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Address changes for official channels distribution: Provide changes to the Editor, The Army Lawyer, TJAGSA, 600 Massie Road, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or e-mail: stroncj@hqda.army.mil.

Issues may be cited as Army Law., [date], at [page number].

Periodicals postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

The Scarlet Letter and the Military Justice System

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Introduction

Adultery as a criminal offense in the military justice system is a controversial topic of late, attracting attention from the general public, the Congress, and the media.[1] A major problem for all concerned is that the reportage has not always accurately described the military offense of adultery or its place in the military justice system.[2] The purpose of this article is to inform the military justice practitioner concerning the offense of adultery as it is recognized by military law. The article will first consider the concept of adultery independent of the substantive criminal law.[3] It will then examine the military offense of adultery, beginning with those characteristics of the offense that are common to proscriptions of this type.[4] The article will then discuss those aspects of the military offense of adultery most likely to challenge practitioners and surprise commentators: the requirement for proof of prejudicial or discrediting effects stemming from the adulterous conduct;[5] the limitation of the offense to acts of wrongful intercourse;[6] and the relationship of adultery to other sexual offenses recognized in the military justice system.[7] This article is not intended to be a comprehensive treatise concerning the criminal aspects of adultery, nor is it a critical treatment of the topic. The primary goal in publishing this work is to provide the interested reader with an introduction to the military offense of adultery, from which additional research may be launched or critical opinions formed.[8]

What Is Adultery?

The word adultery is derived from the Latin verb *adulterare*, which means to alter, pollute, or defile.[9] At common law, the term came to be applied to "illicit intercourse . . . calculated to adulterate the blood."[10] As such, "[t]he essence of adultery . . . was . . . intercourse with a married woman, which tended to adulterate the issue of an innocent husband, to turn inheritance away from his own blood to that of a stranger, and to expose him to support and provide for another man's issue."[11] Over time, adultery came to describe a broader range of sexual conduct, typically including all instances of "voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."[12] Regardless of the precise contours of the concept, the gist of adultery remains unchanged; it describes a breach of the marital relationship by means of sexual intercourse.[13]

The Crime of Adultery

1. *See, e.g.*, Dana Priest and Bradley Graham, *Past Adultery Won't Disqualify Candidate To Lead Joint Chiefs*, WASH. POST, June 5, 1997, at A1; Gregory L. Vistica and Evan Thomas, *Sex And Lies: The Strange Case Of Lieutenant Flinn Is Over, But In The Military The War Over Women Goes On*, NEWSWEEK, June 2, 1997, at 26.

2. *See, e.g.*, Tamara Jones, *The Pilot's Cloudy Future: She Was the First Woman to Fly a B-52. Then She Fell in Love and the Sky Fell In*, WASH. POST, Apr. 29, 1997, at D1 (asserting that adultery is a "felony" under military law).

3. *See infra* notes 9-13 and accompanying text.

4. *See infra* notes 14-29 and accompanying text.

5. *See infra* notes 30-49 and accompanying text.

6. *See infra* notes 50-61 and accompanying text.

7. *See infra* notes 62-67 and accompanying text.

8. This is not to say that I have refrained from all critical commentary relating to the military offense of adultery or its treatment by the courts. I merely wish to emphasize the abecedarian nature of the work and that its target audience is the counsel in the field who needs a primer on the topic.

9. *See* WEBSTER'S DICTIONARY OF WORD ORIGINS 4 (1991).

10. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 454 (3d ed. 1982).

11. 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 214, at 354 n.4 (quoting Evans v. Murff, 135 F. Supp. 907 (D. Md. 1955)); PERKINS & BOYCE, *supra* note 10, at 454.

12. BLACK'S LAW DICTIONARY 47 (5th ed. 1979); *see* RANDOM HOUSE COLLEGE DICTIONARY 19 (rev. ed. 1982). In contrast to this "gender-neutral" formulation, Professors Perkins and Boyce observed that "in the common law view illicit intercourse was adultery by both if the woman was married (whether the man was married or single) and was fornication by both if the woman was single." PERKINS & BOYCE, *supra* note 10, at 454; TORCIA, *supra* note 11, § 217, at 361. *But cf.* United States v. Hickson, 22 M.J. 146, 150 (C.M.A. 1986) (describing treatment of adultery and fornication in military law).

Adultery has been the subject of various prohibitions since Biblical times.[14] Canon law prohibited adultery, but the common law generally did not recognize adultery as a crime "unless the conduct was open and notorious, in which case it was punishable as a public nuisance."[15] Many jurisdictions in the United States nevertheless enacted statutory prohibitions against adultery,[16] some of which remain in effect today.[17] There is not, however, an express prohibition of adultery in the United States Code.[18]

Military law nevertheless recognizes the offense of adultery.[19] The elements of the offense are described in the following manner by the *Manual for Courts-Martial*:

> (1) That the accused wrongfully had sexual intercourse with a certain person;
> (2) That, at the time, the accused or the other person was married to someone else; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[20]

As such, the military offense of adultery is very similar to the contemporary civilian definition of adultery described above,[21] while at the same time possessing unique requirements of proof that narrow its scope and applicability.[22]

Adultery: The General Part

The military offense of adultery generally prohibits sexual intercourse between two persons "if either is married to a third person."[23] Culpability does not depend upon the accused's marital status; it is sufficient if either partner to the intercourse "is married to a third person."[24] It is likewise a gender-neutral prohibition; the accused may therefore be either male or female.[25] Moreover, the offense requires only a single act of sexual intercourse,[26] and "[a]ny penetration, however slight, is sufficient to complete the offense."[27] As a result, it is also unnecessary to establish, as required by some civil penal statutes, that the adulterous intercourse was either "habitual" or in conjunction with unlawful cohabitation by the parties.[28] This expansive defini-

13. *Cf.* TORCIA, *supra* note 11, § 214, at 354 ("The gist of the offense in the ecclesiastical courts was the breach of the marriage vow.").

14. *See Exodus* 20:14; *Deuteronomy* 5:18.

15. TORCIA, *supra* note 11, § 214, at 353-54; *see* PERKINS & BOYCE, *supra* note 10, at 454.

16. PERKINS & BOYCE, *supra* note 10, at 455 & n.18 (observing that "adultery was made an offense in a little over half the states"). These prohibitions took a variety of forms; for a survey of the common types of adultery offenses, see TORCIA, *supra* note 11, § 215, at 355-58.

17. *E.g.*, IDAHO CODE § 18-6601 (1996); KAN. STAT. ANN. § 21-3507 (1995); N.Y. PENAL LAW § 255.17 (McKinney 1989); VA. CODE ANN. § 18.2-365 (Michie 1996); *cf.* MISS. CODE ANN. § 97-29-1 (1996) (prohibiting unlawful adulterous cohabitation); N.C. GEN. STAT. § 14-184 (1996) (prohibiting habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other).

18. The United States Congress had, at one time, enacted a statutory prohibition against adultery that was codified in Title 18 of the United States Code, but that provision was later repealed. United States v. Hickson, 22 M.J. 146, 147-48 (C.M.A. 1986). The federal offense of adultery prohibited intercourse between a married woman and an unmarried man, as well as that between a married man and an unmarried woman. *Id.* at 147 n.3 (quoting 18 U.S.C. § 516 (repealed 1948)).

