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Article

TJAGSA Practice Notes

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

USALSA Report

United States Legal Services Agency

The Practical Consequences of a Court-Martial Conviction

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Introduction

The court-martial has just ended. Despite your best efforts, your client has been found guilty and sentenced to confinement and a punitive discharge. You properly prepared for trial and did an outstanding job presenting your case. But now, as you watch your client say goodbye to his tearful wife, you wonder if you did everything you could to prepare him for this moment. Have you sufficiently advised him of the practical and legal consequences of his conviction? Does he realize all the implications of his sentence? Does his wife know what benefits she is entitled to while he is in confinement? As you instruct the guards to escort your client back to your office, you know that you are not going home anytime soon. You want to go the "extra mile" for your client. You want to ensure that your client appreciates not only the legal aspects of his sentence, but also understands the practical consequences.

This article explains the legal aspects and the practical consequences that may result from a court-martial conviction. For example, can the soldier cash-in unused leave if sentenced to a punitive discharge? If he is sentenced to confinement, can his family members continue to receive medical benefits? Is a court-martial conviction reported to the state and federal authorities so that the soldier will not be allowed to purchase firearms or vote? What consequences does a punitive discharge have on the soldier's Department of Veterans Affairs (VA) entitlements or on his retirement eligibility? Knowing the answers to these and other practical questions will greatly enhance the quality of a trial attorney's advice to his clients.

Experienced trial attorneys may know the answers to some of these questions; however, they may never have actually looked up the laws or regulations. Along with answers to these questions, this article cites the underlying legal authority.[1] Attorneys can therefore properly advise their clients and take appropriate actions to safeguard their clients' rights and interests.

This article consists of three main sections. Section I briefly describes the statutory requirements when different forms of court-martial punishment are executed. It contains subsections covering the procedural aspects of punitive discharges, forfeitures of pay and allowances, and reduction in grade. It also covers how much confinement a prisoner actually serves, as well as matters of clemency and parole. Section II explains the administrative consequences of a punitive discharge. It contains subsections covering matters such as: entitlements to leave, discharge gratuities, Uniformed Services benefits, travel, transportation, and transitional compensation for dependents. Finally, Section III details the collateral effects that flow from a court-martial conviction. It contains subsections covering such matters as the loss of the right to vote or own a firearm, VA entitlements, the requirements imposed by Megan's Law, and the loss of retirement eligibility.

Section I: Legal Aspects of a Court-Martial Sentence

The *Manual for Courts-Martial* (*MCM*)[2] authorizes nine types of punishment. These include death, punitive discharge, confinement, hard labor without confinement, restriction to specified limits, reduction in pay grade, a fine, forfeiture of pay and allowances, and a reprimand.[3] Articles 57, 57a, and 58, Uniform Code of Military Justice (UCMJ), dictate when these types of punishment become effective. Because they become effective at different times depending on various criteria,[4] it is easy to get confused about when a particular type of punishment goes into effect.[5] This section discusses and analyzes when various forms of punishment become effective. More specifically, it covers punitive separation, forfeiture of pay and allowances, reduction in grade, and confinement. It then addresses how much of a sentence to confinement soldiers actually serve. Finally, it explains clemency and parole procedures for soldiers sentenced to confinement.

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1. The World Wide Web contains almost all the resources used in this article. Most footnotes contain both the legal authority and the applicable Web address.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM], *available at* http://192.156.19.100/Pubs/Pubs.htm (PDF format).

3. *Id.* R.C.M. 1003.

4. *See* UCMJ arts. 57, 57a, 58 (2000).

5. For example, confinement becomes effective on the day the sentence is adjudged, *id.* art. 57(b), adjudged forfeitures become effective fourteen days after the sentence is adjudged or when the convening authority approves them, *id*. art. 57(a)(1), and hard labor without confinement becomes effective when the convening authority orders it to be executed, *id*. art. 57(c).

Punitive Discharge

After a court-martial has adjudged a punitive discharge, the discharge cannot be executed until several procedural safeguards have been observed. First, the soldier can request clemency and submit extenuation and mitigation matters to the general court-martial convening authority (GCMCA).[6] After reviewing this request, the GCMCA decides whether to approve the adjudged findings and sentence. In doing so, the GCMCA takes action and promulgates his decision in the initial promulgating order. The initial action and promulgating order specifies which portions of the sentence are approved and at what time each will be executed.[7]

Second, if the GCMCA approves the punitive discharge, it may not be executed until the appellate courts have affirmed the case, including the punitive discharge.[8] For enlisted members, a punitive discharge becomes final once the appellate review is complete and the discharge is ordered executed.[9] For officers, in addition to appellate review, the Secretary of the Army or his designated Assistant Secretary must also approve the dismissal.[10]

Depending on the complexity of the case and the extent of the appellate review, these due process procedures can take from four months to several years.[11] During this process, the soldier remains in an active duty status and is thus entitled to all the benefits of an active duty service member. Should the soldier complete any adjudged confinement (or if no confinement was adjudged) before the completion of appellate review, the soldier will most likely be placed on involuntary excess leave until the appellate process is complete.[12]

Defense counsel should ensure that the soldier understands the process and procedure for taking the initial action and completing the promulgating order, as well as the meaning and effect of each. The initial promulgating order usually states that the sentence is approved, and except for the punitive discharge, will be executed.[13] The convicted soldier must understand that this means that while the convening authority has approved the punitive discharge, it will not become effective unless and until the appellate courts have affirmed his case. Once the case has been affirmed, the GCMCA takes final action and orders the discharge executed,[14] or under rare circumstances, disapproves the discharge.[15]

Forfeiture of Pay and Allowances

If a court-martial adjudges forfeitures, the forfeitures take effect either fourteen days after the sentence is adjudged or when the convening authority approves the sentence, whichever is earlier.[16] As a matter of law, even if there are no adjudged forfeitures, soldiers automatically forfeit money during any period of confinement or parole if the court-martial sentence includes either: (1) confinement for more than six months or death, or (2) a punitive discharge and any amount of confinement.[17] In general courts-martial, this "automatic forfeiture" amounts to an automatic forfeiture of all pay and allowances due the soldier during that period of confinement. In special courts-martial, this amounts to automatic forfeiture of two-thirds pay during that period of confinement.[18] As with adjudged forfeitures, automatic forfeitures take effect either fourteen days after the sentence is adjudged or when the con-

6. *See* MCM, *supra* note 2, R.C.M. 1105(b)(1). Rule for Courts-Martial 1105(b)(1) states: "The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. The convening authority is only required to consider written submissions." *Id.*

7. UCMJ art. 60. The convening authority may either approve the findings and sentence as adjudged, suspend part or all of the sentence, reduce any part of the sentence or disapprove the findings or sentence. *Id*. art. 60(c).

8. *Id*. art. 71(c)(1). A soldier may waive these rights. *Id*. art. 71(c)(2).

9. *Id*. art. 71(c)(1).

10. *Id*. art. 71(b).

11. Interview with Colonel (Retired) Joseph Neurauter, Clerk of Court, Army Court of Criminal Appeals (May 15, 2001).

12. *See infra* notes 68-75 and accompanying text.

13. *See* UCMJ art. 71(c)(1).

14. *See* MCM, *supra* note 2, R.C.M. 1114(b)(2). In cases involving the dismissal of an officer, the record is forwarded to the Secretary of the Army, or his designated Assistant Secretary, for final action. *See* UCMJ art. 71(b).

15. *See infra* notes 52-56.

16. UCMJ art. 57(a)(1).

17. *Id*. art. 58b(a).

18. MCM, *supra* note 2, R.C.M. 1003 discussion.

vening authority approves the sentence, whichever occurs earlier.[19]

Upon the soldier's request, the convening authority may defer adjudged[20] or automatic[21] forfeitures until he takes action.[22] At the time of his action, the convening authority may allow the soldier's dependents to receive all or part of the forfeitures for up to an additional six months after the convening authority takes action.[23] To accomplish this, the convening authority must disapprove all or part of any adjudged forfeitures and waive all or any part of the automatic forfeitures.[24] All waived forfeitures must go directly to the soldier's dependents, not to the soldier.[25]

Financially, forfeitures are different from fines.[26] Forfeitures are withheld from a soldier's pay as they accrue, whereas fines are due immediately and will be collected from his pay to satisfy the debt.[27] Because a soldier never receives the forfeited "income," he does not pay taxes on it.[28] If the convening authority defers or waives forfeitures, however, the deferred or waived amount "remains wages generated by the member's military status, [and] is taxable income to the [soldier], even though paid to the member's dependents."[29] Therefore, federal and state income taxes and Federal Insurance Contribution Act tax will be withheld from the deferred or waived forfeiture amount before it is paid to the dependents.[30] Consequently, if the convening authority intends for the soldier's dependents to receive $500 per month, he must waive more than that amount to account for taxes.

Reduction in Grade

As with forfeitures, a reduction in grade takes effect either fourteen days after the sentence is adjudged or when the convening authority approves the sentence, whichever is earlier. For example, if a soldier is sentenced to reduction to E-1, a punitive discharge, and no confinement, the soldier retains his present grade for fourteen days, absent earlier action taken by the convening authority.[31] Even if the sentence does not include a reduction, an enlisted soldier is automatically reduced to E-1 on the date the convening authority approves the soldier's sentence if the approved sentence includes either: (1) a punitive discharge, (2) confinement, or (3) hard labor without confinement.[32]

Unlike forfeitures, there is no provision in the *MCM* that empowers the convening authority to waive automatic reduction in grade.[33] Consequently, if the convening authority wants to avoid automatic reduction, he must disapprove or suspend all elements of the sentence that trigger the automatic reduction.[34] This can be critical in cases involving retirement-eligible senior enlisted soldiers that have been sentenced to a short period of confinement. Even one day of confinement (as approved by the

19. UCMJ art. 58b.

20. *Id*. art. 57(a)(1).

21. *Id*. art. 57(b).

22. *See id.* art. 60.

23. *Id*. art. 58b.

24. *See id*. art. 58b(b). The convening authority must disapprove the adjudged forfeitures because the *MCM* only provides for him to waive automatic forfeitures. *See id.*

25. *Id*.

26. *See* U.S. Dep't of Defense, Reg. 7000.14-R, Financial Management Regulation 7A paras. 480101-02 (Oct. 2001) [hereinafter DOD FMR], *available at* http://www.dtic.mil/comptroller/fmr/07a/index.html.

27. *Id*. para. 480104.

28. *Id*. para. 480303.

29. *Id*. para. 480306.C.1.

30. *Id*.

31. *See* UCMJ art. 57(a)(1) (2000). As a practical consequence, if the soldier requests voluntary excess leave within that fourteen day period, he may cash-in his accrued leave at the higher pay grade. *See generally* U.S. Dep't of Army, Reg. 600-8-10, Leaves and Passes para. 2-4 (1 July 1994) [hereinafter AR 600-8-10]. Another practical consequence can occur in cases involving co-conspirators that testify against one another. For example, if the first co-conspirator is sentenced to reduction to E-1 and he testifies in the subsequent trial of a co-conspirator within fourteen days, he will testify in the higher grade. *See* UCMJ art. 57(a). This may affect the witness's credibility or make it appear to a panel that he was not reduced in grade as punishment for his crimes.

32. UCMJ art. 58a.

33. *See id.* art. 58b.

convening authority) will reduce the soldier to E-1 and dramatically affect his retirement benefits.[35]

Confinement

As a general rule, any period of pretrial confinement will be credited toward the adjudged confinement on a day-for-day credit.[36] Unless a soldier requests that confinement be deferred,[37] confinement starts to accrue the day it is adjudged, no matter where the accused is being held.[38] For example, if a soldier is sentenced to confinement, but is immediately admitted to a hospital for health or psychiatric treatment, his confinement accrues while he is in the hospital. The fact that the government elects to "confine" the soldier in the hospital instead of a confinement facility has no bearing on his confinement credit.[39]

Serving a Sentence to Confinement: Good Conduct Credit

Soldiers can be devastated when they hear the military judge or president of the court-martial announce a lengthy sentence to confinement. It is important that convicted soldiers realize they can shorten the actual time in confinement if they abide by the confinement facilities' rules and regulations. Defense counsel should know and understand these rules and regulations in order to advise their clients how to minimize actual time spent in confinement.

When authorities at the confinement facility receive a soldier's promulgating order, they read the order to the soldier and immediately inform him of his maximum and minimum release date.[40] His maximum release date is the date he will be released from confinement if he does not earn any abatements.[41] His minimum release date is the date he will be released from confinement if he earns and retains all his abatements through good conduct time (GCT).[42] Good conduct time is credit, in a specified number of days, automatically taken off a prisoner's approved sentence if the soldier abides by the confinement facilities' rules and regulations.[43] Soldiers can earn up to ten days of GCT per month, depending on the length of their sentence.[44] In an effort to motivate prisoners and to secure uniformity in computing GCT, prisoners are automatically credited at the beginning of their confinement with their GCT.[45]

Prisoners who refrain from any misconduct while serving their confinement retain their GCT and leave the confinement facility no later than their minimum release date. Prisoners involved in misconduct, however, may forfeit all or portions of

34. *Id*. 58a(b); DOD FMR, *supra* note 26, para. 480201. This can be accomplished even if the accused has already served his confinement. The soldier would merely be returned to duty and reimbursed for any pay that was forfeited as a result of being confined. *See* UCMJ art. 58a.

35. *See infra* notes 132-40 and accompanying text.

36. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

37. *See* UCMJ art. 57a.

38. *Id*. art. 57(b). "Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial." *Id.*

39. *See id.* art. 57a(a).

40. U.S. Dep't of Army, Reg. 190-47, The Army Corrections System para. 3.5. (15 Aug. 1996) [hereinafter AR 190-47], *available at* http://www.usapa.army.mil/gils/epubs4.html;mark=214,37,43#WN_mark; Telephone interview with Mr. Terry Rush, Military Personnel Clerk, Inmate Registration, Fort Leavenworth Disciplinary Barracks (Mar. 21, 2001) [hereinafter Rush Interview].

41. U.S. Dep't of Army, Reg. 633-30, Apprehension and Confinement: Military Sentences to Confinement para. 2a(2)e (28 Feb. 1989).

42. *Id*. para. 2a(2)f.

43. *See id*. para. 6.

44. *Id*. para. 13a-e. Rates for abatement for GCT are as follows:

a. Five days for each month of the sentence for a sentence of less than 1 year.
b. Six days for each month of the sentence for a sentence of not less than 1 year and less than 3 years.
c. Seven days for each month of the sentence for a sentence of not less than 3 years and less than 5 years.
d. Eight days for each month of the sentence for a sentence of not less than 5 years and less than 10 years.
e. Ten days for each month of the sentence for a sentence of 10 years or more, excluding life.

Id. To illustrate, if a soldier is sentenced to six months confinement and enters confinement on 1 January 2001, his maximum release date will be 30 June 2001 and his minimum release date will be 30 May 2001 (he will have earned 6 x 5 = 30 days of good conduct time). The exact release date is 30 May 2001 because the confinement facility calculates the actual days a prisoner serves in confinement by converting each adjudged "month" of confinement to thirty days. *See, e.g., id.* para. 14.

45. *Id*. para. 6a(3).

their credited GCT.[46] A soldier's maximum release date may not be extended unless he receives a consecutive court-martial sentence to confinement.[47]

In addition to GCT, prisoners who work in certain jobs and "demonstrate excellence in work, educational or vocational training pursuits" may earn extra good credit time (EGCT).[48] The amount of EGCT a prisoner can earn varies per work assignment, but may not exceed seven days per month.[49] Additionally, a soldier may receive up to one day per month of special abatement for working twenty hours of overtime.[50]

Consequently, a soldier can drastically shorten the amount of confinement he actually serves by earning GCT, EGCT, and special abatement. For example, a soldier sentenced to confinement for fifteen years could serve less than half that sentence if he works hard and stays out of trouble. He can receive ten days per month GCT, up to seven days per month EGCT, plus an additional special abatement of one day per month. This is without consideration of his opportunities to receive clemency or parole.

Clemency

In addition to earning abatements, soldiers can reduce their adjudged sentences by being granted clemency or parole. While arguably the best chance for clemency occurs when the convicted soldier submits clemency matters to the convening authority pursuant to Rule for Courts-Martial (RCM) 1105,[51] it is not the only time that clemency may be granted. After the convening authority has taken action, the Secretary of the Army[52] or, if so designated, any GCMCA with personal jurisdiction over the convicted soldier may grant the convicted soldier clemency.[53] While "[t]here is no constitutional, statutory, or regulatory right" entitling a soldier to clemency or parole,[54] he may request either of these actions from the above-mentioned authorities.

The Secretary of the Army or his designee is empowered by Article 74(a), UCMJ, to "remit or suspend any part or amount of an unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President."[55] In addition, the Secretary may, "for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial."[56]

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46. *Id.* para. 7a(2).

> If, during the term of imprisonment, a prisoner violates the rules of the institution or commits any offense, all or any part of the good conduct time which has been earned on any unexpired sentence, regardless of where earned, may be forfeited upon approval by the commanding officer of the installation where the prisoner is confined.

Id.

47. *Id*. para. 7.

48. AR 190-47, *supra* note 40, para. 5.7.B.

49. *Id*. para. 5.7.C. The rate of abatement for EGCT is as follows:

> *Level 1*: Those prisoners continuously employed 1 to 5 months receive 1 day per month.
> *Level 2*: Those prisoners continuously employed 6 to 10 months receive 2 days per month.
> *Level 3*: Those prisoners continuously employed 11 to 15 months receive 3 days per month.
> *Level 4*: Those prisoners continuously employed 16 to 20 months receive 4 days per month.
> *Level 5*: Those prisoners continuously employed 21 to 25 months receive 5 days per month.
> *Level 6*: Those prisoners serving as assistant instructors/supervisor's assistants, following attainment of Level 5, may receive 6 days per month.
> *Level 7*: Those trustees who have maintained level 6 for six months may be upgraded to 7 days per month.

Id.

50. *See* Rush Interview, *supra* note 40.

51. *See* United States v. Johnson-Saunders, 48 M.J. 74, 76 (1998).

52. UCMJ art. 74 (2000).

53. U.S. Dep't of Army, Reg. 15-130, Army Clemency and Parole Board para. 3-1b (23 Oct. 1998) [hereinafter AR 15-130]. Once the convening authority has taken action on the record of trial pursuant to Article 60, UCMJ, however, any clemency action affecting a punitive discharge or dismissal is withheld to the Secretary of the Army, Assistant Secretary of the Army, or the Deputy Assistant Secretary of the Army (Army Review Boards Agency (ARBA)). *Id.*

54. *Id.* para. 1-1.

55. UCMJ art. 74(a).

56. *Id*. art. 74(b).

He may also direct a soldier to be reenlisted even after the execution of a punitive discharge.[57]

Pursuant to 10 U.S.C. § 953,[58] the Secretary of the Army has also empowered the Army Clemency and Parole Board (ACPB) to review clemency requests.[59] The ACPB recommends clemency and parole actions to the Deputy Assistant to the Secretary of the Army (Army Review Boards Agency), who takes final action.[60]

The ACPB considers an eligible prisoner[61] for clemency based on the length of the prisoner's approved sentence.[62] The ACPB uses the following criteria when reviewing clemency requests: (1) the nature and circumstances of the offense; (2) the prisoner's civilian and military history; (3) the prisoner's confinement disciplinary records; (4) personal characteristics of the prisoner (that is age, education, experience); (5) the prisoner's parole plan; and (6) "the views of any victim of the prisoner's offense."[63]

Parole

"A prisoner . . . will be considered for parole when [he] first becomes eligible and annually thereafter."[64] A prisoner must request parole[65] and meet the following criteria to be eligible:

> (a) [He] has an approved court-martial sentence that includes an unsuspended dismissal or punitive discharge or he has been administratively discharged or retired.
> (b) [He] has an unsuspended court-martial sentence . . . to confinement for 12 months or more.
> (c) [He] has served one-third of his term of confinement, but in no case less than six months, or [he] has served ten years of a sentence to confinement for thirty years or more or a sentence to life.[66]

Except for limited cases, the ACBP is the final parole approval authority.[67]

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57. AR 15-130, *supra* note 53, para. 1-4a(5).

58. 10 U.S.C.S. § 953 (LEXIS 2001).

59. AR 15-130, *supra* note 53, para. 2-2. The ACPB consists of five ARBA members. The chairperson is a civilian with extensive experience in the corrections field and the other members are active duty field grade officers. At least one of the field grade officers is from the Judge Advocate General's Corps. *Id*. para. 2-3.

60. *Id*. para. 1-4b.

61. Normally, the ARBA will only consider a prisoner for clemency if the prisoner's clemency file has been reviewed and the convening authority has taken action on the sentence. *Id*. para. 3-1c.

62. *Id*. para. 3-1d. The ACPB will consider an eligible prisoner for clemency as follows:

> (1) When the approved sentence to confinement is less than 12 months, there will be no clemency consideration. . . .
> (2) When the approved sentence to confinement is 12 months or more but less than 10 years, clemency consideration will be not later than 9 months from the date confinement began and at least annually thereafter.
> (3) When the approved sentence to confinement is 10 years or more but less than 20 years, clemency consideration will be not later than 24 months from the date confinement began and at least annually thereafter.
> (4) When the approved sentence to confinement is 20 years or more but less than 30 years, clemency consideration will be not later than 3 years from the date confinement began and at least annually thereafter.
> (5) When the approved sentence to confinement is 30 years or more, to include confinement for life, clemency consideration will be not later than 5 years from the date confinement began and at least annually thereafter.
> (6) A prisoner sentenced to death is not eligible for clemency. . . .

Id. para. 3-1d(1)-(6).

63. *Id*. para 3-2a.

64. *Id*. para. 3-1e.

65. Some prisoners who are near the end of their sentence may not apply for parole because being in a parole status entails numerous reporting requirements and restrictions on freedom. *See id*. para. 3-2a(5). In addition, when a soldier goes on parole, he must remain in the parole status for the entire remaining length of his sentence, in effect forfeiting any good time credit he may have already earned. *See id.* para. 4-5.

66. *Id*. para. 3-1e.

67. *Id*. para. 4-2b-c. The Secretary of the Army has withheld authority for parole in cases which (1) he has a personal interest; (2) involve national security; (3) are the subject of controversy or substantial congressional or press interest; or (4) "for any individual convicted of any single offense for which the maximum authorized confinement as determined by the current *Manual for Courts-Martial* is in excess of 35 years." *Id.* para. 4-2b.

Section II. Administrative Benefits or Entitlements

Leave

Upon the soldier's request, the GCMCA may authorize the soldier to take *voluntary* excess leave when the soldier is not in confinement and meets the following criteria: (1) has been sentenced by a court-martial to a dismissal or punitive discharge, and (2) the sentence has not yet been approved.[68] Before he goes on voluntary excess leave, the soldier is entitled to pay and allowances for any period of unused accrued leave.[69] Once the member has completely used his accrued leave, he will be in an excess leave or leave without pay status[70] and will not be entitled to pay and allowances during the period of excess leave.[71]

The GCMCA may direct *involuntary* excess leave when: "(1) [the s]oldier is sentenced by court-martial to dismissal or a punitive discharge; (2) [the d]ischarge or dismissal is approved by the convening authority and is unsuspended; (3) [the s]oldier is awaiting completion of appellate review; [and] (4) [c]onfinement has been served, deferred, suspended [or the soldier is on parole]."[72] Soldiers required to take involuntary excess leave and who have leave accrued credit may elect one or a combination of the following: "(1) [receive] pay and allowances during the period of accrued leave, with leave beyond that which was accrued charged as excess leave[; or] (2) [p]ayment for leave accrued to the soldier's credit on the day before excess leave begins with the total period of required leave charged as excess leave."[73] Any payments due to the service member are subject to any approved fines or forfeitures ordered executed by the convening authority.[74] "Excess leave ends upon final judgment . . . , when the sentence is ordered executed, or other appropriate action is [taken]."[75]

Discharge Gratuities

To ensure that soldiers released from confinement have a small amount of money to purchase necessities, the military services offer a discharge gratuity. Enlisted members who are released from confinement to parole, appellate review excess leave, or expiration of sentence, and whose sentence includes a punitive discharge may be furnished a gratuity of up to twenty-five dollars if they do not have any funds in their possession.[76] If needed, the military will also provide them with civilian clothing.[77] The gratuities may offer only a small token, but they are better than nothing.

Travel and Transportation Entitlements

"A former member, who has been discharged while in confinement in a U.S. military confinement facility, is entitled, on parole or final release, to transportation . . . from the confinement facility" to his home of record (HOR) or the place he entered active duty (PLEAD).[78] The mode of transportation is that which is the least expensive to the government (usually bus or plane).[79] This entitlement is also available to a soldier placed on involuntarily excess leave "while awaiting completion of appellate review of a court-martial sentence to a punitive discharge or dismissal."[80] In both situations, the benefit may extend to the member's dependents.[81]

A soldier sentenced by a court-martial to confinement for a period of more than thirty days and a punitive discharge is authorized shipment of his household goods (HHG) to his HOR or PLEAD.[82] The service member, however, must ship his HHG within 180 days from the date the court-martial is com-

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68. AR 600-8-10, *supra* note 31, para. 5-23.

69. *See id.* Because voluntary excess leave can only be taken before the convening authority has approved the sentence, *id.*, any pay that the soldier is entitled to will not be subject to any fines. *See* DOD FMR, *supra* note 26, para. 480501 (fines effective upon execution of sentence). Fourteen days after the sentence is adjudged, however, the pay will be subject to any adjudged forfeitures. *See supra* note 16 and accompanying text.

70. *Id.* tbl. 5-11.

71. *Id.* para. 5-15n.

72. *Id.* para. 5-19a.

73. *Id.* para. 5-19e.

74. *See* DOD FMR, *supra* note 26, para. 4805.

75. AR 600-8-10, *supra* note 31, para. 5.19d.

76. AR 190-47, *supra* note 40, para. 10.18.

77. *Id.*

78. I JOINT FED. TRAVEL REGS., pt. P, U7502 (1 Dec. 2000), *available at* http://www.dtic.mil/perdiem/jftr.pdf. The former soldier makes the election. *Id.*

79. *Id.* U7500.

80. *Id.* U7506.

pleted.[83] He is not authorized non-temporary storage of HHG caused by moving out of government quarters.[84]

Medical Services, Post Exchange, and Commissary

Active duty service members[85] and their dependents[86] have a statutory right to receive medical and dental care. In addition, all active duty members and their dependents are authorized commissary and post exchange benefits. Collectively, these are commonly referred to as the Uniformed Services benefits, and are available to all members and their dependents enrolled in the Defense Enrollment Eligibility Reporting System Procedures (DEERS) system and issued a military identification (ID) card.[87] Service members and their dependents are entitled to these benefits while the service member remains on active duty.[88] Therefore, when a soldier has been sentenced to a punitive discharge and is on involuntary excess leave, he and his dependents remain entitled to these benefits until execution of the punitive discharge.[89] The soldier and his dependents do not surrender their ID cards until the soldier is actually discharged from the service.[90]

Transitional Compensation for Victims of Domestic Abuse

The military recognizes the conflict of interest that may confront victims of domestic abuse when the abusers are service members spouses. Service members convicted of abuse may be sentenced to confinement or a punitive discharge, rendering them with little or no income. The net effect is that by reporting domestic abuse and cooperating with authorities, the family often finds itself without financial support from the abuser. Congress has corrected this injustice through legislation aimed at compensating victims of domestic abuse—transitional compensation for abused dependents[91] and the Uniformed Services Former Spouses' Protection Act (USFSPA).[92]

A soldier's dependents may receive transitional compensation if the soldier is: (1) convicted of a dependent-abuse offense and sentenced to either a punitive discharge or total forfeiture of pay and allowances, or (2) administratively discharged from the service for misconduct involving a dependent-abuse offense.[93] Transitional compensation includes monetary payments made to either the spouse or child dependents,[94] and commissary and exchange benefits[95] for up to thirty-six months after the convening authority approves the sentence.[96] The dependents forfeit the transitional compensation if the spouse remarries or the former service member resides in the same household as the dependents.[97]

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81. *See id*. pt. C, U5240, para. F (1 Mar. 2001). "A member (with dependents) stationed in [the continental United States] who: is sentenced by a court-martial to: (1) confinement for more than 30 days, (2) receive a [punitive] discharge, or (3) dismissal from a Uniformed Service . . . is entitled to dependents' PCS travel and transportation allowances." *Id*.

82. *See id*. pt. D, U5370, para. H (1 Mar. 2001). Due to the specificity and complexity of these regulations, service members should consult the *Joint Federal Travel Regulations* and transportation officials for specific circumstances that may affect their HHG shipment.

83. *Id*. U5370, para. H6.

84. *Id*. U5370, para. H7.

85. 10 U.S.C.S. § 1074 (LEXIS 2001).

86. *Id*. § 1076.

87. *See generally* U.S. Dep't of Army, Reg. 600-8-14, Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel (29 July 1999).

88. *See id*. para. 1.4. These privileges can be limited due to misconduct, abuse, or fraud. *See id*. para. 1.5.

89. *See id*. paras. 1.1, 1.2, 1.4.

90. *Id*. para. 1.4.

91. 10 U.S.C.S. § 1059 (LEXIS 2001).

92. *Id*. § 1408(h). Transitional compensation for abused dependents and the USFSPA are mutually exclusive. Victims who qualify for benefits under both programs must choose to participate in one or the other. U.S. Dep't of Defense, Instr. 1342.24, Transitional Compensation for Abused Dependents para. 6.4 (23 May 1995).

93. 10 U.S.C.S. § 1059(b).

94. *Id*. § 1059(d).

95. *Id*. § 1059(j).

96. *Id*. § 1059(e)(2) .

A soldier's dependents may also qualify to receive a portion of the soldier's retirement pay that he would have received had he not been discharged from the service. To qualify, the soldier must have been eligible to receive retirement benefits at the time of his punitive discharge, the punitive discharge must have resulted from a conviction of domestic abuse against the spouse or a dependent child, the spouse and soldier must have been married for ten or more years during which the soldier served in the military, and the spouse must have a court order awarding a portion of the soldiers retirement pay as a division of property of the marriage. Spouses who qualify for this provision may be awarded up to fifty percent of the soldier's retirement pay.[98]

Trial counsel should be prepared to remind the judge or panel of these benefits.[99] The court may be more reluctant to impose a punitive discharge if it would hurt the soldier's dependents in the process. To combat this misconception, trial counsel may inform the court of the transitional compensation for abused dependents and the USFSPA by asking the judge to take judicial notice of these provisions. The court then can make a more informed decision on the appropriateness of sentencing the accused to a punitive discharge.

Section III: Collateral Disabilities

Soldiers may also suffer many collateral "civil disabilities" from a court-martial conviction. These include the loss of the right to vote,[100] the right to purchase or own firearms,[101] VA entitlements,[102] retirement eligibility,[103] parental rights,[104] and public employment eligibility.[105] Soldiers may also be required to register with the local police if convicted of a sex crime.[106]

Voting Rights

In the United States, state law determines qualifications for voting in state and federal elections.[107] The Supreme Court has held that states may disenfranchise convicted felons from voting in state and federal elections.[108] Forty-six states and the District of Columbia have enacted laws that disenfranchise all convicted felons in prison.[109] Thirty-two states disenfranchise felons on parole, with twenty-nine of those states also disenfranchising felons on probation.[110] Only fourteen states permanently deny felons the right to vote.[111] While many state statutes do not specifically address felons who have been con-

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97. *Id.* § 1059(g).

98. Major William Pischnotte & Major Regina Quinn, *The Victim and Witness Assistance Program,* 39 A.F. L. Rev. 57, 66 (1996) (citing 10 U.S.C.A. § 1408 (West 1995)).

99. *See, e.g.*, United States v. Hollingsworth, 44 M.J. 688, 693 (C.G. Ct. Crim. App. 1996).

100. Richardson v. Ramirez, 418 U.S. 24 (1974).

101. 18 U.S.C.S. § 922 (LEXIS 2001).

102. 38 U.S.C.S. § 5303 (LEXIS 2001).

103. 10 U.S.C.S. § 3911 (LEXIS 2001).

104. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 Crime & Just. 479 (1999) [hereinafter Petersilia]. Currently, parental rights can be terminated in nineteen states if the offenses for which the parents were convicted suggest their unfitness to supervise or care for the child. *Id.* at 510.

105. *Id.* at 510.

> Public employment is permanently denied in six states: Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina. The remaining jurisdictions permit public employment in varying degrees. Of these states, ten leave the decision to hire at the discretion of the employer, while twelve jurisdictions apply a "direct relationship test" to determine whether the conviction offense bears directly on the job in question.

Id.

106. 42 U.S.C.S. § 14071 (LEXIS 2001).

107. U.S. Const. art. I, § 2, cl. 1; art. I, § 4; art. II, § 1, cl. 2; amend XVII. *See* Office of the Pardon Attorney, U.S. Dep't of Justice, Civil Disabilities of Convicted Felons: A State by State Survey 6 (1996) [hereinafter State Survey]. This report can be obtained by writing or calling: Office of the Pardon Attorney, 4th Floor, 500 First Street, NW, Department of Justice, Washington, DC 20530-0001, (202) 616-6070.

108. Richardson v. Ramirez, 418 U.S. 24 (1974).

109. The Sentencing Project Policy Reports, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States para. II.4 (1998), *available at* http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY (only Maine, Massachusetts, Utah, and Vermont allow prisoners to vote).

110. *Id.* Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Of these states, only California, Colorado, and New York do not also disenfranchise felons on probation. *Id.* tbl. 1.

victed in a federal court (such as a military court-martial), most states consider a federal felony conviction the same as a state felony conviction.[112]

Defense attorneys should inform clients of these collateral voting consequences before clients plead guilty. Trial counsel, on the other hand, should object to any broad claim by the defense that a felony conviction will permanently disenfranchise the accused. Such a claim would be overly broad and misleading because only fourteen states permanently disenfranchise convicted felons. The convicted soldier could be (or easily become) a resident of one of the other states.

Right to Own Firearms

Federal and state laws govern restrictions on the purchase and possession of firearms. Federal law prohibits " any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[113] A similar prohibition applies to any person who has been convicted of a misdemeanor crime of domestic violence.[114] These rules extend to soldiers convicted of the requisite crimes at courts-martial.[115] These laws are enforced by the federal government through mandatory background checks conducted during the sale of firearms. In accordance with the Brady Handgun Violence Prevention Act, all federally licensed firearm dealers must conduct a check through the National Instant Criminal background Check System (NICS) to ensure that potential buyers are legally qualified to possess firearms.[116] The Federal Bureau of Investigation's (FBI) Criminal Justice Information Services Division (CJIS) performs the NICS checks in coordination with the National Criminal Information Check (NCIC) system.[117] A court-martialed soldier convicted of a reportable offense entered into the NCIC/NICS will be denied the sale of a firearm.[118]

State laws also regulate the possession of firearms by convicted felons. These laws vary with respect to the restrictions they place on convicted felons owning or possessing firearms. For example, thirty-one states have enacted laws that permanently deny or restrict a convicted felon's right to own a firearm.[119] In contrast, eighteen states deny or restrict this right only when the felon was convicted of a violent felony offense.[120] Convicted soldiers must therefore look to the law of their state of residence to determine their firearm restrictions.

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111. *Id.* Alabama, Arizona (second felony), Delaware, Florida, Iowa, Kentucky, Maryland (second felony), Mississippi, Nevada, New Jersey, Tennessee, Virginia, Washington, and Wyoming. Texas denies felons the right to vote for two years after they have completely served their sentence. *Id.* tbl. 1.

112. STATE SURVEY, *supra* note 107.

113. 18 U.S.C.S. § 922(h). The prohibition also extends to fugitives from justice, unlawful users or addicts of marijuana or any depressant or stimulant drug, and those "who [have] been adjudicated as a mental defective or who [have] been committed to any mental institution." *Id.* § 922(g).

114. *Id.* § 922 (g)(9).

115. The statute has an exception for service members, allowing them to possess weapons (military weapons only) in relation to their military duties. The exception does not apply to soldiers convicted of misdemeanor crimes of domestic violence. *Id.* § 925(a).

116. *Id.* § 922.

117. Telephone interview with Mr. David Lavezza, CJIS (Jan. 22, 2001) [hereinafter Lavezza Interview]. The NCIC is a computerized record collecting system that the FBI has used since 1967 to gather criminal history information data nationwide and distribute to law enforcement agencies throughout the United States. 28 C.F.R. § 20.31(a) (LEXIS 2001). The system works by having law enforcement agencies throughout the nation report criminal data information on suspects that they arrest or later convict. When law enforcement personnel arrest a suspect, they send a copy of his fingerprints to the CJIS, and the CJIS enters the suspect's personal information and suspected crime into the NCIC. On final disposition of the case, the reporting agency sends the CJIS an update, which the CJIS then enters into the NCIC. Participating law enforcement agencies can then use the NCIC to check the criminal history of any suspect. Lavezza Interview, *supra*.

118. The Army's military law enforcement agencies (Military Police Investigation and Criminal Investigation Division) report and receive information from the CJIS. *Army Regulation 190-45* and *CIDR 195-1* establish procedures for submitting criminal history data to the CJIS. *See* U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 4-10 (20 Oct. 2000); U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES (1 Oct. 1994).

Military confinement facilities also report criminal information to the CJIS. *See* AR 190-47, *supra* note 40, para. 10.2. Individual confinement facilities submit fingerprint cards to the CJIS once they receive a prisoner's judicially approved sentence that includes either: (1) a dismissal or punitive discharge, or (2) conviction of an offense that carries a possible sentence of confinement of one year or more. *Id*. para. 10.2b. If a prisoner whose sentence meets the above criteria is released from confinement before completion of final appellate review, the confinement facility forwards a final disposition form to the CJSC. *Id*. para. 10c.

For an in depth analysis of the relationship between the NCIC and the military's criminal record reporting system, see Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting,* ARMY LAW., Sept. 1995, at 3.

119. Petersilia, *supra* note 104, at 511.

120. *Id.*

Veterans Benefits

A convicted soldier's VA entitlements depend on the type of court-martial he faced and whether he has previously received a discharge under honorable conditions. Conviction by a general court-martial automatically bars a soldier from all VA benefits.[121] In contrast, the VA reviews the eligibility for VA benefits of a soldier convicted by special court-martial on a case-by-case basis.[122] Whether convicted by a general or special court-martial, a soldier does not lose his VA benefits from any prior honorable enlistment.[123]

Megan's Law

In 1994, Congress passed The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,[124] commonly referred to as Megan's Law.[125] The Act requires all states to establish a registry database for persons convicted of a "sexually violent offense" or a crime against a minor.[126] The individual states must coordinate their programs with the National Sex Offender Registry (NSOR) administered by the FBI.[127] Since 1996, all states have enacted registration laws requiring sex offenders to register with law enforcement officials upon entering the state's jurisdiction.[128] Each state enters the information into its state registry and into the NSOR. Public access to these registries varies from state to state, with many states offering Internet access.[129] The rationale behind community notification is multifold: to assist law enforcement in investigations, to establish supporting evidence to legally hold known offenders, to deter sex offenders from committing additional offenses, and to help citizens protect themselves and their children.[130]

These registries are linked into the FBI's NSOR/NCIC. Soldiers convicted at courts-martial of qualifying offenses will be registered with the NSOR.[131] Defense counsel should inform their clients of this fact, and on sentencing defense counsel should argue that the registration program reduces their client's risk to society.

Retirement Eligibility

Army Regulation 635-200 (enlisted) and *AR 600-8-24* (officers and commissioned warrant officers) regulate the Army's retirement plan.[132] Service members of the "Regular Army, [Army National Guard], or [Army Reserve component] who have completed 20, but less than 30 years of active Federal service in the US Armed Forces," at the discretion of the proper authority,[133] *may* be retired at the service member's request.[134] Soldiers with thirty years of service or more *will* be retired at their request.[135] Regular Army soldiers must be on active duty

121. 38 U.S.C.S. § 5303(a) (LEXIS 2001).

122. *See id*. § 5303(e); United States v. Hopkins, 25 M.J. 671 (A.F.C.M.R. 1987).

123. *See* 38 U.S.C.S. § 5303(a) (limiting the bar of VA entitlements from a general court-martial conviction to "the period form which discharged or dismissed").

124. 42 U.S.C.S. § 14071 (LEXIS 2001).

125. The legislation was enacted in response to the brutal slaying of seven year-old Megan Kanka who was violently raped and murdered by her neighbor, Jesse Timmendequas. Unbeknownst to Megan and her family, Timmendequas was a twice-convicted child sex offender at the time of the murder that had just recently been released from prison. Kerri L. Arnone, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief*, 42 ARIZ. L. REV. 157, 160 n.24 (2000).

126. 42 U.S.C.S. § 14071(a)(1).

127. *Id.*

128. Elizabeth A. Pearson, *Status and Latest Developments in Sex Offender Registration and Notification Laws*, NAT'L CONF. ON SEX OFFENDER REGISTRIES 45 (U.S. Dep't. of Justice ed., 1998), *available at* http://www.ojp.usdoj.gov/bjs/crs.htm#nsor.

129. For a state by state summary of dissemination and community notification information, see BUREAU OF JUSTICE STATISTICS, SUMMARY OF STATE SEX OFFENDER REGISTRY DISSEMINATION PROCEDURES: UPDATE 1999 (1999), *available at* http:/www.ojp.usdoj.gov/bjs/crs.htm.

130. KlaasKids Foundation, *Megan's Law Amendments by State, at* http://www.klaaskids.org/pg-legmeg.htm (last visited Mar. 22, 2001). This Web site provides a state-by-state total of registered offenders and details how states provide access to registration information. *See id*.

131. Lavezza Interview, *supra* note 117. *See supra* notes 117-18 and accompanying text.

132. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS, ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (21 July 1995) [hereinafter AR 600-8-24].

133. The Commander, U.S. Total Army Personnel Command, is the retirement authority for enlisted personnel. AR 635-200, *supra* note 132, para. 12-2. The Secretary of the Army is the approval authority for officer retirements. AR 600-8-24, *supra* note 132, para. 6-14.

134. AR 635-200, *supra* note 132, para. 12-4; *see also* AR 600-8-24, *supra* note 132, para. 6-14c. These regulations implement the provisions of 10 U.S.C.S. §§ 3911 and 3914 for officers and enlisted soldiers, respectively.

when they retire.[136] Therefore, enlisted soldiers separated by a punitive discharge are ineligible for retirement.

Other than requesting clemency, soldiers have no venue to appeal the loss of retirement benefits that result from the court-martial's sentence of a punitive discharge or dismissal. Although military courts recognize that the loss of retirement benefits is an important collateral consequence of a punitive discharge or dismissal, they consistently have held that they do not have jurisdiction to consider an appeal for the loss of retirement eligibility.[137] The military courts consider retirement eligibility an administrative, rather than punitive matter.[138] Therefore, the military courts will not hear, for example, Fifth Amendment claims of lack of due process for taking retirement benefits; nor will the military courts hear arguments that a dismissal, and the subsequent loss of retirement benefits, is equivalent to an excessive fine in violation of the Eighth Amendment.[139] Additionally, a dismissed officer or punitively discharged soldier has no cause of action in Federal Claims Court for the administrative decision denying him retirement. This is because no administrative decision on whether to retire that person is ever made in the process of approving a punitive discharge or dismissal.[140]

Defense counsel who are properly knowledgeable of the devastating impacts of a punitive discharge can better plan a multi-layer strategy to save a client's retirement benefits. The attorney must fully explain the effects of the loss of retirement benefits to the panel during sentencing. As a result, the panel may not adjudge a punitive discharge or, perhaps, may recommend that the convening authority disapprove or suspend the punitive discharge. Understanding the retirement consequences of a punitive discharge will also assist the defense attorneys in preparing effective clemency requests for the convening authority and for the Clemency and Parole Board (enlisted clients) or the Secretary of the Army (officer clients).

Conclusion

Being a trial attorney, whether a defense or trial counsel, entails much more than preparing for and presenting a case at trial. It mandates knowing all the legal and practical consequences of a court-martial conviction. Defense counsel must know these ramifications to properly advise their clients. Most accused soldiers do not even think about the collateral consequences of a conviction until after their trial is over. A complete understanding of the practical and legal consequences of a court-martial may affect the soldier's decision on whether to plead guilty. For example, a senior noncommissioned officer may decide to accept a deal that offers no confinement to avoid the risk of automatic reduction to E-1. Conversely, a person charged with indecent acts upon a minor may decide to contest the case to reduce the risk of having to register as a sex offender for the rest of his life. Regardless of the issue, it is imperative that defense counsel correctly advise their clients so that the clients can make an informed decision.

Trial counsel must also know and appreciate the collateral consequences of a court-martial conviction. Trial counsel are not only responsible for prosecuting criminals, they also are charged with the administration of justice. Without knowing the full consequences of a court-martial conviction, trial counsel cannot fully advise the command of all of the potential ramifications of a court-martial sentence. Commanders need to know this information to make just and fair decisions on individual cases. This information may not alter the command's final decision on whether to refer the case to court-martial; however, it may affect the level of court-martial the case is referred to or whether the command grants some form of post-trial clemency.

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135. 10 U.S.C.S. §§ 3917-3918 (LEXIS 2001).

136. *See id.* §§ 3914, 3917.

137. *See, e.g.*, United States v. Reed, 54 M.J. 37 (2000); United States v. Sumrall, 45 M.J. 207 (1996); United States v. Ives, 45 M.J. 22, 23 (1996) (denial of petition for grant of review).

138. *See, e.g., Sumrall*, 45 M.J. at 211-12.

139. *See, e.g., Reed*, 54 M.J. at 37.

140. *See* Seaver v. Commandant, U.S. Disciplinary Barracks, 998 F. Supp 1215, 1218 (D. Kan. 1998).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Administrative & Civil Law Notes

The Changing Definition of Unit Prices: Another Blow to the Government's Efforts to Keep the Public Informed?

On 30 September 1997, "the Civilian Agency Acquisition Council and the Defense Acquisitions Regulations Council issued a final rule revising Part 15[1] of the FAR [Federal Acquisition Regulation]."[2] Among other changes, the pertinent revisions affected FAR sections 15.503(b)(1) and 15.506(d)(2), which govern post-award notification of unsuccessful offerors and the required content of post-award debriefings for unsuccessful offerors, respectively. The 1997 FAR revisions specifically added "unit prices" to the list of information that must be disclosed following the award of a government contract.[3]

The revisions appeared to send a clear message to the contracting community: for contracts solicited on or after 1 January 1998,[4] "unit prices of each award are to be disclosed to unsuccessful offerors during the post award notice and, most importantly, are also to be made publicly available upon request."[5] While the Department of Defense (DOD) previously required agencies to provide submitters with notice of an agency's intent to disclose a contract's future year pricing, the change to the FAR removed "any confusion about unit prices; they are not proprietary information after contract award, and accordingly, cannot be withheld from disclosure under the FOIA by exemption (b)(4)."[6] The United States Court of Appeals for the District of Columbia's decision in *McDonnell Douglas v. NASA*,[7] however, provided the government with the opportunity to reassess its interpretations of the FAR's revisions.

In *McDonnell Douglas* the court agreed with the parties that the law required the release of the total contract price, but was less than charitable toward the government's posture on the disclosure of specific line-item price information. Before analyzing the facts of the case, the court chided the Department of Justice (DOJ) for instructing agencies to treat "most" contractor submitted information as "required,"[8] thereby warranting analysis and disposition under the *National Parks* test[9] rather than

1. U.S. Dep't of Justice, Office of Info. and Privacy, New Decision Rule Adopted for Unit Prices, XVIII Foia Update 4, at 1 (Fall 1997) [hereinafter XVIII Foia Update 4]. The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council are the joint proponents of the FAR. *Id.*

2. General Servs. Admin. et al., Federal Acquisition Regulation pt. 15 (June 1997) [hereinafter FAR].

3. 48 C.F.R. § 15.503(b)(1)(iv) (LEXIS 2001).

> (b) Postaward Notice. (1) [W]ithin 3 days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award. The notice shall include . . .
>
> (iv) The items, quantities and any stated unit prices of each award. If the number or other factors makes listing any stated unit price impracticable at that time, only the total current price need be furnished in the notice. However, the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request. . . .

Id. Section 15.506, which governs the content of postaward debriefings, was also amended to include a reference to "unit prices": "(d) At a minimum, the debriefing information shall include . . . (2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror." *Id*. § 15.506(d)(2).

4. 1 January 1998 was the effective date of the 1997 FAR rewrite. *Id.*

5. XVIII Foia Update 4, *supra* note 1, at 1.

6. Memorandum, Office of the Assistant Sec'y of Def., subject: Release of Unit Prices in Awarded Contracts (8 Feb. 1998), *available at* http://www.defenselink.mil/pubs/foi/unitprices.pdf, at 3. This memorandum requires contracting officers to provide submitter notice in the case of contracts solicited before 1 January 1998; however, "submitter notification is not required for the release of unit prices or other items indicated in the change" to the FAR for any contract solicited after the effective date of the changes. *Id*.

7. McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999).

8. *Id.* at 306. The court did not discuss whether this "policy" contravened legislation requiring publication and public notice for all policies affecting government procurements. *See* 41 U.S.C.S. § 418b (LEXIS 2001).

9. Nat'l Parks Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). In *National Parks*, the court outlined a test to determine whether information submitted to the government merited protection as "confidential" commercial or financial information under FOIA Exemption 4, 5 U.S.C.S. § 552(b)(4) (LEXIS 2001). The *National Parks* test, which consists of two disjunctive prongs, provides Exemption 4 protection to information the disclosure of which would impair the government's future ability to obtain necessary information or cause substantial harm to the competitive position of the submitter. *Nat'l Parks Ass'n*, 498 F.2d at 770.

the *Critical Mass* test.[10] The court then summarily accepted McDonnell Douglas's assertions that disclosure of line-item prices would "permit its commercial customers to bargain down ('ratchet down') its prices more effectively, and it would help . . . competitors to underbid it."[11] While the court broached the question of whether independent legal authority may exist to support disclosure of line-item prices, it noted that the government did not "claim that it or NASA has any" such authority.[12]

Nonetheless, the DOJ's post-*McDonnell Douglas* position was clear: "[s]uch 'legal authority' can be found in the FAR."[13] Viewing the *McDonnell Douglas* decision as a "case-specific, record-specific" holding, the DOJ did not advocate a change to the government's commitment to disclose unit prices.[14] Instead, DOJ's 24 February 2000 guidance proposed two separate analytical frameworks: one for contracts affected by the 1997 FAR revisions, and another for all other contracts. "For all contracts subject to the revised FAR Part 15, agencies should rely upon the FAR as mandatory authority to disclose unit prices. In such cases . . . no submitter notice"[15] is necessary. "For any contracts not subject to the revised FAR provision . . . [a]gencies should analyze . . . as they have always done, looking to see whether in fact it is likely that a competitor could ascertain from the unit prices any proprietary information (such as profit, or actual costs, etc.) that would permit underbidding."[16] The DOJ did not believe that *McDonnell Douglas* altered the definition of competitive harm outlined in *CNA Finance Corp. v. Donovan*[17] or the requirement for competitive harm outlined in *National Parks*.[18]

Thereafter, the DOD Directorate for Freedom of Information and Security Review (DFISR) reiterated its commitment to the release of unit price information and asserted that *McDonnell Douglas* "has no effect on the change to the FAR . . . . DoD policy has not changed as a result of this decision."[19] Despite the court's ruling in *McDonnell Douglas*, the government continued to view the FAR's disclosure provisions as independent authority to release contractors' unit prices.[20] Numerous prior decisions defending agency mandates to disclose unit prices appeared to fortify the DOJ and DOD positions.[21] In short, because it had long been established that the disclosure of

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10. Critical Mass Energy Project v. Nat'l Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993). The *Critical Mass* court established an alternative to the *National Parks* test for information voluntarily provided by submitters to the government. The only material concern of the *Critical Mass* test is whether the voluntarily submitted information is customarily made available to the public. If the submitter would not customarily share the information with a competitor, the information may be withheld under FOIA Exemption 4. *Id.* at 872.

11. *McDonnell Douglas*, 180 F.3d at 306. McDonnell Douglas believed disclosure "would allow competitors to calculate its actual costs with a high degree of precision." *Id.*

12. *Id*. The court's opinion includes no indication that the government even hinted that the FAR provided the questioned legal authority. *See id*. This seems curious given that the case was argued on 6 May 1999, more than sixteen months after the 1997 FAR revisions became effective.

13. U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 217 (2000) [hereinafter FOIA GUIDE].

14. Memorandum, Dep't of Justice, Office of Info. and Privacy, subject: Unit Price FOIA Officers Conference (24 Feb. 2000) [hereinafter Unit Price FOIA Officers Conference Memorandum], *available at* http://www.defenselink.mil/pubs/foi/unitprices.pdf. The Justice Department advised agencies that the *McDonnell Douglas* decision articulated a new interpretation of the *National Parks'*—substantial competitive harm analysis, focusing on "other sort[s] of economic harm" rather than "competitive" harm. *Id.*

15. *Id*. para. 5a.

16. *Id.* para. 5b.

17. CNA Fin. Corp. v. Donovan, 830 F. 2d 1132 (D.C. Cir. 1987). "This criterion has been interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *Id.* at 1152 (citing Gulf & W. Indus. v. United States, 615 F. 2d 527, 530 (D.C. Cir. 1979); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976)).

18. Unit Price FOIA Officers Conference Memorandum, *supra* note 14, para. 5.

19. Memorandum, DOD DFISR, subject: DOD Policy Concerning Release of Unit Prices Under the FOIA (3 Mar. 2000) [hereinafter DOD Policy Concerning Release of Unit Prices Under the FOIA], *available at* http://www.defenselink.mil/pubs/foi/unitprices.pdf.

20. Because protection under FOIA Exemption 4 "is vitiated if the information is publicly available elsewhere, all unit prices of successful offerors that are required to be disclosed under the FAR should not be considered to fall under Exemption 4." FOIA GUIDE, *supra* note 13, at 218 (citing XVIII FOIA UPDATE, 4, *supra* note 1, at 1; U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, V FOIA UPDATE 4, at 4 (Fall 1984); U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, VII FOIA UPDATE 1, at 6 (Winter 1986)).

21. *See, e.g.*, Pac. Architects & Eng's, Inc. v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1999) ("unit price rates" may be disclosed as they are made up of a number of fluctuating variables); Acumenics Research & Tech. v. U.S. Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (too many unascertainable variables in the unit price calculation to warrant protection); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37 (D.D.C. 1997) (disclosure of unit prices required, including component and configuration prices).

"prices charged the Government is a cost of doing business with the government,"[22] the government viewed *McDonnell Douglas* as an anomaly.

A year later, the District Court for the District of Columbia's decision in *Mallinckrodt v. West*[23] shook the government's "unit price" posture again. In *Mallinckrodt*, the court dissected the government's conclusion that all contractor submissions were "required"[24] and examined the government's characterization of "unit price." The court distinguished items that a contractor "must" submit from those that the contractor "should" submit,[25] concluding that it was inappropriate for the government to include voluntarily submitted "rebates and incentives" within a contract's "unit price."[26] The court's conclusion, which did little to clarify the definition of "unit price," was another blow to the government's effort to disclose contract prices.

The government was still evaluating how to respond to *Mallinckrodt* when it was stung again in the most recent "unit price" case. On 7 September 2001, the District Court for the District of Columbia issued its ruling in the consolidated cases of *MCI Worldcom, Inc. v. General Services Administration and Sprint Communications Co. v. General Services Administration*.[27] In late April 2000, after learning that a competitor had requested their "confidential" data, MCI Worldcom and Sprint filed actions to enjoin the General Services Administration (GSA) from disclosing their price information.[28] The plaintiffs' concern was the government's decision to release all of the "B-Tables"[29] plaintiffs had submitted in their successful bids for two multi-year long distance telecommunications contracts. The court found that the government's decision to release the information was "arbitrary and capricious because it violate[d] applicable statutes, regulations and case law"[30] and granted the plaintiffs' motions.

First, the court evaluated whether the B-Tables were "unit prices." The government, relying "exclusively" on the language of FAR sections 15.503 and 15.506, "interpreted the FAR to require disclosure of Plaintiffs' B-Tables."[31] The court recognized that neither the FAR nor case law provided a standard definition of "unit price."[32] Even under the definition proffered by the government,[33] however, the court held that "Plaintiffs' B-Tables do not constitute unit price information."[34] Furthermore, the court determined that the agency's very characterization of the B-Tables as "unit prices" was categorically wrong.[35] The B-Tables, which "specify millions of pricing elements and

22. Racal-Milgo Gov't Sys. v. Small Bus. Admin., 559 F. Supp. 2d 4, 6 (D.D.C. 1981).

23. Mallinckrodt v. West, 140 F. Supp. 2d 1 (D.D.C. 2000).

24. Hence, triggering the application of the *National Parks* test, *supra* note 9, to any "confidentiality" determination, should one be necessary. *See also supra* notes 9-11 and accompanying text.

25. *Mallinckrodt*, 140 F. Supp. 2d at 13 (citing McDonnell Douglas v. NASA, 180 F.3d 303, 306 (D.C. Cir. 1999)) (outlining the court's disfavor of the government's efforts to characterize all contractor submissions as required).

26. *Id.* at 11.

27. MCI Worldcom, Inc. v. Gen. Servs. Admin., Sprint Communications Co. v. Gen. Servs. Admin., Nos. 00-914 and 00-915, consolidated slip op. (D.D.C. Sept. 7, 2001) [hereinafter MCI Worldcom v. GSA].

28. *Id.* at 2.

29. "B-Tables" are detailed pricing schedules which are comprised of

> complex matrices in computer data base format that contain detailed line-item pricing information. In particular, the B-Tables contain a "breakdown" of the price of every call, transmission or service into its component parts. There are separate B-Tables for each of the eight years of the FTS2001 Contracts, and together the B-Tables total tens of thousands of pages of pricing data for all services and features to be provided to the Government under the FTS2001 Contracts.

Id. at 3 (citation omitted).

30. *Id.* at 20-21.

31. *Id.* at 8.

32. *Id.* at 8 (citing Acumentics Research & Tech. v. U.S. Dep't of Justice, 843 F.2d 800, 802 n.1 (4th Cir. 1988); United States for Use and Benefit of Sanford v. Cont. Cas. Co., 293 F. Supp. 816, 822 (N.D. Miss 1968)).

33. *Id.* at 9. The GSA advocated "a definition of unit price that is 'the amount of public funds the government pays for its goods and services.'" *Id.* Because the *Mallinckrodt* court had recently posited that a "unit price is the amount of public funds the government must pay for goods and services, Mallinckrodt v. West, 140 F. Supp. 2d 1, 11 (D.D.C. 2000), it was logical for the GSA to urge the adoption of a nearly identical definition.

34. *Id.* at 9.

pricing components that make up the individual calls or transmissions sold to the government,"[36] are primarily line-item pricing information. Consequently, the court held that "line-item pricing information similar to that at issue here is exactly the type of information that constitutes 'confidential commercial or financial information,' and is not disclosable in response to a FOIA request."[37] The court "conclude[d] that Plaintiffs' B-Tables contain confidential information falling within FOIA Exemption 4 and therefore is protected from disclosure under the Trade Secrets Act."[38]

The court added that "[e]ven assuming *arguendo* that the B-Tables do contain 'unit price' information, no reasonable reading of FAR §§ 15.503 and 15.506 would permit their disclosure."[39] Although the government asserted that the 1997 FAR revisions "mandated" disclosure of the information,[40] the court reported that the GSA's interpretation of the FAR merited no more than minimal deference.[41] Moreover, the court ruled that the GSA's reading of the FAR was far too narrow, focusing "exclusively on those portions . . . that require 'unit price' information to be disclosed" and ignoring "the fact that both FAR provisions also expressly prohibit the use of information that is confidential, trade secret, or otherwise exempt under FOIA Exemption 4."[42] Instead, the court reasoned, the focus should return to the "underlying statute authorizing the FAR, namely the Federal Property and Administrative Services Act,"[43] because the FAR "may not be interpreted in a way that contravenes this statutory prohibition on disclosure."[44]

The court also highlighted other shortcomings it perceived in the government's case. First, the court discussed the government's arbitrary and capricious departure from its position "in another case involving nearly identical pricing information, [where the] GSA argued and prevailed on the theory that Sprint's B-Table did *not* constitute 'unit prices.'"[45] Next, the court asserted that the government acted arbitrarily[46] by failing to follow its own FOIA regulations,[47] which require submitter notice.[48] Finally, the court noted the unexplained change in the government's disclosure policy.[49] The government "acknowledged that its decision to release all pricing data for *future* years differed from its previous long-standing policy and practice of disclosing only *current*-year prices."[50] Given the government's "failure to explain its reversal, the court concluded that

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35. *Id*. at 11. Indeed, the information contained in the B-Tables more closely resembles "cost-breakdowns," which are specifically prohibited from disclosure by every FAR provision relied upon by GSA. *Id*. at 9 (citing FAR, *supra* note 2, § 15.503(b)(1)(v) (LEXIS 2001)).

36. *Id*. at 9 (citing FAR, *supra* note 2, § 15.503(b)(1)(v)).

37. *Id*. at 15 (citing McDonnell Douglas v. NASA, 180 F.3d 303, 306 (D.C. Cir. 1999)).

> GSA ignores the fact that both FAR provisions also expressly prohibit the release of information that is confidential, trade secret, or otherwise exempt under FOIA Exemption 4. *See also* 48 C.F.R. § 15.503(b)(v) ("In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror."); 48 C.F.R. § 15.506 ("the debriefing shall not reveal any information . . . exempt from release under the Freedom of Information Act, 5 U.S.C. § 552, including trade secrets; . . . and . . . (3) commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information . . . .").

Id. at 12.

38. *Id*.

39. *Id*. at 11.

40. *Id*. at 5.

41. *Id*. at 6. Agencies' interpretations of their own regulations are entitled to considerable deference, but the FAR "is not written or prepared by GSA, but rather is a joint product of several agencies." *Id.*

42. *Id*. at 12. The court returned to the "pricing composition" theme outlined in *Mallinckrodt* and declared that "the unmistakable meaning of FAR §§ 15.503 and 15.506 is that unit price information may be disclosed, but only insofar as it does not consist of trade secrets, confidential business information, or is otherwise exempt from disclosure under the FOIA, Exemption 4." *Id*. at 13.

43. *Id*. at 12 (citing 41 U.S.C. § 253b (2000), *as amended by* the Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. § 253b(e)(3)).

44. *Id*. at 12, 13 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1975)).

45. MCI Worldcom v. GSA, *supra* note 27, at 10 (citing Cohen, Dunn & Sinclair, P.C. v. Gen. Servs. Admin., No. 92-0057-A, 1992 U.S. Dist. LEXIS 21730 (E.D. Va. Sept. 10, 1992)).

46. *Id*. at 19.

its decision to disclose Plaintiffs' B-Tables was arbitrary and capricious."[51]

It is too early to determine whether the one-two-three punch of *McDonnell Douglas–Mallinckrodt–MCI Worldcom* has ended the government's effort to disclose all unit prices. What is certain is that the *MCI Worldcom* decision will change the manner in which DOD contracting officials manage FOIA requests for unit prices and unit price information.

The DOJ has not yet discussed its position on unit price disclosure. Nonetheless, the DOD DFISR promptly issued a policy change on 28 September 2001.[52] The *MCI Worldcom* decision "has resulted in a change in the guidance concerning the release of unit prices issued by this Directorate on March 3, 2000."[53] The message advises that "submitter notification, in accordance with Executive Order 12,600, should be made whenever an agency receives a FOIA request for documents that contain unit prices. Accordingly, depending upon submitter's response, the release of unit prices should be made on a case-by-case basis."[54] This new policy apparently impacts all requests for unit price information, regardless of the contract type. While this new approach may be appropriate for cases like *MCI Worldcom*, in which complex unit price information exists, the policy also seems to apply to far simpler single-price, single-object procurements.

The case-by-case analysis advocated in DOD's 28 September 2001 policy may be the safest and best approach to the disclosure of unit prices. This policy appears to permit the continued distinction between the types of potential economic harms alleged by submitters. For example, in cases where there is a clear "showing of actual competition and a likelihood of substantial competitive injury,"[55] the agency can rely upon the competitive harm prong of the *National Parks* test[56] to withhold unit prices. On the other hand, in cases where the potential economic injury flows from the affirmative use of proprietary information by someone other than a competitor, the agency

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47. The GSA's FOIA procedures are outlined in 41 C.F.R. § 105-60.405 (LEXIS 2001).

> (d) Procedural requirements -- consultation with the submitter. (1) If GSA receives a FOIA request for potentially confidential commercial information, it will notify the submitter immediately by telephone and invite an opinion whether disclosure will or will not cause substantial competitive harm.
>
> . . . .
>
> (3) If the submitter indicates an objection to disclosure GSA will give the submitter seven workdays from receipt of the letter to provide GSA with a detailed written explanation of how disclosure of any specified portion of the records would be competitively harmful.
>
> . . . .
>
> (6) GSA will review the reasons for nondisclosure before independently deciding whether the information must be released or should be withheld. If GSA decides to release the requested information, it will provide the submitter with a written statement explaining why his or her objections are not sustained. The letter to the submitter will contain a copy of the material to be disclosed or will offer the submitter an opportunity to review the material in none of GSA's offices. If GSA decides not to release the material, it will notify the submitter orally or in writing.

Id.

48. Agencies frequently receive FOIA requests for previously submitted commercial information that may be considered "confidential" by the submitter. Executive Order 12,600 requires all executive branch departments and agencies to establish and publish "predisclosure notification procedures which will assist agencies in developing adequate administrative records." FOIA GUIDE, *supra* note 13, at 652 (citing 3 C.F.R. § 235 (1988)). Under these procedures, agencies are generally required to notify submitters of the potential disclosure of "confidential" information. The agency must consider the submitter's response before the agency determines whether release is appropriate. This process is commonly referred to as "submitter notice." Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (July 23, 1987), *reprinted in* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, VIII FOIA UPDATE 2, at 2-3 (Summer 1987); *see also* 3 C.F.R. § 235 (1988), *reprinted in* 5 U.S.C. § 552 (1994). The FOIA procedures for individual agencies are generally published in the Code of Federal Regulations.

49. MCI Worldcom v. GSA, *supra* note 27, at 19.

50. *Id.* at 4. The contracts also included clauses providing that the government's disclosures were limited to current year contract prices. *Id.* at 19 n.2.

51. *Id.* at 19.

52. E-mail from Jim Hogan, Deputy Chief, DOD DFISR, to Barbara Thompson, Marine Corps, et al., subject: FOIA Requests for Unit Prices (Sept. 28, 2001, 08:27 EST) [hereinafter DOD DFISR Interim Guidance] (on file with author).

53. *Id.* (citing DOD Policy Concerning Release of Unit Prices Under the FOIA, *supra* note 19).

54. *Id.*

55. CNA Fin. Corp. v. Donovan, 830 F. 2d 1132 (D.C. Cir. 1987).

56. *See supra* note 9.

could continue to follow the DOJ's 24 February 2000 guidance.[57] Even in the absence of clear competitive harm, however, compliance with the submitter notice requirements of Executive Order 12,600[58] appears prudent.

It appears that the *McDonnell Douglas* court's tacit approval of the "ratcheting-down" concept[59] may have laid the foundation for a new methodology to withhold unit price information under Exemption 4. Contrary to DOJ's earlier belief that *McDonnell Douglas* did not affect the competitive harm prong of the *National Parks*[60] test,[61] the District of Columbia District Court's recognition of this "ratcheting-down" concept in *MCI Worldcom*[62] appears to be a step in that direction.[63]

The impact of *MCI Worldcom* is yet uncertain. It is certain, however, that DOJ will carefully evaluate whether it will appeal the *MCI Worldcom* decision.[64] Given the *McDonnell Douglas–Mallinckrodt–MCI Worldcom* decisions, it is even more certain that Congress will closely review the perceived broadening of Exemption 4 to include potential economic injury from someone other than a competitor. Major Tuckey.

New Interim Rules Implement the Expanded K Visas for Spouses of U.S. Citizens and Their Children

The Immigration and Naturalization Service (INS), on 14 August 2001, finally published interim rules[65] implementing section 1103 of the Legal Immigration Family Equity (LIFE) Act enacted by Congress on 21 December 2000.[66] Section 1103 created a new immigration classification for alien[67] spouses of U.S. citizens and their children,[68] allowing them to enter the United States on a nonimmigrant K visa.[69] Legal assistance attorneys, especially those practicing overseas, should take particular note of this new visa classification, as it allows a service member's alien spouse and children to travel to the United States without waiting for an immigrant visa.[70]

Before the LIFE Act, a service member who married a non-U.S. citizen overseas had to petition for an immigrant visa to allow the alien spouse and any children to enter the United States. The alien spouse "frequently [waited for as long as a] year for the [INS] to approve the initial petition and the Department of State to issue the immigrant visa."[71] This led to extended separations of military families when the service member transferred to the United States before the alien spouse received an immigrant visa.[72]

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57. *See* Unit Price FOIA Officers Conference Memorandum, *supra* note 14; *see also supra* notes 14-18 and accompanying text.

58. Exec. Order 12,600, 52 Fed. Reg. 23,781 (July 23, 1987).

59. McDonnell Douglas v. NASA, 180 F.3d 303, 306 (D.C. Cir. 1999).

60. *See supra* note 9.

61. *See* Unit Price FOIA Officers Conference Memorandum, *supra* note 14.

62. MCI Worldcom v. GSA, *supra* note 27, at 17-18.

63. The courts could determine that a submitter is indirectly disadvantaged *vis-à-vis* its competitors any time the submitter's commercial customers "leverage" disclosed "unit price information" to lower the submitter's commercial rates. The case law's requirement for "both a showing of actual competition and a likelihood of substantial competitive injury," CNA Fin. Corp., 830 F. 2d 1132, 1152 (D.C. Cir. 1987), may be satisfied whenever a submitter is "required" to disclose information that may be used to the submitter's detriment.

64. According to the DOD DIFSR's interim guidance, the DOJ's Office of Information and Privacy "will issue further guidance concerning the release of unit prices" once it determines whether the government will appeal the MCI Worldcom court's decision. DOD DFISR Interim Guidance, *supra* note 52.

65. *See* 66 Fed. Reg. 42,587 (Aug. 14, 2001) (to be codified at 8 C.F.R. pts. 212, 214, 245, 248, and 274a).

66. Pub. L. No. 106-553, 114 Stat. 2762 (2000) (codified at 8 U.S.C. §§ 1101(a)(15)(K), 1255, 1184, 1186a (2000)).

67. As defined in 8 U.S.C. § 1101(a)(3), the term "alien" means "any person not a citizen or national of the United States."

68. Children must be under twenty-one years of age and unmarried to meet the definition of "child." *See id.* § 1101(b)(1).

69. This nonimmigrant classification status is known as the "K visa" because it is found at subsection 101(15)(K) of the Immigration and Naturalization Act, codified at 8 U.S.C. § 1101(a)(15)(K).

70. *See* 66 Fed. Reg. at 42,587, para. I.A.

71. *Id.*

72. *See id.*

The LIFE Act expanded the K visa nonimmigrant status to address family separations. The K visa originally allowed the fiancée of a U.S. citizen and the minor children of the fiancée to enter the United States in a nonimmigrant status solely for the purpose of concluding a valid marriage with the U.S. citizen within ninety days after entry.[73] The LIFE Act extended the K visa nonimmigrant status to alien spouses and their children, thus expediting their entry into the United States.

To take advantage of the new K visa, the service member citizen must first file a Petition for Alien Relative, Form I-130, with the INS on the alien spouse's behalf to begin the immigration process.[74] The service member must also file a Form I-129F, Petition for Alien Fiancée, to obtain a nonimmigrant K visa for the spouse and children.[75] Generally, both applications require a fee.[76] Once the INS approves the I-129F petition, they inform the American consulate in the country where the marriage took place.[77] The alien spouse must then apply for a nonimmigrant K visa in that country.[78] If legal assistance attorneys are involved in the visa process early, they should ensure that the service member client is aware that if the marriage occurs overseas, the alien spouse must apply for the nonimmigrant K visa in the country where the marriage took place. This requirement could prove onerous to those couples who marry in a different country than the country they are living in.

After the alien spouse and children obtain their K visa, they may enter the United States for two years.[79] Aliens admitted to the United States as nonimmigrant K visa holders are authorized to work once they have an approved Form I-765, Application for Employment Authorization.[80]

Legal assistance attorneys who have clients applying for a K visa must inform them that, once the alien spouse and children enter the United States, they should immediately apply to adjust their status to that of permanent resident alien. Alien spouses may apply for permanent resident status by filing a Form I-485, Application for Adjustment to Permanent Residence, with the INS.[81] Those who have been married for less than twenty-four months when they enter the United States may only be granted conditional permanent resident status.[82] Legal assistance attorneys need to remind their clients that the spouse who receives conditional permanent resident status must apply for removal of the conditional status "within the ninety-day period immediately preceding the second anniversary of the date on which the alien obtained conditional permanent residence."[83] Absent good cause, failure to apply for removal of the condition in a timely manner will result in the automatic termination of the alien's lawful status in the United States.[84]

The immigration process can be complicated. Legal assistance attorneys need to be familiar with immigration processing requirements to assist service members who marry non-U.S. citizens overseas. In particular, the legal assistance attorney must understand the new LIFE Act amendments that expedite the process by which a service member's alien spouse and children may enter the United States. Consequently, legal assistance attorneys, particularly overseas, should take the initiative

73. 8 U.S.C. § 1101(a)(15)(K)(i).

74. 66 Fed. Reg. at 42,588, para. II.A. A Petition for Alien Relative, Form I-130, requests the INS to classify the alien spouse as an immediate relative for immigration purposes. 8 C.F.R. § 204.1 (LEXIS 2001).

75. Before implementation of the LIFE Act rules, "K" nonimmigrants were designated as "K-1" for the fiancée of a U.S. citizen, and "K-2" for their children. For consistency, the INS decided not to change the original classification designations. Therefore, U.S. citizen spouses and children are designated as "K-3" and "K-4," respectively. *See* 66 Fed. Reg. at 42,588, para. I.C. Applications for K-3/K-4 status must be sent to Immigration and Naturalization Service, P.O. Box 7218, Chicago, IL 60680-7218. The Form I-129F is a temporary solution. The INS plans to design a new form; however, because LIFE is already in effect and a process was needed to implement it immediately, the INS is using Form I-129F until further notice. Applicants are cautioned not to fill out section (B)(18) and (B)(19) of the form. *See id.* at 42,589, para. II.B.

76. Form I-130 requires a fee of $110 and Form I-129F requires a fee of $95. Immigration judges may waive the fees of any case under their jurisdiction if the alien can substantiate that he is unable to pay the prescribed fee. 8 C.F.R. § 103.7(b)-(c).

77. 66 Fed. Reg. at 42,589, para. II.B.

78. 8 U.S.C. § 1184(p)(2). To obtain the K visa, the alien spouse must file a Nonimmigrant Visa Application, Form OF-156. 22 C.F.R. § 41.103 (LEXIS 2001). The spouse must also submit a Form I-693, Medical Examination, when the spouse appears at the consulate to apply for the K visa from the State Department. *Id.* § 41.108.

79. Or, in the case of a child, until they reach their twenty-first birthday, whichever is shorter. *See* 66 Fed. Reg. at 42,589, para. II.C (to be codified at 8 C.F.R. § 214.2(k)(8)).

80. 8 C.F.R. § 274a.12(a)(6). The Application for Employment, Form I-765, must be accompanied by a $100 fee, unless waived by the immigration judge. *Id.* § 103.7(b).

81. *Id*. § 214.2(k)(6)(ii); *see id.* § 103.7(b) for fee schedules.

82. 8 U.S.C. § 1186a.

83. 8 C.F.R. § 216.4(a).

84. *Id*. § 216.2(a)(6).

and "get the word out" to service members that they need to seek advice early in the process. Ideally, service members should seek counsel before the marriage takes place to ensure smooth processing of the myriad documents required to allow the alien spouse and children to travel to the United States and obtain permanent resident status. Lieutenant Colonel Stahl.

Environmental Law Note

The Environmental Assessment as a "Concise Public Document"

Military environmental law attorneys face the challenge of ensuring that military programs and operations comply with the National Environmental Policy Act of 1969 (NEPA).[85] One of the most difficult aspects of NEPA compliance is choosing the appropriate level of environmental analysis for a particular situation. The NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for major federal actions "significantly affecting the quality of the human environment."[86] *Army Regulation 200-2* provides guidance on conditions requiring an EIS[87] and actions normally requiring an EIS.[88] In addition, the Regulations of the Council on Environmental Quality (CEQ) implementing NEPA[89] recognize the use of categorical exclusions[90] which require neither an Environmental Assessment (EA)[91] or an EIS. *Army Regulation 200-2* provides the requirements for the use of categorical exclusions,[92] including a list of the categorical exclusions available and screening criteria that must be met before their use.[93]

A significant challenge arises for military environmental law practitioners in situations where a categorical exclusion is clearly not applicable and the agency proposal is not squarely within the category of actions normally requiring an EIS. The textbook solution to such a situation is to prepare an EA[94] to

85. 42 U.S.C. §§ 4321-4370 (2000).

86. *Id.* § 4332.

> [A]ll agencies of the Federal Government shall (C) include in every recommendation or report on proposals for legislation and any other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be eliminated, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

87. U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS para. 6-1 (23 Dec. 1988) [hereinafter AR 200-2].

88. *Id.* para. 6-3.

89. 40 C.F.R. §§ 1500-1508 (LEXIS 2001).

90. Categorical exclusion is defined as follows:

> "Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment or an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Id. § 1508.4.

91. Environmental Assessment is defined as follows:

> "Environmental Assessment":
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
> (3) Facilitate preparation of a statement when one is necessary.
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(e), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Id. § 1508.9.

92. *See* AR 200-2, *supra* note 87, paras. 4.0-.4.

93. *Id.* app. A.

make a threshold determination. If the EA concludes that the proposal constitutes a "major federal action significantly affecting the human environment,"[95] an EIS is prepared. If the EA concludes that the threshold for an EIS has not been met, a Finding of No Significant Impact (FNSI)[96] is issued, and no further analysis under NEPA is required.

The use of an EA as described above seems straightforward; but, in practice the process is not always so simple. Environmental assessments can be costly and are quite often performed by private firms under contract with Department of Defense agencies. In addition, recent experience shows that EAs sometimes are extremely lengthy documents that take months to prepare.[97] These factors could potentially lead to the overly creative use of categorical exclusions to avoid preparation of an EA. In addition, the sheer volume of an extremely lengthy EA could lead some to conclude that an EIS was likely the appropriate level of analysis for the action.[98] Litigation over the FNSI following a lengthy EA could lead to the agency having to produce an EIS, causing further delay in the implementation of the federal action proposed. In either case, the prospect of a lengthy EA may not serve the interests of the agency in its efforts to comply with NEPA.

While the length of an EA is not the determining factor as to its legal sufficiency, a look at initial guidance from the CEQ about EAs is instructive. While the NEPA statute does not define or discuss EAs, the CEQ regulations define an EA as "a concise public document."[99] Question 36a of the CEQ's *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* is particularly informative on the question of the length of EAs, stating:

> Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).
>
> While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than 10-15 pages.[100]

Thorough and professional environmental analyses are critical to federal agency compliance with NEPA. "Thorough and professional," however, does not have to equate to "long and expensive" in all cases. There appears to be room for the increased use of shorter EAs that the agency potentially could produce in-house. For the reasons set out above, environmental law practitioners should look carefully at the length of the EAs they review. From both the legal and practical standpoint, in some cases less could be more. Lieutenant Colonel Tozzi.

Tax Law Notes

Update for 2001 Federal Income Tax Returns

On 2 June 2001, President George W. Bush signed a $1.35 trillion tax cut.[101] The law, known as the Economic Growth and

94. *See supra* note 91 (definition of Environmental Assessment).

95. 42 U.S.C. § 4332 (2000).

96. Finding of No Significant Impact is defined as follows:

> "Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.3.

97. The foregoing is based upon the experience of the author in his prior duty assignment as an environmental attorney with the U.S. Army Environmental Law Division, where one of his primary responsibilities was the review of Army NEPA analyses. One EA reviewed by the author was over 300 pages long.

98. Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981) [hereinafter NEPA's Forty Most Asked Questions], *available at* http://ceq.eh.doe.gov/nepa/regs/40/40p3.htm. Question 36b reads:

> Under what circumstances is a lengthy EA appropriate? A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

Id. at 18,037.

99. 40 C.F.R. § 1508.9.

100. NEPA's Forty Most Asked Questions, *supra* note 98, at 18,037.

Tax Relief Reconciliation Act of 2001 (EGTRRA), purports to reduce tax rates, repeal the estate tax, provide marriage penalty relief, expand education incentives, increase the child tax credit, and provide pension relief. The catch is that it will take eleven years to realize the full effect of the tax cuts, because the majority of the provisions will be phased in over the next ten years (2001 through 2010). Then, to comply with budgetary restraints, the entire package of tax cuts goes away in 2011.[102] This "sunset" provision essentially returns the tax laws to their pre-2 June 2001 state.[103]

This article provides a brief update of tax changes that are important for taxpayers in the military community. Its goal is to inform legal assistance attorneys of updates in tax numerology and changes for the upcoming tax season. Some of these changes arise from the EGTRRA, and some were scheduled to take effect based on existing law.

Key Changes for 2001

EGTRRA Changes

Tax Rates Reduced

All regular income tax rates, except for the 15% rate, were reduced in 2001 by one-half of one percent.[104] These rates for 2001 are now 27.5%, 30.5%, 35.5%, and 39.1% and are reflected in the current tax tables.[105] These rates will be reduced by an additional one-half of one percent per year through the year 2006.[106]

The Act created a new 10% regular income tax bracket for the portion of taxable income currently taxed at 15%.[107] It is effective for taxable years that begin after 31 December 2000.[108] The 10% rate bracket applies to the first $6000 of taxable income for single individuals ($7000 for 2008 and thereafter), $10,000 of taxable income for heads of households, and $12,000 for married couples filing joint returns ($14,000 for 2008 and thereafter).[109]

Rate Reduction Credit

For 2001 only, the 10% income tax rate bracket is implemented through a rate-reduction credit of 5% (the difference between the 15% rate and the 10% rate) of the amount of income that would otherwise be eligible for the new l0% rate.[110] The 2001 tax tables and schedules, therefore, do not reflect the 10% rate. The maximum credit will be $300 for a single individual, $500 for a head of household, and $600 for a married couple filing a joint return.[111] Many taxpayers received a Department of the Treasury check for an advance rate-reduction credit.[112] The advance payment was based on tax data from 2000.[113]

Those who did not receive a rebate check, or received one for less than the full amount, can take the rate-reduction credit when filing the 2001 tax return.[114] The credit is calculated on a worksheet in the instructions to the Forms 1040, 1040A, and 1040EZ. Calculating the credit requires the taxpayer to take into account any advance rebate check received.[115] If the taxpayer received a rebate check, the amount of the advanced pay-

101. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38 (codified in scattered sections of I.R.C. (LEXIS 2001)) [hereinafter EGTRRA].

102. *Id.* § 901.

103. Matthew Bender & Company, Inc., Explanation of the Provisions of H.R. 1836, The Economic Growth and Tax Relief Reconciliation Act of 2001 (June 6, 2001).

104. I.R.C. § 1(i)(2) (LEXIS 2001) (codifying EGTRRA § 101(a)(i)(2)).

105. *Id.* § 1.

106. *Id.* § 1(i)(2) (codifying EGTRRA § 101(a)(i)(2)).

107. *Id.* § 1(i)(1) (codifying EGTRRA § 101(a)(i)(1)).

108. *Id.* § 1(i)(1)(A) (codifying EGTRRA § 101(a)(i)(1)(A)).

109. *Id.* § 1(i)(1)(B) (codifying EGTRRA § 101(a)(i)(1)(B)).

110. *Id.* § 6428 (codifying EGTRRA § 6428). The benefit of the 10% bracket, however, is extended to dependents. A worksheet is in the instructions to Form 1040 for this purpose. I.R.S. Form 1040, Instructions, at 33 (2001).

111. I.R.C. § 6428(b) (codifying EGTRRA § 6428(b)).

112. *Id.* § 6428(e) (codifying EGTRRA § 6428(e)).

113. *Id.* § 6428(e)(1) (codifying EGTRRA § 6428(e)(1)).

114. I.R.S. Form 1040, Instructions (2001).

ment reduces the potential credit. If the advance payment is equal to the maximum credits, the taxpayer will not be able to claim the credit. If the advance payment received is less than the amount the taxpayer is entitled to, he can offset that amount by the advance payment, and claim the excess. If the advance payment exceeds the credit to which the taxpayer is entitled, he does not need to return the excess advance payment nor include the excess amount in income.[116]

Larger Child Tax Credit

Taxpayers with a "qualifying child" may take a child tax credit.[117] The EGTRRA gradually increases the child tax credit per child to $1000 over ten years. For calendar years 2001-2004, the credit is $600.[118] The child tax credit is made refundable (whether or not the taxpayer pays any federal income tax) to the extent of 10% of the taxpayer's earned income in excess of $10,000 for calendar years 2001-2004.[119] Families with three or more children are allowed a refundable credit for the amount the taxpayer's social security taxes exceed his earned income credit (the existing-law rule) if that amount is greater than the refundable credit based on the taxpayer's earned income in excess of $10,000.[120] The refundable portion of the child tax credit does not constitute income. It also is not treated as resources for determining eligibility for any federal, state, or local program financed with federal funds, or for the amount or nature of benefits or assistance under any such program.[121]

Non-EGTRRA Changes

Lower Capital Gains Rates: Qualified Five-Year Gain

For tax years that begin after 31 December 2000, a gain from the sale or exchange of property held for more than five years that would otherwise be taxed at the 10% rate will be taxed at an 8% rate.[122] Gain from the sale or exchange of property held for more than five years, for which the holding period begins after 31 December 2000, which would otherwise be taxed at a 20% rate will be taxed at an 18% rate.[123] The holding period of any property acquired pursuant to the exercise of an option (or other right or obligation to acquire the property) includes the period such option (or other right or obligation) was held.[124] Therefore, the sale or exchange of property acquired after 2000, by exercising an option acquired before 2001, would not qualify for the 18% rate.

The 8% rate applies to post-2000 gains on qualifying assets held for more than five years, regardless of when the holding period began.[125] Thus, some 2001 gain is automatically taxed at 8%. The 18% rate, however, will not be available for a gain realized before 2006, because that rate requires the five-year holding period to start after 2000.[126] Thus, if a taxpayer sells property before 2006, the gain on the sale will be taxed at 8% to the extent it would otherwise be taxed at a rate below 25% (if it were ordinary income), and the balance of the gain will be taxed at 20%.

115. I.R.C. § 6428(d)(1) (codifying EGTRRA § 6428(d)(1)).

116. I.R.S. Form 1040, Instructions, at 36 (2001).

117. A qualifying child is a child, descendant, stepchild, or eligible foster child who is a U.S. citizen, for whom the taxpayer may claim a dependency exemption, and who is less than seventeen years old on the last day of the tax year. I.R.C. § 24.

118. *Id.* § 24(a)(2) (codifying EGTRRA § 201(a)). For calendar years 2005-2008, the credit is $700; for calendar year 2009, the credit is $800; and for calendar year 2010 and later years, the credit is $1000. *Id.*

119. *Id.* § 24(d) (codifying EGTRRA § 201(c)). The percentage is increased to fifteen percent for calendar years 2005 and thereafter. The $10,000 amount is indexed for inflation beginning in 2002. *Id.*

120. *Id.* § 24(d)(1)(B)(ii) (codifying EGTRRA § 201(c)).

121. EGTRRA, *supra* note 101, § 203.

122. I.R.C. § 1(h)(2)(A).

123. *Id.* § 1(h)(2)(B).

124. *Id.*

125. *Id.* § 1(h)(2)(A).

126. *Id.* § 1(h)(2)(B).

Deemed Sale-and-Repurchase Election

A non-corporate taxpayer may elect to treat any readily tradable stock or any other capital asset or property used in the trade or business (as defined in section 1231(b) of the Internal Revenue Code (IRC) of 1986), held by the taxpayer on 1 January 2001 (and not sold before 2 January 2001), as having been sold on 2 January 2001 for an amount equal to its closing market price or fair market value on 2 January 2001, and as having been reacquired on that date for an amount equal to the closing market price.[127] The election does not apply to assets disposed of in a transaction in which a gain or a loss is recognized before the close of a one-year period beginning on the date that the asset would have been treated as sold under the election.[128] Any gain recognized as a result of the election is recognized notwithstanding any other provision, and any loss resulting from the election is not allowed for any tax year. Once made, the deemed-sale-and-repurchase election is irrevocable.[129]

The election is made by: (1) reporting the deemed sale(s) on the timely filed return (including extensions) for the tax year that includes the deemed-sale date (calendar year taxpayers make the election on their 2001 tax returns), and (2) attaching a statement declaring that an election is being made under section 311 of the Taxpayer Relief Act of 1997 and specifying the assets for which the election applies. If the taxpayer timely filed his tax return without making the election for any asset, he can still make the election by filing an amended return within six months of the due date of the return (excluding extensions). "Election Under Section 311 of the Taxpayer Relief Act of 1997" should be written at the top of the amended return. In other words, calendar-year taxpayers may make the deemed sale-and-repurchase election as late as 15 October 2002.[130]

The above rules for property held for more than five years do not apply to collectibles gains, un-recaptured section 1250 gains, and section 1202 gains.[131] Additionally, it is not possible to effect a deemed election to qualify the property and then exclude the gain under IRC section 121.[132]

Individual Retirement Arrangements (IRAs)

The phase-out limitations increase again for 2001, potentially making it easier for more service members to make deductible contributions to a traditional IRA.[133] The phase-out limits for IRA deduction increase this year for employees covered by qualified retirement plans.[134] Because service members are active participants and have coverage by a pension or retirement plan, deductible IRA contributions are subject to limitations.[135] The adjusted gross income (AGI) limits are gradually increasing over the next several years. For 2001, married filing jointly, the phase-out begins at $53,000 and tops out at $63,000. In 2007 and thereafter the maximum range will be from $80,000 to $100,000. For single filers (including head of household), the phase-out begins at $33,000 and ends at $43,000. In 2005 and thereafter the maximum range will be from $50,000 to $60,000. For married filing separately, the limit remains $10,000.[136]

The EGTRRA increases the maximum annual dollar contribution limit for IRA contributions from $2000 to $3000 for 2002-2004, $4000 for 2005-2007, and $5000 for 2008.[137] After 2008, the limit is adjusted annually for inflation in $500 increments.[138] Individuals fifty years of age and older can make additional catch-up IRA contributions. The otherwise maximum contribution limit (before application of the AGI phase-out limits) for these individuals is increased by $500 for 2002-2005, and $1000 for 2006 and thereafter.[139]

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127. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311(e).

128. *Id.* § 311(e)(1)(A)-(B), *as amended by* Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 314(c).

129. *Id.* § 311(e).

130. COMMERCE CLEARING HOUSE, 2002 U.S. MASTER TAX GUIDE ¶ 1736 (2001).

131. I.R.C. § 1(h)(9) (LEXIS 2001).

132. Rev. Rul. 2001-57, 2001-46 I.R.B. 488.

133. I.R.C. § 219(g). For more information on IRAs in general, see I.R.S. Pub. 590, Individual Retirement Arrangements (IRAs) (2000); ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 269, FEDERAL TAX INFORMATION SERIES (Dec. 2000) [hereinafter JA 269].

134. Rev. Proc. 99-42, 1999-2 C.B. 568.

135. I.R.C. § 219(g); I.R.S. Notice 87-16; Morales-Caban v. Commissioner, 66 T.C.M. (CCH) 995 (1993).

136. I.R.C. § 219(g)(2)(A)(ii).

137. *Id.* § 219(b)(5)(A) (codifying EGTRRA § 601(a)).

138. *Id.* § 219(c).

Student Loan Interest Deduction

The student loan interest deduction continues to increase in value to the military taxpayer. For 2001, taxpayers can deduct up to $2500 of student loan interest.[140] The student loan interest deduction is taken as an adjustment to income; taxpayers do not have to itemize to qualify for this deduction.[141] The deduction declines, however, for couples with an AGI of $60,000 to $75,000. For single taxpayers, the deduction decreases with an AGI of $40,000 to $55,000.[142]

Currently, student loan interest deductions are limited to the interest paid during the first sixty months in which interest is required to be paid on an educational loan.[143] Beginning with tax year 2002, the EGTRRA repeals the limit on the number of months during which interest paid on a qualified education loan is deductible. Further, EGTRRA increases the income phase-out ranges for eligibility for the deduction to $50,000 through $65,000 for single taxpayers and to $100,000 through $130,000 for married taxpayers filing joint returns. These income phase-out ranges will be adjusted annually for inflation after 2002.[144]

Earned Income Credit (EIC)[145]

The refundable EIC is available to certain low-income individuals who have earned income, meet adjusted gross income thresholds, and do not have more than a certain amount of disqualified income.[146] Beginning in 2001, the EIC is denied if the aggregate amount of disqualified income exceeds $2450 ($2400 in 2000).[147]

Tax Form Changes

The biggest change on the tax forms for 2001 is the addition of a line to claim the rate-reduction credit.[148] Form 1040A adds line 30 and Form 1040 adds line 47, and treats the rate-reduction credit as it would any other non-refundable credit. Form 1040EZ adds line 7, and treats any rate reduction credit due as an addition to the credits, payments, and tax—essentially treating any rate-reduction credit due as an additional withholding or a refundable credit.

Additionally, all three forms include a space near the end of the return to appoint a "Third Party Designee." A taxpayer should complete this if he wishes to allow a friend, family member, or any other person to discuss his 2001 tax return with the IRS.[149]

Mailing Locations for Tax Returns

Some taxpayers will mail their tax returns to a different IRS Service Center this year because the IRS changed the filing location for several areas. Taxpayers should mail their tax returns to the address on the envelope they received with their tax package, or they should determine the proper mailing address in the Form 1040 Instruction Booklet. Lieutenant Colonel Parker.

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139. *Id.* § 219(b)(5)(B).

140. *Id.* § 221(b)(1).

141. *Id.* § 62(a)(17).

142. *Id.* § 221(b)(1)(B).

143. *Id.* § 221(d); Prop. Reg. §1.221-1(e)(1).

144. I.R.C. § 221 (codifying EGTRRA § 412). For more information on the student loan interest deduction, see Major Richard Rousseau, TJAGSA Practice Notes, *Internal Revenue Service Restructuring and Reform Act of 1998*, ARMY LAW., Nov. 1998, at 44-45; Major Richard Rousseau, TJAGSA Notes, *Update for 1999 Federal Income Tax Returns*, ARMY LAW., Dec. 1999, at 30.

145. I.R.C. § 32. For more information, see I.R.S. Pub. 596, Earned Income Credit (2000).

146. I.R.C. § 32(a), (i). Disqualified income includes capital gain net income and net passive income in addition to interest, dividends, tax-exempt interest, and non-business rents or royalties. *Id.*

147. *Id.* § 32(j)(1); Rev. Proc. 99-42, 1999-2 C.B. 568.

148. *See supra* notes 110-16 and accompanying text.

149. I.R.S. Form 1040, Instructions, at 53 (2001).

2001 Numerology

Tax Rates[150]

The 2001 tax rates by filing status are:

Married Filing Jointly and Qualifying Widow(er):

Taxable Income	Marginal Tax Rate
$1 - 45,200	15%[151]
45,200 - 109,250	27.5%
109,250 - 166,500	30.5%
166,500 - 297,350	35.5%
over 297,350	39.1%

Single:

Taxable Income	Marginal Tax Rate
$1 - 27,050	15%
27,050 - 65,550	27.5%
65,550 - 136,750	30.5%
136,750 - 297,350	35.5%
over 297,350	39.1%

Head of Household:

Taxable Income	Marginal Tax Rate
$0 - 36,250	15%
36,250 - 93,650	27.5%
93,650 - 151,650	30.5%
151,650 - 297,350	35.5%
over 267,350	39.1%

Married Filing Separately:

Taxable Income	Marginal Tax Rate
$1 - 22,600	15%
22,600 - 54,625	27.5%
54,625 - 83,250	30.5%
83,250 - 148,675	35.5%
over 148,675	39.1%

150. I.R.C. § 1.

151. A 10% rate bracket, which would otherwise apply, is not in effect for 2001. It is made inapplicable for any tax year to which I.R.C. section 6428 applies (that is, the 2001 rate-reduction credit and the advanced refund of that credit). *Id*. § 1(i)(1)(A)(i), (D). Thus, for 2001, the rate-reduction credit applies in lieu of the 10% tax rate bracket for 2001. For 2002 and later years, a 10% tax rate bracket applies. *Id*. § 1(i)(1)(A)(i). There is no 10% tax rate bracket for trusts and estates as there is for individuals. *See id*.

Estates and Trusts

Taxable Income	Marginal Tax Rate
$1 - 1800	15%
1800 - 4250	27.5%
4250 - 6500	30.5%
6500 - 8900	35.5%
over 8900	39.1%

Standard Deduction

Married Filing Jointly or Qualifying Widow(er) – 2001: $7600 ($7350 in 2000; $7850 projected for 2002).
Single – 2001: $4550 ($4400 in 2000; $4700 projected for 2002).
Head of Household – 2001: $6650 ($6450 in 2000; $6900 projected for 2002).
Married Filing Separately – 2001: $3800 ($3675 in 2000; $3925 projected for 2002).

Reduction of Itemized Deductions

Otherwise allowable itemized deductions are reduced if AGI exceeds:

Married Filing Separately: $66,475.
All other returns: $132,950.

Personal Exemptions

Higher personal exemption deduction – 2001: $2900 (up from $2800 in 2000; $3000 projected for 2002).

2001 Phase-Out Amounts for Personal Exemptions:

Taxpayer	Begins After
Married Filing Jointly	$199,450
Single	$132,950
Head of Household	$166,200
Married Filing Separately	$ 99,725

Foreign Earned Income Exclusion[152]

Higher exclusion for 2001: $78,000 (was $76,000 in 2000; will be $80,000 in 2002 and thereafter).[153]

152. *Id.* § 911. For more information on the Foreign Earned Income Exclusion, see I.R.S. Pub. 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad (2000); I.R.S. Pub. 516, TAX Information for U.S. Government Civilian Employees Stationed Abroad (2000); I.R.S. Pub. 593, Income Tax Benefits for Citizens Who Go Overseas; JA 269, *supra* note 133, at 64-70.

153. I.R.C. § 911(b).

Earned Income Credit

Number of Children	Maximum Amount of the Credit	Earned Income Amount	Threshold Phase-Out Amount	Completed Phase-Out Amount
1	$2428	$7100	$13,100	$28,281
2	$4008	$10,000	$13,100	$32,121
None	$364	$4750	$5950	$10,710

Auto Standard Mileage Allowances

If a taxpayer can use an automobile for business, medical, charity, or moving purposes, the taxpayer is allowed a standard mileage deduction rate. For 2001, the rates are:

Business: 34.5 cents per mile.
Charity: 14 center per mile.
Medical or Moving: 10 cents per mile.

Lieutenant Colonel Parker.

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 law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

Pending Legislation Targets Military Environmental Compliance

On 13 June 2001, Representative Bob Filner (D-CA) introduced legislation entitled "The Military Environmental Responsibility Act" (MERA).[1] The MERA has been referred to various subcommittees and is still in the early stages of the legislative process. Nevertheless, this legislation has already sparked questions and some debate, making it worthy of a brief summary for the benefit of field practitioners.

At a news conference, Congressman Filner described the military as "environmentally unaccountable for the last several decades."[2] It is with this mindset that he introduced the MERA. The MERA basically seeks to "entirely waive any and all sovereign immunity" under all federal and state laws designed to protect the environment or the health and safety of the public.[3] At a glance, this language seems like an extension of the Federal Facilities Compliance Act (FFCA) of 1992.[4] A closer read, however, reveals that the waiver of sovereign immunity does not apply to all federal facilities as it does under the FFCA.

Under the MERA, the proposed waiver of sovereign immunity applies to "federal defense agencies." The bill defines "federal defense agencies" to include: the Department of Defense (DOD); the Department of Energy (DOE); the Nuclear Regulatory Commission; the Office of Naval Nuclear Reactors; any other defense-related agency of the United States designated by the President; and installations, facilities, and operations of DOD and other defense-related agencies, both inside and outside the United States.[5] In other words, the MERA's reach does not apply equally to all federal facilities. Rather, the MERA focuses only on DOD, DOE, and related organizations.[6]

The MERA is intended to apply to the following environmental statutes: the Atomic Energy Act of 1954; the Clean Air Act; the Comprehensive Environmental Response, Compensa-

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1. H.R. 2154, 107th Congress (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h2154ih.txt.pdf.

2. Hearst News Service, *Bill Would Apply Environmental Rules to Military*, DALLAS MORNING NEWS, June 16, 2001, at 5A.

3. H.R. 2154 § 2(2). Note that the Safe Drinking Water Act, 42 U.S.C.S. §§ 300f to 300j-26 (LEXIS 2001), and the Solid Waste Disposal Act, *id*. §§ 6901-6992k, are not covered by the MERA because these laws already contain sovereign immunity waiver provisions "that otherwise appropriately provide for protection of the environment and the health and safety of the public." H.R. 2154 § 3(c).

4. 42 U.S.C.S. § 6961(a).

> In general. *Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government* (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.

Id. (emphasis added).

5. H.R. 2154 § 3(a).

6. *See id*.

tion, and Liability Act of 1980; the Coastal Zone Management Act of 1972; the Department of Energy Organization Act; the Emergency Planning and Community Right-to-Know Act of 1986; the Endangered Species Act of 1973; the Federal Water Pollution Control Act; the Marine Mammal Protection Act of 1972; the National Environmental Policy Act of 1969 (NEPA); the Noise Control Act of 1972; the Nuclear Waste Policy Act of 1982; the Occupational Safety and Health Act of 1970; the Oil Pollution Act of 1990; and the Robert T. Stafford Disaster Relief and Emergency Assistance Act. This, however, is not an exhaustive list.[7]

In short, the MERA subjects each federal defense agency to both the substantive and procedural requirements of the applicable laws mentioned above "in the same manner and to the same extent as any individual is subject to those requirements."[8] The MERA goes on to address exemptions by providing for the revocation of "any exemption otherwise applicable to a Federal defense agency."[9] The bill includes language expanding the basis for citizen suits,[10] but contains no rationale explaining why such expansion is desirable. The bill also seeks to limit the use of presidential exemption authority, without citing a basis for concluding that DOD has abused or attempted to abuse the exemption provisions.[11] Another provision mandates liberal judicial interpretation of the MERA "to effect the intent of Congress."[12] The MERA also specifically subjects weapon system development and procurement to compliance with the NEPA.[13] Notably, there is no provision in the bill that addresses classified information.

When Congressman Filner introduced the MERA , various grassroots groups endorsed the legislation. These included national organizations such as: Military Toxics Project, Indigenous Environmental Network, Center for Marine Conservation, and the Center on Conscience and War. Various other state and local groups have also endorsed the bill.[14]

Clearly, the "purpose" section of the MERA states a strong intent to waive sovereign immunity and revoke exemptions with respect to defense-related agencies.[15] What remains unclear is the rationale for focusing on defense-related agencies in this manner. The bill fails to refer to any factual findings or other empirical data to support or validate the MERA's purpose.

In July 2001, the DOD was given an opportunity to comment on the bill. In the comments, DOD characterized as "false" the premise that DOD is exempt from environmental laws. The comments also noted that DOD is subject to environmental constraints not imposed on the private sector. The comments further emphasized that the limited military exemptions currently allowed by law result from carefully balanced consideration of all interests.[16]

There has been no action on the MERA in either the Senate or the House of Representatives since the terrorist attacks on 11 September 2001; however, the legislation is still pending. Meanwhile, on 5 October 2001, a group of ten members of Congress sent a letter to the Secretary of Defense inquiring about DOD's policy for invoking the National Security Waiver exemption under the Endangered Species Act (ESA).[17] The letter notes that, to date, the Secretary of Defense has never invoked the exemption and has no process in place for reviewing the exemption should it ever be invoked.[18]

When this letter is read in the context of the MERA's focus on defense-related agencies, one can readily surmise a wide range of opinions about the degree of DOD's environmental accountability. At a minimum, some unbiased empirical data would assist Congress in evaluating the proposed legislation.

Personnel can track the progress of the MERA at http://thomas.loc.gov. This Web site provides a copy of the bill and a

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7. *Id*. § 3(c). The MERA includes these statutes and their analogous state counterparts "at a minimum." *Id*.

8. *Id*. § 3(b).

9. *Id*.

10. *Id*. § 3(g).

11. *See id*. § 3(e).

12. *Id*. § 3(h).

13. *Id*. § 4.

14. *See* Military Toxics Project, *Endorsers of the Military Responsibility Act, at* http://www.miltoxproj.org/HCC/Endorsers.htm (last visited Oct. 23, 2001).

15. H.R. 2154 § 2.

16. Interview with Lieutenant Colonel Jacqueline R. Little, Chief, Compliance Branch, Army Envtl. Law Div., U.S. Army Legal Servs. Agency (Oct. 23, 2001).

17. Letter from Ten Members of Congress to Sec'y of Defense Donald H. Rumsfeld (Oct. 5, 2001) [hereinafter ESA Letter] (on file with author). The ESA is one of the statutes for which the MERA would seek to abolish exemptions for national security. *See supra* note 7 and accompanying text.

18. ESA Letter, *supra* note 17.

chronology of the bill's progression in the legislative process. Major Arnold.

District of Columbia District Court Puts Advisory Council on Historic Preservation in Its Place

In a recent case, oddly hailed as a victory by the Advisory Council on Historic Preservation (Council), the District Court for the District of Columbia made rulings that dramatically impact federal agency compliance with section 106 of the National Historic Preservation Act (NHPA).[19] In *National Mining Association v. Slater*,[20] the National Mining Association (NMA) and the Cellular Telecommunications & Internet Association (CTIA) brought suit under the Administrative Procedures Act[21] to set aside the Council's final rule (Final Rule)[22] setting forth revised regulations for implementation of section 106. After determining that plaintiffs had demonstrated standing and ripeness, the court reviewed the parties' cross-motions for summary judgment. Based on its review, the court dismissed the majority of plaintiffs' claims. It did find, however, that two important provisions of the Council's regulations were substantive rather than procedural and thus violated the plain language of the NHPA.[23]

Section 106 of the NHPA (Section 106) sets forth two basic compliance requirements.[24] Before authorizing any project that may affect a historic property,[25] an agency must first consider the project's effects and thereafter provide the Council a reasonable opportunity to comment on the project. Federal agencies, including the Army, comply with these mandates by following the detailed case-by-case regulatory review procedures set forth in part 800 of Title 36, Code of Federal Regulations (CFR), "Protection of Historic Properties."[26] After Congress amended the NHPA in 1992, the Council consulted with a wide range of stakeholders and determined that regulator revisions were necessary in light of the congressional amendments.[27] The Council therefore initiated the rule-making process; it published the new regulations on 18 May 1999.[28] Following a legal challenge by the NMA, the Council withdrew the regulations, reopened the rule-making process, and on 12 December 2000 the Council published a Final Rule.[29] The NMA and CTIA challenged the Final Rule in *National Mining Association*.[30]

The Final Rule, like its predecessor regulations, established a basic process by which federal agencies identify properties and evaluate their historic significance, assess the effects of their actions on such properties, consider alternatives to avoid adverse effects, and enter into agreements to mitigate adverse effects when they cannot be avoided.[31] The court did not find any legal deficiencies with this basic procedural framework.[32] It was concerned, however, that the Council strayed from procedural to substantive mandates.[33]

The court observed that Congress, through Section 106, had imposed "procedural" obligations on federal agencies but reserved to such agencies the sole duty to make "effects" determinations.[34] The court found that the Council strayed impermissibly beyond the plain language of the statute when it

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19. *See* 16 U.S.C.S. § 470-470w (LEXIS 2001).

20. Nat'l Mining Ass'n v. Slater, Cellular Telecomm. & Internet Ass'n v. Slater, Nos. 00-00288 and 01-00404, consolidated op. 2001 U.S. Dist. LEXIS 14694 (D.D.C. Dec. 18, 2001) [hereinafter Nat'l Mining Ass'n].

21. 5 U.S.C.S. §§ 701-706 (LEXIS 2001).

22. The Final Rule is published at 65 Fed. Reg. 77,698 (Dec. 12, 2001) (to be codified at 36 C.F.R. pt. 800).

23. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *2.

24. *See* 16 U.S.C.S. § 470f (LEXIS 2001).

25. A historic property is any site, district, structure or object that is either listed or eligible for listing in the National Register of Historic Places. *See* 36 C.F.R. § 800.16(l) (LEXIS 2001).

26. *Id*. pt. 800.

27. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *12.

28. *Id*. at *14.

29. *Id*. at *14-15.

30. *Id*. at *15.

31. *See* 36 C.F.R. § 800.3-.7 (LEXIS 2001).

32. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *46.

33. *Id*. at *52.

imposed "substantive" mandates by reserving the right to second-guess federal agency "effects" determinations and force further section 106 consultation.[35]

The court concluded that this occurred in two provisions of 36 CFR part 800: subparts 4(d)(2) and 5(c)(3).[36] The former provision forces an agency to continue Section 106 consultation if the Council disagrees with the agency's conclusion that there are *no historic properties affected* by the proposed action.[37] The latter provision authorizes the Council to force further Section 106 consultation if it second-guesses the agency's conclusion that an action will have *no adverse effects* on historic properties.[38] The court explained:

> Both of these provisions cross the line from procedure into substance because they require an agency to proceed with the Section 106 process in the face of that agency's own determination to the contrary. '[T]he practical consequences of the[se] provisions would have been such as to interfere with [an agency's] ability to exercise its statutorily guaranteed prerogatives.' Both of these provisions plainly give the [Council] the authority to review and effectively reverse—at least for the purpose of continuing the Section 106 process—the agency's determination with respect to the effects of an undertaking on historic properties. Making that determination, however, is the one substantive role that is expressly delegated to the agency in Section 106 of the Act. Sections 800.4(d)(2) and 800.5(c)(3) thereby enable the Council to interfere directly with the agency's responsibility in this respect, and as such, they are impermissible substantive regulations.[39]

This decision provides much needed clarification to the distinct roles played by federal agencies and the Council in the Section 106 review process. It unequivocally pronounces that federal agencies are solely responsible for the determination of effects on historic properties.[40] Should this ruling stand on appeal, the Council, at the behest of dissatisfied stakeholders, including State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs), will no longer have the authority to second-guess an agency's "no historic properties affected" and "no adverse effect" findings. In recognition of this limitation, the Council recently issued the following interim guidance:

> [T]he Council plans to provide opinions to Federal agencies regarding their "no historic properties affected" findings, pursuant to Section 800.9(a) of its regulations, whenever appropriate. However, such opinions will be advisory and will not require the Federal agencies to continue to the next step in the Section 106 process.
>
> In the event that a SHPO/THPO does not agree with a finding of "no historic properties affected," the agency official should notify the Council and seek an advisory opinion. The Council believes this interim step, while not mandatory, would help resolve disputes and avoid the potential for litigation or other delays.
>
> The Council will continue reviewing "no adverse effect" disputes referred to it under Section 800.5(c)(2) within the allotted 15 day period. Nevertheless, the Council's opinion on such matters will be advisory and will not require agencies to proceed to the next step in the process.[41]

Environmental law specialists at the installation level should provide cultural resource managers with copies of *National Mining Association* and the Council's interim guidance, and explain their implications. The court's ruling, as implemented by the Council's interim guidance, imposes a significant departure from the traditional Section 106 process, particularly the authoritative roles of the Council and the SHPO/THPO. Mr. Farley.

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34. *Id*.

35. *Id*. at *58-60.

36. *Id*. at *61.

37. 36 C.F.R. § 800.4(d)(2) (LEXIS 2001).

38. *Id*. § 800.5(c)(3).

39. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *58-60 (quoting Dep't of the Treasury v. Federal Labor Relations Authority, 857 F.2d 819, 821 (D.C. Cir. 1994)) (internal citations omitted).

40. *Id*. at *45-46.

41. Advisory Council on Historic Preservation, *Section 106 Regulations Users Guide*, *at* http://www.acgo.giv/news-regsopinion.html (last visited Oct. 23, 2001).

Encroachment: Putting the "Squeeze" on the Department of Defense (DOD)

Over the past year, DOD and the armed services (Services) conducted a rigorous analysis of "encroachment" and impacts on military testing and training. From DOD's perspective, encroachment includes external influences, such as environmental laws and regulations, threatening or constraining testing and training activities on DOD ranges and facilities required for force readiness and weapons acquisition.[42] Corresponding impacts involve restrictions on available locations, times, and duration, and reduced effectiveness, of testing and training activities.[43] Additional adverse impacts involve restrictions on weapons systems, equipment, and munitions used during testing and training.[44] The Department's interest in these restrictions on military training has been accompanied by increased congressional concern as exhibited by Senate Armed Services Committee (SASC), House Committee on Government Reform (HCGR), and House Armed Services Committee (HASC) formal hearings focused on this issue.[45]

Within DOD, the Senior Readiness Oversight Council (SROC), chaired by the Deputy Secretary of Defense, first addressed encroachment issues affecting test and training ranges in June 2000. At that session, the Service Chiefs of Staff briefed the SROC regarding constraints on their respective ranges, and how those constraints affect the conduct and character of training.[46] Although direct effects of any specific limitation vary by range and activity, DOD is concerned with a number of issues.[47] In November 2000, the SROC's initial review focused on the following nine range-related issues and action plans to address the encroachment of environmental requirements affecting DOD: Endangered Species Act and Critical Habitat (Marine Corps lead), Unexploded Ordnance and Munitions (Army lead, Office of the Deputy Chief of Staff for Operations (Training)), Bandwidth and Frequency Encroachment (Office of the Secretary of Defense lead), Maritime Sustainability (Navy lead), National Airspace System (Air Force lead), Air Quality (Navy lead), Airborne Noise (Air Force lead), Urban Growth (Marine Corps lead), and an Outreach Plan (DOD Defense Test and Training Steering Group lead).[48] The Services continue to refine those action plans, and look toward the future to address overseas ranges, space, airspace restrictions, water use, cultural resources, ecosystem and biodiversity, and land use.

The Army, like other services, has found itself struggling to reconcile environmental compliance requirements with the need for realistic training.[49] To ensure that the Army is ready to accomplish its primary mission of fighting and winning in armed conflict, soldiers, leaders, and units must receive proper training.[50] Effective training must provide soldiers with opportunities to develop and improve proficiency, competence, and confidence in the use of sophisticated weapons systems under combat-like conditions.[51] Those conditions must be realistic and physically and mentally challenging.[52]

Environmental encroachment limits the Army's ability to conduct realistic training and adequate testing activities.[53] "The Army's primary encroachment concerns are urban sprawl,

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42. *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001) (statement of Major General Robert L. Van Antwerp, Assistant Chief of Staff for Installation Mgmt., at 5) [hereinafter Van Antwerp Statement], *available at* http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/01-05-22vanantwerp.html.

43. *Fiscal Year 2002 Army Budget: Hearing Before the Defense Subcomm. of the Senate Appropriations Comm.*, 107th Cong. (2001) (written responses to questions by General Eric K. Shinseki).

44. *Id.* at 1.

45. *See Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001), *available at* www.house.gov/reform/military/index.htm; *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://commdocs.house.gov/committees/security/has142030.000/has142030_0x.htm; *Range Encroachment Hearing Before the Readiness and Mgmt. Support Subcomm. of the Senate Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://www.senate.gov/~armed_services/hearings/2001/r010320.htm.

46. *See* DEP'T OF DEFENSE MONTHLY READINESS REPORT TO CONGRESS 2 (Dec. 2000) [hereinafter DOD READINESS REPORT].

47. *Id*. at 2; *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001) (statement of Mr. Joseph J. Angello, Jr., Acting Deputy Under Sec'y of Defense for Readiness, at 6) [hereinafter Angello Statement], *available at* http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/01-05-22angello.html.

48. DOD READINESS REPORT, *supra* note 46, at 2-3.

49. *See generally Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001) (statement of Lieutenant General Larry R. Ellis) [hereinafter Ellis Statement], *available at* www.house.gov/reform/hearings/05.09.01/ellis.htm.

50. *Id.* at 2.

51. *Id.*

52. *Id*; *see also* Van Antwerp Statement, *supra* note 42, at 3.

threatened and endangered species, and restrictions that impact munitions use."[54] Until the last thirty years, Army training lands had been remote areas with little residential or commercial development. Public awareness of live training activities was minimal.[55] Population and economic growth around installations have caused ranges and training lands to become "islands of biodiversity," thereby increasing their value as natural resources.[56] Additionally, the Army has created environmental concerns by using a variety of weapons on its ranges and training lands for many years. The Army leadership has called for a more balanced approach that would ensure that environmental statutes and regulator decisions consider the importance of our national defense mission and recognize readiness as a positive societal good and a legal mandate.[57] In testimony to Congress, the Army expressed a desire to work with other federal agencies, Congress, and the Administration to reduce uncertainty and increase flexibility in laws and regulations to ensure a balance between national security and environmental needs.[58]

When Congress conducted formal hearings and asked the military services about encroachment and its impacts on training and readiness, the Army staff leadership presented its concerns. On 20 March 2001, the Army's Assistant Chief of Staff for Installation Management (ACSIM) and other service representatives testified at the SASC Subcommittee on Readiness and Management encroachment hearings.[59] The ACSIM, other service representatives, and the Acting Deputy Under Secretary of Defense for Readiness testified at the 22 May 2001 HASC, Subcommittee on Military Readiness encroachment hearing, "Constraints and Challenges Facing Military Test and Training Ranges."[60]

The HCGR visited Fort Hood, Texas, in April 2000. On 9 May 2001, the Army's Deputy Chief of Staff for Operations and Plans and the Commanding General, III Corps and Fort Hood, testified at the Committee's hearing, "Challenges to National Security: Constraints on Military Training," regarding encroachment impacts on readiness and training.[61] The HCGR requested that the U.S. General Accounting Office (GAO) review the limitations placed on the military's use of U.S. ranges. Accordingly, on 2 May 2001, the GAO wrote to the Secretary of Defense indicating that it will review training limitations and increased costs for alternative training arrangements due to environmental encroachment and other constraints.[62] The GAO also announced that, at the SASC Readiness Subcommittee's request, the GAO is reviewing limitations on the ability of U.S. forces to train overseas.[63]

Since the service representatives testified at the congressional encroachment hearings, correspondence continues to illustrate the hotly contested nature of this issue. On 24 May 2001, the Chairmen of the HCGR and the House Committee on Resources, as well as fourteen other members of Congress, wrote to President Bush urging him to initiate government reforms that address encroachment impacts because "these problems are affecting the ability of our forces to fight."[64] They stressed that the central question is how to cooperatively balance the important national interests of readiness, environment, development, and commercial aviation. Their letter enclosed a tape of the HCGR hearing and a copy of the witnesses' testimony.[65] On 31 May 2001, twenty-nine state attorneys general signed a letter from the National Association of Attorneys General (NAAG) to the SASC, HASC, Senate Environment and Public Works Committee, and House Committee on Energy

53. Van Antwerp Statement, *supra* note 42, at 5.

54. *Id.* at 6.

55. Ellis Statement, *supra* note 49, at 4.

56. *Id.* at 5; Angello Statement, *supra* note 47, at 5.

57. Ellis Statement, *supra* note 49, at 4.

58. Van Antwerp Statement, *supra* note 42, at 11.

59. *See Range Encroachment Hearing Before the Readiness and Mgmt. Support Subcomm. of the Senate Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://www.senate.gov/~armed_services/hearings/2001/r010320.htm.

60. *See Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://commdocs.house.gov/committees/security/has142030.000/has142030_0x.htm.

61. *See Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001), *available at* www.house.gov/reform/military/index.htm.

62. Letter from Barry W. Holman, Director, Defense Capabilities and Mgmt., U.S. Gen'l Accounting Office, to Sec'y of Defense Donald H. Rumsfeld (May 2, 2001) (on file with author).

63. Letter from Neal P. Curtin, Director, Defense Capabilities and Mgmt., U.S. Gen'l Accounting Office, to Sec'y of Defense Donald H. Rumsfeld (May 17, 2001) (on file with author).

64. Letter from Representative Dan Burton and Representative James V. Hansen, House Comm. on Gov't Reform, to President George W. Bush (May 24, 2001) (on file with author).

and Commerce in response to the SASC 20 March 2001 encroachment hearing.[66] The NAAG members stressed "that federal agencies are not above the law" and that extensive consultation with the states and congressional hearings (with the opportunity for interested parties to present their views) should occur before considering any proposal to exempt or limit federal agency obligations under environmental laws.[67]

For now, the encroachment issue remains contentious and highly divisive in Congress. In the DOD arena, the military services, with the DOD as the lead, will continue to analyze and develop responses to encroachment and the effects on testing and training activities. Lieutenant Colonel Schenck.

Procurement Fraud Division Note

It is widely known within the government contracting field that a suspended or debarred firm may continue, under certain conditions and types of contracts, to do business with the government even after being placed on the General Service Administration (GSA) *List of Parties Excluded From Federal Procurement and Nonprocurement Programs* (*List*).[68] In particular, under indefinite delivery/indefinite quantity (IDIQ) contracts, the Federal Acquisition Regulation (FAR) permits contracting activities to place orders with a suspended or debarred contractor.[69] What may be less well known, however, is that for Department of Defense contracting activities, reliance on the FAR provision alone as authority for continued dealings with GSA-listed contractors could lead to the improper award of IDIQ contract delivery orders.

The effect of "listing" with the GSA is sweeping. Federal Acquisition Regulation section 9.405 states:

> 9.405 Effect of Listing
>
> (a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head or a designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.[70]

The FAR, however, does not preclude the continuation of existing contracts with listed contractors. Rather, under FAR 9.405-1(a), "agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head or a designee directs otherwise."[71] Specifically, FAR 9.405-1(b) sanctions the continued placement of "orders against existing contracts, including indefinite delivery contracts, in the absence of termination."[72]

A contracting officer who reads no further than these provisions may conclude that he is free, without limitation, to place orders against existing IDIQ contracts. For contracting activities subject to the Defense Federal Acquisition Regulation Supplement (DFARS), however, further inquiry is necessary before issuing delivery orders under an existing IDIQ contract with a GSA-listed contractor.

Defense Federal Acquisition Regulation Supplement 209.405-1(b) states: "Unless the agency head makes a written determination that a compelling reason exists to do so, ordering activities shall not (i) [p]lace orders exceeding the guaranteed minimum under indefinite quantity contracts; or (ii) [w]hen the agency is an optional user, place orders against Federal Supply Schedule contracts."[73] Thus, for IDIQ contracts with a GSA-listed contractor, the contracting officer must know whether the guaranteed minimum order amount has been reached.[74] For Federal Supply Schedule (FSS) contracts, however, DFARS 209.405-1(b) completely negates the FAR exemption.[75]

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65. *Id*.

66. Letter from the Nat'l Ass'n of Att'ys Gen'l to the Senate Armed Servs. Comm., House Armed Servs. Comm., Senate Environment and Public Works Comm., and House Comm. on Energy and Commerce (May 31, 2001) (on file with author).

67. *Id*. at 1.

68. *See* Acquisition Reform Network, *List of Parties Excluded From Federal Procurement and Nonprocurement Programs*, Excluded Parties List System, *at* http://epls.arnet.gov/epls_reports/EPLR_PN.LIS (last modified Dec. 12, 2001).

69. 48 C.F.R. § 9.405(a) (LEXIS 2001).

70. *Id*.

71. *Id.* § 9.405-1(a).

72. *Id*. § 9.405-1(b).

73. *Id*. § 209.405-1(b).

Government contracting professionals must remember the DFARS limitation on continued IDIQ contracts. Following the placement of a firm under an existing IDIQ contract on the GSA *List*, the contracting officer should compare the level of orders issued to the guaranteed minimum. Where there is still "room" under an IDIQ contract's guaranteed minimum, a contracting officer who elects to continue the contract must closely monitor future orders. When the guaranteed minimum has been reached, further delivery orders should cease. For FSS contracts, however, contracting activities must refrain immediately from issuing delivery orders to GSA-listed contractors.

Widespread knowledge of the FAR's permissiveness regarding the continuation of dealings under IDIQ contracts, combined with ignorance of the DFARS restrictions on such dealings, is a recipe for improper contract actions and protests. Lieutenant Colonel O'Keeffe.

74. *See id*. § 209.405-1(b)(i).

75. *See id*. § 209-405.1(b)(ii).

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-OPB, 1 Reserve Way, 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, 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

2001

December 2001

3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-12 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
10-14 December	4th Fiscal Law Comptroller Accreditation Course—Hawaii (**Tentative**) (5F-F14).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
6-18 January	2002 JAOAC (Phase II) (5F-F55).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
14-18 January	2002 USAREUR Tax CLE (5F-F28E).
23-25 January	8th RC General Officers Legal Orientation Course (5F-F3).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
3-8 February	2002 USAREUR Operational Law CLE (5F-F47E).
4-8 February	2nd Closed Mask Training (512-27DC3).
4-8 February	77th Law of War Workshop (5F-F42).
11-14 February	2002 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

25 February- 26 April	7th Court Reporter Course (512-27DC5).
28 January 8 February	4th Voice Recognition Training (512-27DC4).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).
18-22 March	4th Contract Litigation Course (5F-F102).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	Domestic Operational Law Workshop (5F-F45).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Paralegal NCO Course (512-27D/20/30).
22-26 April	2002 Combined WWCLE (5F-2002).
29 April- 10 May	148th Contract Attorneys Course (5F-F10).
29 April- 17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	5th Intelligence Law Workshop (5F-F41).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June- 28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Paralegal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Paralegal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June- 6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).
15 July- 2 August	MCSE Boot Camp.
15 July- 13 September	8th Court Reporter Course (512-27DC5).
29 July- 9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

1 February ICLE	Jury Selection & Persuasion Atlanta, Georgia
28 February ICLE	Advanced Criminal Practice Kennesaw State University Atlanta, Georgia
28 February-1 March ICLE	Trial Evidence Atlanta, Georgia
15 March ICLE	Effective Closing Arguments Atlanta, Georgia
22 March ICLE	Advocacy & Evidence 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	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July 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	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September/ October 2001 issue of *The Army Lawyer.*

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

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

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 by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 Ocotber 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRNG SITE/HOST UNIT	COURSE NUMBER*	CLASS NUMBER	SUBJECT	ACTION OFFICER
5-6 Jan 02	Long Beach, CA 63rd RSC	JA0-41 JA0-21	924 930	Operational Law; Operations other than War; Administrative Law (Legal Assistance)	CPT Paul McBride (760) 634-3829 ncsdlaw@pacbell.net
2-3 Feb 02	Seattle, WA 70th RSC/WAARNG	JA0-21 JA0-31	931 924	Administrative Law (Legal Assistance); Criminal Law	LTC Greg Fehlings (206) 553-2315 Gregory.e.fehlings@usdoj.gov
8-10 Feb 02	Columbus, OH 9th LSO	JA0-41 JA0-21	926 932	Operational Law; Law of War; Administrative Law	SSG Lamont Gilliam (614) 693-9500
16-17 Feb 02	Indianapolis, IN INARNG	JA0-31 JA0-21	926 933	Criminal Law; Administrative Law	LTC George Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
23-24 Feb 02	West Palm Beach, FL 174th LSO/FLARNG	JA0-31 JA0-41	925 925	Criminal Law (Administrative Separation Boards); Operational/Deployment Law; Ethics Tape	LTC John Copelan (305) 779-4022 john.copelan@se.usar.army.mil
2-3 Mar 02	Denver, CO 96th RSC/87th LSO	JA0-21 JA0-31	934 927	Administrative Law (Legal Assistance/Claims)); Criminal Law	LTC Vince Felletter (970) 244-1677 vfellett@co.mesa.co.us
9-10 Mar 02	Washington, DC 10th LSO	JA0-41 JA0-11	927 920	Operational Law; Contract Law	CPT James Szymalak (703) 588-6750 James.Szymalak@hqda.army.mil
9-10 Mar 02	San Mateo, CA 63rd RSC/75th LSO	JA0-41 JA0-11	928 921	International Law (Information Law); Contract Law; Ethics Tape	MAJ Adrian Driscoll (415) 274-6329 adriscoll@ropers.com
16-17 Mar 02	Chicago, IL 91st LSO	JA0-21 JA0-11	935 924	Administrative Law (Claims); Contract Law	MAJ Richard Murphy (309) 782-8422 DSN 793-8422 murphyr@osc.army.mil
12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC	JA0-21 JA0-11	936 922	Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
22-26 Apr 02	Charlottesville, VA OTJAG	5F-2002	002	Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO	JA0-31 JA0-21	929 937	Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov
27-28 Apr 02	Newport, RI 94th RSC	JA0-31 JA0-11	930 923	Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil
4-5 May 02	Gulf Shores, AL 81st RSC/ALARNG	JA0-31 JA0-21	928 938	Criminal Law (Administrative Separation Boards); Administrative Law (Legal Assistance); Ethics Tape	MAJ Carrie Chaplin (205) 795-1516 carrie.chaplin@se.usar.army.mil

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

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

For a complete listing of TJAGSA Materials Available through the DTIC, see the September/October 2001 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September/October 2001 issue of *The Army Lawyer.*

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password,* contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the September/October 2001 issue of *The Army Lawyer*.

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional 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 at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessi-

ble e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

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 Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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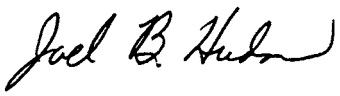

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