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Essential Estate Planning: Tools and Methodologies For the Military Practitioner

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Introduction

The issue of personal estate planning is critical for United States military members. Due to the nature of the profession and the mobility requirements that are the trademark of duty in the modern military, service in the military is dangerous. Although no one looks forward to the prospect of considering their own demise, without a prepared, well thought out, and executed estate plan one is unable to take advantage of the legal mechanisms that allow the estate owner the greatest flexibility to manage his assets. The purpose of this article is to present a broad overview of those mechanisms and other issues involved in estate planning.[1]

One way to think of an estate plan is as a process whereby an individual takes measures and makes decisions compatible with the use, preservation, and distribution of his wealth. This planning process also involves many different factors that are not associated with the financial nature of the estate plan; for instance, the personal desires of the estate owner may be entirely inconsistent with the best method for preserving or distributing wealth. This article will raise awareness of estate planning matters for members of the military through a conscious effort to address the practical considerations of anyone concerned with the best use of assets during life and a managed disposition of those assets on death.

The first step for military members in developing the financial aspect of an estate plan is to understand the items that are already part of the estate of the individual as a result of the benefits due by virtue of that individual's citizenship and service in the armed forces. After that, the focus of estate planning shifts to that portion of an estate that makes up the majority of an estate for most service members–life insurance. The key to accumulating assets within an estate also hinges on an individual's ability to invest and build an estate. Once an individual has accumulated some measure of wealth, the issues then most critical to estate planning are the decisions regarding how to manage and then distribute the accumulated assets of the estate. All of these topics will be addressed in this article, with particular emphasis being placed on the unique issues confronting military members in estate planning.

Government Survivor Benefits

There are certain survivor benefits that an individual enjoys solely as a result of their service on active duty. Despite the general requirement of service on active duty as a trigger for the establishment of the benefits, there are differing criteria for entitlement for survivors under different programs. The basic government survivor benefits include Dependency and Indemnity Compensation (DIC), Survivors' and Dependents' Educational Assistance, Survivor Benefit Plan (SBP), and Social Security Administration survivor benefits. When determining government benefits, there are two questions that must be answered: who is eligible to receive the benefits, and what are the specific benefits to which the recipient is entitled?

The first government program to be addressed is the coverage provided under DIC.[2] Administered by the Veterans Administration (VA), DIC is unequivocally a beneficial program for the survivors of a deceased military member. While there are some limitations on the benefits, there is the potential for the surviving spouse of a military member to receive no-cost, tax-free, life-long financial benefits under DIC.

The threshold requirement in a DIC eligibility inquiry focuses on whether the death of the service member occurred while on active duty, and concurrently, and even more importantly, whether or not the death occurred in the line of duty. The first step in determining eligibility is to ascertain if the service member was on "active military, naval, or air service" at the time of death.[3] As this definition includes active duty, an understanding of how the statute defines active duty is also important. For purposes of DIC coverage, active duty is defined as, "full-time duty in the armed forces."[4] Because the definition is generally applicable to all members on active duty, those members are covered by DIC benefits.

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1. The focus of this article is to generally address some of the more common issues that arise when advising service members in the area of estate planning. It is not intended to be a comprehensive review of the tools available for estate planning, or a "how to" on estate building or planning. Hopefully, this article will provide the reader with a baseline on the primary issues affecting military members in this area of the law while providing a reference source to the statutory foundations for some of the specific legal and tax topics surrounding government benefits and estate planning devices.

2. 38 U.S.C.A. § 1310 (West 1999).

The next hurdle is a determination by the VA that the death occurred in *line of duty.* The phrase, "line of duty," has meaning to most service members and certainly all judge advocates and Department of Defense (DOD) civilian attorneys. However, the issues that most persons are familiar with in a line of duty investigation[5] are different from the issues the VA considers in making a line of duty determination for DIC. An injury or disease is considered to have occurred in the line of duty when the member "was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or authorized leave, unless such injury was the result of the person's own willful misconduct or abuse of alcohol or drugs."[6] This liberal view of the definition seems to support the notion that willful misconduct generally means conduct that is criminal.[7]

Also, DIC provides another way for a survivor to be entitled to benefits under the program even after the service member is no longer serving on active duty; that is, when the death of the member is considered "service-connected."[8] For the VA to consider a death service-connected, there must be a nexus between the death of the service member and that member's service on active duty.[9] An example of the service connection is when a military member is injured or contracts a disease while on active duty then subsequently is discharged or retires from active duty and then dies as a result of the injury or disease. In other words, DIC coverage is only available when the cause of death is closely connected to a medical condition that arose or became aggravated during the veteran's service on active duty.

Once an individual qualifies for DIC benefits, it's simple to determine the amount of benefits that will be received. As of 1 December 1998, surviving spouses of military members of all ranks receive $861 per month from DIC.[10] If the surviving spouse has children, the spouse will receive additional benefits equaling $218 per month for each child under the age of eighteen.[11] That monthly amount is reduced to $185 for any children between the ages of eighteen to twenty-two attending a VA-approved educational institution.[12]

Children are entitled to benefits when there is no surviving spouse.[13] Children's benefits terminate when the child reaches the age of eighteen, or twenty-three if in an authorized educational institution. Any benefits paid to a child who is or becomes disabled before either of the above applicable age cutoffs will continue to receive the benefits.[14] Even parents of the deceased may be entitled to benefits if their annual income is low enough.[15]

There are many benefits to the actual compensation dependents under DIC receive. The most important is that DIC benefits come at no cost to the military member or the dependents. This is not like an insurance policy or an annuity; there are no premiums to pay and no beneficiaries to name. A military member's dependents are entitled to the benefits strictly

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3. 38 U.S.C.A. § 101(24) provides:

> The term "active military, naval, or air service" includes active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty.

4. *Id.* § 101(21)(A). This article mainly concentrates on the benefits and considerations for active duty members and does not address specific status or applicability for members of the guard or reserve.

5. *See* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION (15 Aug. 1994); U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONNEL-GENERAL, ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (17 Oct. 1986); U.S. DEP'T OF NAVY, REG. 1124, MISCONDUCT AND LINE OF DUTY FINDINGS (14 Sept. 1990).

6. 38 U.S.C.A. § 105(a).

7. *See id.* § 105(b).

8. *Id.* § 1310(a).

9. The term "service-connected" is defined as meaning "that the death resulted from a disability incurred or aggravated, in line of duty. . . ." *Id.* § 101 (16).

10. *See id.* § 1311.

11. *Id.* § 1311(b).

12. While all educational institutions are subject to approval by the Secretary of the Veterans Administration, some examples listed at 38 U.S.C.A. § 104 include: schools, universities, colleges, seminaries, academies, and technical institutes.

13. *See id.* § 1313.

14. *See id.* § 1314(a)-(c).

15. "In no case may dependency and indemnity compensation be paid . . . to any parent if the annual income of such parent exceeds $4038 . . . ." *See id.* § 1315(b)(3).

because of the military service of their sponsor. The DIC compensation is also tax free to the beneficiaries; the benefits are not taxed as income to the recipients.[16] In addition, the benefits also have a cost of living factor added in that allows for increases in the amounts received. These benefits are also not reduced by Social Security or any other government survivors benefit program; if dependents are eligible to receive DIC, they receive the entire amount to which they are entitled without any set-offs.[17] Finally, DIC benefits received by a surviving spouse can be received for the duration of the life of the spouse. The benefits to the surviving spouse are terminated by the death of the spouse and can be terminated upon the remarriage of the spouse.[18]

As previously mentioned, the benefits proceeding from DIC are substantial and in most cases, free from restrictions. The program more than adequately succeeds in it's general purpose of ensuring that the surviving dependents are not left destitute by the death of the service member. While the survivors are not set for life, there will be some income to assist them in regaining the standard of living previously enjoyed. This article will next analyze some of the educational benefits available to the survivors of a deceased service member.

Another benefit program administered by VA is Survivors and Dependents Educational Assistance.[19] Under this program, the spouse and surviving children of a service member are entitled to receive benefits toward expenses while pursuing a post-secondary education.[20] Benefit amounts differ based on the full- or part-time status of the student and the type of training or education.[21] This assistance is generally available after the child reaches the age of eighteen or completes secondary schooling, and the benefits can last until the child reaches age twenty-six.[22] For the surviving spouse, the benefits remain available for up to ten years after the service member's eligibility or death, whichever is later.[23] As previously mentioned, to remain eligible for veterans' benefits, the surviving spouse cannot be remarried.[24] One of the main benefits of this program is its duration; "each eligible person shall be entitled to educational assistance . . . not in excess of forty-five months."[25]

Although this review of benefit programs has so far focused on the benefits available only to survivors of military members, there are additional survivor benefits available to all qualified United States' citizens through the Social Security Administration. Eligibility for Social Security survivor benefits is determined by the "insured status" of the deceased.[26] The survivors of a military member are eligible for Social Security due to the military status of the deceased. What this means is that even if a military member has not been employed for a long enough period of time to be either currently or fully insured under Social Security, the member will still be treated as if fully insured.[27] The surviving spouse of a veteran is not entitled to monthly survivor benefits until the spouse has reached the age of sixty.[28] However, the surviving spouse will receive benefits as a custodial parent for any child of the fully or currently insured individual who is under the age of sixteen.[29] The children of the deceased are entitled to benefits until age eighteen or nineteen if still in high school.[30]

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16. *Id.* § 5301.

17. While other benefit programs do not reduce DIC, some of those same programs are reduced when the recipient is also receiving DIC. For example, Survivor Benefit Plan benefits are reduced to the extent that the surviving spouse is also receiving DIC benefits. *See* 10 U.S.C.A. § 1450(c)(1) (West 1999).

18. *See* 38 U.S.C.A. § 101(3) (defining "surviving spouse"); 38 U.S.C.A. § 1311 (regarding remarriage of surviving spouse).

19. 38 U.S.C.A. § 3500.

20. *See id*. § 3531.

21. *See id.* § 3532 for differing benefit amounts based on the full-time, three-quarter-time, or halftime status of the eligible person.

22. *See id*. § 3512(a).

23. *Id*. § 3512 (b)(1)(A-C).

24. *Id*. § 104.

25. *Id*. § 3511(a).

26. A "fully insured individual" is one who has generally paid into Social Security for at least forty quarters during their life. A "currently insured individual" is someone who has paid in at least six of the last thirteen quarters before death. *See* 42 U.S.C.A. § 414 (West 1999). "A *quarter* or *calendar quarter* means a period of three calendar months ending March 31, June 30, September 30, or December 31 of any year." 20 C.F.R. § 404.102 (1999).

27. If at the time of his death a veteran is neither fully or currently insured, and the death occurs while on active duty or is service-connected, VA will pay benefits to the survivors equal to what the veteran would have received from Social Security Administration if fully or currently insured. *See* 38 U.S.C.A. §1312.

28. *See* 42 U.S.C.A. § 402(e)(1)(B).

29. *Id.* § 402(g).

Survivor benefits under Social Security are based on the individual employment history of the deceased. The benefits are determined by the primary insurance amount (PIA) attributed to the employee because of his contributions to the system.[31] Without delving too deeply into the mathematics, the PIA is derived from a computation that considers the average monthly wages of the deceased individual.[32] Once the PIA is determined, the amount of benefits due to the survivors is calculated by multiplying the PIA by a factor (these multipliers differ and depend upon the number and type of survivors; for example, surviving spouse and one child; surviving child only; surviving spouse and two or more children). The figure arrived at from this calculation is the amount of monthly benefits available to survivors.[33]

Although the survivor benefits from Social Security are also substantial, there are several limitations on receipt of benefits. First, to receive survivor benefits, the survivors must apply to the Social Security Administration; the benefits do not arise automatically. In addition, benefits will not be paid retroactively; the benefits will begin upon approval of an application, regardless of when the application is made in relation to the death of the service member.[34] Next, survivor benefits are capped at the maximum family benefit (MFB), the amount which Social Security survivor benefits will not exceed.[35] For example, assuming the same PIA, a surviving spouse with two children receives the same benefits as one with six children because the MFB has reached its limit. Finally, similar to DIC, the benefits to the surviving spouse are generally unavailable to the surviving spouse who decides to remarry.[36]

The previous benefits discussions have centered on the benefits available simply because of the service of the military member. The final topic for discussion, the Survivor Benefit Plan (SBP),[37] is also based on the service of the member. The SBP, however, is fundamentally different from the other programs because eligibility for SBP is usually dependent upon voluntary monetary contributions from the service member. With one notable exception, SBP is an annuity program in which the service member determines the annuity to be received by his survivors by electing the level of monetary contribution to the plan. Through this election, the member determines what benefits will be paid to survivors upon his death. As most military members understand, the SBP decision is one of the most critical ones that must be made by retiring military members. Unfortunately, even though aware of the importance, there is often little research done to be adequately informed as to what the benefits are and how those benefits can best fit into the retiree's financial future.

The SBP is a DOD program that provides for the continuing payment of a benefit to specified survivors upon the death of the participating service member. This optional plan is funded by monthly premiums contributed from the retired pay of the military member and partially subsidized by the government.[38] The member determines the amount of that benefit and to whom it is paid.[39] The member can make a number of elections regarding the benefit recipients (for example: spouse only, spouse and qualifying children, qualifying child only) and the amount of benefits to be received. Nonetheless, the service member cannot act alone in making the SBP decision; if there is a spouse, the spouse must also concur with certain decisions of the member regarding participation in SBP.[40] Aside from a one-time opportunity to discontinue participation in the plan,[41] and exceptions for when there are changes to eligible beneficiaries, the decision to participate or not, is irrevocable.[42]

30. *Id.* § 402(d).

31. *Id.* § 415.

32. *Id*. § 415(b).

33. The Personal Earnings and Benefit Estimate Statement (PEBES) is the document the Social Security Administration uses to estimate future benefits as well as determine how individuals qualify for benefits. The PEBES can be requested online at <http://www.ssa.gov> or by calling 1-800-772-1213.

34. Any inquiry by an active duty or retired service member regarding these or other government survivor benefits should begin with a casualty assistance office of the respective service.

35. *See* 42 U.S.C.A. § 403(a).

36. Widow and widower benefits are dependent upon the surviving spouse being unmarried. *See id*. § 402(e)(1)(a). If the surviving spouse remarries after reaching the age of sixty, the marriage will be deemed to have not occurred. *See id.* § 402(e)(3).

37. 10 U.S.C.A. § 1447 (West 1999).

38. For a general idea of the premium costs for SBP, the premium is equal to 6.5% of the base amount selected by the participant. *See* U.S. Dep't of Air Force, Secretary of the Air Force Instr. 36-3006, Survivor Benefit Plan (SBP) and Supplemental Survivor Benefit Plan (SSBP) (1 July 1996).

39. The monthly benefit is determined by the "base amount" selected by the participant. This base amount can be any amount between $300 and the full amount of the monthly retired pay. *See* 10 U.S.C.A. § 1447(6). The monthly SBP benefit is 55% of the selected base amount until the surviving spouse reaches the age of 62; thereafter, the monthly benefit is equal to 35% of the base amount. *See id*. § 1451.

40. 10 U.S.C.A. § 1448(a)(3).

Eligibility for SBP is determined by the term of the member's service to the armed forces. In most cases, a member elects to participate in SBP when retirement eligible and immediately prior to retirement as part of personnel out-processing from active duty.[43] However, in addition to this voluntary participation in SBP, eligibility also arises once the member becomes retirement eligible.[44] For example, if a military member dies while on active duty after the completion of twenty years of active duty service, the surviving spouse (and children if no surviving spouse or if surviving spouse subsequently dies) receives the full benefits from SBP without paying any costs or making any contributions to the plan. In that scenario, the survivor would receive fifty-five percent of the member's monthly base pay each month for as long as otherwise eligible to receive the benefits from SBP.[45]

Before determining whether SBP is an appropriate part of one's estate plan, a service member must consider a number of factors. First, SBP is similar to a bet or gamble (analogous to the considerations in purchasing life insurance)–the participant is betting that he will die and that his spouse will outlive the participant; thus making SBP pay out over the life of the participant's survivor. Its easy enough to consult actuarial tables to determine the mortality of the participant and the spouse. If the participant is decidedly older than his spouse, SBP may have more value to that participant.

Another consideration is whether the member has young or disabled children. In general, a child is a dependent child eligible to receive benefits if unmarried, under eighteen years of age, under twenty but pursuing a full-time course of study or training, and incapable of self support because of mental or physical incapacity. If a disabled child is named as a beneficiary under SBP, there is the potential that SBP could pay benefits to the disabled child as long as the disability continues or until the child marries.[46] For those with young children who are considering participation, one must again consider a mortality analysis. What is the likelihood that the service member will die while the child is still entitled to benefits from SBP? In this case, SBP may become more attractive to the participant.

Yet another concern is the insurability of the member. As covered next in this article, commercial insurance policies can also provide protection for survivors. If a member might otherwise be ineligible for commercial insurance because of a medical condition, they could still participate in SBP because eligibility is not determined on a medical basis. Again, using a comparison to insurance, the factors critical to determining whether SBP is right for an individual is based on a risk assessment dependent upon the personal needs, family needs, and the decision of what amount of risk is appropriate for that particular participant.

The worst case scenario for SBP purposes involves a participant contributing to SBP for many years[47] who dies, followed shortly thereafter by the death of the surviving spouse. At the death of the surviving spouse, the benefits from SBP terminate; they are not passed to successor beneficiaries. In this example, there would be a tremendous amount of payments into SBP without any significant benefits being passed along to the spouse, and for that matter any other heirs after the spouse's death. An alternative method for ensuring that survivors receive benefits upon the death of the retiree is through the purchase of life insurance.

Before making the election under SBP (and the Supplemental Survivor Benefit Plan (SSBP) as discussed later), a retiree should compare the costs of SBP to a life insurance policy that could provide comparable benefits.

Instead of paying premiums to SBP, the member could purchase life insurance that would pay a lump sum to the spouse or other beneficiaries upon his death. If the goal of the military member is to provide assets available to his estate, as opposed to a lifetime benefit to a spouse, that result can be achieved through the purchase of life insurance. In addition to potentially lower premiums than SBP, the retiree could invest the difference between the cost of insurance and the cost of coverage from SBP; thus, providing the ability for even greater assets to be passed to the heirs. A thorough comparison of the costs of SBP and the price of a commercial life insurance that provides comparable benefits is paramount to the overall SBP decision.

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41. A participant may elect to discontinue participation in the plan within a one-year window after the two-year anniversary of the first payment received. *See id*. § 1448a.

42. *Id.* § 1448(a)(4)(A). An exception to the general irrevocability of elections, a recent one-year open enrollment period (beginning 1 March 1999) has been made available to eligible retired or former members of the uniformed services who are not participants in SBP. *See* Pub. L. 105-261, Div. A, Title VI § 642, 112 Stat. 2045 (1998).

43. This article addresses SBP for active duty members. While the Reserve Component SBP is very similar, there are special rules for eligibility and participation. *See* 10 U.S.C.A. § 1448(a)(1)(B).

44. *Id.* § 1448(d)(1).

45. *Id*. § 1451(c)(1)(A).

46. *See id*. § 1447(11)(a).

47. The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920 (1998). The Act provides that effective 1 October 1998, SBP payments are terminated following 30 years of payment and attainment of the age of 70.

Although this article discussed some of the advantages and disadvantages of SBP, the service member should consider some further limiting factors regarding the plan. For instance, in addition to termination of benefits upon the death of the named beneficiary, SBP benefits also terminate upon the remarriage of the survivor, with some exceptions.[48] If the surviving spouse is also entitled to DIC, the annuity is decreased by the amount of DIC.[49] Unlike the benefits received from DIC, SBP benefits are taxable; and treated as ordinary income. While the benefits are considered income, the SBP premium is withdrawn from the retired pay out of pre-tax dollars.

However, one of the biggest limitations of SBP is the two-tier nature of the system. As mentioned above, once a survivor reaches the age of sixty-two, SBP benefits drop substantially in recognition that the survivor is now eligible to claim retirement benefits under Social Security.[50] To make up this deficit in benefits, participants in SBP are offered participation in SSBP.[51] This optional plan allows participating members to pay an additional premium to avoid decreased SBP benefits to survivors at age sixty-two.

Retirees can choose the level of benefits by paying increasingly graduated premiums that give the participant the ability to maintain the benefit between thirty-five to fifty-five percent of the base amount.[52] A retiree can continue to provide the same monthly benefit (fifty-five percent of the selected base amount) to his survivor even after the survivor reaches the age of sixty-two. The SSBP is essentially a commercial insurance plan; the cost of the benefits is not subsidized by the government like the costs of the SBP. To maintain the same level of benefits as provided under SBP, a participant would pay greatly increased costs with SSBP. Before making the SSBP election under SBP, a retiree should compare the costs of SBP and SSBP to a life insurance policy that could provide comparable benefits.

While these government programs provide fairly generous benefits to a military member, they are usually not enough to enable one's survivors to maintain the standard of living to which they have become accustomed. As mentioned above, the main purpose behind these programs is to provide the day-to-day living expenses. However, when planning an estate, one of the primary goals is to accumulate an estate that can be passed on to heirs. One estate planning tool that most people look to as a source for providing those assets is life insurance. Purchasing life insurance is a critical decision that must be addressed, and continually re-addressed, throughout the life of anyone who is serious about planning to leave an estate for his heirs. The next section will address the uses of life insurance as a means to create an estate, to provide liquidity, and to insure against estate taxes.

Estate Accumulation

For military members, life insurance can help bridge the gap between the benefits that will be paid to survivors and the amount that the deceased would like to have available for lifetime use by his survivors. Notwithstanding the role that life insurance plays in most estates, an individual must first determine whether there is an actual need for life insurance. The purchase of any type of insurance is a matter of risk assessment. The purchaser must compare how likely the item insured is to be damaged or lost compared to the financial interest the purchaser has in the item. If the likelihood of loss is great and the value of the item is also great, then the purchase of insurance is probably a good risk. Since the financial interest in a person's life is of great value to their survivors, and because death is inevitable, life insurance of some sort is almost required for most individuals.

Whether you need insurance, or how much, is based on individual needs. A simple way of looking at the question is to estimate the total financial resources needed; determine all the financial resources available, including life insurance and other benefits (such as the previously discussed government benefits) already in place; and subtract the amount available from the amount needed to arrive at the amount of additional life insurance needed. This highly individual determination depends on the economic needs of each family. Factors that are important to the assessment of the economic needs of a family include: replacement of family income, debt liquidation, education needs, liquidity, and any additional expenses such as child care, cooking, and cleaning. An in-depth consideration of all these factors is critical to adequately assess one's need for life insurance.

The insurance industry has created many different vehicles to meet the insurance and investment needs of participants. A discussion of these tools is outside the scope of this article, however, an understanding of some of the basic principles is warranted for proper decision-making within an estate plan. The first point of illustration when purchasing life insurance is whether the product is pure life insurance (term insurance), or

48. Survivor Benefit Plan coverage is terminated if the surviving spouse remarries before reaching age 55. The annuity shall resume if that marriage is later terminated. *See* 10 U.S.C.A. § 1050(b)(2)(3).

49. *Id*. § 1450(c)(1).

50. *Id*. § 1451(a)(1)(B). The presumption is that because the deceased military member was either fully insured or treated as such, the surviving spouse will make up the difference because of the entitlement to receive Social Security retirement benefits.

51. *Id*. § 1466.

52. *Id*. § 1457(b).

some other type of life insurance that is also imbued with an ability to accumulate a cash value through an investment or savings function (whole life insurance).[53] Generally, the insured will pay quite a bit more for the same amount of death benefits when choosing a policy that will also accumulate a cash value. Most important to one's decision as to what type of policy to purchase is the optimum use of one's current income and wealth as a means to accumulate future assets. The purchaser has to decide whether the cash value policy will do better as an investment or whether the purchaser would be better served to purchase cheaper term insurance and invest the difference in cost from a whole life policy into another investment vehicle. Once this decision is made, the purchaser can control his current income to properly balance insurance payments with investments.

In most cases, insurance benefits make up the largest asset of a service member's estate.[54] Other than providing family income as discussed above, these assets also contribute flexibility to an estate. First, insurance benefits provide liquidity. One of the biggest items of property included in most estates is real property. This property is generally not as liquid as other assets in the estate; for example, even though there may be accumulated equity in a personal residence, the surviving spouse may be at a loss to benefit from the equity without selling the property or taking out a mortgage on the home. In this example, life insurance benefits can provide an easily transferable asset to an estate that is otherwise encumbered by real property, which the surviving spouse might wish to keep intact. Another very important use of life insurance is as a means of protection against estate taxes. In the simplest form, the benefits can provide assets to the estate for use in paying estate taxes; on a more sophisticated level, life insurance can also serve as the principal of a trust for the same purpose.

All military members have the opportunity to enroll in Serviceman's Group Life Insurance (SGLI).[55] This group term insurance policy generally provides $200,000 to the beneficiaries of the military member.[56] As an example of how to use this type and amount of benefits, SGLI benefits would aid in fulfilling the family income needs of the survivors or even to have available income to pay estate taxes if required. The topic of estate taxes and some of the means for planning to best minimize the effect of taxation will be discussed later in this article.

To this point, this article has addressed the estate planning issues specifically related to benefits incurred as a military member and the estate building aspects insurance can supply to a typical military member. However, to provide the greatest amount of assets for one's survivors, estate planning must also be concerned with the accumulation of wealth. While insurance can provide significant assets toward the creation of an estate, an effective estate plan must address other methods of estate building. Despite the government benefits and insurance proceeds available to members, most will find that those benefits do not provide the assets needed to maintain an accustomed standard of living for the survivors. This additional deficit can be overcome with an individual financial plan that accounts for the needs and desires of the member as a baseline to structure a specific savings and investment strategy.

While this article does not attempt to provide investment advice, it must be mentioned that any estate plan would be remiss without a concentrated plan for how to accumulate wealth to build an estate to provide as desired for survivors. When people begin to save and invest, they usually do it for reasons other than creating an estate. Such reasons usually include: children's education, financial security, and retirement. Even if most would agree that the ultimate goal is to accumulate enough wealth to be self-insured and to take care of all the lifetime needs of one's family, it is difficult to accomplish this deal without an investment plan. Central to this strategy are effective management of credit and debt, consideration of investment methods and strategies (to include tax advantaged investments), participation in an investment plan, and awareness of how federal taxes impact investments.

An example of the effect of taxes on military members and estate building can be seen in the changes to the capital gains tax applied to the sale of rental property. While almost all homeowners benefit from the change to the capital gain exclusion[57] on the sale of a principal residence, the same cannot be said of those homeowners who leased their principal residence and later sold that property. Due to the necessity of transfers inherent in the military, for many military members the purchase of a residence is often accompanied by a period of leasing out that same residence once the member is transferred from that duty station.

53. In a term policy, the insurance company agrees to pay a stated amount of death benefits if the insured dies. Although there are many variations, the insured generally agrees to pay a level premium over the length of the term of the policy. As the name implies, whole life is designed to offer insurance for the whole life of the individual. In addition to death benefits, whole life also has a savings feature that allows the policy to develop a cash value which accrues from the investment earnings on the premiums. In addition to whole life, the insurance industry has developed other insurance/investment vehicles such as universal life and variable life to meet the needs of its customers. *See generally* HAROLD WEINSTOCK, PLANNING AN ESTATE (3d ed. 1988 and Supp. 1993).

54. *See* ASSOCIATES IN THE SOCIAL SCIENCES, THE UNITED STATES MILITARY ACADEMY AT WEST POINT, PRINCIPLES OF INSURANCE AND RELATED GOVERNMENT BENEFITS (10th ed. 1965).

55. 38 U.S.C.A. § 1967 (West 1999).

56. *See id.* § 1967(a) (discussing the options under SGLI).

57. "The amount of gain excluded from gross income under subsection (a) with respect to any sale or exchange shall not exceed $250,000." I.R.C. § 121(b)(1) (West 1999). The amount of gain that can be excluded by a husband and wife filing a joint return on the sale of a principal residence is $500,000. *Id.*

Prior to The Taxpayer Relief Act of 1997,[58] this was still a relatively safe risk for military members; the service member could hope to possibly return to that home and reestablish residence in it for a period of time to enable them to take advantage of the "rollover" procedure.[59] If the homeowner had a "dominant motive" to sell the principal residence, had the intent to return and reoccupy the residence, and actually reoccupied the residence, the homeowner was able to rollover the capital gain on the sale of that home provided the principal residence was replaced within the specified time period.[60] However, under the new rule, the homeowner is now subject to tax as a result of any gains due to depreciation of the property even if the investment property is later "owned and used" as the principal residence and is sold.[61] To be considered "owned and used," the home must have been the principal residence of the taxpayer for a total of two years during the five-year period prior to the sale of the home.[62] This is a far cry from the previous standard of just showing an intent to reoccupy the home.

Another fundamental change of The Taxpayer Relief Act was the introduction of a new Individual Retirement Account (IRA) option, the Roth IRA.[63] In a traditional IRA, contributions are deductible, as allowed, as long as eligibility requirements are met; then, when the taxpayer withdraws the funds from the account, the income becomes taxable. However, contributions to a Roth IRA are not deductible during the year in which contributed; nonetheless, the earnings on the contributions grow tax free as they accrue. Distributions from the Roth IRA, if made after age fifty-nine and one-half and at least five years after the account is established, are then tax-free.[64]

Because of this opportunity to dramatically change the taxable format of one's IRA, taxpayers have been given a grace period in which to convert their traditional or nondeductible IRAs into a Roth IRA without paying an early withdrawal penalty.[65] However, that conversion comes at a cost; any taxable amounts that are rolled over from a current IRA must be included in the income of the taxpayer. If the rollover was completed prior to 1 January 1999, the income could be apportioned over the next four years.[66] This look at some of the changes from The Taxpayer Relief Act depicts the effect federal taxes can have on the structure and strategy of an investment plan. The focus of the article will next shift to the most important issue in estate planning: the implementation of the wishes of the estate owner to manage the estate according to his personal desires for preservation and distribution of assets.

Estate Management and Control

To establish an effective estate plan, tools must be used that are consistent with the objectives of the individual. Although tax planning is important to an overall estate plan, of foremost importance is that the plan represents the desires of the individual. Herein lies the dilemma of estate planning; if too much emphasis is placed on avoidance of estate taxes, it may require that the planner give up some control of the estate. Similarly, if the focus is on control of the estate, the individual will likely be subjecting the estate to increased estate taxes. Before using any of the tools available to estate planners, it's vital that those involved in the estate contemplate the goals they wish to accomplish through their estate plan. When all is considered, what is of utmost importance to the owner of the estate is whether or not he feels comfortable with the answer to the question, "Will my estate be administered and distributed in a manner that is consistent with my desires?"

To illustrate the effect that management decisions can have on estate planning, consider the effect that choosing joint ownership as the means for property ownership can have on an estate. For many married military members, like most Americans, joint ownership is generally a preferred method of owning property. The main reason is that if the property is owned jointly with a right of survivorship, ownership of the property will automatically pass to the survivor upon the death of the other joint owner as a matter of law.[67] In this way, joint tenancy with a right of survivorship ensures continuity of ownership for the couple. Another reason that many married couples prefer to own property as joint tenants may be that it projects a relationship where the spouses are equal partners.

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58. Pub. L. 105-78, Title V, § 519, 111 Stat. 1519 (1997).

59. Under former I.R.C. § 1034, taxpayers were generally allowed to roll over any gain from the sale of their old residence into a new residence when the cost of the new residence was greater than the old one. (*Repealed by* Pub. L. 105-34, Title III, § 312(b), 111 Stat. 839. (1997)).

60. Pub. L. 105-34, Title III, § 312(b), 111 Stat. 839. (1997).

61. *See* I.R.C. § 121(a).

62. *Id.*

63. *Id.* § 408A. The Roth IRA is named for Senator William Roth, Jr. of Delaware, an ardent supporter of IRA tax benefits.

64. *See id.* § 408A(d).

65. *Id.* § 408A(d)(3)

66. *See id.* § 408A(d)(3)(A)(iii).

Practically, joint ownership also gives each owner the right individually to make all decisions regarding any disposition of the property because each has an undivided ownership interest in the property.[68] The final advantage to joint ownership of property, since it is not considered a testamentary asset, is that title to the property passes to the surviving joint owner without going through probate procedures upon the death of the first joint tenant. Despite these considerations, joint ownership of property can have adverse effects on the taxability of the property both for estate and income tax purposes.

Although a discussion of what assets are considered part of the gross estate of the deceased for estate tax purposes is saved for later in this article, presume that the value of the joint property will be included in determining the taxability of a decedent's estate.[69] With regard to an asset owned by a husband and wife as tenants by the entirety or as joint tenants with right of survivorship, one-half of the value of that property will be included in the gross estate of the first to die.[70] Although title to the property will transfer to the surviving joint owner, the estate of the decedent will be increased by half of the value of that property without gaining any control over the disposition of that property. If avoidance of estate taxes is a goal of the estate plan, joint ownership can have the effect of exposing more assets and increasing the probability that the estate will be subject to estate taxes.

The major disadvantage to joint ownership of property for income tax purposes is the effect a joint tenancy has on the taxable basis that the surviving tenant maintains in the property after the death of the first joint tenant. If the asset that is owned in joint tenancy appreciates, it subjects the surviving joint tenant to greater taxability on any gain that arises as a result of the later sale of that property.[71] For example, if a married couple purchased a vacation home as joint tenants with right of survivorship (or as tenants by the entirety) in 1970 for $40,000, and the present value of that home is $100,000 at the death of the first joint tenant, the surviving spouse would have a taxable basis in the property of $70,000. That amount is equal to the half of the original basis in the house ($20,000) plus the stepped-up basis of the deceased spouse's share of the property ($50,000).[72]

The general rule is that if that same property had been owned solely by the first spouse to die and then passed to the surviving spouse through the estate, the surviving spouse would receive a stepped-up basis equal to the federal estate tax value of the asset.[73] Furthermore, when the first spouse dies, one-half of the value of the property will be included in the gross estate of that spouse.[74] Considerations such as these are important to what decisions are made and when regarding the disposition of assets. The article will next begin a discussion of the tools available to manage and distribute an estate.

The primary, and still the singularly most important planning tool for controlling the disposition of one's estate, is the last will and testament. Despite the use of joint tenancy, or other vehicles that will be discussed later, as a means of transferring assets, there will undoubtedly be a need for a will. For example, for those with children, only through a will can the testator identify who will be the guardian of those children upon the death of the testator. A will is also the main method for distributing personal property that cannot be transferred through some other manner.

When considering how best to use the varied estate planning tools to accomplish individual objectives, the will should be thought of as the foundation upon which the estate plan is built. For military members, especially those just getting started in estate planning, the execution of a will is an easy way to make initial progress in taking control of an estate. Some members may have accumulated an estate with assets that are already so great as to raise immediate estate tax concerns.[75] Because it's likely their legal issues will be outside the scope of typical legal assistance, there may be a need for that individual to seek more specialized assistance from an attorney specializing in estate planning.

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67. State property law governs the manner in which property may be "jointly titled" (title held by more than one individual or entity) and whether a particular form of joint ownership provides the "right of survivorship" (the automatic transfer of a decedent's share of jointly owned property to the surviving joint owner(s)). *See* Danforth, 823 T.M., *Taxation of Jointly Owned Property*, for a good general discussion of jointly owned property and a detailed analysis of relevant estate planning issues.

68. *Id*.

69. Usually all property "to the extent of the interest therein of the decedent at the time of his death" is included in the gross estate of the decedent. I.R.C. § 2033. However, joint property interests receive different tax treatment under I.R.C. § 2040.

70. I.R.C. § 2040(b). To maintain a general approach in this article, the impact of community property will not be addressed. In addition, the discussion of joint property will be limited to that property owned by a husband and wife as joint tenants with a right of survivorship.

71. Danforth, s*upra* note 67.

72. *See* I.R.C. § 1014(a), (b)(9).

73. *Id*. § 1014 (a)(1).

74. *Id*. § 2040(b).

In addition to these functions of a will, there are also trust mechanisms that can be built into a will to further enhance the testator's control over the estate. Because these testamentary trusts do not come into operation until the testator's death, they have the advantage of giving the testator the ability to benefit from the control of a trust without the costs inherent in the creation and maintenance of a trust during his life.[76] As in any trust, a testamentary trust will transfer legal title to property from one party (the testator) to a third party (the trustee) who will then manage the property (the corpus or principal) for the beneficiaries until some stated time when ownership of the property will be transferred to the beneficiaries.[77] This article first discusses the contingent trust for minors.

Of valid concern for married couples is the question of how their estate will be distributed to their minor children if both parents are deceased. It is easy to understand that concern, if for no other reason than the parents would be unable to effect any control over the financial welfare of their surviving children. If the minor children are left the estate through a will, or even if the parents die intestate, most states would create a trust for minor children and then appoint a custodian and/or a conservator (usually a close relative) to manage the assets for the children.[78]

By taking the precaution of creating a contingent trust for minors in the will, the parents can appoint the trustee themselves and ensure the terms of the trust are to their specifications. In a contingent trust for minors, the parent bequeaths the property to his spouse, if survived by that spouse, otherwise to the trustee for the benefit of the children. The trustee then manages the assets for the children until the youngest child reaches the age of majority, or as specified in the trust. At that time, the principal of the trust would be paid to the beneficiaries equally. During the specified period, the trustee may use income from the trust to provide for needs of the children as spelled out by the will and consistent with the powers of a trustee as directed by state law.[79] This method of managing the distribution of assets can be especially comforting to a testator who has concerns about the influence of family or friends who lack the ability to adequately perform as a fiduciary for the benefit of the children.

Another testamentary trust that accomplishes the same goal of protecting the assets for the long-term benefit of the surviving children is the simple family trust. Again, this trust will also come into effect upon the death of the testator and become operative through the will. The purpose of the trust is to provide income to the surviving spouse for life and support for minor children while ensuring that the principal of the trust remains intact for the surviving children.[80] One of the reasons a testator

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75. "A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." *Id*. § 2001(a). If an individual dies with a taxable estate (generally, the gross estate + adjusted lifetime taxable gifts – administration expenses and other deductions) greater than the "applicable exclusion amount," the estate will be subject to estate taxes on the balance over such "applicable exclusion amount." Stated inversely, anyone whose total assets will clearly remain below the "applicable exclusion amount" (currently $650,000) for the foreseeable future, need not worry about estate taxes. The applicable exclusion amount (and thus the "applicable credit amount" or "unified credit") is I.R.C. § 2010. The Taxpayer Relief Act of 1997 (P.L. 105-34, 111 Stat. 788 (1997)) increased the exclusion amount from the prior $600,000 as follows:

Year	Applicable Credit Amount	Applicable Exclusion Amount
1998	$202,050	$625,000
1999	$211,300	$650,000
2000 & 2001	$220,550	$675,000
2002 & 2003	$229,800	$700,000
2004	$287,300	$850,000
2005	$326,300	$950,000
2006 & after	$345,800	$1,000,000

ERIC BROWN, FEDERAL ESTATE AND GIFT TAXES EXPLAINED 9 (1998).