19. United States v. Butler, 5 C.M.R. 213, 215 (A.B.R. 1952); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 62 (1995) [hereinafter MCM]. In *Butler*, the Army Board of Review observed that "adultery is not specifically denounced as an offense by the Uniform Code of Military Justice," but concluded that "the offense is certainly embraced within the purview of Article 134 of the Code as 'conduct of a nature to bring discredit upon the armed forces,' if not a crime and offense not capital." 5 C.M.R. at 215.

20. MCM, *supra* note 19, pt. IV, ¶ 62b. "In the case of officers, adultery can be charged alternatively as conduct unbecoming an officer, under Article 133, Uniform Code of Military Justice, 10 U.S.C. § 933." United States v. King, 34 M.J. 95, 96 n.1 (C.M.A. 1992). In such circumstances, the government must establish beyond a reasonable doubt that the adultery constituted conduct unbecoming an officer and gentleman rather than conduct prejudicial or discrediting to the armed forces. *See* MCM, *supra* note 19, pt. IV, ¶ 59b(2).

21. *See supra* notes 9-13 and accompanying text.

22. *See infra* notes 30-61 and accompanying text.

23. United States v. Hickson, 22 M.J. 146, 150 (C.M.A. 1986).

24. *Id.*

25. *See* MCM, *supra* note 19, pt. IV, ¶ 64b.

26. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 3-62-1d, at 573 (30 Sept. 1996) [hereinafter BENCHBOOK].

27. *See id.*; *cf.* MCM, *supra* note 19, pt. IV, ¶ 45c(1)(a) (defining intercourse in the context of rape and carnal knowledge). Professor Torcia further opines that "[t]he intercourse need not result in an emission." TORCIA, *supra* note 11, § 214, at 354.

tion of the military offense of adultery appears to provide comprehensive protection to the marital relationship and "the morals of society, rather than the person of one of the participants."[29]

Prejudicial, Discrediting, or Unbecoming Conduct

There are, however, a number of characteristics of the military offense of adultery that may limit its scope and applicability. As a threshold matter, it is important to remember that Congress has not expressly proscribed adultery under the Uniform Code of Military Justice (UCMJ). [30] The military offense of adultery typically arises under Article 134, UCMJ,[31] which provides that courts-martial shall take cognizance of "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."[32] The Court of Military Appeals (COMA) has also noted that "[i]n the case of officers, adultery can be charged alternatively as conduct unbecoming an officer under Article 133."[33] In either case, the prosecution must not only establish the general part of adultery beyond a reasonable doubt, but also the unique requirements of proof associated with the General Articles. [34] Alternatively stated, adultery is not a military offense in the absence of prejudice to good order and discipline, a tendency to bring discredit upon the armed forces, or, in the case of an officer charged under Article 133, unbecoming conduct.[35]

The requirement that the adultery be prejudicial, discrediting, or unbecoming is not insignificant.[36] The prejudice to good order and discipline associated with a particular act of adultery must be "reasonably direct and palpable";[37] remote or indirect prejudice stemming from the illicit intercourse will not be sufficient to establish this element.[38] Direct and palpable prejudice may include, but is not limited to, actual or potential marital discord and strife, discord and strife with a sexual partner who is not made aware that one is married to another, compromise of the respect due to military authority, or causing "other soldiers to be less likely to conform their conduct to the rigors of military discipline."[39]

Discredit requires a different analysis. The statutory text requires only that the conduct "be of a nature to bring discredit upon the armed forces" to be punishable under Article 134.[40] The *Manual for Courts-Martial* explains that "[t]his clause . . . makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."[41] This focus upon the "nature" or "tendency" of the illicit intercourse to discredit the armed forces stands in apparent contrast to the requirement for "direct and palpable" prejudice under clause one, Article 134. However, the practical effect of this distinction may be reduced by commonly-cited precedent asserting that "Congress has not intended by Article 134 . . . to regulate wholly private moral conduct of an individual,"[42] and as such "[c]ivilians must be aware of the behavior and the military status of the offender."[43] Among the factors

28. For example, South Carolina defines adultery as "the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person," S.C. CODE ANN. § 16-15-70 (Law Co-Op. 1996), and provides that "[a]ny man or woman who shall be guilty of the crime of adultery or fornication shall be liable to indictment and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court." *Id.* § 16-15-60.

29. United States v. Ambalada, 1 M.J. 1132, 1137 (N.C.M.R. 1977).

30. *See generally* 10 U.S.C. §§ 801-946 (1988); *see* United States v. Butler, 5 C.M.R. 213, 215 (A.B.R. 1952).

31. *Butler*, 5 C.M.R. at 215; MCM, *supra* note 19, pt. IV, ¶ 62.

32. UCMJ art. 134 (1995).

33. United States v. King, 34 M.J. 95, 96 n.1 (C.M.A. 1992).

34. MCM, *supra* note 19, pt. IV, ¶¶ 59-60; *see* United States v. Poole, 39 M.J. 819, 821 (A.C.M.R. 1994).

35. *See* BENCHBOOK, *supra* note 26, para. 3-62-1d. *But cf.* UCMJ art. 80 (1995) (providing that anyone attempting to commit an offense under the UCMJ "shall be punished as a court-martial may direct"); United States v. St. Fort, 26 M.J. 764, 766 (A.C.M.R. 1988) (affirming conviction for attempted adultery); MCM, *supra* note 19, pt. IV, ¶ 62d (describing attempts as lesser-included offense to adultery).

36. *See Poole*, 39 M.J. at 821 (indicating that adultery is not inherently prejudicial to good order and discipline and requires "an assessment of the circumstances surrounding the commission of the offense in making the determination").

37. MCM, *supra* note 19, pt. IV, ¶ 60c(2)(a).

38. *Id.*

39. United States v. Green, 39 M.J. 606, 609-10 (A.C.M.R. 1994).

40. UCMJ art. 134 (1995).

41. MCM, *supra* note 19, pt. IV, ¶ 60c(3).

identified by the military appellate courts as relevant to the determination are the identity and military status of the participants, the location and circumstances of the intercourse, and local law or community standards concerning the relevant conduct.[44]

The prosecution faces a similar challenge if the accused is an officer charged with unbecoming conduct in violation of Article 133. In addition to establishing the general part of adultery,[45] the evidence must also establish that the illicit intercourse "constituted conduct unbecoming an officer."[46] To be "unbecoming," the circumstances of the intercourse must not only dishonor or disgrace the officer personally, but also "seriously compromise the person's standing as an officer."[47] The ultimate effect of a failure-of-proof on this unique element is minimized, however, by two characteristics of the law concerning the General Articles. First, the Court of Appeals for the Armed Forces recently observed that "[a]s a matter of law, it is well-established that, when the underlying conduct is the same, a service discredit or disorder under Article 134 is a lesser-included offense of conduct unbecoming an officer under Article 133."[48] Moreover, the maximum punishment is the same for the greater and lesser-included offenses.[49] As a result, there may be little practical difference between charging an officer with adultery as unbecoming conduct under Article 133, or with prejudicial or discrediting conduct in violation of Article 134.

Wrongful Sexual Intercourse

The military offense of adultery also requires proof beyond a reasonable doubt that the accused engaged in *wrongful* sexual intercourse with another person.[50] In *United States v. King*,[51] the COMA explained that this requirement of wrongful intercourse has two components: "[t]he wrongfulness of the act obviously relates to mens rea (not elsewhere specified amongst the elements) and lack of a defense, such as excuse or justification."[52] An evident, but often overlooked, ramification of this statement is that the military offense of adultery *does* have a mental component; it is not a purely strict-liability crime. Also implied by the court's assertion is that an excuse or justification may negate the wrongfulness of an act of intercourse.

The military justice practitioner is most likely to encounter issues of this sort when a person accused of adultery claims ignorance or mistake relating to marital status,[53] either their own or that of their partner in intercourse.[54] It is a defense to adultery "that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the

42. United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952).

43. United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) (citing United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955)).

44. *See id.* In *Perez*, the Army court also observed that "[w]hile the appellant was still technically married to his wife, the separation agreement would appear to permit sexual intercourse with another woman without violating the sanctity of the marriage contract." *Id.*

45. This requirement is set forth in the *Manual* as follows:

> Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act of omission constitutes conduct unbecoming an officer and gentleman.

MCM, *supra* note 19, pt. IV, ¶ 59c(2).

46. *Id.* ¶ 59b(2). The complete statement of the element contained in the *Manual* uses the language "officer *and a gentleman.*" The term "gentleman" is a redundant anachronism in that it includes "both male and female commissioned officers, cadets, and midshipmen." *Id.* ¶ 59c(1).

47. *Id.* ¶ 59c(2).

48. United States v. Harwood, 46 M.J. 26, 28 (1997) (citing United States v. Rodriquez, 18 M.J. 363 (C.M.A. 1984)).

49. *Compare* MCM, *supra* note 19, pt. IV, ¶ 59e *with id.* ¶ 62e. Adultery is punishable by a "dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year." *Id.* ¶ 62e. In spite of assertions to the contrary, *see, e.g.*, JONES, *supra* note 2, at D3 (asserting adultery is a "felony" offense under military law), the federal law of criminal procedure classifies such an offense as a class A misdemeanor. *See* 18 U.S.C. § 3559(a)(6) (1996).

50. MCM, *supra* note 19, pt. IV, ¶ 62b(1).

51. 34 M.J. 95 (C.M.A. 1992).

52. *Id.* at 97.

53. *Cf.* MCM, *supra* note 19, R.C.M. 916(j) (describing defense of ignorance or mistake of fact in military law). This is not to say that ignorance or mistake of fact or law is the *only* defense that may be relevant to allegations of adultery; for example, one could engage in what would otherwise be adulterous conduct, but avoid criminal liability if participation in the offense was caused by coercion or duress. *See id.* R.C.M. 916(h).

54. *Id.* pt. IV, ¶ 62b(2).

accused would not be guilty of the offense."[55] Because the offense of adultery does not require a specific intent or actual knowledge of any particular fact, the incorrect belief must therefore be both honest and reasonable.[56]

Exculpatory ignorance or mistake may take a variety of forms. For example, the incorrect belief may relate to factual matters, such as the performance of a marriage ceremony or the identity of a sexual partner.[57] Alternatively, the ignorance or mistake may concern the legal effect of a ceremony, proceeding, or documents.[58] Its precise form is of minimal importance;[59] to be exculpatory, the incorrect belief need only "have existed in the mind of the accused[,] . . . been reasonable under all the circumstances," and be such that the accused would not be guilty of adultery "if the circumstances were as the accused believed them."[60] Such a belief may operate to excuse an otherwise wrongful act of adultery.[61]

Adultery And Other Sexual Offenses

The relationship between adultery and other military sexual offenses is best introduced by this passage from the COMA opinion in *United States v. Hickson*:[62]

> In summary, the treatment of adultery and fornication in military law seems to be this: (a) two persons are guilty of adultery whenever they engage in illicit sexual intercourse if either of them is married to a third person; (b) if unmarried, they are guilty of fornication whenever they engage in illicit sexual intercourse under circumstances in which the conduct is not strictly private; and (c) private sexual intercourse between unmarried persons is not punishable.[63]

The relationship between adultery and other military sexual offenses requiring intercourse cannot be stated as certainly or succinctly. Adultery appears to be a separate offense from carnal knowledge because the former requires proof that one party to the intercourse is married to another,[64] while carnal knowledge requires proof that one party is under 16 years of age.[65] Likewise, recent precedent holds that adultery is a separate offense from rape; the marital relationship of the parties to the intercourse is now irrelevant to a charge of rape, and rape requires force and lack of consent.[66] In most circumstances, an accused may be separately charged, convicted, and punished for the offenses of adultery and either carnal knowledge or rape, even if they arise from the same criminal act or transaction.[67]

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55. MCM, *supra* note 19, R.C.M. 916(j); *see* United States v. Fogarty, 35 M.J. 885, 892 (A.C.M.R. 1992).

56. BENCHBOOK, *supra* note 26, para. 3-62-1d note 4, at 574; *see* MCM, *supra* note 19, R.C.M. 916(j). *But cf. Fogarty*, 35 M.J. at 892 (making no mention of reasonableness requirement).

57. *See* MCM, *supra* note 19, R.C.M. 916(j); 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(e) (1984).

58. *See* MCM, *supra* note 19, R.C.M. 916(l)(1) discussion; ROBINSON, *supra* note 57, § 62(e); *cf.* BENCHBOOK, *supra* note 26, para. 3-62-1d note 4 (characterizing mistaken belief that "divorce was final based on legal documents he/she received" as mistake of *fact*).

59. Professor Robinson has observed that "the distinction between mistakes of fact and mistakes of law . . . has proven very troublesome in practice," and concludes that "the difference between these mistakes is not significant in determining culpability, and the mistakes should be treated identically." ROBINSON, *supra* note 57, § 62(e). Professors LaFave and Scott call the basic rule "extremely simple" and explain that "ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged." 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1(a), at 575 (1986). While the Rules for Courts-Martial provide that "[i]gnorance or mistake of law . . . ordinarily is not a defense," R.C.M. 916(l)(1), the military appellate courts have "expressly adopt[ed] the view that the defense of mistake of law . . . is available to one accused of crime in the military establishment." United States v. Sicley, 20 C.M.R. 118, 127 (C.M.A. 1955). The discussion accompanying R.C.M. 916(l)(1) grudgingly recognizes the precedent stated in *Sicley* when it states that "[i]gnorance or mistake of law may be a defense in some limited circumstances." The discussion then identifies two mistakes of law that may be exculpatory in a prosecution involving adultery. The accused may be mistaken as to a separate non-penal law and lack the criminal intent or state of mind necessary to establish guilt, or the incorrect belief may be caused by "reliance upon the decision or pronouncement of an authorized public official or agency." MCM, *supra* note 19, R.C.M. 916(l)(1) discussion. For an expanded treatment of potentially exculpatory mistakes of law, see LAFAVE & SCOTT, *supra*, § 5.1.

60. MCM, *supra* note 19, R.C.M. 916(j); *see* BENCHBOOK, *supra* note 26, paras. 3-62-1d note 4 & 5-11-2. *But cf.* BENCHBOOK, *supra* note 26, para. 5-11-2 (providing that the ignorance or mistake "cannot be based on a negligent failure to discover the true facts").

61. *See* United States v. Fogarty, 35 M.J. 885, 892 (A.C.M.R. 1992).

62. 22 M.J. 146 (C.M.A. 1986).

63. *Id.* at 150.

64. MCM, *supra* note 19, pt. IV, ¶ 62b(2).

65. *Id.* ¶ 45b(2).

66. United States v. Mason, 42 M.J. 584, 586 (Army Ct. Crim. App.) (questioning rationale of holding to the contrary in *Hickson*, 22 M.J. 146), *rev. denied*, 43 M.J. 166 (1995).

Conclusion

The military justice system recognizes the offense of adultery.[68] The general part of the offense prohibits sexual intercourse between two persons "if either is married to a third person."[69] The reach of the criminal sanction is limited, however, to instances of wrongful intercourse[70] that cause either prejudicial or discrediting effects to the armed forces.[71] The military offense of adultery is therefore nothing more than a particularized form of that general proscription of "disorders and neglects to the prejudice of good order and discipline in the armed forces" and "conduct of a nature to bring discredit upon the armed forces."[72]

Some have questioned the need for such an offense, observing that it has no counterpart in civilian jurisprudence.[73] Such observations overlook the fact that it is the unique mission of the military to fight or prepare to fight wars;[74] the demanding nature of that task necessitates that "[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code."[75] The military offense of adultery is simply a recognition of this moral dimension to military service, and is evidence that the military justice system is flexible enough to recognize the judgment of the military community "concerning that which is honorable, decent, and right."[76]

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67. It is unclear whether trial counsel could plead sufficient facts in a specification alleging rape or carnal knowledge and thereby "convert" adultery into a lesser-included offense. *Cf.* United States v. Weymouth, 43 M.J. 329, 337 n.5 (1995) (observing that "[w]e need not decide here if the Government could create a lesser offense merely by alleging extra, non-essential elements"); United States v. Ureta, 41 M.J. 571, 580 (A.F. Ct. Crim. App. 1994) (holding "carnal knowledge is not a lesser-included offense of rape, at least where . . . the rape specification does not allege the victim's age as being under 16, thereby putting the accused on notice to defend against it as well as the principal offense of rape"); United States v. Baker, 28 M.J. 900, 900-01 (A.C.M.R. 1989) (treating carnal knowledge as lesser-included offense of rape); MCM, *supra* note 19, pt. IV, ¶ 45d (identifying carnal knowledge as lesser-included offense to rape). *But cf.* MCM, *supra* note 19, R.C.M. 307 (c)(4) discussion (observing "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person").

68. *See supra* notes 19 - 20 and accompanying text.

69. *See supra* notes 23 - 29 and accompanying text.

70. *See supra* notes 50 - 61 and accompanying text.

71. *See supra* notes 30 - 49 and accompanying text.

72. *See* UCMJ art. 134 (1995). The basic form of the offense is such that it does not necessarily lead to "witch hunts" or contribute to licentiousness in the ranks. *But cf.* PRIEST AND GRAHAM, *supra* note 1, at A12 (quoting unidentified retired general officer concerning current interest in adulterous misconduct).

73. *See, e.g.*, Meg Greenfield, *Unsexing the Military*, NEWSWEEK, June 16, 1997, at 80.

74. Parker v. Levy, 417 U.S. 733, 743 (1974).

75. *Id.* at 764-65 (Blackmun, J., concurring) (quoting Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891)).

76. *Id.* at 765 (Blackmun, J., concurring).

Spycraft and Government Contracts: a Defense of *Totten v. United States*

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U.S. Army Legal Services Agency

Introduction

William A. Lloyd stood before his president, who was a tall, lanky man with piercing eyes, a craggy brow, and a strong, prominent chin. After his death, the president's country would come to see him as one of the greatest leaders in its history. The two men were discussing the beginning of a civil war that had riven their country, brother fighting brother, son fighting father, and which would, over the next four years, bathe the country in blood and fire. The President, Abraham Lincoln, was requesting that Lloyd travel south and gather information on the seceding confederacy. He was "to proceed south and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the Government of the United States . . . ."[1] Finally, President Lincoln made an offer of payment, which Lloyd accepted. Lloyd was not to see the President again.

The President and Lloyd's discussion eventually resulted in the United States Supreme Court case of *Totten, Administrator v. United States*.[2] *Totten* held that United States courts lack jurisdiction to hear complaints against the United States brought by parties who allege to have entered into contracts for secret services with the United States. In June, 1996, *Time* magazine discussed this venerable case in reporting on the situation of former Vietnamese commandos. The article stated that the Central Intelligence Agency (CIA), in responding to the allegations of commandos, "cited an 1875 Supreme Court case that it has used successfully to fend off past suits by agents who claimed to have been cheated."[3] How does a case decided in 1875 merit the attention of *Time* today?

This article discusses *Totten* and its progeny, including the recent case of *Vu Doc Guong v. United States*.[4] It also analyzes the continuing impact of *Totten* in the murky world of covert operations, using the recent case of the "Vietnamese Lost Commandos" as a point of focus.

The Interesting Case of Mr. Totten

Mr. Enoch Totten brought action in the United States Court of Claims[5] to recover monies due as the result of the services of his intestate, Mr. Lloyd. The Court of Claims found that Mr. Lloyd "proceeded, under the contract [with the President], within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and that, upon the close of the war, he was only reimbursed his expenses."[6] The Court of Claims dismissed Mr. Totten's complaint, finding that the President lacked authority to enter into such a contract.[7]

The Supreme Court held that the President had authority to employ Mr. Lloyd to spy on the enemies of the United States. The Court also stated that under a contract to compensate such an agent it was lawful for the President to direct payment to Mr. Lloyd of the amount stipulated.[8] The Court then stated, however:

> Our objection is not to the contract, but to the action upon it in the Court of Claims. The

1. Totten, Administrator v. United States, 92 U.S. 105 (1875).

2. *Id.*

3. Douglas Waller, *Victims of Vietnam Lies*, TIME, June 24, 1996, at 44.

4. 860 F.2d 1063 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989).

5. The Court of Claims was renamed the United States Claims Court by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982). The Claims Court was subsequently renamed the United States Court of Federal Claims by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992).

6. *Totten*, 92 U.S. at 106.

7. *Id.*

8. *Id.*

> service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely; and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter. This condition of engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat recovery.[9]

With these findings, the Court affirmed the judgment of the Court of Claims.

Totten Progeny

Among other things, *Totten* held that when the government and a private party enter into an alleged agreement involving covert services, the private party necessarily makes an implied promise of secrecy about the existence of the agreement and the conditions and terms of the service.[10] The following are the few cases since *Totten* that have interpreted this holding.

In *De Arnaud v. United States*,[11] De Arnaud brought an action in the Court of Claims against the United States for services rendered during the Civil War. Specifically, in August 1861, De Arnaud entered into an agreement with Major General John C. Fremont.[12] Under this agreement, De Arnaud was:

> to go within the Confederate lines, make observations of the country in the states of Kentucky, Tennessee, and Missouri, to observe the position of the rebel forces, the strategic positions occupied by them, and advise [General Fremont] of the movements necessary to be made by the Union forces to counteract the movements of the enemy and to facilitate the advance of [Union] troops, and aid them in attacking and repulsing the Confederate forces.[13]

Ultimately, in early September 1861, De Arnaud was responsible for providing information to Brigadier General Ulysses S. Grant, which prompted General Grant to advance into Paducah, Kentucky ahead of Confederate forces.[14] After being paid $600 on General Fremont's orders, De Arnaud submitted a claim in the amount of $3,600 to President Lincoln in January, 1862, enclosing letters of commendation from a virtual Who's Who of Union Commanders in the Western Theater.[15] President Lincoln passed the claim to the Secretary of War for action, and the Secretary paid Mr. De Arnaud $2,000. De Arnaud then became insane, as the result of a head wound

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9. *Id.* at 106-07.

10. *Id.* The decision in *Totten* was also based on the public policy ground that when trial of an issue would lead to the disclosure of confidential matters related to the Government, suit is prohibited. *See* Weinberger v. Catholic Action of Hawaii, 454 U.S. 143, 146-47 (1981); Hudson River Sloop Clearwater, Inc. v. Department of the Navy, No. CV-86-3292, 1989 WL 50794, * 2 (E.D.N.Y. May 4, 1989). This article does not discuss this branch of *Totten*, which is a distant ancestor of the current extensive case law on the government's assertion of its state's secret privilege.

11. 151 U.S. 483, 493 (1894).

12. The famous "Pathfinder of the West" and less than stellar Union Civil War commander. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 350-54, 501 (1988).

13. *De Arnaud*, 151 U.S. at 484-85.

14. *Id.* at 485. Kentucky, as a border state, was neutral, having neither seceded from the Union, nor declared its allegiance. Hence, General Grant was hesitant to move into Kentucky unless Confederate forces entered Kentucky first. MCPHERSON, *supra* note 12, at 295-96.

15. *De Arnaud*, 151 U.S. at 486-87. The commanders included General Grant; Flag-Officer Andrew H. Foote, naval commander of the Army's gunboats on Western inland waters; and General M.C. Meigs, Quartermaster General of the Army.

suffered in late 1861, and remained insane until he recovered sufficiently in 1886 to bring his claim.[16]

In analyzing the case, the Supreme Court found it unnecessary to discuss the holding of *Totten*, dismissing De Arnaud's case as barred by the statute of limitations. The Court did not criticize the *Totten* decision and found, in dicta, that the work De Arnaud performed for General Fremont was not substantially different from the work Lloyd performed for President Lincoln.[17]

In *A.H. Simrick v. United States*,[18] the plaintiff claimed that from 1969 to 1976 he had a contract with the State Department and the CIA under which he was to establish a business in Mauritius, which would act as a cover for CIA agents.[19] In return, the CIA was to pay him a salary and buy all of his product at a fair market rate.[20] He alleged that his claim was not governed by *Totten* because his role was primarily that of a businessman and that there was little secret information that would have to be disclosed during the litigation.[21] The Court of Claims disagreed, finding that the case was controlled by *Totten*. The court stated that the contract, if one existed, required the plaintiff to engage in significant undercover intelligence work for the government. The court also found that the plaintiff would have to reveal secret matters to make his case and that the parties "understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[22]

The Court of Claims interpreted *Totten* again in *Mackowski v. United States*,[23] where the plaintiff claimed that she was an agent of the CIA hired to perform espionage activities in Cuba and that the CIA had failed to pay her expenses and other benefits as promised. The court found that the plaintiff could not prosecute her case without revealing secret matters which should not be disclosed, in violation of *Totten*.[24] The court also dismissed the plaintiff's argument that the government had waived its *Totten* defense because the plaintiff was released from Cuban prison due to the efforts of then Senator Frank Church.[25]

In *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*,[26] the district court analyzed *Totten*, stating that *Totten* had created two separate doctrines. The first was related to the state's secret privilege.[27] The second was "an independent doctrine, founded in prudence or public policy, that sometimes causes courts to dismiss plaintiffs' causes of action without letting them proceed to consideration by a finder of fact."[28] Applying these doctrines, the court then stated that *Totten* was decided on two separate grounds. First, public policy forbids a suit when the trial of the issue would inevitably lead to the disclosure of confidential matters. Second, the court stated that the *Totten* court had found that Lloyd's contract contained an implied term that forbade the parties ever to disclose the contents of the contract and that the act of bringing a suit constituted a breach of this implied term.[29]

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16. *Id.* at 489.

17. *Id.* at 493. De Arnaud's argument against *Totten* presaged by almost 100 years the argument advanced in *Vu Doc Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989). In *Vu Doc Guong* the plaintiff argued that because he was a saboteur, and not a spy, *Totten* was inapplicable. *Id.* De Arnaud argued that because he was a "military expert," and not a "spy," that *Totten* was inapplicable. The Court, dispensing with this argument in dicta, stated: "[i]f it were necessary for us to enter into the question thus suggested, it might be difficult for us to point out any substantial difference in character between the services rendered by Lloyd [in *Totten*] and those rendered by Arnaud . . . ." *De Arnaud*, 151 U.S. at 493.

18. 224 Ct. Cl. 724 (1980).

19. *Id.* Mauritius is a small island off the southeast coast of Africa, east of Madagascar. It is becoming something of an economic powerhouse, similar to Singapore. *See e.g.*, Chris Hall, *A Tiger is Born Off Africa . . . and its Claws May Get Sharper*, BUS. WK., Jan. 13, 1997, at 4.

20. *Simrick*, 224 Ct. Cl. 724.

21. *Id.* at 726.

22. *Id.* (quoting Totten, Administrator v. United States, 92 U.S. 105, 106 (1875)). The court also stated that the Supreme Court had summarily reaffirmed the *Totten* holdings in United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953).

23. 228 Ct. Cl. 717, 718 (1981).

24. *Id.* at 720.

25. *Id.* at 719.

26. No. CV-86-3292, 1989 WL 50794 (E.D.N.Y. May 4, 1989).

27. *Id.* at * 2.

28. *Id.*

29. *Id.* (citing Ellsberg v. Mitchell, 709 F.2d 51, 65 n.60 (D.C. Cir. 1983)).

OPLAN 34A in North Vietnam and Laos, 1960-1969

Beginning in 1960, the Republic of Vietnam, in coordination with the CIA, organized an operation in which small teams, and on occasion single individuals, infiltrated into North Vietnam to establish long-term agent networks, to gather intelligence, and to perform small-scale sabotage aimed at de-stabilizing the communist government in Hanoi.[30] From its inception, however, the program was not particularly effective.[31] Because it was very difficult to determine whether teams were effective and whether they were compromised, the program's lack of success was not well understood at the time.[32]

In January 1964, this covert program was made the responsibility of the Department of Defense (DOD) and was titled OPLAN 34A.[33] Oversight of OPLAN 34A was the responsibility of a new organization titled Military Assistance Command Vietnam, Studies and Observations Group (MACVSOG).[34] The MACVSOG was a counterpart organization to the Vietnamese organization responsible for executing OPLAN 34A.[35] The staffing of MACVSOG rose from a handful in early 1964 to over 400 United States soldiers, sailors, airmen, and civilians at its largest.[36] The MACVSOG was a DOD-established joint unconventional warfare task force to which special United States ground, sea, and air units were assigned.[37]

At its inception, MACVSOG concentrated on the implementation of OPLAN 34A. Operations for the first year of OPLAN 34A were primarily oriented to sabotage and psychological operations.[38] These initial operations, for a number of reasons, resulted only in limited success.[39] As a result, MACVSOG changed its focus from implementing OPLAN 34A to inserting long-term agent teams into North Vietnam.[40] Between January 1964 and October 1967, when MACVSOG ceased to insert teams under OPLAN 34A, MACVSOG sent some forty teams of about 300 men into North Vietnam.[41] These long-term agent teams were invariably killed or captured upon landing.[42] The Joint Chiefs of Staff halted the long-term agent program in 1968 after an extensive review of the operation's results and a counterintelligence review were conducted. The reviews showed that the program was compromised and ineffective.[43]

OPLAN 34A was a covert and implicitly deniable military operation run by the Republic of Vietnam with United States oversight and funding.[44] The United States did not contract with the OPLAN 34A commandos; all contracts were between the commandos and the Republic of Vietnam.[45] The Republic

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30. Unknown author(s), Military Assistance Command Vietnam Studies and Observation Group Documentation Study, Bt1 through Bt3, Cb1, Cd1 (10 Jul. 1970) (unpublished report, on file with Joint Chiefs of Staff archives) [hereinafter Documentation Study]. The authors of the study are unknown due to its classification. The Documentation Study is a multi-volume after-action review of this program, currently classified TOP SECRET. Most of the MACVSOG Documentation Study was declassified in 1992, at the request of the Senate Select Committee for POW/MIA Affairs. Significant national security concerns remain, however, related to means and methods concerning the commandos' operations which remain classified. Nothing in this article is classified.

31. SEDGWICK TOURISON, SECRET ARMY SECRET WAR 315-17 (1995).

32. *See generally*, Documentation Study, *supra* note 30, at Cb2. Compare Cb97 (1966 Military Assistance Command Vietnam evaluation stating that "in general the information produced is of intelligence value") with Cb8 (security assessment in June 1968 evaluated that all the in place teams were probably under North Vietnamese control). Communication with the teams was almost exclusively by radio. The North Vietnamese security forces had significant success in "turning" the radio operators and feeding false information to the Military Assistance Command, Vietnam. *See generally*, TOURISON, *supra* note 31, at xviii.

33. Documentation Study, *supra* note 30, at C4.

34. *Id.* The abbreviation SOG originally meant "Special Operations Group." It was re-designated "Studies and Observations Group" in late 1964 without any change in function. *Id.*

35. *Id.* at Bt4 through Bt12. This organization and method of control is not singular to the Vietnam War. During the Korean War, the United States Army was involved in an operation almost identical to OPLAN 34A. *Vietnamese Commandos: Hearings Before the Senate Select Committee on Intelligence*, 102d Cong. 61 (1996) (statement of Major General (Ret.) John K. Singlaub) [hereinafter Singlaub Statement]. Major General Singlaub served 35 and 1/2 years in the Army, most of it in special forces, including the period of the Vietnam and Korean Wars. He was the commander for MACVSOG from May 1966 until August 1968. He left active service in 1978. *Id.* at 29-30.

36. Documentation Study, *supra* note 30, at C32-C33.

37. Singlaub Statement, *supra* note 35, at 30.

38. Documentation Study, *supra* note 30, at C9.

39. *Id.* at C12-C13.

40. *Id.* at C15-C18.

41. *Id.* at Cb63-Cb65. The last insertion of a long-term agent team occurred in October 1967. *Id.* at Cb65.

42. TOURISON, *supra* note 31, at 217.

43. Documentation Study, *supra* note 30, at C29.

of Vietnam companion organization to MACVSOG (under various names, the last being Strategic Technical Directorate, STD) forwarded requests for payment for agent missions to MACVSOG, which would audit the request and then issue a lump sum each month to STD from which it paid agents.[46]

The MACVSOG also developed other operations which eventually greatly eclipsed OPLAN 34A in scope and magnitude. It inserted Short-Term Roadwatch and Target Acquisition (STRATA) teams into North Vietnam, Laos, and eventually Cambodia. The mission of the STRATA teams was primarily the short-term reconnaissance of supply routes.[47] The MACVSOG also operated short-term psychological operations missions (for example, placing "poisoned" weapons in North Vietnamese weapons caches, and inserting decoy agent teams).[48] Additionally, it created a mini-army of Vietnamese, Montagnards, and other ethnic minorities, led by American soldiers, for long-range, hit-and-run reconnaissance and sabotage operations into Laos and Cambodia.[49]

The 1973 Paris Peace Accords contained a provision requiring that all prisoners of war involved in the Vietnam War be repatriated.[50] Neither the United States nor the Republic of South Vietnam demanded the return of the OPLAN 34A personnel, and North Vietnam did not release most of them.[51] Many of the commandos remained in prison until the fall of South Vietnam in April, 1975, and then, like most people closely connected to the Republic of Vietnam, they were placed in re-education camps.[52] North Vietnam did not begin to release most of the commandos until the late 1970s and some did not leave confinement until 1988 or later.[53]

Vu Doc Guong v. United States

The case of *Vu Doc Guong v. United States*[54] presented the Court of Appeals for the Federal Circuit with a claim by an OPLAN 34A commando who was suing the United States for breach of contract and lost wages. The plaintiff alleged that he was a Vietnamese commando and asserted a claim based on an alleged contract with the United States to perform covert military operations against North Vietnam.[55] The court found *Totten* to be controlling, holding that an alleged contract between a Vietnamese commando and the United States for the performance of covert operations against North Vietnam was not enforceable.[56] Guong argued that *Totten* only applied to contracts for "secret services" and that he was employed as a saboteur, which by its nature is neither secret nor concealed. The Court found this argument unconvincing, stating:

> [I]t cannot be doubted that *Totten* stands for the proposition that no action can be brought to enforce an alleged contract with the government when, at the time of its creation, the contract was secret or covert. We are equally certain that the words secret and covert are synonymous, and, as stated in *Totten*, the existence of [the] contract . . . is itself a fact not to be disclosed.[57]

Guong also argued that *Totten* only prohibits disclosure and enforcement of contracts when doing so would compromise current government secrets.[58] The Court dismissed this argument, observing that *Totten* was decided ten years after the close of the Civil War and that the military secrets uncovered

44. Singlaub Statement, *supra* note 35, at 30.

45. *Id.* at 35-36; Documentation Study, *supra* note 30, at J12.

46. Documentation Study, *supra* note 30, at Cb12.

47. *Id.* at C19.

48. *Id.* at C47, C49, and C51.

49. Singlaub Statement, *supra* note 35, at 37-38, 56, 59. This operation was entitled "OPLAN 35."

50. TOURISON, *supra* note 31, at 269.

51. *Id.* at 272.

52. *Id.* at 292, 296.

53. *Id.* at 273, 304.

54. 860 F.2d 1063, 1065-66 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989).

55. *Id.* at 1064.

56. *Id.* at 1067.

57. *Id.* at 1065 (citing Totten, Administrator v. United States, 92 U.S. 105, 107 (1875)).

58. *Id.*

by Mr. Lloyd were certainly not still military secrets ten years later.[59] The Court continued:

> Certain former government officials and military historians may perhaps have uncovered and divulged details of military actions in which plaintiff claims to have participated. The legality of those disclosures, however, are governed by other standards or principles which reflect strong First Amendment concerns . . . Those cases, however, do not modify the *Totten* precedent, and do not deal with a cause of action against the government predicated upon an alleged contract for secret or covert services.[60]

Recent Lost Commandos Litigation and Legislation

On 24 April 1995, Au Dong Quy and 280 others filed suit in the United States Court of Federal Claims alleging that each plaintiff was an OPLAN 34A commando, or represented the estate of an OPLAN 34A commando, and had a contract with the United States during the Vietnam War providing for monthly wages and other benefits.[61] They also alleged that their contract promised, upon capture, continued payment of the monthly wage.[62] The government filed a motion to dismiss in February 1996, asserting among other things: lack of privity, lack of jurisdiction under *Totten*, and expiration of the statute of limitations.[63]

The case generated significant national media attention, culminating in a segment on the television news program *60 Minutes*.[64] Congressional interest in the Lost Commandos' story was also increasing, and on 19 June 1996, the Senate Select Committee on Intelligence met to hear testimony on the issue.[65] As a result, the Court of Federal Claims stayed the litigation, pending possible resolution of the Commandos' issues by legislative means.[66] Subsequently, Congress passed into law a provision for compensation of all persons who were captured or incarcerated by the Democratic Republic of Vietnam as a result of the participation by that person in operations conducted under OPLAN 34A or its predecessor.[67]

The Need to Contract for Secret Services

In recent history, the United States has conducted numerous unconventional warfare operations, many of which were similar to OPLAN 34A.[68] For example, in his testimony before the Senate Select Committee on Intelligence, Major General (Retired) John K. Singlaub stated that the United States conducted such unconventional warfare operations during the Korean War.[69] He stated that there were probably hundreds of Koreans who were in a situation similar to the OPLAN 34A Commandos.[70]

The United States Supreme Court has recognized the importance of secrecy in intelligence gathering.[71] In *CIA v. Sims*,[72] for example, the CIA entered into research contracts, often

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59. *Id.*

60. *Id.* at 1065-66 (citing Snepp v. United States, 444 U.S. 507 (1980) (per curiam); New York Times Co. v. United States, 403 U.S. 713 (1971)).

61. Complaint ¶¶ 1-2, Au Duong Quy, et al./ Lost Army Commandos v. United States, No. 95-309C (Fed. Cl. filed Apr. 24, 1995).

62. *Id.* at ¶ 7.

63. Defendant's Motion to Dismiss, Au Duong Quy, et al./ Lost Army Commandos v. United States, No. 95-309C (Fed. Cl. Feb. 2, 1996).

64. *60 Minutes: Lost Commandos* (CBS television broadcast, May 5, 1996).

65. *Vietnamese Commandos: Hearings Before the Senate Select Comm. on Intelligence*, 104th Cong., 2d Sess. (1996). Subsequent to the hearings, Section 649 (subsequently re-numbered 657) of the DOD Authorization Act was introduced before the Senate. *See* Comments Before the Senate Concerning Amendment 4055 to the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, *reprinted in* 142 CONG. REC. S6439-41 (daily ed. June 19, 1996). Unfortunately, some senators sponsoring the bill disregarded Major General Singlaub's testimony and incorrectly reached the conclusion that "the United States apparently contracted with South Vietnamese nationals to conduct covert military operations in North Vietnam." Statement of Senator John S. McCain, *id.* at S6440.

66. Order, Au Duong Quy, et al./ Lost Army Commandos v. United States, No. 95-309C (Fed. Cl. July 2, 1996) (order staying litigation).

67. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 657(a)(1), 110 Stat. 2422, 2584 (1996).

68. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 100-25, DOCTRINE FOR ARMY SPECIAL OPERATIONS FORCES 2-5 through 2-6, 3-4 through 3-6, 3-8 through 3-9 (12 Dec. 1991) [hereinafter FM 100-25].

69. Singlaub Statement, *supra* note 35, at 61.

70. *Id.*

71. *See* CIA v. Sims, 471 U.S. 159 (1985), (discussed *infra*); Baldridge v. Shapiro, 455 U.S. 345, 361 (1982); Haig v. Agee, 453 U.S. 280, 307 (1981).

72. 471 U.S. at 161.

through intermediaries, with numerous universities, research foundations, and similar institutions. Some of the agreements contained an explicit promise of confidentiality so that the identities of the researchers would not be disclosed.[73] The Court commented on the importance of agreements for secrecy, stating "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[74]

The Legal Relationship Between the Parties when Covert Services are Obtained

The legal relationship between the United States and those who perform covert services is a separate factor which should be considered in conjunction with the *Totten* doctrine. Before a plaintiff can successfully pursue any contractually-based action in federal court, he must be in privity of contract with the United States. If there is privity, the United States, as a matter of policy, attempts to adequately compensate the covert operative. Without privity, however, the United States has no legal obligation to compensate. In such a case, the covert operative may attempt to turn to the federal courts for relief, but the courts lack jurisdiction over such disputes unless there is privity of contract between the parties. Thus, the issue of whether there is privity in the first place may be another way to keep a dispute involving *Totten* doctrine issues out of the public eye.

The Contract with the Filipino Scouts

For clear policy reasons, the United States attempts to take care of, and to compensate, the operatives in unconventional warfare operations that it has fostered.[75] The largest exercise of this policy, in terms of claimants, concerned the United States commitment to pay the "Filipino Scouts" for services rendered while fighting as guerrillas during the Japanese occupation of the Philippine Islands during World War II. Prior to the outbreak of World War II, the Philippine Commonwealth had established its own army, with a strength of approximately 120,000 men.[76] After the outbreak of the war, the United States Congress authorized money to mobilize, to train, to equip, and to pay the Philippine Army.[77] Hence, a relationship with many aspects of a direct contractual relationship existed between the Philippine Army and the United States. After the fall of Corregidor in May 1942, Lieutenant General Jonathan M. Wainwright, commander of all troops in the Philippines, ordered the surrender of all troops under his command.[78]

In late 1942, a spontaneous guerrilla movement arose in the Philippines, supported with supplies and weapons from the sea. The movement continued until the end of the war, providing valuable services to the United States at all stages.[79] After the conclusion of the war, Congress provided an appropriation of $200 million for the benefit of the former members of the Philippine Army for service rendered during the war, including service during the Japanese occupation. As a result, the United States Army, over a period of several years, identified and paid thousands of individuals who had performed guerilla service, placing their names on permanent rosters.[80]

Thus, where a clear contractual relationship for covert services exists, the United States will pay legitimate claims of operatives. On the other hand, absent some sort of contractual relationship which establishes privity, the issue is whether the claims may be properly disposed of by the agency, Congress, or the courts.

The Contractual Relationship

Federal statutes defining the jurisdiction of the federal district courts state that "[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount . . . upon any express

73. *Id.* at 165.

74. *Id.* at 175 (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam)). In *Snepp*, the Supreme Court held that an agreement containing promises of secrecy could not be enforced because the possibility of public disclosure of confidential information and the accompanying inability of the United States to guarantee the security of relations with foreign sources would impermissibly impair intelligence gathering. *Snepp*, 444 U.S. 507.

75. *See* Letter from George J. Tenet, Central Intelligence Agency, to Honorable Arlen Specter, Chairman, Senate Select Committee on Intelligence (June 18, 1996), *reprinted in* 142 CONG. REC. S6440-41 (daily ed. June 19, 1996) [hereinafter Tenet Letter]. In pertinent part, the letter states that:

> [T]he creed of the Central Intelligence Agency, then as now, is to protect, [to] defend, and [to]compensate its assets for the sometimes mortal risks they take on our behalf. That is the only credible position for a secret intelligence service to take if it is to win and [to] hold the loyalty of its assets.

76. Besinga v. United States, 14 F.3d 1356, 1358 (9th Cir. 1994).

77. *Id.*

78. David W. Hogan, *MacArthur, Stilwell, and Special Operations in the War Against Japan*, 25 U.S. ARMY WAR C. Q., PARAMETERS 104, 106 (Spring 1995).

79. *Id.* at 112.

80. *See* Guerrero v. Marsh, 819 F.2d 238, 239-41 (9th Cir. 1987); Information Paper, Admin. L. Div., OTJAG, Army, DAJA-AL, subject: Filipino Claimants to U.S. Veterans Status as a Result of Guerilla Service During World War II (17 June 1974).

or implied contract with the United States . . . ." [81] In addition to that provision, the federal statute which establishes the jurisdiction of the Court of Federal Claims provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any express or implied contract with the United States . . . ." [82] Relying on this provision of the Tucker Act, federal courts have held that a party must be in privity of contract with the United States to assert a claim based on that contract in the Court of Federal Claims.[83] Absent privity, "there is no case." [84]

In tandem, these provisions grant exclusive jurisdiction to the Court of Federal Claims for nontort and contract claims against the government for money damages in excess of $10,000. [85] Without privity, however, this court lacks jurisdiction to hear the claim. [86] A contract with the United States is the sine qua non of jurisdiction in this court.

Unfortunately for lawyers, the legal relationship between the United States and a party to an agreement to conduct unconventional warfare is often unclear. For example, during the Vietnam War, an anti-Communist army of indigenous tribesmen fought a guerilla war in Laos, providing significant support to American forces.[87] This army was trained, equipped, and transported by the CIA, and the operation was conducted covertly.[88] Laos was a declared neutral, and the official position of all parties to the war was to recognize that neutrality; hence, the CIA operation was deniable.[89] Many of the tribesmen were Hmong and have been attempting to obtain compensation for their efforts during this guerilla war.[90] The Hmong have been unsuccessful in their attempts to obtain any compensation from the United States.[91] It is unclear whether there was any contractual relationship between the tribesmen who fought this guerilla war and the United States.[92]

Unconventional warfare operations generally involve some contracting for covert services. As in OPLAN 34A, however, there might not be a direct relationship between the United States and the operative. If the United States does not directly contract with the operatives, the United States has no legal obligation to them. If a direct contractual relationship *is* created, then the operatives are in privity of contract with the United States, and the Court of Federal Claims will have jurisdiction over claims under the contract which exceed $10,000. If the Court of Federal Claims has jurisdiction, government attorneys should then invoke the *Totten* doctrine, when applicable, to protect the interests of the United States in covert operations.

Totten's Role in Maintaining the Viability of Contracts for Secret Services

Unconventional warfare and special operations are an integral part of the total United States defense posture and are an instrument of its national policy.[93] The *Totten* doctrine, as expanded in later cases interpreting it, most notably *Vu Doc Guong*, forms a vital link between funding and maintaining such operations. Without this doctrine, disgruntled operatives in United States sponsored unconventional warfare operations could pressure the United States into paying the operatives, so as to avoid damage to national interests. If adequate payment were not made, the claimant presumably could pursue the

81. 28 U.S.C. § 1346(a)(2) (1997).

82. Tucker Act, 28 U.S.C. § 1491 (1982).

83. *See* Erickson Air Crane of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1983); Oakland Steel Corp. v. United States, 33 Fed. Cl. 611, 613 (1995).

84. Katz v. Cisneros, 16 F.3d 1204, 1210 (Fed. Cir. 1994).

85. A.E. Finley & Assoc. Inc. v. United States, 898 F.2d 1165 (6th Cir. 1990); Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hewitt v. Grabicki, 794 F.2d 1373, 1382 (9th Cir. 1986); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818 (10th Cir. 1981); Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981), *reh'g denied*, 646 F.2d 566.

86. Regarding the OPLAN 34A Commandos, if a legal commitment is found, such commitment would create a significant monetary liability to the OPLAN 34A Commandos and other operatives involved in the many operations similar to OPLAN 34A. Singlaub Statement, *supra* note 35, at 61. The recent legislation granting compensation to the Lost Commandos has forestalled, if not completely eliminated, the resolution of the nature of the United States legal commitment to the Lost Commandos. *See supra* note 67 and accompanying text.

87. WILLIAM COLBY, HONORABLE MEN, MY LIFE IN THE CIA 194-200 (1978).

88. *Id.*

89. *Id.* at 191-92.

90. Thomas W. Lippman, *Laotian Claims U.S. Owes a Debt*, WASH. POST, Sept. 18, 1995, at A16.

91. *Id.*

92. See KENNETH CONBOY, SHADOW WAR: THE CIA'S SECRET WAR IN LAOS (1995) for an exhaustive study of the CIA's involvement in Laos.

93. FM 100-25, *supra* note 68, at 2-1.

action in court, exposing the details of the operation as necessary to prove the case. The *Totten* doctrine, therefore, protects the national interests of the United States and prevents the untoward exposure of intelligence assets.

Critics have stated that *Vu Doc Guong's* interpretation of *Totten* was incorrect. It has been argued that *Vu Doc Guong* misstated and misapplied the *Totten* doctrine by holding that secret contracts bar a suit, regardless of whether the service provided is secret.[94] Thus, in *Vu Doc Guong*, Guong argued that *Totten* was only applicable to contracts for secret services, not sabotage services, because sabotage services, by their very nature, are neither secret nor concealed.[95]

The argument that the *Totten* doctrine does not include sabotage is overly simplistic and demonstrates a fundamental misunderstanding of covert operations. The fact that the results of sabotage are frequently public[96] does not create any less need to maintain secrecy over the means and methods employed, both during and after a war or operation. Secrecy of the identity of the operatives is important, so that they can maintain their freedom and are available to perform further operations. Secrecy of the methods employed is also important, so as to ensure that technologies, personnel assets, and information are not revealed to the enemy.

Additionally, the nature of the services performed should not control whether secrecy is important. The United States has many reasons to hide the existence and nature of its relationships. Hence, in instances of sabotage, as in espionage, if the employment of the operator is secret, and if the United States desires that the employment remain secret, it is immaterial what services are performed. The *Totten* doctrine, by barring jurisdiction over contracts for covert services, prevents the existence, nature, and extent of the relationship of the parties from being divulged in court.

Totten was not decided based on the secret nature of the service, although the Supreme Court discussed the secret nature of the service Lloyd provided. Rather, the Court in *Totten* based its decision on the finding that "[b]oth employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[97] The court analyzed the nature of the service as evidence that such a provision should be implied in the contract. Hence, focusing on the nature of the covert service misses the basis for the Court's opinion in *Totten*. The *Vu Doc Guong* court correctly decided that the nature of the service is immaterial and that the issue of importance is whether the parties at the formation of the contract intended that their "lips remain forever sealed."[98]

Conclusion

The *Totten* doctrine, as expanded and interpreted by later cases, most importantly *Vu Doc Guong*, is as integral a part of the United States unconventional warfare posture as unconventional warfare and special forces are an integral part of the total defense posture of the United States.[99] Without the *Totten* doctrine, covert operations would be more difficult to execute, and operatives would be more difficult to recruit and to protect and would be less effective. The *Totten* doctrine provides a black-letter rule that is both efficacious and simple in application. For these reasons, the *Totten* doctrine should remain the law regarding contracts for covert services.

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94. *See, e.g.*, Theodore Francis Riordan, *Judicial Sabotage of Government Contracts for Sabotage Services*, 13 SUFFOLK TRANSNAT'L L. REV. 807, 815 (1989).

95. Vu Doc Guong v. United States, 860 F.2d 1063, 1065 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989). The court in *Vu Doc Guong* dismissed this argument, stating that no action can be brought to enforce a contract with the government if the contract is secret or covert at the time of its formation. *Id.*

96. In Mr. Guong's case, he was tasked to blow up ships and destroy harbor facilities in North Vietnam.

97. Totten, