Regulation 27-1*, paragraph 10-10, requires Unites States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other USAR units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army Judge Advocates, National Guard Judge Advocates, and Department of Defense civilian Attorneys also are strongly encouraged to attend and take advantage of this valuable program. We are looking forward to three more successful On-Sites during the month of November at Bloomington, Minnesota, Willow Grove, Pennsylvania, and New York, New York.

If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552- 3978, extension 380. You may also contact me on the Internet at *riveraju@otjag.army.mil*. Major Juan J. Rivera.

GRA On-Line!

You may contact any member of the GRA team at the addresses below.

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Ms. Sandra Foster, ... fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan, ... groganma@otjag.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, 1996-1997 ACADEMIC YEAR

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
9-10 Nov	Willow Grove, PA 153d LSO/99th RSC WG Naval Air Station AF Auditorium-Bldg. 203 Willow Grove, PA 19090	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	None COL R. O'Meara MAJ M. Lescault MAJ C. Pede COL K. Hamack	LTC Donald Moser 153d LSO North Penn USAR Center 1625 Berks Road Norristown, PA 19403 (215) 925-5800
16-17 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	MG Nardotti COLs Eres, DePue & O'Meara MAJ M. Henderson MAJ M. Newton COL T. Tromey	LTC Myron J. Berman 77th RSC, Building 637 Fort Totten, NY 11359 (718) 352-5703
4-5 Jan 97	Long Beach, CA 78th MSO	AC GO RC GO Contract Law Criminal Law GRA Rep	MG K. Gray COL J. DePue MAJ T. Pendolino MAJ S. Henley COL K. Hamack	LTC Andrew Bettwy 10541 Calle Lee, Ste 101 Los Alamitos, CA 90720 (714) 229-3700
1-2 Feb	Seattle, WA 6th MSO	AC GO RC GO Criminal Law Int'l-Ops Law GRA Rep	MG W. Huffman COL R. O'Meara LTC L. Morris MAJ S. Morris LTC P. Menk	MAJ Frank Chmelik Chmelik & Associates 1500 Railroad Avenue Bellingham, WA 98225 (360) 671-1796
8-9 Feb	Columbus, OH 9th MSO Clarion Hotel 7007 N High Street Columbus, OH 43085 (614) 436-0700	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG K. Gray COL J. DePue MAJ J. Fenton MAJ N. Allen COL T. Tromey	LTC Timothy J. Donnelly 9th MSO 765 Taylor Station Road Blacklick, OH 43004 (419) 625-8373
22-23 Feb	Salt Lake City, UT 87th MSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG M. Nardotti COL R. O'Meara LTC J. Frisk MAJ A. Frisk Dr. M. Foley	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
22-23 Feb	Denver, CO 87th MSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	None COL J. DePue MAJ S. Castlen MAJ W. Barto COL T. Tromey	LTC David L. Shakes 3255 Wade Circle Colorado Springs, CO 80917 (719) 596-3326
22-23 Feb	Indianapolis, IN IN ARNG Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG W. Huffman COL T. Eres MAJ S. Parke MAJ R. Barfield COL K. Hamack	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, 1996-1997 ACADEMIC YEAR

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
1-2 Mar	Charleston, SC 12th LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG J. Altenburg COL T. Eres MAJ C. Garcia LTC K. Ellcessor COL K. Hamack	COL Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 727-4523
8-9 Mar	Washington, DC 10th MSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Int'l-Ops Law Criminal Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ M. Newton MAJ C. Pede Dr. M. Foley	CPT Michelle A Lang 10th MSO 5550 Dower House Road Washington, DC 20315 (301) 394-0558/0562
15-16 Mar	San Francisco, CA 75th LSO	AC GO RC GO Criminal Law Contract Law GRA Rep	MG M. Nardotti COLs O'Meara, Eres, & DePue MAJ R. Kohlmann LTC J. Krump COL T. Tromey	LTC Allan D. Hardcastle Babin, Seeger & Hardcastle P.O. Box 11626 Santa Rosa, CA 95406 (707) 526-7370
22-23 Mar	Rolling Meadows, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ P. Conrad MAJ M. Mills LTC P. Menk	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60430-0395 (312) 443-4550
4-6 Apr	Jacksonville, FL 174th MSO/FL ARNG	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Altenburg COL R. O'Meara LCDR M. Newcombe MAJ T. Pendolino LTC P. Menk	LTC Henry T. Swann P.O. Box 1008 St. Augustine, FL 32085 (904) 823-0131
26-27 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Tng Ctr 360 Eliott Street Newport, RI 02841	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Cooke COL J. DePue MAJ M. Mills MAJ K. Sommerkamp LTC P. Menk	MAJ Katherine Bigler HQ, 94th RSC ATTN: AFRC-AMA-JA 695 Sherman Avenue Fort Devens, MA 01433 (508) 796-6332, FAX 2018
3-4 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf St Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	AC GO RC GO Criminal Law Contract Law GRA Rep	BG W. Huffman COL T. Eres MAJ D. Wright MAJ W. Meadows Dr. M. Foley	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304
TBD	Des Moines, IA 19th TAACOM The Embassy Suites 101 E Locust Des Moines, IA 50309 (515) 244-1700	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	TBD COL R. O'Meara MAJ J. Little LTC J. Krump LTC P. Menk	MAJ Patrick J. Reinert P.O. Box 74950 Cedar Rapids, IA 52407 (319) 363-6333

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1996

November 1996

18-22 November:	20th Criminal Law New Developments Course (5F-F35).
18-22 November:	64th Law of War Workshop (5F-F42).

December 1996

2-6 December:	139th Senior Officers Legal Orientation Course (5F-F1).
9-13 December:	Government Contract Law Symposium (5F-F11).

1997

January 1997

7-10 January:	USAREUR Tax CLE (5F-F28E).
13-17 January:	USAREUR Contract Law CLE (5F-F18E).
19 January-11 April:	142d Basic Course (5-27-C20).
21-24 January:	PACOM Tax CLE (5F-F28P).
22-24 January:	3d RC General Officers Legal Orientation Course (5F-F3).
27-31 January:	26th Operational Law Seminar (5F-F47).

February 1997

3-7 February:	USAREUR Operational Law CLE (5F-F47).
3-7 February:	140th Senior Officers Legal Orientation Course (5F-F1).
10-14 February:	Maxwell AFB Fiscal Law Course (5F-F12A).
10-14 February:	65th Law of War Workshop (5F-F42).
18-21 February:	1st National Security Crimes Course (5F-F30).
24-28 February:	40th Legal Assistance Course (5F-F23).

March 1997

3-14 March:	138th Contract Attorneys Course (5F-F10).
17-21 March:	21st Administrative Law for Military Installations Course (5F-F24).
24-28 March:	1st Advanced Contract Law Course (5F-F103).
31 March-4 April:	141st Senior Officers Legal Orientation Course (5F-F1).

April 1997

7-18 April:	7th Criminal Law Advocacy Course (5F-F34).
14-17 April:	1997 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April:	27th Operational Law Seminar (5F-F47).

28 April-2 May:	8th Law for Legal NCOs Course (512-71D/20/30).
28 April-2 May:	47th Fiscal Law Course (5F-F12).

May 1997

12-16 May:	48th Fiscal Law Course (5F-F12).
12-30 May:	40th Military Judge Course(5F-F33).
19-23 May:	50th Federal Labor Relations Course (5F-F22).

June 1997

2-6 June:	3d Intelligence Law Workshop (5F-F41).
2-6 June:	142d Senior Officers Legal Orientation Course (5F-F1).
2 June-11 July:	4th JA Warrant Officer Basic Course (7A-550A0).
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).
16-27 June:	JAOAC (Phase II) (5F-F55).
16-27 June:	JATT Team Training (5F-F57).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
22 June-12 September:	143d Basic Course (5-27).
30 June-2 July:	28th Methods of Instruction Course (5F-F70).

July 1997

1-3 July: Seminar	Professional Recruiting Training
7-11 July:	8th Legal Administrators Course (7A-550A1).
23-25 July:	Career Services Directors Conference
28 July-8 May 1998:	46th Graduate Course (5-27-C22). (5-27-C22).
28 July-8 August:	139th Contract Attorneys Course (5F-F10).
29 July-1 August:	3d Military Justice Managers Course (5F-F31).

August 1997

4-8 August:	1st Chief Legal NCO Course (512-71D-CLNCO).
11-15 August:	8th Senior Legal NCO Management Course (512-71D/40/50).
11-15 August:	15th Federal Litigation Course (5F-F29).
18-22 August:	66th Law of War Workshop (5F-F42).
18-22 August:	143d Senior Officers Legal Orientation Course (5F-F1).
25-29 August:	28th Operational Law Seminar (5F-F47).

September 1997

3-5 September:	USAREUR Legal Assistance CLE (5F-F23E).
8-10 September:	3d Procurement Fraud Course (5F-F101).
8-12 September:	USAREUR Administrative Law CLE (5F-F24E).
15-26 September:	8th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1996

November 1996

16-21, AAJE:	Domestic Relations: Philosophical Ethics and Decision Making, San Juan, PR
16-21, AAJE:	No Reversals—Correct Rulings: Evidence in Action, San Juan, PR
17-22, NJC:	Drug Courts: The Judicial Response, Reno, NV
20-22, NJC:	Ethics for Judges, Reno, NV

December 1996

6, ICLE	Environmental Law, Atlanta, GA

11, ICLE	5th Annual ADR Advocacy, Atlanta, GA
12, ICLE	Professionalism, Ethics and Malpractice, Atlanta, GA
13, ICLE	Labor and Employment Law, Atlanta, GA
19, ICLE	Evidentiary Crises, Atlanta, GA

1997

January 1997

3-11, VCLE	Sixteenth Institute of Trial Advocacy, Charlottesville, VA

For further information on civilian courses in your area, please contact the one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS-(215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662.
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3203 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW., Suite 408 Washington, D.C. 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 222-5286
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, N.W., Room 2107 Washington, D.C. 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227.
LSU:	Louisiana State University Center of Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516.
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100

NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (800) 225-6482 (612) 644-0323 in (MN and AK).
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557 (702) 784-6747
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (800) 932-4637 (717) 233-5774
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially

Jurisdiction	Reporting Month
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available Through the Defense Technical Information Center

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is 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. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100 or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms for registration as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service 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. These publications are for government use only.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).

AD A305239 Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).

AD B164534 Notarial Guide, JA-268-92 (136 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A297426 Wills Guide, JA-262-95 (517 pgs).

*AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A289411 Tax Information Series, JA 269-95 (134 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A275507 Air Force All States Income Tax Guide, April 1995.

Administrative and Civil Law

*AD A310157 Federal Tort Claims Act, JA 241-96 (118 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A311351 Defensive Federal Litigation, JA-200-95 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A311070 Government Information Practices, JA-235-95 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-92 (45 pgs).

Labor Law

AD A308341 The Law of Federal Employment, JA-210-96 (330 pgs).

AD A308754 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD 302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-5181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988).*

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish aM single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(*3*) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(*1*) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(*2*) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(*3*) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(*4*) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of *DA Pams* by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serv-

ing the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novelle LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11
Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter

to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AF All States IncomeTax Guide for use with 1994 state income tax returns, April 1996.
ALAW.ZIP	June 1990	*The Army Lawyer/Military LawReview* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	July 1996	Current list of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school in Word 6.0, June 1996.

FILE NAME	UPLOADED	DESCRIPTION
CHILDSPT.ASC	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FOIA2.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200.ZIP	January 1996	Defensive Federal Litigation, August 1995.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.ZIP	May 1996	Law of Federal Labor-Management Relations, May 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, Volumes I and II, September 1995.
JA235.ZIP	January 1996	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	January 1996	Federal Tort Claims Act, August 1994.
JA260.ZIP	August 1996	Soldiers' & Sailors' Civil Relief Act Guide, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA263.ZIP	August 1996	Family Law Guide, August 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	January 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA275.ZIP	August 1993	Model Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.ZIP	January 1996	15-6 Investigations, November 1992 in ASCII text.
JA301.ZIP	January 1996	Unauthorized Absences Programmed Text, August 1995.

FILE NAME	UPLOADED	DESCRIPTION
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.

FILE NAME	UPLOADED	DESCRIPTION
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95.ZIP	January 1996	Operational Law Deskbook 1995.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
0YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 ¼ inch or 3 ½ inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

5. The Army Lawyer on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP APR96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Above in paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

6. Articles

The following information may be useful to judge advocates:

Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client is Safe*, 47 FLA. L. REV. 1 (1995).

Bernard H. Oxman, *International Maritime Boundaries: Political, Strategic, and Historical Considerations*, 26 U. MIAMI INTER-AM. L. REV. 243 (1994-95).

7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978 [Lieutenant Colonel Godwin (ext. 435)].

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

U.S. Army Legal Services Agency
Law Library, Room 203
Nassif Building
5611 Columbia Pike
Falls Church, Virginia 22041-5013
POC Melissa Knowles
COM (703) 681-9608

* West's Federal Practice Digest, 4th
Volume 35, Criminal Law 1171 to 1221
Volume 35A, Criminal Law 1222 to End

* District of Columbia Code Annotated, 1981 edition
Volume 4, 1995 Replacement,
Title 6-Health and Safety
Volume 4A, 1995 Replacement, Titles 7-15

* District of Columbia Code Annotated, 1981 edition
Volumes 1 and 2

* District of Columbia Code Annotated, 1981 edition
1995 Cumulative Supplement (Pocket Parts) for
Volumes 1-11

U.S. Army Missile Command
ATTN: AMSMI-GC-PO
Redstone Arsenal, Alabama 35898
POC Doris Lilliard
COM (205) 876-2252
DSN 746-2252
FAX (205) 876-9438

* Code of Alabama 1975, Volume 1 thru 24 (31 vols.)

* Shepard's Military Justice Citations, 1985

* Shepard's Southern Reporter Citations
Volumes 1, 2, 2A, 3, 4, 5, 5A, 6, 6A, 7, 7A, 8, 8A,
9, 9A, 10, 11, 11A, 12, 12A, 13, 14, 15, 15A,
16, 16A, 17, 18, 19, 20, Index (2 sets)
(62 vols.)

* United States Law Week, looseleaf, 1 July 58 thru
30 June 89 (58 vols.)

*U.S. Government Printing Office: 1996 — 418-244/40010

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