76. *See* Jay D. Waxenberg & Henry J. Leibowitz, *Comparing the Advantages of Estates and Revocable Trusts*, EST. PLAN. (Sept./Oct. 1995) at 265.

77. *See* 1A AUSTIN SCOTT, SCOTT ON TRUSTS §§ 2-4, 54 (4th ed. 1987 & Supp. 1998).

78. Distributions to minors (or their guardian or conservator) are governed by state law. Commonly, a will directs the named executor to appoint a custodian under the applicable "Uniform Transfers to Minors Act" or similar applicable statute for any transfer to a minor from the estate. Most states have adopted some form of the Uniform Transfers to Minors Act.

79. *See* STEPHAN R. LEIMBERG ET AL., THE TOOLS & TECHNIQUES OF ESTATE PLANNING (1998).

80. *Id.*

may wish to avoid leaving the property outright to the surviving spouse is concern about the capability or desire of the surviving spouse to manage the assets of the estate. Another frequently mentioned reason is the fear that the surviving spouse will remarry and transfer assets to the new spouse and then die leaving the new spouse as the owner of the majority of the assets of the estate.

This simple trust will allow the testator to name a trustee who will then manage the assets to provide income to the spouse and also to preserve the corpus of the trust for the benefit of the children. Because the spouse's interest in this property terminates upon his death, this type of trust could raise some estate tax issues. Particularly, the spouse's interest in the property may not qualify for the marital deduction.[81]

Yet another method for using the will to manage, rather than just distribute, the assets of the estate is the pour-over will. In a pour-over will, the testator makes a devise or bequest of the residue of the estate into a revocable living trust. Essentially, the remaining unspecified assets of the estate then pour over into a living trust.[82] This trust, whether funded or unfunded by the testator during his lifetime, must be identified in the testator's will, and the terms must be set forth in a written instrument that is executed before or concurrently with the execution of the testator's will. As a precautionary measure, the pour-over will should also provide that if the trust is invalid or has been revoked, the provisions of the trust should be incorporated by reference into the will and treated as a testamentary trust. This language will be especially helpful in the rare case where both husband and wife are grantors of the trust and one revokes the trust without the other's knowledge or consent.[83]

One of the benefits of the pour-over will is that if the trust is unfunded, the grantor will avoid the ancillary problems of maintaining the trust during his lifetime. If the estate owner's assets are used during his life to fund a revocable living trust, the pour over to the trust as a result of the will does not insulate the trust assets from probate. All assets that had not been transferred before death will be admitted to probate.[84] While this discussion of these testamentary trusts illustrates how a will can provide short- and longer-term solutions for estate management, they are certainly not the only solutions. After a discussion of probate, this article examines the relative advantages and disadvantages of using other trust forms in estate planning.

To properly transfer clear title to property passing from the decedent to the beneficiaries named in the will, or otherwise entitled to the property under the appropriate state intestacy rules, a will must go through probate. Probate is the court-supervised process for collecting, valuing, and retitling the assets of the decedent; it provides the administrative legal process for validating the testamentary distributions made by the decedent.[85] The probate process does not apply to those assets that transfer by some other method, such as through contract, joint ownership with right of survivorship, or by statute. These non-probate assets transfer in accordance with the appropriate legal process governing the subject of the property.

Since many individuals are fearful of probate, and especially the perceived high costs involved, they look for methods to avoid the probate process. An estate-planning tool that is frequently used to avoid the costs and hassles associated with probate is the *inter vivos* or living trust. Such a trust is formed and operates during the testator's life. A living trust can be either revocable, that is the grantor can modify the agreement, or irrevocable, that is they cannot be amended even if personal or family circumstances change. While certainly not a panacea, these living trusts present different opportunities for estate management and different liabilities of estate taxation.

Before reviewing living trusts, its important to understand how gift tax rules generally apply, and how gifts can be used to manage the estate. Since 1977, there has been a unified estate and gift tax imposed on the value of transferred property; due to this unification, the same tax rates apply regardless of whether the property is transferred by gift or though estate distribution.[86] The gift tax is a tax on the gratuitous transfer of property or services made during the lifetime of the transferor or donor "for less than full and adequate consideration in money or money's worth."[87] In general, a gift occurs when a donor has so parted with dominion and control of the property so as to leave the donor powerless to change the disposition of the property.[88]

For estate planning purposes, the most beneficial aspect of the gift tax rules is the $10,000 per donee annual exclusion from

81. If the interest that passes to the surviving spouse will terminate because of a lapse of time or the occurrence of an event or the failure of an event to occur and then pass to some other person, no marital deduction will generally be allowed with respect to such interest. I.R.C. § 2056(b) (1999).

82. *See generally* Annotated, 12 A.L.R. 3d 56, "*Pour-Over" Provisions from Will to Inter Vivos Trust*; Berall et al., 468-2d T.M., *Revocable Inter Vivos Trusts*, at A-27 for a discussion of the use of a revocable trust as a receptacle for pour-over from a probate estate. *See also* SCOTT, *supra* note 77, § 54.3 for a discussion of the issues and potential problems regarding the disposition of property by will in accordance with an inter vivos trust.

83. PLANNING AN ESTATE, *supra* note 53, at 163.

84. *Id.*

85. *See* Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107 (1984).

86. *See* I.R.C. § 2001.

87. *Id.* § 2512.

taxes.[89] The exclusion, however, is limited to the gift of a present interest; the donor must transfer an unrestricted right to the immediate use, possession, or enjoyment of the item.[90] Furthermore, if one spouse makes a gift to a third party, the spouse who did not make the gift can elect to treat one-half of the gift as if made by him.[91] The effect of this gift splitting is to allow one spouse to give up to $20,000 per year tax free to a donee, provided the other spouse makes no gifts to that donee. The annual exclusion provides two benefits to the donor. The first benefit is somewhat intangible in that the annual exclusion gives the donor a certain satisfaction in actually seeing a beneficiary use and enjoy the gift during the donor's lifetime. The secondary benefit from the annual exclusion is that by giving away assets of the estate, the donor is actually decreasing the size of the estate and thereby decreasing the estate's liability for estate taxes. Any gifts over the annual exclusion will be subject to gift tax and will have the concurrent effect of decreasing the amount of the unified credit.[92] An analysis of some different types of trusts will show how these trust tools can accomplish management goals of the planner, yet still be in conflict with the gift and estate tax rules.

The revocable living trust allows the estate owner, during his lifetime, to transfer assets to the trust while retaining all of the beneficial rights to the property of the trust, including the right to receive income or even the ability to revoke the trust.[93] Upon the death of the grantor, the trust becomes irrevocable and the corpus of the trust is administered consistent with the desires of the grantor as specified in the trust. Since legal title to the assets of the trust is held by the trustee and not the grantor, these assets are non-probate property and are not subject to probate. In addition to this, the trust will also provide flexibility to the estate through the ability of the trust to control the assets in the event of the incapacity of the grantor. Due to the transfer of legal title to the trust, there is no need for appointment of guardians or conservators to manage the grantor's assets.

Furthermore, if the grantor is looking for professional management or just relief from the headaches inherent in the management of trust property, this trust can also be useful to serve that purpose while still providing income to the grantor during the grantor's lifetime. The grantor can have another manage the assets for his benefit without irrevocably giving up control of the assets since the grantor retains the ultimate power of revocation of the trust. One of the most important benefits that this type of trust has for military members is the use of the trust as a means to transfer title to property located in different states. Since military members often accumulate property in different states due to their military assignments, the retitling of that property through different probate systems may be a cumbersome task. Depending on how the property is titled, it may be easier to transfer those assets into a revocable living trust and then have the provisions in the trust determine how and to whom the property is transferred upon the death of the grantor.[94] While these are generally thought to be some of the main advantages of the revocable living trust, there are equally as many disadvantages to this vehicle.[95]

In addition to being an advantage of the revocable living trust, the power to revoke the trust is also a disadvantage of this device. As will be discussed later, a revocable living trust is considered part of the gross estate of the decedent. The decedent is treated as the owner of the trust because of the dominion enjoyed over that property due to the power to revoke.[96] Thus, the value of the revocable living trust assets is considered in the gross estate of the decedent. Another disadvantage, or at least

88. Treas. Reg. § 25.2511-2 (1999).

89. For each calendar year after 1998, the annual exclusion shall be increased by a cost-of-living adjustment. *See* I.R.C. § 2503(b). (The annual exclusion does not apply to spouses, as the value of a gift to a spouse will be deducted from amount of taxable gifts during a calendar year. *See id*. § 2523(a).)

90. *See id.* § 2503(b) *See also* Treas. Reg. § 25.2503-3(b).

91. I.R.C. § 2513(a).

92. The rationale for this is that:

> Although the gift credit must be used to offset gift taxes on lifetime transfers, regardless of the amount so used, the full credit is allowed against the tentative estate tax. The rationale for such full application is that, under I.R.C. § 2001(b)(2), the estate tax payable is calculated using the cumulative transfers at life and at death as then reduced by the amount of gift tax paid by a decedent. If a portion of the unified credit was used to avoid the payment of gift taxes, the gift tax paid reflects the amount subtracted under I.R.C. § 2001(b)(2). The estate tax payable is necessarily increased by the amount of the gift tax credit used.

See BROWN, *supra* note 75, ¶ 15.

93. *See* SCOTT, *supra* note 77, § 54.3. (discussing of the issues and potential problems regarding the disposition of property by will in accordance with an inter vivos trust). *See generally* Berall et al., *supra* note 82 (discussing inter vivos trusts).

94. The method of ownership is an important consideration for determining the need for a revocable living trust. For example, if property is owned as joint tenants with a right of survivorship, there may be no need to use a revocable living trust.

95. For a good counterpoint to the advocates of revocable living trusts, *see* JOHN P. HUGGARD, LIVING TRUST LIVING HELL, WHY YOU SHOULD AVOID LIVING TRUSTS (1998).

96. I.R.C. § 2038.

refuting a purported advantage, relates to the authority of the trustee (or a successor trustee if the grantor is also the trustee) to make management decisions regarding the trust property if the grantor becomes incapacitated.

Another tool available that can accomplish this same goal is the "springing" durable power of attorney.[97] With this power of attorney, the grantor appoints another person, called an attorney-in-fact, to handle the affairs of the grantor if he becomes legally incapacitated. These powers are typically called springing powers because they only spring to life upon the incapacity of the grantor. Much simpler than a trust, and undoubtedly less expensive, the durable power of attorney can carry out this task equally as well as a revocable living trust.

Next, although usually touted as a probate avoidance device, the revocable living trust will not obviate the need for a will and the concomitant need to probate the will. If a grantor has a living trust that does not contain all of the assets of the estate, then probate becomes much more likely. As the grantor acquires other assets, he must be quick to retitle them into the trust or those assets may have to pass through probate as well. In addition, a will is the predominant instrument to enable parents to name guardians for their children. Finally, the costs associated with creating a living trust and paying the annual management fees may over time be greater than the probate costs associated with an estate. Probate costs are not usually as onerous as feared and are dependent upon the property that is subject to probate.

Service members can use numerous methods to manage assets to ensure that they are not subject to probate, thereby further limiting the costs of probate. While not comprehensive, this discussion of the advantages and disadvantages of the revocable living trust helps supply issues for consideration in determining whether or not this mechanism of estate management is appropriate for a personal estate plan.

Living trusts may also be irrevocable. Obviously, a disadvantage to this type of trust is that the grantor loses the power to control assets as could be done under a revocable living trust. What the grantor gains with this type of trust though is the removal of the trust assets from the gross estate of the decedent for estate tax purposes. Provided the grantor has relinquished his or interest in the property by transferring the assets irrevocably to the trust, the property will not be included in the gross estate of the decedent.[98]

One of the most popular methods for taking advantage of this benefit is the irrevocable life insurance trust. This alternative gives the grantor a trust mechanism that gives him the ability to purchase life insurance and then transfer ownership of the policy to a trustee (unfunded) or to transfer assets into the trust and have the trustee purchase life insurance from the trust assets (funded). Upon the death of the grantor, the trust will pay the proceeds of the policy to the beneficiaries of the trust.[99] The grantor's intent in these trusts is usually to provide liquidity to the beneficiaries or to have available cash assets to pay estate taxes if owed.

Issues that must be considered in creating an irrevocable life insurance trust are whether the trust is a completed gift for tax purposes and whether the trust is includable in the estate of the grantor or donor because it was an incomplete gift. Generally, a transfer of a life insurance policy or the premium of a life insurance policy to a trust would be considered a gift of a future interest. As stated above, such a transfer would not qualify for the gift tax annual exclusion because the gift must be of a present interest–a right to use, possess, or enjoy the property.[100] Clearly then, a transfer of an existing life insurance policy or the payment of premiums of a life insurance policy to an irrevocable life insurance trust is generally a gift for purposes of the gift tax.[101]

By giving the trust beneficiary the present right to demand a distribution of assets from the trust, however, the value of the assets that are subject to that demand power qualify for the annual exclusion as a present interest.[102] This so-called *Crummey* power, is a general power of appointment; as such, it is defined as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate."[103] A

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97. *See generally* Michael N. Schmitt & Steven A. Hatfield, *The Durable Power Of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203 (1991) (providing general information on powers of attorney).

98. Because the grantor will no longer have an interest in the property that is the principal of the trust, it will not be subject to consideration as part of the gross estate. *See* I.R.C. § 2033.

99. *See* Slade, 210-4th T.M., *Personal Life Insurance Trusts* (for a detailed explanation and analysis of the use of life insurance trusts in estate planning). *See also* SCOTT, *supra* note 77, § 57.3 (discussing the general validity of insurance trusts irrespective of the tax implications of such trusts).

100. *See* I.R.C. § 2503(b).

101. If the same gift was made to a revocable living trust it would not be considered a gift at all for gift tax purposes. The asset and any income generated from it would be treated as belonging to the donor because of the control retained over the asset due to the revocable nature of the trust.

102. *See* Crummey v. Commissioner of Internal Revenue, 397 F.2d 82 (9th Cir. 1968).

103. Because of the control granted to the holder through a general power of appointment, it is considered part of the value of the gross estate of the decedent. However, in the case of a power to invade the principal of a trust, such a general power of appointment is not included in the gross estate if the power is limited by an "ascertainable standard relating to the health, education, support, or maintenance of the decedent." I.R.C. § 2041(b)(1)(A).

power of appointment is the power to determine who will become the owner of the property. Provided the beneficiary's power to demand a distribution is limited to the lesser of $5000 or five percent of the assets subject to the demand power, the transfer will qualify for the annual exclusion.[104] The donor must also give the power holder actual notice of the transfer and the right to withdraw the assets, and a reasonable time to exercise the power to withdraw the assets.

The practical effect of this approach is that the grantor puts the beneficiaries on notice that a transfer is being made to the trust (for example, a life insurance policy or the premiums that will be used by the trustee to purchase life insurance) and then notifies the beneficiary that he has the right to demand, within the amount stated above, the transferred assets. In most cases, this will be prearranged between the grantor and the beneficiary to ensure that the transfer proceeds without any mishaps. After all, the resultant effect is that the beneficiary will be the ultimate beneficiary of the assets regardless of whether the demand power is exercised or the assets are transferred to the trust.

Estate Distribution

This article has concentrated on the assets that comprise an estate and how an individual can best manage those assets to accomplish the goals set out within an estate plan. Upon the death of the taxpayer, the focus switches to the distribution of these assets in accordance with the objectives of the decedent and the federal tax implications on those transfers. Because probate issues and some estate planning tools have been previously addressed, this section focuses on the potential federal tax consequences inherent with an estate.[105] However, this segment will also discuss additional estate planning instruments available to protect the property of the estate from taxes. Implicit in this approach is that the goals of the decedent encompassed the objectives of providing for the disposition of assets in such a way as to maximize the estate while transferring property in conformity with both the desires of the decedent and the needs of survivors.

The starting point for any analysis of estate distribution is at the source–the federal estate tax system. The estate tax is an excise tax levied on the transfer of property that occurs at the decedent's death.[106] It is not a property tax or an inheritance tax; it is a tax on the transfer of property itself. The first step in understanding how the rules apply to an estate is determining what part of the estate is subject to taxation. Because of the high rates of tax[107] on the transfer of an estate, a majority of the attention on estate planning focuses on tax avoidance. As stated above, tax planning is an extremely important aspect of the estate plan. However, it should remain secondary to the underlying goals and purposes of the estate owner.

The inquiry into estate taxation begins with an understanding of the gross estate. The value of the gross estate is determined by calculating the value of all property "real or personal, tangible or intangible, wherever situated" at the time of the decedent's death.[108] While this provision seems to include almost all property in the gross estate, the definition is then limited somewhat to the "the value of all property to the extent of the interest therein of the decedent at the time of his death."[109] Due to this still aggressive approach, it is beneficial to each estate to have a plan for how to remove assets from the gross estate in order to limit the potential tax.

Reducing the gross estate centers on methods of transferring incidents of ownership over assets of the estate. Some previously mentioned examples include the annual gift exclusion, the irrevocable living trust, and the irrevocable life insurance trust. As life insurance is a major part of most estate plans, it often makes up the bulk of the gross estate of the decedent.[110] A way of removing these assets from the gross estate is to transfer away all incidents of ownership over the policies. The following are some examples of incidents of ownership: power to change beneficiaries, right to economic benefits of the policy, power to cancel or surrender the policy, and power to borrow against the cash value of the policy. The downside to a transfer of ownership in a life insurance policy is the possible gift tax implications depending on the policy and whether the transfer was of a present interest. Another concern is that any transfers of ownership in a life insurance policy within three years of the death of the decedent will be treated constructively as if transferred in contemplation of death, and it will be included in the gross estate of the insured.[111]

104. *See id*. § 2041(b)(2).

105. Although there are possible state inheritance taxes and estate taxes, this article only addresses federal estate tax issues.

106. I.R.C. § 2001(a).

107. After the application of the unified credit, the initial rate for estate tax is thirty-seven percent on the amount of the taxable estate greater than the applicable exclusion amount. There is a graduated tax rate schedule that eventually is capped at 55% on all estates greater than $3,000,000. *See id.* § 2001(c)

108. *Id.* § 2031.

109. *Id.* § 2033.

110. Life insurance benefits are generally not taxable to the recipient. *Id.* § 101(a). However, proceeds of life insurance on the life of the decedent are included in the gross estate of the decedent if death benefits are either receivable by the decedent's estate or receivable by other beneficiaries and decedent had any incidents of ownership in the policy at death. *See id.* § 2042.

The next consideration is to ascertain what part of that gross estate is taxable. The taxable estate is determined by subtracting allowed deductions from the gross estate of the decedent.[112] While there are numerous deductions from the gross estate,[113] the two items that have the most significance for estate tax planning purposes are the marital deduction and the unified credit. For property that passes to a surviving spouse by the decedent's estate, the estate tax rules provide for an unlimited marital deduction for that property if it is included in calculating the gross estate of the decedent.[114] This unlimited deduction is only available for spouses who are United States citizens.[115]

If the unlimited marital deduction applies, essentially all property that is received by the surviving spouse because of the death of the other spouse is free from estate taxes. The marital deduction is not so much a deduction as it is a deferral; the assets transferred to the spouse are exposed to estate taxation when later transferred by the surviving spouse through devise or bequest. While most married couples want the security of having all the assets of the estate available for support of both spouses during their lives, transferring the entire estate to the surviving spouse may be inconsistent with another estate plan purpose like maximizing assets for surviving children. Regardless of the value transferred to the surviving spouse, the amount is deductible from the taxable estate of the decedent.

As previously discussed in the section on gift tax, there is a single unified tax rate whether the property is transferred as a gift or included in the gross estate of the decedent. After concluding the taxable estate of a decedent, this unified rate is applied to the assets of the estate to determine the tax liability of the estate.[116] However, before applying the tax, the recipient of the estate is able to claim a credit against the taxes payable on the transfer of property to the estate.[117] This enables the recipient of the estate to subtract the amount of this unified credit from the amount of estate tax liability owed.[118]

For 1999, the unified credit of $211,300 is equal to the amount of tax due on a transfer of $650,000; by the year 2006, that amount will rise to $1,000,000.[119] This entire credit amount will be available for estate purposes unless the decedent made lifetime taxable gifts. If taxable gifts were made, the amount of the gift tax is subtracted from the amount available as a credit for estate taxes.[120] The benefit of the unified credit is clear; for those taxable estates that are less than $650,000 there is no estate tax owed. With an understanding of what property is taken into account in the taxable estate and how the unified credit applies to that taxable estate, an individual can be in a better position to make the most advantageous use of different estate management tools to achieve estate planning goals.

An example of an excellent way to take advantage of the unified credit and the marital deduction is seen in the bypass or credit shelter trust. While there are many variations on this theme, the simplest method for achieving an estate tax bypass of the surviving spouse's estate is for the husband (assume he dies first) to transfer the exclusion amount ($650,000 in 1999) into a trust, and then transfer his remaining assets[121] to his wife by an outright bequest. The result of this is that at the husband's death, there would be no estate tax owed as the amount transferred to the wife is not subject to estate tax because of the marital deduction and the husband's unified credit could be applied to the amount transferred to the trust. This would allow the couple to shield $1,300,000 from estate taxes.

Although a very simple example, the notable characteristic of this approach is the marital deduction and the unified credit are used in an interrelated fashion to minimize estate taxes. A more sophisticated use of this same principle would be to have

111. *See id.* § 2035.

112. *See id.* § 2051.

113. For example: funeral expenses, estate administration expenses, casualty and theft losses, bequests to qualified charities, and debts and enforceable claims against the estate are all deductions from the gross estate. *See id.* §§ 2051-2056.

114. *See id.* § 2056.

115. While I.R.C. § 2056(d)(1) disallows the marital deduction where the surviving spouse is not a United States citizen, the qualified domestic trust (QDT) option under § 2056(d)(2) allows the marital deduction if the decedent used a QDT as defined in § 2056(A), or one is created prior to the date of the tax return.

116. *See id.* § 2001(a).

117. *See id.* § 2010(a).

118. *Id.*

119. *Id.* § 2010(c).

120. *Id.* § 2001(b).

121. As first seen in the analysis of the estate tax effect on joint property, the method in which property is owned by a married couple becomes more important as the size of their estate gets closer to the exclusion amount provided by the unified credit. It will often become more advantageous to change how some properties are owned to equalize the effect of taxes on each estate.

two trusts where the marital deduction portion of one spouse's estate would go into one trust and the residue of that spouse's estate would go into another trust. The first trust would be designed to qualify for the marital deduction; the purpose of the second trust could be to pay income to the surviving spouse during his lifetime, while keeping the principal of the estate separate from the surviving spouse's estate. Usually, the children of the grantor are then named as the beneficiaries of the principal of the trust.[122] This is possibly the best way to continue to make available nearly all of the assets for the benefit of the surviving spouse during his lifetime while ultimately passing on the bulk of the estate to the children.

A limitation to the marital deduction arises when such lifetime benefits are used in trusts. Because the spouse's interest in this property terminates upon his death, this type of transfer could be seen as disqualifying this asset for the marital deduction due to the creation of a terminable interest.[123] However, if certain requirements are met, the bequest to the trust will be properly considered as a qualified terminable interest property (QTIP).[124] To ensure the property can qualify for the marital deduction, the following conditions must be specified in the trust: the surviving spouse must be entitled to receive all of the income from the trust at least annually, for life; no person can have a power to appoint property to a third person during the surviving spouse's lifetime; and, any income that has accrued at the death of the surviving spouse must be paid over to the estate of that spouse.[125] The decedent's executor then has the ability to make a one-time irrevocable election as to whether the property will be considered as QTIP.[126] It may not always be advantageous to make this election, because, once made, the value of the assets in the QTIP trust will be included in the estate of the surviving spouse.[127] Without these steps to ensure treatment as a QTIP trust, a transfer to the trust would lose the marital deduction for property placed in the trust.[128] Like the simple family testamentary trust, the QTIP trust permits the surviving spouse to use and enjoy the income from the trust, while reducing the risk that the spouse will violate the principal to the detriment of the ultimate beneficiaries.

Conclusion

While this article is not intended to be an exhaustive treatise on the topic of estate planning, the purpose is to provide an overview to the general issues, rules, and mechanisms important to military members. For example, disability planning was not covered although the use of durable powers of attorney and advanced medical directives has an important function related to an estate plan, especially for military members. The focus was on those areas of the subject that had the most general applicability as well as the broadest base of insight into the tools and processes that are the normative framework of estate planning. After discerning how the topics of government benefits, insurance, and investing provide the baseline for the financial portion of the estate plan, its easier to comprehend how personal objectives determine the best methods to manage the estate with individual strategies for asset protection and distribution.

The most significant feature of any estate plan is recognizing the needs and objectives of the participants in the plan. Once identified, the decisions can more easily be made as to what tools should be used to manage the estate to accomplish the goals of the participants. By acknowledging their needs and addressing the practicalities of planning an estate, the participants will progress steadily toward the ascertainable goals of preparedness and self-sufficiency.

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122. Grantors should be wary of naming grandchildren as beneficiaries when children of the grantor are still alive. Such a transfer to a generation that is two below the generation of the transferor will likely result in a generation skipping transfer (GST) subject to tax. *See* I.R.C. § 2601. Although this is often not much of an issue since the GST rules allow for a $1,000,000 GST exemption from tax on any property transferred by the individual. *See id.* § 2631.

123. If the interest that passes to the surviving spouse will terminate because of a lapse of time, the occurrence of an event, or the failure of an event to occur and then pass to some other person, no marital deduction will generally be allowed with respect to such interest. *See id.* § 2056(b).

124. *Id.* § 2056(b)(7)(B).

125. *Id.*

126. *Id.* § 2056(b)(7)(B)(v).

127. *Id.* § 2044.

128. The QTIP is but one of the exceptions to the terminable interest rule. Other examples include an estate trust, a power of appointment trust, and life insurance or annuity payments.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

International and Operational Law Practice Note

Non-Governmental Organizations and the Military

Purpose

On 9 December 1998, the Department of Defense (DOD) issued a directive[1] that updated the Department of Defense Law of War Program.[2] This note was originally intended to be published as one in a series of practice notes addressing the meaning of the term "principles"[3] as it exists in both this directive, and the Chairman of the Joint Chiefs of Staff Instruction that implemented the prior version of the Law of War Program.[4] This term appears as follows in the most current version of the Law of War Program:

> 5.3. The Heads of the DOD Components shall:
> 5.3.1. Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the *principles and spirit of the law of war during all other operations*.[5]

The review process related to this note included comments from several prominent Department of the Army international and operational law experts on the proposed "principle." These comments led to a significant discussion within the International and Operational Law Department of The Judge Advocate General's School, U.S. Army (TJAGSA) of both the legitimacy of this proposed principle, and the meaning of the term "principle" in the mandates cited above. Several important aspects of these discussions warrant emphasis. First, all those involved in the review of this note concur that U.S. armed forces are obligated to comply with the principles of the law of war during all military operations, even those that do not involve conflict, and therefore do not trigger application of the law of war. Second, the mandates cited above, while establishing this obligation, do not define the specific law of war rules encompassed by the term "principles." Thus, it is necessary to analyze which law of war rules fall into this category. From the perspective of members of the International and Operational Law Department, this is an especially important task, because it is this Department that confronts the task of teaching judge advocates how this policy should be applied to resolve issues confronted by supported commanders during Military Operations Other Than War (MOOTW). As a result, both faculty members and students in the Judge Advocate Officer Graduate Course have in the past attempted to propose certain fundamental rules from the law of war that should be considered to fall within this definition.

Defining the meaning of the term "principle" is, unfortunately, less likely to result in consensus than identifying the need for such a definition. To illustrate this point, the law of war "principle" proposed in this note generated a good deal of conflicting opinion as to its legitimacy. The purpose of this note, and all notes in the series, is to propose a rule derived from the law of war that falls within the category of "principle," and not to definitively establish the precise definition of that term under the DOD Law of War Program. It is hoped that by generating consideration of possible principles, judge advocates will derive a greater understanding of both the law of war foundations proposed for these principles, and the legal challenges related to the relevant issue that arise during MOOTW. It is within this context that this, and indeed all notes published in this series must be understood: not as a reflection of Department of the Army doctrine or an official position of TJAGSA, but as a proposal to help illuminate the meaning of the mandate that serves as the analytical anchor for resolving the multitude of legal issues related to MOOTW.

Scenario

In Kosovo, Doctors Without Borders (DWOB), a non-governmental organization (NGO) that renders essential medical aid to the local residents, has requested transportation to an area controlled by the military where a number of Kosovars reside. Many of the Kosovars are sick and in need of medical attention.

1. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77].

2. *Id.* para. 5.1.

3. *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 22; International and Operational Law Note, *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1998, at 25; International and Operational Law Note, *Principle 7: Distinction Part II*, ARMY LAW., June 1999, at 35.

4. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter CJCS INSTR. 5810.01]. This Instruction also established an obligation for United States Armed Forces to comply with the "principles" of the law of war.

5. DOD DIR. 5100.77, *supra* note 1, para. 5.3.1 (emphasis added).

The military doctors do not have the resources to assist all the residents in the area. The growing fear is that if help is not immediate, Kosovars might start to die. The brigade commander asks his judge advocate what support the brigade is authorized to give DWOB, if any.[6]

Introduction

At first glance, the answer seems simple: help the Kosovars in distress, some of whom might die. But, is it possible that the commander may have a *legal* obligation under international law to provide support to NGOs when the military mission has a humanitarian motivation and is also a MOOTW? A related question is whether, absent a legal obligation, U.S. policy dictates that the commander support NGOs?

This scenario is a classic example of the type of dilemma encountered during the conduct of MOOTW. The scenario involves both legal and policy ramifications. The simple fact is that no easy answers exist to resolve such dilemmas. There is no single clearly identifiable source of legal authority relevant to the resolution of humanitarian type issues arising during MOOTW. Instead, judge advocates must craft resolutions based on a variety of binding and non-binding legal authorities, ranging from core principles of international human rights law to domestic law related to the permissibility of expending federal funds for humanitarian assistance. However, the starting point for analyzing how to resolve such humanitarian type issues encountered during the conduct of MOOTW is, by analogy, to examine the relevant "principles" of the law of war applicable to such operations pursuant to U.S. national policy. However, it must be emphasized that this provides only the starting point for analyzing how to resolve this issue. It does not absolve the judge advocate from considering other sources of authority relevant to the issue, such as U.S. fiscal law.

This note draws an analogy between the issue presented in the scenario and issues related to the treatment of civilians during international armed conflict. It concludes that the situation presented to the notional commander is most closely analogous to situations related to the treatment of civilian populations during armed conflict. A key provision of the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War[7] provides the authority, by analogy, on how to react to the challenge of dealing with NGOs in such a MOOTW environment.

The issue of relief efforts directed toward civilian populations in time of war is addressed in numerous specific articles of the GC.[8] However, in Part I of the GC, entitled "General Provisions,"[9] a general rule is established by Article 10[10] that is to guide military forces in deciding how to deal with impartial humanitarian organizations within their area of operations. While this note, in concert with U.S. policy,[11] should be read to prohibit any intentional U.S. interference with relief efforts which are not justified by mission related factors (such as force protection), it cannot be read to mandate assisting the relief organization.

This note does, however, provide a source of authority to support assisting the NGOs to "undertake [measures for] the protection of civilian persons and for [their] relief."[12] The distinction is subtle, but critical: it highlights the difference between viewing this law of war provision as creating an *obligation* to assist, versus providing an *authority* to assist. Viewing the provision as an authority, instead of an obligation, allows the commander to consider other legal and operational factors in deciding how to respond to the plea for assistance. Thus, the legal advisor could, under the circumstances presented in the scenario, advise the commander that applying the law of war principle in issue would provide a legal justification for assisting DWOB, to the extent that operational conditions permit, if the provision of such assistance could be undertaken in a manner that was consistent with applicable U.S. law.[13]

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6. Although this scenario was written before the beginning of current North Atlantic Treaty Organization (NATO) operations in Kosovo, it is strikingly similar to an actual event documented by an American news crew on 12 June 1999. The report, shown on the American Broadcasting Company (ABC) news program *20/20*, detailed the difficulty encountered by a United Nations humanitarian relief convoy traveling from Albania to Pristina. After being halted, the convoy leader demanded security from a French officer serving with the NATO Kosovo Force. The French officer sought guidance from his command channels via a cellular telephone, but was ultimately unable to provide a solid answer for the convoy leader. The convoy ultimately diverted its course to an old warehouse, without security provided by NATO forces. *See 20/20*: *Kosovo: After the Peace* (ABC television broadcast, June 13, 1999).

7. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, art. 2-3, T.I.A.S. 3365 [hereinafter GC].

8. *See, e.g.*, *id.* arts. 59-63 (establishing rules of civilian relief efforts in occupied territory); *id.* art. 108 (establishing rules of relief efforts on behalf of civilian detainees).

9. *Id.* pt. I.

10. *Id.*

11. *See* DOD DIR. 5100.77, *supra* note 1; CJCS INSTR. 5810.01, *supra* note 4.

12. GC, *supra* note 7, art. 10.

The Law of War

Article 10 of the GC[14] states:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or *any other impartial humanitarian organization* may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.[15]

This provision of the Geneva Convention is only triggered when armed conflict of an international nature occurs.[16] Its mandate seems clear: that the provisions of the GC are not to be regarded as the exclusive mechanisms for providing relief in favor of the civilian population, and that other humanitarian endeavors for that purpose should be regarded as generally permissible.

Although this note's scenario is not set in time of international armed conflict, Article 10 potentially provides a baseline principle for dealing with organizations engaged in humanitarian activities on behalf of civilian populations in areas affected by military operations. Article 10, according to the Official Commentary, is intended "to make easier to put into practice" the protection of civilians–individuals not involved as combatants.[17] However, because Article 10 creates a requirement that the humanitarian aid organization be impartial, the commander is entitled to demand assurance that the organization is both humanitarian in purpose, and impartial in the execution of that purpose. According to the Official Commentary to Article 10,[18] the organization "must be concerned with the condition of man, considered solely as a human being . . . ."[19] Furthermore, the organization must be "subject to certain conditions. They must be purely humanitarian in character; that is to say they must be concerned with human beings as such . . . ."[20] As to impartiality, the organization must not be "affected by any political or military consideration."[21] The Official Commentary, however, states that "impartiality does not necessarily mean mathematical equality."[22]

Under Article 10, humanitarian activities are subject to the consent of all the concerned parties to the conflict. According to the Official Commentary, "[T]his condition is obviously harsh but it might almost be said to be self-evident. A belligerent [p]ower can obviously not be obliged to tolerate in its territory activities of any kind by any foreign organization."[23] Because the Convention was drafted to apply to periods of international armed conflict, this self-evident condition is indeed logical. However, translating this particular aspect of the Article to a MOOTW situation requires a careful analysis of why this consent condition was included in the Article. Because the intent of the condition was to acknowledge the pragmatic reality of requiring consent of a belligerent in control of a certain area, the party to which this aspect of the principle is applicable may vary from situation to situation. Quite simply, any party who can essentially veto the presence of the humanitarian organization falls within this definition. Thus, if it is an area where U.S. forces have the ability to dictate who will be permitted to undertake humanitarian activities, the United States is the relevant party. However, if the area of intended relief is under the control of another party related to the situation, the United States may not have the ability to provide the relevant consent. This pragmatic emphasis of the consent requirement is highlighted by the following language from the Official Commentary:

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13. For example, fiscal law constraints cannot be ignored, but are beyond the scope of this note. Similar to aid provided to host nation military or civilian forces, a specific statutory authority permitting the desired assistance to the NGO must be identified prior to providing the requested aid. For example, NGO's are often in need of transportation for relief supplies. Two statutory authorities that specifically address the transport of relief supplies are 10 U.S.C.A. §§ 402, 2551 (West 1999). Section 401(c)(4), often referred to as De Minimis Humanitarian and Civic Assistance, may provide some authority for limited assistance. *See generally* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, chs. 11, 28 (2000) [hereinafter OPLAW HANDBOOK] (providing a general discussion of the fiscal law authorities typically relied on by judge advocates in the field).

14. OPLAW HANDBOOK, *supra* note 13, chs. 11, 28.

15. *Id.* (emphasis added).

16. *See id.* art. 2.

17. COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 97 (Jean S. Pictet et al. eds., 1958) [hereinafter GC COMMENTARY].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 98.

> The "Parties concerned" must be taken to mean those upon which the possibility of carrying out the action contemplated depends. For example, when consignments of relief are forwarded, it is necessary to obtain the consent not only of the State to which they are being sent, but also of the State from which they come, of the countries through which they pass in transit and, if they have to pass through a blockade, of the Powers which control the blockade.[24]

In the scenario presented in this note, the extent of control over the area of operations by U.S. forces results in the conclusion that it is the United States that is the key consenting party. In such a situation, an ill-conceived rejection of permission to undertake humanitarian relief efforts could be considered a violation of the spirit of the law of war, and therefore potentially a violation of U.S. policy (and potentially other aspects of international law, such as fundamental human rights obligation not to condone inhumane treatment of civilians). Of course, if the local commander makes a good faith judgment that legitimate military considerations preclude the grant of consent, no such violation could exist.

The judge advocate should also be aware that there are other articles of law of war treaties that can be viewed as validating the conclusion that the Article 10 requirement is indeed a fundamental law of war principle. Specifically, the basic concept of not obstructing humanitarian relief efforts is found in both 1977 Protocols I and II to the 1949 Geneva Conventions. In fact, Protocol I goes one step further, and establishes the additional requirement of "facilitating" the provision of such relief. In a section devoted entirely to "Relief In Favour Of The Civilian Population,"[25] Article 70 of Geneva Protocol I, which supplements the law of war applicable to international armed conflict, establishes the following requirement:

> The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.[26]

One significant issue that arises from interjecting the term "facilitate" into the rule related to dealing with impartial relief efforts is the meaning of that term. According to the Official Commentary:

> The intention of these words is to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous . . . Thus the obligation imposed here is relative: the passage of the relief consignments should be as rapid as allowed by the circumstances. Obviously the passage is in danger of being difficult across territory or through the airspace of a Party to the conflict, and no one is expected to do the impossible: such a Party must do all it can to facilitate the passage of relief consignments. On the other hand, if it does not consider itself to be in a position to guarantee the safety of a consignment, it should say so clearly so that an alternative solution can be sought . . . .[27]

Interestingly, the provision related to relief efforts found in Geneva Protocol II,[28] which supplements the law of war applicable to internal armed conflict, returns to the original requirement of the GC, and omits the obligation to "facilitate" such endeavors. According to Article 18(2) of that treaty:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.[29]

While the United States is not a party to either of these treaties, there is no indication that the basis for refusal to join them was related to either of these provisions.[30] There is also a strong argument that these provisions are binding on the United States as reflections of customary international law.[31] What is more significant than whether these provisions are technically binding on the United States is the support they lend to the conclusion that complying with the principle established in Article 10

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24. *Id.*

25. 1977 Protocol I Additional to the Geneva Conventions, sec. II, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391.

26. *Id.* art. 70(2).

27. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 823 (1987) [hereinafter COMMENTARY].

28. 1977 Protocol II Additional to the Geneva Conventions, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391.

29. *Id*. art. 18.

is a fundamental law of war principle. If so, this principle should transcend periods of "armed conflict" and also apply to MOOTW in accordance with U.S. national policy.[32]

Assuming the Article 10 mandate does amount to such a principle, it is important to establish the extent of the obligation. It seems clear that Article 10, as supplemented by the GP I and II articles cited above, require a commander to avoid unjustified interference with impartial relief efforts. Whether there also exists an express or implied requirement to "facilitate" such efforts is less certain. Although this seems to be the requirement established in GP I, the Commentary suggests that "facilitate" is really defined as streamlining the transit process and avoiding bureaucratic delays in the transit of such supplies. Defining the term in such a way seems compatible with the realities of contemporary military operations, because it is a narrow definition of the term, and does not *mandate* extensive efforts to support the transit and delivery of relief supplies. While such an effort may be consistent with the spirit of this principle of the law of war, it does not appear to be mandated even by the expanded concept reflected in GP I, and therefore remains essentially a policy judgment for the commander confronted with a request for such support.

Even a narrow interpretation of this proposed principle plays an important role in analyzing issues related to treatment of civilians during MOOTW. As evidenced by history, civilians are often injured and killed during war, and suffer great hardships during MOOTW. One of the overarching principles of the law of war since the advent of the Geneva Conventions is protecting civilians and alleviating the suffering of civilian populations.[33] Article 10 and the NGO role it validates are but one prong of an effort to achieve this goal. However, the significance of this prong is that it represents an explicit effort to provide a mechanism for dealing with hardships that could not be anticipated, and therefore provided for specifically in other provisions of the law of war. The following language of the Official Commentary highlights this point:

> There are one hundred and fifty-nine Articles in the Convention which we are studying and it might have been thought that they would provide a solution, based on the experience gained in previous conflicts, for any situation which could arise. No one, however, can foresee what a future war will be like, under what conditions it will be waged and to what needs it will give rise. It is therefore right to leave a door open for any initiative or activity, however unforeseeable today, which may be of real assistance in protecting civilians . . . .
>
> . . . Therefore, when everything had been settled by legal means–ordinary and extraordinary–by assigning rights and duties, by obligations laid upon the belligerents and by the mission of the Protecting Powers, a corner was still found for something which no legal text can prescribe, but which is nevertheless one of the most effective means of combating war-namely charity. . . .[34]

While the word "charity" in the quoted text refers to the efforts of humanitarian relief organizations, the theory of Article 10 is that such charity will be meaningless if the armed forces controlling the areas where it is directed unjustifiably impede the effort. Thus, such armed forces should embrace such charitable efforts as beneficial to the interests of humanity because they alleviate the suffering of innocents. The logic of this quotation seems to clearly support the extension of this principle of the law of war to the MOOTW environment described in the scenario at the beginning of this note.

Human Rights Law

Human rights law is the body of law that protects an individual from the state. The law of human rights is distinct from the law of war, in part, because the law of war is triggered only by armed conflict, while human rights law arguably applies at all times. It is the United States position that the vast majority of human rights law protects individuals from the treatment of only their own government, not other governments.[35] Under

30. Abraham D. Sofaer (Legal Advisor, United States Department of State), The Position of the United States on Current Law of War Agreements, Remarks at the Symposium on Humanitarian Law (Jan. 22, 1987), *in* 2 AM. U.J. INT'L. L. & POL'Y 415, 463-66 (1987).

31. *Id.* Additional evidence that these rules should be considered customary international law can be found in the Official Commentary to the 1977 Protocols. In discussion of the GP I article, the Commentary cites several United Nations General Assembly resolutions, passed by unanimous vote, that indicate that "facilitating" humanitarian relief efforts is an obligations that exists during all conflicts, both internal and international. *See* COMMENTARY, *supra* note 27, at 1476 n.5. Facilitating such relief efforts was also cited as a fundamental rule of the law of war by the International Criminal Tribunal for the Former Yugoslavia in the opinion of the Appellate Chamber in the case of Prosecutor v. Dusko Tadic a/k/a "Dule," IT-94-1-AR72, at 61.

32. *See* DOD DIR. 5100.77, *supra* note 1; *see also* CJCS INSTR. 5810.01, *supra* note 4.

33. COMMENTARY, *supra* note 27, at 597-600.

34. GC COMMENTARY, *supra* note 17, at 98-99.

35. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1986) [hereinafter RESTATEMENT] ("[A] state is obligated to respect the human rights of persons subject to its jurisdiction.").

this interpretation, U.S. forces deployed to Kosovo are not exposed to many provisions of human rights treaties signed and ratified by the United States. However, the core principle of "humane treatment" is considered by the United States to represent a binding customary international law obligation, which applies everywhere, all the time.[36]

While the United States adheres to a restrictive view of the scope of human rights law obligations, the core provisions of this body of law, sometimes referred to as "fundamental" human rights, are considered by the United States as customary international law, and therefore binding at all times. Most significant of these provisions is the obligations not to "practice, encourage, or condone cruel, inhumane, or degrading treatment."[37] A similar obligation exists under the law of war, as reflected in common Article 3 to the Geneva Conventions. The significance of this law is that an unjustified interference with the DWOB effort to treat the sick might be interpreted by critics of U.S. operations as tantamount to encouraging or condoning cruel, inhumane, and degrading treatment, thus violating customary international law. Furthermore, because the fundamental humanitarian prohibition against cruel, inhumane, and degrading treatment is not only a law of war principle applied as a matter of U.S. policy, but also a fundamental principle of customary human rights law, the imperative of compliance is only heightened.

Because non-interference with humanitarian relief efforts is potentially an offshoot of this "humane treatment" obligation, coalition partners in Kosovo, or any other MOOTW environment, may regard this failure to facilitate humanitarian relief as a violation of international law. Furthermore, because other nations interpret human rights treaty obligations to extend beyond national territory,[38] disregard of more explicit human rights mandates may be regarded as violating international law.[39] Thus, voluntary compliance with the requirement of Article 10 will insulate the command from any assertion that the United States is violating the fundamental human rights of the local population, and provide the command with a compelling argument that such an assertion is unjustified. This is one significant benefit of the U.S. law of war policy, which mandates extension of law of war principles to non-conflict operations.[40]

United States Policy

By instruction, U.S. forces must comply with the "law of war principles during all operations that are categorized as [MOOTW]."[41] This is often referred to as law by analogy.[42] If forces in combat are obligated to do their utmost to respect and protect civilians, then it is essential that forces operating in a MOOTW also take feasible measures to mitigate civilian suffering, so long as those measures are consistent with U.S. law and requirements of the military mission. Based on applying law by analogy, U.S. forces should strive to give civilians the same fundamental respect and protection they would otherwise be entitled to during an armed conflict. Today's operational environments in MOOTW often entail civilian suffering equaling, or even exceeding, the degree of civilian suffering resulting from an armed conflict. Therefore, it is imperative to apply the mandate of Article 10 to MOOTW. In a nutshell, reality dictates that a facet of all military operations in today's world is humanitarian in nature and Article 10, a law of war principle, fosters this humanitarian aim by enhancing the cooperation between U.S. forces and NGOs devoted to impartial relief efforts. At a minimum, the efforts of such NGO's should not be impeded by U.S. forces absent some compelling military justification. This includes anticipating the role of such organizations in the planning process, and establishing effective procedures for dealing with these organizations during mission execution. Furthermore, as a matter of policy, a commander may attempt to take more affirmative measures intended to aid the NGO's in achieving their humanitarian objectives.

Military Mission

During a MOOTW, the real concern for most commanders is how to balance accomplishing a limited mission with the humanitarian needs throughout the area of operations. This often includes the challenge of managing NGO activity in their area of operations, to include preventing interference with the military mission. Concern over how to provide support to NGOs is a secondary concern to mission accomplishment. In a MOOTW, the complex situation on the ground and the number of NGOs in an area might make it difficult for the military to accomplish its mission. Worse yet, a NGO might not like the way the military approaches a particular problem and may take

36. For a discussion on the distinction between treaty and customary international law human rights obligations, see OPLAW HANDBOOK, *supra* note 14, ch. 6.

37. *See* RESTATEMENT, *supra* note 35.

38. *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L. L. 78 (1995).

39. For example, the right to health care is viewed as a "right" under human rights law. The United States does not see this "right" as binding on U.S. forces, but many nations do. If the United States does not assist DWOB in the scenario, then the United States has denied health care to the Kosovars and this is arguably a violation of international law.

40. *See* OPLAW HANDBOOK, *supra* note 13, ch. 7.

41. *See* CJCS INSTR. 5810.01, *supra* note 4.

42. *See* OPLAW HANDBOOK, *supra* note 13, ch. 7.

measures that essentially eviscerate the military's efforts. Compliance with Article 10 does not mean subjugating the military mission to the will of a NGO. A plain reading of Article 10 indicates a negative: it does not allow the military to be an obstacle to NGOs in the absence of military necessity.

In the reality of MOOTWs today, Article 10 should be interpreted to mean that every effort be made to avoid impeding NGO support, which, in turn, means to protect civilians. When a particular type of support to the NGO is no longer possible, the abeyance of support should be for a quantifiable military reason. For example, the NGO is no longer impartial, the NGO is a danger to the force, or the NGO is at cross-purposes with the military mission. United States military objectives should always trump the needs of the NGOs. Article 10 does not mandate a different result. What it does require, in addition to taking no action intended to unjustifiably inhibit the efforts of the humanitarian organization, is a good faith effort on the part of the command to provide support to the NGOs.

As demonstrated, "law by analogy" requires commanders to apply Article 10 principles to MOOTW. Applying these principles to the scenario at the beginning of this note, it is clear that the commander may not unjustifiably interfere with the humanitarian efforts of DWOB. More importantly a commander could justifiably make a good faith effort, in the absence of mission constraints (such as fiscal prohibitions), to give support to DWOB.

Conclusion

As the military's role shifts to MOOTW, the dynamics of what constitutes mission success changes. It is essential, according to our own government, to "empower NGOs" to help innocent civilians caught up in world troubles. While Article 10 cannot be read as creating an obligation to provide assistance to such organization, it does prohibit unjustified interference with the organization, and establishes a basis for adopting a policy of rendering such assistance when doing so is consistent with other requirements of the military mission. Major Maxwell, Major Smidt, Major Corn.

Legal Assistance Practice Notes

Former Spouses Beware: Protecting Yourself Is Not Just A Job for the Courts

Many legal assistance and civilian attorneys routinely advise spouses of service members on divorce actions and strategies. A common topic of discussion involves the former spouses' portion of retirement pay. There are typically two ways to address a former spouses' portion in the divorce decree or property settlement–as a specific dollar amount or as a percentage of the disposable retired pay.[43] Both have advantages and disadvantages. With a specific amount, the former spouse ensures they will receive the amount they are entitled to regardless of the service member's election to waive a portion of their retired pay for Veteran's Administration (VA) disability payments. The disadvantage of specific dollar amounts is that the amount remains the same even though the retired pay increases through annual cost-of-living increases.

Conversely, a specific percentage lets the former spouse benefit from the cost-of-living increase, but can reduce the total amount from which their percentage is determined by the election to waive retired pay in exchange for VA disability pay. Attorneys typically explain both options, let the spouse choose one, and head off to court. However, a recent Kansas case highlights the need for attorneys to reevaluate their advice and recommend both a specific amount and a percentage.

According to the Kansas Court of Appeals in *In re Marriage of Pierce*,[44] the trial court correctly ruled that it was powerless to order a man to reinstate his military pension or to pay to his ex-wife the share awarded her in the divorce after the pension was converted to disability pay.[45] In a surprising opinion, the court stated that the wife should have done more to protect herself from this possibility when she signed the agreement giving her a percentage of the pension.[46]

The husband was retired at the time of the 1993 divorce and already receiving his retired pay.[47] He and his wife had a property settlement that gave the wife 18/20ths of one-half of his retirement benefits.[48] The husband also agreed to name the wife

43. 10 U.S.C.A. § 1408(a)(2)(C) (1999). The Uniformed Services Former Spouses Protection Act (USFSPA) requires that an award of a portion of a member's retired pay as property be expressed in dollars or as a percentage of disposable retired pay. *Id.*

44. 982 P.2d 995 (Kan. Ct. App. 1999). Because the regional reporter citation is not yet paginated, this note will use the following LEXIS citation for pinpoint citations: No. 80,115, 1999 Kan. App. LEXIS 454 (Kan. Ct. App. June 25, 1999).

45. *Id.* at *15-*16.

46. *Id.* at *12.

47. *Id.* at *2. The parties in this case were married to each other twice and divorced twice. This case does not deal with the first marriage or divorce, but only with the second.

48. *Id.* Under the parties' settlement agreement, the wife was awarded, among other things, "eighteen twentieths (18/20ths) of one-half (1/2) of the military retirement benefits of the respondent, pursuant to 10 U.S.C. § 1408. From the amount due the petitioner the Air Force or Defense Accounting Agency shall deduct the cost of the Survivor Benefit Plan of which petitioner is the beneficiary." This language is the only reference to the wife's interest in retirement pay. *Id.* at *2-*3.

as his beneficiary under the Survivor Benefit Plan.[49] Although the agreement set out the percentage the wife was to receive, it did not state any specific amount the wife was to receive or the duration of the payments.[50] The agreement contained nothing prohibiting the husband from making a VA disability election or forcing him to indemnify the wife if he made that election.[51]

After the divorce, the husband converted his retired pay to disability pay.[52] The wife stopped receiving her $600 per month payment.[53] In 1997, the wife asked the court to order the husband to reinstate his retirement pay or pay her what she was entitled to under the agreement had he not elected disability pay.[54] The trial court denied her request, and she appealed.

The court of appeals stated that since the divorce had been final since 1993, the only way to grant relief to the wife would be to modify and change the property settlement agreement.[55] However, because *Mansell v. Mansell*[56] made clear that state trial courts do not control military disability benefits, the trial court could not do indirectly what it could not do directly, that is, order the husband to reinstate his pension or pay a portion of his disability pay to the wife.[57]

Additionally, the court found that the husband did not violate the property settlement agreement because nothing in the agreement prevented him from waiving a portion of his pension.[58] The court stated that the "very unambiguous"[59] settlement agreement just gave the wife a specific portion of the retired pay, and that it "should have been perfectly obvious to anyone in 1993 that if [the husband] waived all of his retirement pay for a VA disability pension, [the wife] would get 18/20ths of one-half of nothing."[60] Because the wife was given the opportunity to protect herself from this very predicament at the time of the divorce, the court found that she had shown no valid reason why she should be allowed to do so now.[61]

Simply put, the court believed that the wife had been awarded an asset that had merely declined in value over the years, and the court did not feel that this was a sufficient basis to reopen the divorce settlement and demand more payments or additional property.[62] Although the court recognized that other state courts had granted relief similar to that sought by the wife,[63] it stated that Kansas state law was inconsistent with the rationale used in these decisions.[64] The court also stated that the

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49. *Id.* at *3.

50. *Id.*

51. *Id.* The court also noted that it was unknown whether the husband "voluntarily waived his retirement pay or whether it was waived by the VA due to his deteriorating physical condition." *Id.* at *4.

52. *Id.* at *4-*5.

53. *Id.* at *5.

54. *Id.* Kansas statute § 60-260(b) requires, in part:

> [T]hat a motion for relief be filed within one year after the judgement takes effect and be grounded in one of the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial; or (3) fraud, misrepresentation or other misconduct by an adverse party.

KAN. STAT. ANN. § 60-260(b) (1997).

55. *Id.* at *5. The agreement entered into by the parties "could not be amended or modified except by the written agreement and consent of each party hereto." *Id.* at *4.

56. 490 U.S. 581 (1989). *Mansell* makes clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. *Id.*

57. *Pierce*, 1999 Kan. App. LEXIS 454, at *8

58. *Id.*

59. *Id.* at *9.

60. *Id.*

61. *Id.* at *12. The court found that the wife:

> [C]ould have insisted [the husband] agree that he would not convert his retirement funds to disability benefits. She did not do so. She could have provided that in the event the retirement funds were converted to disability benefits that [the husband] would be required to continue to pay her from other assets. She did not do so.

Id.

62. *Id.* at *12-*13.

wife's allegations were insufficient to satisfy a breach of contract action.[65]

One judge dissented, stating that the wife's vested interest in the retired pay was similar to a life estate in property.[66] The dissenting judge also pointed out that although the Uniformed Services Former Spouses Protection Act[67] prohibits a state court from awarding more than fifty percent of a military pension to a former spouse,[68] it allows courts to use other assets to satisfy the former spouse's share of the property.[69]

Although this case may be appealed further, it contains a valuable teaching point for legal assistance attorneys. Including language in a property settlement or divorce decree that awards a former spouse the greater of a specific dollar amount or a percentage of the military retired pay, or requires the retired service member to indemnify the former spouse for the amount of money lost after a VA disability election goes a long way towards ensuring that clients do not suffer the same fate as the wife in *In re Marriage of Pierce*. Major Boehman.

Is It Time To Create Another Suspect Class? Missouri Supreme Court Holds That Divorced Parents Are Not A Suspect Class

Legal assistance attorneys have long guided clients through the minefield of divorce and separation actions. One question that frequently comes up is which parent, if any, bears responsibility for paying for the college education of their children? A majority of states provide for continued child support payments for children under the age of twenty-one or twenty-two years who are pursuing a college or vocational degree.

A recent Missouri case, *Kohring v. Snodgrass*,[70] tested the constitutionality of such a statute. The parents in this case had divorced in 1989,[71] and the mother received custody of the couple's two children.[72] The father was ordered to pay child support, with the payment to increase in 1994.[73] In 1997, when the couple's oldest child–a daughter–applied to and was accepted by the University of Missouri-Columbia, the mother filed a motion compelling the father to pay a portion of the child's college expenses.[74] The father filed a motion to dismiss and a cross motion to terminate child support.[75] The court overruled the father's motions and ordered him to pay eighty percent of his daughter's college expenses.[76]

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63. *Id.* at *13 (citing Dexter v. Dexter, 661 A.2d 171 (Md. Ct. Spec. App. 1995)). The court also noted that several other states would also deny the relief sought by the wife, citing Matter of Marriage of Reinauer, 946 S.W.2d 853 (Tex. App. 1997) and Marriage of Jennings, 958 P.2d 358 (Wash. Ct. App. 1998). In *Dexter*, the wife sued on a breach of contract action. The court found for the wife and awarded damages. *Dexter*, 661 A.2d at 171. In *Pierce*, the Kansas Court of Appeals found that case to be an ordinary action for breach of contract, which had no support in the case before it. *Pierce*, 1999 Kan. App. LEXIS 454, at *13-*14. The Kansas court found nothing to indicate that the husband intentionally breached the settlement agreement and stated further that it did not believe that a "motion filed in a divorce action is or can be construed as an action for breach of contract, at least not as alleged by [the wife] in her motion." *Id.*

64. *Pierce*, 1999 Kan. App. LEXIS 454, at *13.

65. *Id.* at *14.

66. *Id.* at *18 (Green, J., dissenting).

67. 10 U.S.C. § 1408 (1994).

68. *Pierce*, 1999 Kan. App. LEXIS 454, at *19-*20 (Green, J. dissenting).

69. 10 U.S.C. § 1408 (e)(6).

70. Kohring v. Snodgrass, No. 81139, 1999 Mo. LEXIS 52 (Mo. Aug. 24, 1999).

71. *Id.* at *1.

72. *Id.*

73. *Id.* The amount was increased to $900 monthly for the two children.

74. *Id.*

75. *Id.*

76. *Id* at *2. The father was also ordered to pay a portion of the mother's attorney fees.

On appeal the father argued, among other things,[77] that the state statute unconstitutionally established child support awards[78] for college expenses in violation of the equal protection clauses of the United States Constitution and the Missouri Constitution.[79] He also argued that the statute infringed upon his "fundamental right" to decide whether to financially support an adult.[80] The Missouri statute[81] essentially provides that any child enrolled in an institution of higher learning by the October following their graduation from high school, who remains enrolled in at least twelve credit hours per semester, is entitled to continued parental support until completing the degree program or reaching the age of twenty-two, whichever occurs first.

The court noted that the first step in determining whether a statute violates the equal protection clause is to decide whether the challenged statutory classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[82]

The father's equal protection argument consisted of two prongs. The first prong was that the statute "burdens a previously unrecognized suspect class of unmarried, divorced, or legally separated parents and imposes on them a monetary obligation [of] funding their children's college education that does not exist for married parents."[83] The court disagreed, noting that a suspect class ordinarily contains a group of persons "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[84] Traditionally, membership in a suspect class is reserved for those persons classified according to gender, race, national origin, and illegitimacy.[85] Not only is one's status as a divorced parent outside any of these criteria, but membership in a suspect class is usually something over which the member has no control, and additional protections are therefore required. The decision to divorce, or at least the decision to marry, which may ultimately lead to divorce, is made voluntarily.

The second prong of the father's argument was that the statute also burdens a different suspect class–illegitimate children and children from broken homes–by "alienating them from the parent required to pay support and subjecting them 'to the regrettable but almost inevitable reality of divided allegiances to their parents.'"[86] The court disagreed, finding that it was the divorce or separation itself that tended to alienate the children from the non-custodial parent. Conversely, the purpose of the statute was to support the child, not burden the children. The court also found that even if the children of broken marriages constituted a suspect class, there was no equal protection violation.[87]

The father also argued that as an unmarried parent, he had a "fundamental right" to decide whether to provide support to an adult child.[88] As he can legally exert no control over his adult daughter, it should be his decision, and not the state's, whether to financially support her. Although conceding that the parent-

77. The father also argued that his daughter failed to comply with the statute's requirements by showing him the courses she was enrolled in, the credits earned, and her grades. The father also appealed the decision ordering him to pay 80% of the college expenses, as well as a portion of the mother's attorney fees. *Id.*

78. MO. REV. STAT. § 452.340.5 (1998).

79. *Kohring*, 1999 Mo. LEXIS 52, at *2.

80. *Id.*

81. In relevant part, Missouri statute § 452.340.5 states:

> If when a child reaches age eighteen, the child is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue, if the child continues to attend and progresses toward completion of said program, until the child completes such program or reaches age twenty-one, whichever occurs first. If the child is enrolled in an institution of vocational or higher education not later than October first following graduation from a secondary school or completion of a graduation equivalence degree program and so long as the child enrolls for and completes at least twelve hours of credit each semester, not including the summer semester, at an institution of vocational or higher education and achieves grades sufficient to re-enroll at such institution, the parental support obligation shall continue until the child completes his or her education, or until the child reaches the age of twenty-two, whichever occurs first.

MO. REV. STAT. § 452.340.5.

82. *Kohring*, 1999 Mo. LEXIS 53, at *4 (quoting Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1997) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).

83. *Id.* at *5.

84. *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

85. *Id.* (quoting Call v. Heard, 925 S.W.2d 840, 846-47 (Mo. 1996); State v. Stokely, 842 S.W.2d 77, 79 (Mo. 1992)).

86. *Id.* at *6.

87. *Id.*

child relationship is "an associational right . . . of basic importance in our society,"[89] the court found that a "parent's financial obligations to his or her child are considered merely economic consequences that do not critically affect associational rights."[90] The court also found that because the father's alleged "right" to decide whether to support his adult child involved only economic interests and not his associational rights, the statute was not subject to strict scrutiny.[91]

Once the court found that no suspect classifications were involved and no fundamental rights impinged upon, it turned to whether the statute would meet the constitutionality test by relating to a legitimate state interest.[92] The court agreed with the mother's argument that "the state has a legitimate interest in securing higher education opportunities for children from broken homes,"[93] because those children suffer disadvantages that children of existing marriages do not.[94] The court held that the statute "rationally advance[s] a legitimate state interest by requiring financially capable parents to lend support to their children wishing to pursue higher education."[95] Moreover, the court held that the statute only deals with financial interests.[96] For all of these reasons, the court found no constitutional violation.

From a practical perspective, legal assistance attorneys must ensure that their divorce and separation clients are aware that their support orders and agreements are subject to modification by statutory operation, and that the obligation to provide child support does not necessarily end when the child reaches the age of majority. Major Boehman.

Criminal Law Note

Explanation of the 1999 Amendments to the *Manual for Courts-Martial*

Introduction

This note highlights the changes made to the *MCM* and the impact these amendments may have for military criminal law practitioners. The Appendix to this note contains a copy of the 1999 amendments to the *Manual for Courts-Martial* (*MCM*).[97] Generally, the changes will take effect 1 November 1999.

Qualifications of the Military Judge

The 1999 amendments included a change to Rule for Courts-Martial (R.C.M.) 502(c), dealing with the qualifications of the military judge. Formerly, R.C.M. 502(c) required that a military judge be "a commissioned officer on active duty in the armed forces."[98] Amended R.C.M. 502(c) removes the "on active duty" requirement. This change applies only to cases where arraignment has been completed on or after 1 November 1999. The purpose of this amendment is to enable Reserve Component judges to conduct trials during periods of inactive duty training and inactive duty training travel. Congress established the qualifications for military judges in Article 26, Uniform Code of Military Justice (UCMJ),[99] but did not mandate that military judges be on active duty. The active duty qualification appears to be a "vestigial requirement" from the 1951 and 1969 *MCM*. Deleting the language should "enhance efficiency in the military justice system."[100]

88. *Id.*

89. *Id.* at *7 (quoting M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996)).

90. *Id.* (quoting Rivera v. Minnich, 483 U.S. 574, 580 (1986)).

91. *Id.* at *8.

92. *Id.* (quoting Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1997)).

93. *Id.* at *9.

94. *Id.* (quoting Leahy v. Leahy, 858 S.W.2d 221 (Mo. 1993)).

95. *Id.*

96. *Id.*

97. Executive Order Number 13,140 contains the recent amendments to the *MCM*. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

98. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(c) (1998) [hereinafter MCM].

99. UCMJ art. 26 (1998).

100. Exec. Order No. 13,140, 64 Fed. Reg. at 55,120.

Remote Live Testimony of a Child

The President created new rules for cases involving child abuse or domestic violence to accommodate child victims and witnesses who may be reluctant or fearful to testify before a court-martial.

A newly-created provision of Military Rule of Evidence (MRE) 611[101] reflects Confrontation Clause case law[102] by establishing procedures that the military judge can employ to permit child victims or witnesses to testify from an area outside of the courtroom. The military judge may employ these procedures upon a finding that a child is unable to testify in open court in the presence of the accused (1) because of fear, (2) because the child would suffer emotional trauma from testifying, (3) because of a mental or other infirmity, or (4) because of conduct by the accused or defense counsel that causes the child to be unable to continue testifying.[103] The analysis to MRE 611(d) clarifies that child witnesses who are not victims can be allowed to testify from a remote location.[104]

If the military judge makes one of the above findings under MRE 611(d)(3), the military judge must permit testimony of the child outside of the presence of the accused. The judge will decide the procedure to take the remote testimony, but the testimony should normally be taken via a two-way closed circuit television system. At a minimum, the judge must follow the procedures under R.C.M. 914(a): (1) the victim or witness shall testify from a remote location; (2) personnel at the remote location is limited to the witness, counsel for each side,[105] equipment operators, and other persons deemed necessary by the military judge;[106] (3) sufficient monitors will be used to ensure that the judge, the accused, the members, the court reporter, and the public can see and hear the testimony; (4) the voice of the military judge will be transmitted into the remote location; and (5) the accused will be allowed private, contemporaneous communication with his counsel.[107]

The 1999 amendments include a new rule, R.C.M. 804(c), which provides for another exception to the general rule in R.C.M. 804(a).[108] Under R.C.M. 804(c), the accused may preclude the use of the procedures under R.C.M. 914(a) if he voluntarily leaves the courtroom during the testimony of the child witness.[109] Rule for Courts-Martial 804(c) permits the accused to go to a remote location where he may view the proceedings. In that situation, two-way closed circuit television will transmit the child's testimony from the courtroom to the accused's location. The accused will also have private, contemporaneous communication with his counsel. The accused's election to leave the courtroom during the child witness's testimony does not otherwise affect the accused's right to be present for the remainder of the trial.

Sentencing

The 1999 changes to R.C.M. 1001(b)(4) arguably expand the types of aggravation evidence that can be admitted during the pre-sentencing phase of trial. The 1999 version of R.C.M. 1001(b)(4) includes the same language as the 1998 version, with the following additions: "In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[110] The rule was amended to insure that "hate crime" evidence could be presented to the sentencing authority. It is likely that the language of R.C.M. 1001(b)(4) was already broad enough to allow the government to introduce "hate crime" evidence. The 1998 version of R.C.M. 1001(b)(4)

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101. *Id.* at 55,118.

102. *See* Maryland v. Craig, 497 U.S. 836 (1990); United States v. Longstreath, 45 M.J. 366 (1996); United States v. Anderson, 51 M.J. 145 (1999). *See also* 18 U.S.C.S. § 3509 (LEXIS 1999). In *Craig*, the Supreme Court required trial judges to make three case specific findings before allowing a child victim to testify in the absence of face-to-face confrontation. These findings are: (1) The procedure proposed is necessary to protect the welfare of the child victim, (2) The child victim would be traumatized by the presence of the accused, and (3) The emotional distress would be more than *de minimus*. *Craig*, 497 U.S. at 856.

103. Exec. Order No. 13,140, 64 Fed. Reg. at 55,118.

104. *Id.* at 55,122.

105. This does not include an accused who is representing himself.

106. An example would be an attendant for the child.

107. Exec. Order No. 13,140, 64 Fed. Reg. at 55,116.

108. MCM, *supra* note 98, R.C.M. 804(a), (b). Rule for Courts-Martial 804(a) establishes a general rule that the accused will be present at each session of the court-martial. Rules for Court Martial 804(b) identifies two exceptions to the general rule: when the accused is absent without leave after arraignment, and when the accused is persistently disruptive in court. *See* United States v. Daulton, 45 M.J. 212 (1996) (holding that the accused's rights were violated when he was removed from the courtroom so that a child witness could testify).

109. Exec. Order No. 13,140, 64 Fed. Reg. at 55,115.

110. *Id.* at 55,116.

allowed the government to introduce "aggravating circumstances directly relating to or resulting from the offense of which the accused was found guilty."[111] The motive for a person to commit a crime, especially if the motive is hate, would probably be an aggravating circumstance directly relating to the offense.[112] Any question that might have existed has now been removed by this amendment.

The language of the amendment is taken from section 3A1.1 of the Federal Sentencing Guidelines.[113] Under the Federal Sentencing Guidelines, evidence that a crime was motivated by hate of a particular race, color, religion, national origin, ethnicity, gender, sexual orientation, or disability allows for an upward adjustment in the sentence received by the accused.[114]

Another 1999 amendment in the area of sentencing is deleting R.C.M. 1003(b)(4). This change removes the loss of numbers, lineal position, or seniority as a possible punishment in a court-martial. According to the analysis accompanying the 1999 changes, the punishment was dropped "because of its negligible consequences and the misconception that it was a meaningful punishment."[115]

Capital Cases: Aggravating Factors

The amendment to R.C.M. 1004 adds an additional aggravating factor to the list of those aggravating factors that may warrant the death penalty.[116] The new aggravating factor is the premeditated murder of a person under age fifteen. This factor is now found at R.C.M. 1004(c)(7)(K) and is the final aggravating factor listed with respect to violations of Article 118(1). The number of aggravating factors listed in R.C.M. 1004 is now twenty-four, twelve of which involve premeditated murder. The analysis now accompanying this amendment refers to a desire posited by the Joint Services Committee on military justice and endorsed by the President "to afford greater protection to victims who are especially vulnerable due to their age."[117]

Psychotherapist-Patient Privilege

Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the UCMJ.[118] Military Rule of Evidence 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*.[119] Military Rule of Evidence 513 is not intended to apply to any proceeding other than those authorized under the UCMJ. The rule was based in part on the proposed Federal Rule of Evidence (not adopted) 504 and state rules of evidence. Military Rule of Evidence 513 is not a physician-patient privilege; instead, it is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*. The armed forces still does not recognize a physician-patient privilege for its members.[120] The exceptions to the new MRE 513 are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment.

New Offense: Reckless Endangerment

The recent changes to the *MCM* created paragraph 100a of part IV, which enumerates reckless endangerment as an offense under Article 134. This addition is based on *United States v. Woods*.[121] As defined by the President, the offense has four elements: (1) the accused engaged in conduct; (2) the conduct was wrongful and reckless or wanton; (3) the conduct was likely to produce death or grievous bodily harm to another person; and (4) under the circumstances, the conduct was prejudicial to good order and discipline or service-discrediting.[122] The para-

111. MCM, *supra* note 98 R.C.M. 1001(b)(4).

112. United States v. Martin, 20 M.J. 227, 232 (C.M.A. 1985).

113. Exec. Order No. 13,140, 64 Fed. Reg. at 55,121.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 55,118.

119. 518 U.S. 1 (1996).

120. *See* MCM, *supra* note 98, MIL. R. EVID. 302, 501 analysis, app. 22, at A22-7, A22-37.

121. 28 M.J. 318 (C.M.A. 1989) (finding that unprotected sexual intercourse with another service member, while HIV-positive and after being counseled that the virus is deadly and can be transmitted sexually, stated an offense under Article 134); Exec. Order No. 13,140, 64 Fed. Reg. at 55,123.

122. Exec. Order No. 13,140, 64 Fed. Reg. at 55,119.

graph also explains to practitioners the offense and provides a model specification. The maximum punishment is a bad-conduct discharge, total forfeitures, and confinement for one year.

The addition of reckless endangerment as an enumerated offense under Article 134 assists the government in prosecuting crimes against people. This offense is unique in that it requires neither specific intent nor consummated harm. The prosecution must prove, however, that the conduct was reckless and *likely* to produce death or grievous bodily harm. This offense is an effort to deter the conduct before injury or death actually occurs. Although the amendment was based on an HIV-related case, the offense may be charged in many different types of cases, such as child neglect. In cases involving the operation of vehicles, aircraft, and vessels, however, Article 111 will probably preempt a charge under Article 134. Major Sitler.

Appendix

EXECUTIVE ORDER

1999 AMENDMENTS TO THE MANUAL
FOR COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12,473, as amended by Executive Order 12,484, Executive Order 12,550, Executive Order 12,586, Executive Order 12,708, Executive Order 12,767, Executive Order 12,888, Executive Order 12,936, Executive Order 12,960, and Executive Order 13,086, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

a. R.C.M. 502(c) is amended to read as follows:

"(c) Qualifications of military judge. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge."

b. R.C.M. 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting after subsection (b) the following new subsection (c):

"(c) Voluntary absence for limited purpose of child testimony.

(1) Election by accused. Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914a.

(2) Procedure. The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) Effect on accused's rights generally. An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule."

c. The following new rule is inserted after R.C.M. 914:

"Rule 914a. Use of remote live testimony of a child

(a) General procedures. A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) Prohibitions. The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c)."

d. R.C.M. 1001(b)(4) is amended by inserting the following sentences between the first and second sentences:

"Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

e. R.C.M. 1003(b) is amended:

(1) by striking subsection (4) and

(2) by redesignating subsections (5), (6), (7), (8), (9), (10), and (11) as subsections (4), (5), (6), (7), (8), (9), and (10), respectively.

f. R.C.M. 1004(c)(7) is amended by adding at end the following new subsection:

"(K) The victim of the murder was under 15 years of age."

Section 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

a. Insert the following new rule after Mil. R. Evid. 512:

"Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psycho-therapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

b. Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

"(d) Remote live testimony of a child.

(1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. The term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child. The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

(A) The child is unable to testify because of fear;

(B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(C) The child suffers from a mental or other infirmity; or

(D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

(4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c)."

Section 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

a. Insert the following new paragraph after paragraph 100:

"100a. Article 134: (Reckless endangerment)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused did engage in conduct;

(2) That the conduct was wrongful and reckless or wanton;

(3) That the conduct was likely to produce death or grievous bodily harm to another person; and

(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or serious injury to others.

(2) Wrongfulness. Conduct is wrongful when it is without legal justification or excuse.

(3) Recklessness. "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

(4) Wantonness. "Wanton" includes "reckless," but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(5) Likely to produce. When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is "likely" to produce that result. See paragraph 54c(4)(a)(ii).

(6) Grievous bodily harm. "Grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(7) Death or injury not required. It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

d. Lesser included offenses. None.

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification. In that _____ (personal jurisdiction data), did, (at/on board–location)(subject-matter jurisdiction data, if required), on or about _____ 19__, wrongfully and recklessly engage in conduct, to wit: (he/she)(describe conduct) and that the accused's conduct was likely to cause death or serious bodily harm to _____."

Section 4. These amendments shall take effect on 1 November 1999, subject to the following:

a. The amendments made to Military Rule of Evidence 611, shall apply only in cases in which arraignment has been completed on or after 1 November 1999.

b. Military Rule of Evidence 513 shall only apply to communications made after 1 November 1999.

c. The amendments made to Rules for Courts-Martial 502, 804, and 914A shall only apply in cases in which arraignment has been completed on or after 1 November 1999.

d. The amendments made to Rules for Courts-Martial 1001(b)(4) and 1004(c)(7) shall only apply to offenses committed after 1 November 1999.

e. Nothing in these amendments shall be construed to make punishable any act done or omitted prior to 1 November 1999, which was not punishable when done or omitted.

f. The maximum punishment for an offense committed prior to 1 November 1999, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

g. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 November 1999, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 6, 1999.

The Art of Trial Advocacy

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

Advocacy in Front of the Military Judge

Much of advocacy training focuses on finding ways to persuade and convince fact finders at various trial stages. Too often, however, judge advocates forget that there is another person in the courtroom that they must often try to convince just as much. That person, of course, is the military judge! On questions of law, whether arguing for the admissibility of evidence or to sustain a particular objection, advocacy can be just as important as when judge advocates present pure questions of "fact" to panel members. This note addresses ways to improve advocacy in front of the military judge. It addresses general points, such as "knowing your judge" and being courteous. It also discusses ways to ensure the military judge gets in the "comfort zone." Finally, it will present some advocacy tips for objections and motions practice.

Know Your Judge

Judge advocates have heard this adage many times before, but it bears repeating: advocacy is an art, not a science. Advocacy is practiced in front of human beings, all of whom come to court with flaws, gifts, reputations, and an infinite variety of life experiences. The most brilliant "by the book" lawyer is ineffective in court if he cannot grasp the human element in each case. The judge is neither a computer who can endlessly absorb and process information, nor a Solomon who can dispense profound wisdom without effort, but a human being with an attention span of a certain length and an intelligence of a particular depth. He may also possess idiosyncrasies to a peculiar degree.

Knowing such things about judges is important when trying cases, and may require some detective work on the judge advocate's part, especially if the judge is visiting or new to the circuit. Calling colleagues in other circuits who have tried cases before a new or unknown judge is always wise. Finding out "track records" for judges in sentencing (and keeping your own track records if it is your judge) is another important tool. Getting a copy of his rules of court and mastering them is also a necessity.

Trial counsel will usually have to ensure that the courtroom is configured the way the judge likes it. Find out if you do not know. If the judge is visiting, find out if he will need certain references available. A visiting judge will usually bring a laptop computer with him, so make sure there is a printer in the chambers for him to use–he should not have to run down the hall or across the street to the criminal law office every time he wants to print something. Finally, before going to court in your case, watching the judge try someone else's case, so you can get a feel for his habits, quirks, and pet peeves, is invaluable.

Courtesy at All Times

As James McElhaney states, "The adversary system applies to the lawyers, not the judge. Do not start a war with the judge–you are not likely to win."[1] Because judge advocates deal with military judges so often, they often fail to show basic military courtesy–something they would never fail to show to a battalion or brigade commander. Attention by counsel to elementary manners and military courtesy will avoid embarrassing and even disrespectful moments.

Of course, counsel should always stand when addressing the military judge, refer to the judge as "Your Honor" or "Sir or Ma'am," and always accord the judge the respect that he is due. Additionally, one sure way of displaying a lack of courtesy and of being–perhaps embarrassingly–corrected in front of members is to play "ping-pong" with opposing counsel. Counsel must not address each other in a heated exchange, rather than addressing the judge. This is especially true during an objection.

Counsel should also, as a matter of basic courtesy and respect, start the trial with documents and evidence previously marked, having gone over them with the court reporter prior to trial. Trial counsel should ensure the flyer and findings and sentencing worksheets are prepared. This saves time and makes counsel look professional and better prepared. Finally, trial and defense counsel should coordinate and negotiate issues before approaching the judge. This eliminates a possibly needless extra step and reassures the judge that counsel are genuinely working together.

Getting Judges in the Comfort Zone

If there is one thing most judges dislike, it is going "out on a limb" to make a ruling. Judges like to rely on standard practices, established rules, and *stare decisis*. No judge wants to be scrutinized by a "higher" authority, to be told that his decision was bad, and then have this published for everyone–especially his peers–to see. That is what happens when a judge is overturned by an appellate court. What counsel should be aware of is the need to get judges "in the comfort zone"–in an area where they are comfortable when making their rulings. To help them get there, counsel should do the following:

1. JAMES MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 700 (1994).

Use the language of the rules, and then some—One way to get a judge into the comfort zone is to use the "tried and true" language of the rules and familiar words and terms. This may actually involve using language that is not required to satisfy a legal burden. By meeting a more stringent legal burden, the judge will feel assured that he is also certainly satisfying the lesser standard actually required by law.

Take for example the required test for determining probable cause. As announced in *Illinois v. Gates*,[2] the standard for determining probable cause is that under the "totality of the circumstances" there was probable cause that the evidence is located at a particular location.[3] This replaces the older, more stringent *Aguilar-Spinnelli* test, which requires two factors to be satisfied: (1) that informant had a solid basis of information, and (2) that the informant was sufficiently reliable.[4]

At first glance, one may question why a trial counsel would want to use the more stringent *Aguilar-Spinelli* test in arguing that probable cause was satisfied. The reason is twofold. First, the "totality of the circumstances" test of Gates is sometimes considered hard to grasp because it is so highly amorphous.[5] Second, by meeting the more restrictive test, the military judge will undoubtedly feel more comfortable and certain that he has satisfied the less stringent *Gates* test.[6]

Think carefully about which argument you want to make—Do you want to argue on the "cutting edge," or rely on a more "tried and true" approach? The latter is not only more likely to withstand appeal, it is the approach the judge will probably be more familiar and comfortable with.

For example, assume you are the government counsel in a case involving a search of the barracks room that defense counsel wants to suppress. One argument you could make is to assert that, following *United States v. McCarthy*,[7] there is no reasonable expectation of privacy in the barracks room, and therefore the Fourth Amendment requirements for valid searches does not apply. This argument is very tempting, especially if it is in the context of a possible "subterfuge" search which requires a higher burden of proof for the government to enter in a piece of evidence.[8] But this argument forces the judge to decide an issue using still unsettled law. If the judge is going to rule that, based on *McCarthy*, there is no expectation of privacy in the barracks or at least a highly reduced, he is undoubtedly setting up an issue on appeal. Furthermore, the judge may be signaling to government counsel in his jurisdiction that warrantless intrusions in the barracks are legally sufficient as a matter of course–a signal he would probably not want to give.

Doing it the judge's way – if you can—Related to using well-established rules and familiar language is the following point by McElhaney: "When the judge gives you a clue to what words he expects in a foundation, make them the words you use. If you think something else is required, put that in, to be sure. But do not insist on your terminology just for its own sake."[9] Again, the idea is to make a judge comfortable so he will agree with your position. Part of doing that is not just using the applicable rules, standards, and terms the judge is familiar with, but also using the requirements and language the judge wants and likes to hear. Does the judge dislike the phrase "let the record reflect"? If so, eliminate it from your vocabulary. Does the judge want a legend drawn on every diagram offered into evidence? If so, make sure that this is done by the appropriate witness. Does he require a certain way of laying a foundation? If so, rehearse it beforehand, and then do it in court as he wants it done. Doing it the judge's way not only puts him in the comfort zone, it also helps you avoid embarrassing (and possibly discrediting) interruptions in front of panel members.

Objections: State What You Want and Why

What do you want to achieve with a particular objection? Why should the judge grant your objection? Stating why you are objecting is particularly important. Military Rule of Evidence 103(a)(1) specifies that unless a counsel states an objection and asserts "the specific ground of objection . . . [e]rror

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2. Illinois v. Gates, 462 U.S. 213 (1983).

3. *Id.*

4. The "*Aguilar-Spinnelli*" test is based on two older Supreme Court cases, Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

5. At the May 1999 Military Judge's Course held at TJAGSA, several judges (some new, some experienced) commented on the superiority of the older *Aguilar-Spinelli* test precisely because it gave clearer guidelines than *Gates* did.

6. The recent case, United States v. Hester, 47 M.J. 461 (1998), is a good example of this. In that case, the Court of Appeals for the Armed Forces used the more stringent *Aguilar-Spinelli* test in affirming the lower court's determination of sufficient probable cause, even though it acknowledged that use of such a test was not required. *Id.*

7. 38 M.J. 398 (C.M.A. 1993).

8. When dealing with a possible "subterfuge" inspection, the burden for the government is not preponderance of the evidence. Rather the government must show by "clear and convincing evidence" that the primary purpose of the "intrusion" was administrative, not criminal. MANUAL FOR COURTS-MARTIAL, MIL. R. EVID. 313(B) (1998) [hereinafter MCM].

9. MCELHANEY, *supra* note 1, at 700.

may not be predicated upon [the] ruling which admits or excludes evidence."[10] In other words, you need to do more than simply object: you need to state why you are objecting or you have probably waived preserving the error on appeal.

Some Points on Motions

Bottom Line Up Front (BLUF)—When requesting relief in the form of a motion, you should let the judge know up front what you want in the motion when you address him–a concept known in the military as "BLUF." Organize the argument in four parts: the requested relief, the pertinent law, a more in-depth discussion of the legal principle, and evidence to support the motion.

First, briefly request relief: "Your honor, the defense makes a motion to suppress the bag of marijuana. It was unlawfully obtained during a government inspection of Specialist Snuffy's barracks room." Next briefly state the law: "The inspection violated Military Rule of Evidence 313(b)[11] because it was conducted immediately after report of someone having drugs in the barracks, and there was insufficient probable cause." Next go into the rule itself, briefly explaining it and citing the relevant case law, having hard copies of cases available for the judge and opposing counsel. Finally, as mentioned above, present evidence in support of your motion.

Arguments ARE NOT Enough: One significant problem noted by many judges is the failure of counsel to present evidence when arguing their motions.[12] The counsel simply assume that their arguments are enough. This is often not the case, especially when the judge will probably have to make essential findings of fact. Those findings will be closely scrutinized by the appellate courts if the case ends in a conviction. You must ensure that you have *some* evidence to present other than just your bald assertions. Presenting this evidence should not be too difficult–remember, Military Rule of Evidence 104(a) allows the judge to accept virtually any type of unprivileged information when determining a preliminary matter.[13] Hearsay statements, unauthenticated documents, and information possibly excludable under Section III of the Military Rules of Evidence can all be used in these preliminary determinations. Criminal Investigation Command reports, Article 32 reports, and sworn statements should all be available for use. The accused himself can make a statement for the limited purposes of a motion. Also, when possible, counsel on both sides should create a stipulation of fact or expected testimony. This both saves time and simplifies matters for the judge, because he can adopt the stipulation as part of his facts. The bottom line is that counsel should support everything they say in argument with the appropriate law *and* evidence on record.

These are just a few tips to help you in your advocacy in front of the military judge. If judge advocates remember that there are real people on the bench, just as there are real people in the panel boxes, they will serve their clients and the cause of justice even better. Major Hudson

10. MCM, *supra* note 8, MIL R. EVID. 103(a)(i).

11. *Id.*, MIL. R. EVID. 313(b).

12. Colonel Gary Smith, Remarks at the 12th Criminal Law Advocacy Course (CLAC), The Judge Advocate General's School (TJAGSA) (Sept. 24, 1999).

13. MCM, *supra* note 8, MIL. R. EVID. 104(a). The rule states that when the judge rules on preliminary questions, he "is not bound by the rules of evidence except those with respect to privileges." *Id.*

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 6, number 8, is reproduced in part below.

Today's Koan:[1] Can an Agency be Arbitrary and Reasonable at Same Time?

In *Ross v. Federal Highway Administration*,[2] a federal district court ruled that an agency's action could be both "arbitrary and capricious" under the National Environmental Policy Act (NEPA)[3] and "substantially justified" for purposes of the Equal Access to Justice Act (EAJA).[4]

In *Ross*, the Federal Highway Administration (FHWA) was participating with local authorities to build an expressway near Lawrence, Kansas. A 1990 NEPA Environmental Impact Statement (EIS) and Record of Decision drew opposition from property owners on the eastern side of the proposed project. In 1994, the State of Kansas and FHWA agreed to proceed on the western segments of the project. The FHWA then began to supplement the EIS as it applied to the eastern side of the project. The various parties involved could not agree on a route on the eastern side. Kansas and local governments agreed in 1997 to fund the eastern project themselves. Taking the view that it was no longer a federal project, the FHWA published a notice in the Federal Register withdrawing the Notice of Intent to supplement the EIS.

Plaintiffs sued to enjoin the project and to compel completion of the supplemental EIS. Applying the arbitrary and capricious standard of review in the Administrative Procedure Act,[5] the court found that the FHWA had violated NEPA by not completing the supplemental EIS. The Tenth Circuit Court of Appeals affirmed this decision.[6]

Plaintiffs applied to the court for attorneys' fees under EAJA. The relevant portion of EAJA provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.[7]

It was undisputed that plaintiffs were a "prevailing party." Even though the court found the FHWA's actions arbitrary and capricious, it held that the agency could argue that its position was substantially justified. The court cited precedent and legislative history for this proposition.[8]

The FHWA restated its position that the eastern part of the project was not a "major federal action" because it was not federally funded. This position was supported by case law governing at the time as well.[9] The court found that since the FHWA's argument had a reasonable basis in fact and law, the government's position was substantially justified and plaintiffs' EAJA motion was therefore denied.

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1. In Zen practice, a koan is a short vignette describing a paradoxical situation. It is used by the zen master to cause the student to depart from established patterns of thinking.

2. No. 97-2132, 1999 U.S. Dist. LEXIS 8870 (D. Kan. May 24, 1999).

3. 42 U.S.C.A. § 4321 (West 1999).

4. 28 U.S.C.A. § 2412 (West 1999).

5. 5 U.S.C.A. § 706(2)(A) (West 1999).

6. Ross v. Federal Highway Admin., 162 F.3d 1046 (10th Cir. 1998).

7. 28 U.S.C.A. § 2412(d)(1)(A).

8. Ross v. Federal Highway Admin., 1999 U.S. Dist. LEXIS 8870, at *8, citing Cohen v. Bowen, 837 F.2d 582, 585 (2d Cir. 1988) (quoting H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990).

9. *See* Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990).

This case means that a court requirement to do new or additional NEPA analysis does not necessarily mean that an award of attorneys' fees under EAJA will automatically follow. Lieutenant Colonel Howlett.

Migratory Bird Treaty Act May Now Apply To Federal Agencies

Federal agencies' obligations under the Migratory Bird Treaty Act[10] (MBTA) were recently thrown into greater confusion at the hands of the federal district court for the District of Columbia. In direct opposition to two federal circuit courts of appeals, the district court held that the MBTA does apply to federal agencies, who must therefore obtain appropriate permits before engaging in activities resulting in the taking of migratory bird species. If upheld on appeal, this ruling could require installations to revert to traditional means of obtaining "take" permits from the U.S. Fish and Wildlife Service, including intentional depredation permits for the control of nuisance birds.

In 1997, two federal circuit courts ruled that the MBTA does not apply to the United States, its instrumentalities, or its officers and agents. In the case of *Sierra Club v. Martin*,[11] the Eleventh Circuit held that Congress did not clearly intend for the MBTA to apply to the federal government. In *Martin*, the Sierra Club sued the Forest Service to prevent the taking of migratory birds in the course of timber harvesting for which the Forest Service had contracted. The court concluded that the MBTA did not apply to the federal government by contrasting the definition of the term person under the MBTA with the definition of the term person under the Endangered Species Act (ESA).[12] "Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do so."[13] The court also examined the historical context of the MBTA's enactment, noting that twenty years before the MBTA became law, Congress had authorized the Forest Service to manage the national forests to provide timber for the nation. The court reasoned:

> In light of that purpose, it is difficult to imagine that Congress enacted the MBTA barely twenty years later intending to prohibit the Forest Service from taking or killing a single migratory bird or nest 'by any means or in any manner' given that the Forest Service's authorization of logging on federal lands inevitably results in the deaths of individuals birds and destruction of nests.[14]

The Eighth Circuit reached a similar result in *Newton County Wildlife Ass'n v. United States.*[15] In that case environmentalists seeking to halt timber sales in the Ozark National Forest, along the Buffalo River sued the United States. Similar to the plaintiffs in *Martin*, the plaintiffs in *Newton County* sought to enjoin the timber sales because the Forest Service had not obtained a permit from the Fish and Wildlife Service to take migratory birds, among other reasons. The court first noted that the definition of the term "person" does not ordinarily include the sovereign.[16] The court disagreed with the plaintiffs' assertion that "[the] MBTA must apply to federal agencies if our [n]ation is to meet its obligations under the 1916 treaty,"[17] noting that "the government's duty to obey arises from the treaty itself; the statute extends that duty to private persons."[18] Finally, the court noted that the Fish and Wildlife Service did not require, and its MBTA regulation did not contemplate, federal agencies applying for migratory bird taking permits.[19]

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10. The Migratory Bird Treaty Act (MBTA) provides in pertinent part:

> [E]xcept as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird, or any product . . . composed in whole or in part, of any such bird.

16 U.S.C.A. § 703 (West 1999).

The MBTA carries criminal penalties of up to six months confinement and/or a $15,000 fine for violation of a regulation made pursuant to the MBTA, or up to two years imprisonment and a maximum $250,000 fine if the violation is done with a pecuniary motive. *Id*. § 707.

11. Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997).

12. 16 U.S.C.A. § 1532(13).

13. *Martin*, 110 F.3d at 1555.

14. *Id.* at 1556.

15. Newton County Wildlife Assoc. v. United States, 113 F.3d 110 (8th Cir. 1997).

16. *Id.* at 115.

17. *Id.*

18. *Id.*

On 6 July 1999, a memorandum opinion handed down in the case of *Humane Society v. Glickman*[20] by the district court for the District of Columbia came to the opposite conclusion, holding that the strictures of the MBTA apply to federal officials. In that case, the Department of Agriculture had developed a program to euthanize Canada geese in Virginia, thereby alleviating problems caused by the burgeoning Canada geese population. The Humane Society filed suit to enjoin executing the program, citing violations of NEPA and the MBTA. In a lengthy analysis of the MBTA's applicability to federal officials, the court eventually determined that the MBTA does bind federal agency actions.

First, the court examined the Supreme Court's dicta in *Robertson v. Seattle Audubon Society,*[21] in which the Supreme Court seemed to assume that federal agencies are bound by the MBTA, though the opinion never directly addressed or analyzed that issue squarely. Next, the court examined the exceptions to the canon that "[s]ince, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."[22] The court found that compliance with the MBTA would not "deprive the sovereign of a recognized or established prerogative title or interest,"[23] and that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong."[24] Thus, the court reasoned, federal agencies are bound by the MBTA, given the Supreme Court's "considered dictum,"[25] and the applicability of the two exceptions to the general rule regarding sovereign immunity.

A decision has not yet been made on whether to appeal the district court's ruling, leaving an open question as to whether federal agencies will now have to apply for permits from the USFWS before engaging in any activities that may be construed as taking migratory birds. That being the case, installation environmental law specialists should offer the following guidance to natural resource managers and other relevant installation staff. Where activities to control nuisance birds are proposed for the intentional destruction of migratory bird species, the installation should apply to the USFWS for depredation permits allowing for intentional taking at specified levels and through particular methods. For other activities that forseeably will result in unintentional destruction, such as contracting for the harvest of timber, the installation should consider whether to apply for an appropriate permit. In all permitting actions, installations should carefully prepare and maintain their application and the USFWS response. In all circumstances where installation activities may result in adverse impacts to migratory birds, such impacts should be considered and, where appropriate, mitigated through the NEPA and the integrated natural resource management planning processes. Environmental law specialists should contact ELD for further guidance on a case-by-case basis. Major Robinette.

Second Circuit Clarifies Burden of Proof under RCRA

Thomas and Filomena Prisco were simply trying to find an economical way to level their land when they began operating a landfill on their property in Putnam County, New York.[26] Little did they know that they were embarking on a odyssey that would ultimately clarify the burden of proof under the Resource Conservation and Recovery Act (RCRA)[27] and have a potential impact on all future citizen suits under this statute.

From sometime in 1986 until February 1988, the Priscos served as largely absentee managers of the landfill with day to day operation falling at different times to three separate entities. As might be imagined, based upon the relative inexperience and lack of attention on the part of the Priscos, New York's Department of Environmental Conservation (DEC) discovered that hazardous substances from the landfill had leached into nearby wetlands.[28]

While contesting the imposition of civil penalties, the Priscos went on the offensive by suing a large and diverse array of people who had any association with the landfill. Among the causes of action was RCRA § 7002(a)(1)(B), known as a private attorney general provision, that allows citizen suits. This provision states that any person has a right of action

19. *Id.* at 116.

20. Humane Soc'y v. Glickman, Civ. Act. No. 98-1510, mem. op. (D.D.C. July 6, 1999).

21. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).

22. United States v. Cooper, 312 U.S. 600, 604 (1941).

23. Nardone v. United States, 302 U.S. 379, 383 (1937).

24. *Id.*

25. *Humane Soc'y,* Civ. Act. No. 98-1510 at 10.

26. Prisco v. A & D Carting, 168 F.3d 593 (2d Cir. 1999).

27. 42 U.S.C.A. § 6972 (West 1999).

28. *Prisco*, 168 F.3d at 599-600.

> against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to or the environment.[29]

During the course of protracted litigation, the district court dismissed the RCRA claim stating that the plaintiff had failed to prove that waste attributed to particular defendants was linked to an imminent and substantial endangerment. Specifically, the district court held that the Priscos had not carried their burden under RCRA because they could not link any specific defendant to any particular waste.[30]

On appeal to the Second Circuit, the Priscos claimed that the lower court had acted contrary to the intent of the statute when it required an additional burden of linking a defendant and its waste to an imminent and substantial endangerment.[31] The appellant claimed that the word "may" was intended to capture anyone who contributed any waste to a site at which there ultimately arose a risk to health or the environment. The appellate court disagreed. Relying on the plain language of the statute, the Second Circuit affirmed the holding of the district court.[32]

Environmental law specialists should be aware that this additional burden now presents another arrow in the quiver in the defense of citizen suits. In any RCRA § 7002 suit the government must ensure that the plaintiff is able to link a particular waste with the alleged imminent and substantial endangerment. Major Egan.

Litigation Division Note

Federal Subject Matter Jurisdiction under the Tucker Act in Military Personnel Cases: *James v. Caldera*

Introduction

Every year, hundreds of former service members file suit challenging various military personnel actions that have affected their pay or retirement eligibility, potentially subjecting the government to enormous financial liability. Among the jurisdictional bases for these claims, the Tucker Act[33] and the Administrative Procedures Act (APA)[34] are the most significant. The Army Litigation Division has sought to ensure that all actions with military pay implications are treated as Tucker Act claims, to be adjudicated primarily in the United States Court of Federal Claims,[35] rather than APA claims, which are heard in the district courts. The Litigation Division has done this to ensure that such actions: (1) will generally be considered by the court having the most expertise with military pay claims, and (2) will be subject to uniform precedent.

The United States Court of Appeals for the Federal Circuit has generally held that claims must be pursued under the Tucker Act when recovery of back pay or allowances is the essential nature of the relief sought.[36] This matter has never been completely settled, however, and late last year the Federal Circuit added to the quandary that government counsel face with its decision in *James v. Caldera*.[37] In this decision, the Federal Circuit found that a plaintiff's claim could be dissected for purposes of determining whether jurisdiction in certain military personnel cases lies exclusively in the Court of Federal Claims or in the district courts. In so doing, the Federal Circuit has increased the likelihood of "confusion, unpredictability,

29. 42 U.S.C.A. § 6972(a)(1)(B).

30. *Prisco*, 168 F.3d at 608-09.

31. *Id.* at 609.

32. *Id.*

33. 28 U.S.C.A. § 1346, 1491 (West 1999).

34. 5 U.S.C.A. § 501 (West 1999).

35. The United States Court of Federal Claims has exclusive jurisdiction over any claim in excess of $10,000. 28 U.S.C.A. §§ 1491, 1346. "[D]istrict courts shall have original jurisdiction, concurrent with the United States Claims Court, of . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any act of Congress, or any regulation. . . ." 28 U.S.C.A. § 1346(a)(2). Moreover, the United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over district court Tucker Act claims, so that the court's precedents apply equally to Court of Federal Claims and district court actions in which jurisdiction is based in whole or in part on the Tucker Act. *See* 28 U.S.C.A. § 1295(a)(2).

36. Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Bobula v. United States, 970 F.2d 854, 859 (Fed. Cir. 1992) (holding that the Court of Federal Claims has jurisdiction over equitable claims for injunctive and declaratory relief when incident to a "concurrent colorable claim for monetary recovery").

37. 159 F.3d 573 (Fed. Cir. 1998), *reh'g denied*, 1999 U.S. App. LEXIS 5084 (Fed. Cir. Feb. 24, 1999).

expense, and delay in the litigation of claims for military pay and benefits."[38]

Background

In 1988 through 1989, plaintiff, Augustin S. James, was a First Sergeant at Tripler Army Medical Center with almost twenty years of active service. James' duties included scheduling random drug urinalysis testing for his unit's soldiers. Although James was not required to schedule himself, he did so voluntarily, and his specimen tested positive for cocaine. James' commander administered nonjudicial punishment[39] for wrongful possession of cocaine-laced tea.[40] In April 1989, the Army initiated administrative discharge proceedings against James. However, the Board of Officers hearing the proceedings found that James had not knowingly ingested cocaine and recommended his retention.

James' company commander then initiated a bar to James' reenlistment based on his nonjudicial punishment and his positive drug test. James asked to have his current enlistment extended by five months so that he would be able to retire with twenty years service. James' company and battalion commanders recommended approval of the request for extension of enlistment, but his division commander disapproved it.[41] The Army honorably discharged James in August 1989, about five months short of retirement eligibility.

Procedural History

James applied for relief to the Army Board for Correction of Military Records (ABCMR)[42] in February 1992. The ABCMR denied his application in November 1993. In May 1996, James filed an action in the U.S. District Court for the Northern District of California challenging on various grounds the Army's actions in discharging him, refusing to permit him to extend his enlistment, and barring his enlistment. The relief he requested included correction of his records to reflect that he had twenty years of service and a retroactive grant of backpay, retired pay, and benefits.[43]

The government moved the district court to transfer James' case to the Court of Federal Claims,[44] arguing that the district court lacked jurisdiction. The government maintained: first, that James' complaint essentially was an action for over $10,000 over which the Court of Federal Claims has exclusive jurisdiction; and, second, no waiver of sovereign immunity existed under the APA because plaintiff had an adequate remedy under the Tucker Act. The district court granted the government's motion in January 1997.

Discussion

After the district court declined to amend its ruling and the case was transferred to the Court of Federal Claims, James made an interlocutory appeal to the Federal Circuit.[45] On 28 October 1998, the Federal Circuit, in a split decision, reversed in part, vacated in part, and remanded the decision of the United States District Court for the Northern District of California transferring the plaintiff's case from the U.S. District Court to the Court of Federal Claims. The court observed that, in its view, James was making two claims, one challenging his bar to reenlistment and the other challenging the denial of his extension on active duty. The court held first that James' challenge to the bar to reenlistment sought purely injunctive or declaratory relief, over which the Court of Federal Claims lacks jurisdiction. The court remanded to the district court for further consideration of James' enlistment extension claim, noting that the record below did not address whether James had any "firm right" to extend his enlistment. The majority of the court indicated that, if the district court found that James had such a right,

38. *James*, 159 F.3d. at 589.

39. *See* 10 U.S.C.A. § 815 (West 1999).

40. The charge arose as a result of James' assertion that he had unknowingly ingested cocaine when he drank Health Inca Tea.

41. The commanding general endorsed for higher headquarters the request for the bar to reenlistment, but recommended against granting the extension of enlistment. He based his recommendation on the following facts: Mr. James' positive urinalysis results; his failure of a voluntary polygraph examination; that each of Mr. James' commanders had carefully considered and dismissed plaintiff's defense of unknowingly using cocaine; Mr. James' request to the drug coordinator to lose the positive urinalysis report; his departure on a thirty-day leave of duty following the initial positive urinalysis test results; his explanation that he unknowingly ingested cocaine from some Inca Health Tea, which had been used as a successful defense in a recent unrelated court-martial where the accused had been acquitted; and Mr. James' demeanor during the nonjudicial punishment hearing.

42. *See* 10 U.S.C.A. § 1552 (authorizing the secretaries of the military departments to create boards of civilian officials to consider when military records should be corrected in cases of error or injustice).

43. Had James filed his complaint in the Court of Federal Claims, his action would have been barred by the applicable statute of limitations. *See* 28 U.S.C.A. § 2501 (West 1999); *see also* Hurick v. Lehman, 782 F.2d 984, 987 (Fed. Cir. 1986) (holding that resort to a correction board such as the ABCMR neither tolls the running of the statute, nor does an adverse decision by a board create a new period of limitations).

44. Under 28 U.S.C.A. § 1631, a court may transfer an action over which it lacks jurisdiction to another court where the action could properly have been brought.

45. *See* 28 U.S.C.A. § 1292(d)(4)(A). The Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals of district court orders transferring cases to the Court of Federal Claims. *See also James*, 159 F.3d at 575.

that the extension claim was necessarily a claim for monetary relief (for example, the back pay and allowances for the five months that James would have been extended on active duty), which could only be pursued in the Court of Federal Claims.

A strong dissent criticized the majority on several grounds. First, the majority's opinion conflicts with prior Federal Circuit and Supreme Court precedent holding that claims that seek monetary relief, as an essential or primary component, must be brought under the Tucker Act.[46] Second, the majority's holding "frustrates the legislative purpose of the Tucker Act as amended and [is] likely to create unnecessary confusion, unpredictability, expense, and delay in the litigation of claims for military pay and benefits."[47] "The most worrisome effect of" the decision, the dissent noted, will be its creation of "a new, easily utilized escape route from Tucker Act jurisdiction in the Court of Federal claims for military pay and benefit cases."[48]

The Future

The decision of the Federal Circuit panel in *James* could have a far-reaching effect on all the services, and further confuse an already troubled area of federal jurisdiction. As the dissent notes, the majority's decision will enable potential plaintiffs to evade Tucker Act jurisdiction simply by casting their claims as suits for declaratory or injunctive relief, even though their clear goal is recovery of back pay and other money benefits.

James may lead to an increasingly inefficient procedure for determining Tucker Act jurisdiction. Courts may employ this precedent to analyze all discernible components of a claim to find a basis for the district courts to entertain suits that plainly seek monetary relief. In the absence of curative legislation,[49] the Litigation Division will continue to be proactive in its initial motions' practice and argue as aggressively as possible that claims involving monetary relief must be filed in the Court of Federal Claims. Captain Levy.

46. Bowen v. Massachusetts, 487 U.S. 879 (1988); Mitchell v. United States, 930 F.2d 893 (Fed.Cir. 1991) (holding that back pay cases fall under the Tucker Act).

47. *James*, 159 F.3d at 584.

48. *Id*. at 589.

49. For example, one provision of the proposed Military Personnel Review Act of 1997 would have made the U.S. Court of Appeals for the Federal Circuit the exclusive tribunal for judicial review of nearly all military personnel cases.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

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

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *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 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.

1999-2000 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving 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. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call COL Tromey, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6381 or (800) 552-3978, ext. 381. You may also contact Colonel Tromey on the Internet at trometn@hqda.army.mil. Colonel Tromey.

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) will process all application for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by GRA, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837

(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1999-2000 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
30-31 Oct	West Point ARNG Conference	BG Barnes and BG O'Meara are attending this conference.		Host: COL Randy Eng (718) 520-2848
6-7 Nov	Minneapolis, MN 214th LSO	AC GO BG Marchand RC GO BG O'Meara GRA Rep TBD	International Law: ROE Law of War Criminal Law: NJP, fraternization	POC: CPT Todd Corbo 214th LSO (612) 596-4753 Host: COL Don Betzold (612) 566-8800
13-14 Nov	New York 77th RSC/4th LSO	AC GO BG Barnes RC GO BG O'Meara GRA Rep TBD	Administrative & Civil Law: Admin Boards (incl Hemp Defense) Contract Law	POC: LTC Don Lynde 77th RSC (718) 352-5106 Host: COL Henry Wysocki (212) 612-9316
21-23 Nov	LSO/MSO Conference St. Petersburg, FL	BG Romig and BG DePue are attending this conference.		Host: COL Bob Yerkes (904) 346-3160
8-9 Jan 2000	Long Beach, CA 78th MSO	AC GO MG Altenburg RC GO BG O'Meara GRA Rep TBD	Administrative & Civil Law (4 hrs): Separation Boards Criminal Law (2 hrs): Urinalysis Testing	POC: MAJ Jacqueline Jackson (619) 594-2012 corlett@rohan.sdsu.edu Host: COL Dan Allemeier (310) 317-5851
7-9 Jan	New Orleans, LA 2d LSO	AC GO MG Huffman RC GO COL (P) Walker GRA Rep TBD	International & Operational Law (4 hrs): Law of War Criminal Law (2 hrs)	POC: LTC William Baker (405) 377-8644 Host: COL Kenneth Densmore (580) 442-5846
Jan 29-30	Seattle, WA 6th MSO/70th RSC	AC GO MG Altenburg RC GO COL (P) Walker GRA Rep TBD	Criminal Law International & Operational Law	POC: LTC Scotty Sells (360) 336-9462 scottys@co.skagit.wa.us Host: COL Matt Vadnal (206) 553-0940
5-6 Feb	Columbus, OH 9th MSO	AC GO BG Barnes RC GO COL (P) Walker Contract Law Int'l Law GRA Rep TBD	Contract Law Administrative Law	POC: LTC Mark Landers (937) 255-3203, ext. 215
19-20 Feb	Salt Lake City, UT 87th MSO/UTARNG	AC GO BG Marchand RC GO COL (P) Walker GRA Rep TBD	Criminal Law: Fraternization Administrative & Civil Law	POC: MAJ Jay Woodall (801) 531-0435 Host: COL Christiansen ((801) 366-7861

26-27 Feb	Indianapolis, IN INARNG	AC GO BG Barnes RC GO COL (P) Walker Criminal Law Int'l & Op Law GRA Rep TBD	CLAMO: Legal Issues in JRTC Training Criminal Law Professional Responsibility tape to be shown.	POC: LTC George Thompson (317) 247-3491/3449 Host: COL George Hopkins (765) 457-4349
4-5 Mar	Washington, DC 10th MSO	AC GO BG Barnes RC GO BG DePue Criminal Law Int'l & Ops Law GRA Rep TBD	Criminal Law Administrative & Civil Law	MAJ Gerry P. Kohns kohnsg@hq.navfac.nav.mil Host: COL Jan Horbaly (202) 633-9615
11-12 Mar	San Francisco, CA 75th LSO	AG CO BG Romig RC GO BG O'Meara GRA Rep TBD	Contract Law Administrative & Civil Law: POR—How to get ready to deploy	POC MAJ Douglas Gneiser (415) 673-2347 Host: COL Charles O'Connor (415) 436-7180
18-19 Mar	Chicago, IL 91st LSO	AC GO BG Marchand RC GO BG DePue	Contract Law International & Operational Law	POC: MAJ Tom Gauza (312) 443-1600 Host: COL Johnny Thomas (210) 226-5888
25-16 Mar	Charleston, SC 12th LSO	AC GO MG Altenburg RC GO BG DePue Int'l & Operational Law Criminal Law GRA Rep TBD	International & Operational Law Criminal Law: Fraternization	COL Robert P. Johnston (704) 347-7800 Host: COL Dave Brunjes (912) 267-2441
1-2 Apr	Orlando, FL FLARNG	AC GO BG Romig RC GO BG O'Meara Criminal Law Int'l & Operational Law GRA Rep TBD	Administrative & Civil Law Contract Law	Ms. Cathy Tringali (904) 823-0132 Host: COL Henry Swann (904) 823-0132
16-20 Apr	Spring Workshop GRA			
21-23 Apr	Easter Weekend			
29-30 Apr	Newport, RI 94th RSC	AC GO MG Huffman RC GO BG O'Meara GRA Rep TBD	Int'l & Operational Law: ROE Criminal Law: New Developments requested. (But a possible substitution by CLAMO was discussed with a focus on Domestic Operations)	POC: MAJ Jerry Hunter (978) 796-2140 1-800-554-7813
6-7 May	Gulf Shores, AL 81st RSC/ALARNG	AC GO BG Barnes RC GO BG DePue GRA Rep TBD	Criminal Law Administrative & Civil Law	Host: COL Bernard Pfeiffer (706) 545-3285

12-14 May	Omaha, NE 89th RSC	AC GO BG Romig RC GO COL (P) Walker	Contract Law Administrative & Civil Law	POC: LTC Jim Rupper (316) 681-1759, ext. 1397 Host: COL Mark Ellis (402) 231-8744

*Topics and attendees listed are subject to change without notice.
Please notify COL Tromey if any changes are required, telephone (804) 972-6381.

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 nonunit reservists, through the 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 Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's 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.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1999

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November-3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November-3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-17 December	3rd Tax Law for Attorneys Course (5F-F28).2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
9-21 January	2000 JAOAC (Phase II) (5F-F55).

Note: See paragraph 5 below for adjusted JAOAC suspense dates. The course was scheduled originally for 10-21 January 2000.

10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-14 January	2000 PACOM Tax CLE (5F-F28P).
10-28 January	151st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10 January-29 February	1st Court Reporter Course (512-71DC5).
18-21 January	2000 Hawaii Tax Course (5F-F28H).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January-7 April	151st Offier Basic Course (Phase II, TJAGSA) (5-27-C20).
31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).

7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).
31 May-2 June	4th Procurement Fraud Course (5F-F101).

June 2000

5-9 June	3rd National Security Crime & Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	4th Chief Legal NCO Course (512-71D-CLNCO)
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Career Services Directors Conference.
26 June-14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

5-7 July	Professional Recruiting Training Seminar.
10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July-	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
14 July-22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July-1 September	2d Court Reporter Course (512-71DC5).
31 July-11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August-24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).

21 August- 1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
25 September- 13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

2 October- 21 November	3d Court Reporter Course (512-71DC5).
9-16 October	2000 JAG Annual CLE Workshop (5F-JAG).
23-27 October	47th Legal Assistance Course (5F-F23).
13 October- 22 December	153d Officer Basic Course (Phase II, (TJAGSA) (5-27-C20).
30 October- 3 November	58th Fiscal Law Course (5F-F12).
30 October- 3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
13-17 November	54th Federal Labor Relations Course (5F-F22).
27 November- 1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November- 1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
7-19 January	2001 JAOAC (Phase II) (5F-F55).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8-26 January	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8 January- 27 February	4th Court Reporter Course (512-71DC5).
16-19 January	2001 Hawaii Tax Course (5F-F28H).
24-26 January	7th RC General Officers Legal Orientation Course (5F-F3).
26 January- 6 April	154th Basic Course (Phase II, TJAGSA) (5-27-C20).
29 January- 2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
12-16 February	25th Admin Law for Military Installations Course (5F-F24).
26 February- 9 March	35th Operational Law Seminar (5F-F47).
26 February- 9 March	146th Contract Attorneys Course (5F-F10).

March 2001

12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-4 May	59th Fiscal Law Course (5F-F12).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

7-11 May	60th Fiscal Law Course (5F-F12).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June - 13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.

July 2001

2-4 July	Professional Recruiting Training Seminar.
2-20 July	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase II) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
20 July-28 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

3. Civilian-Sponsored CLE Courses

4 November ICLE	American Justice System Kennesaw State University Kennesaw, Georgia
19-20 November ICLE	Alternative Dispute Resolution Institute Calloway Gardens Pine Mountain, Georgia
2 December ICLE	Environmental Law Marriott Gwinnett Place Hotel Atlanta, Georgia
2 December ICLE	Professionalism and Ethics: Judges and Lawyers Marriott Gwinnett Place Hotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction 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
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
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**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials was ***NLT 2400, 1 November 1999***, for those judge advocates who desired to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) on 9-21 January 2000 (hereafter "2000 JAOAC"). This requirement included submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 1999***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2000 JAOAC. To provide clarity, all

judge advocates who are authorized to attend the 2000 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notificaiton of their ineligibility to attend the 2000 JAOAC.

If you have any further questions, contact LTC Paul Conrad, JAOAC Course Manager, (800) 552-3978, extension 357, or e-mail <conrape@hqda.army.mil>. LTC Goetzke.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1999 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the September 1999 issue of *The Army Lawyer.*

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

For detailed information, see the September 1999 issue of *The Army Lawyer.*

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1999 issue of *The Army Lawyer.*

5. Articles

The following information may be useful to judge advocates:

Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction (UCCJA)*, 75 N.D. L. REV. 301 (1999).

Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. (January 1999).

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and Pentium PCs in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We have migrated to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are 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.

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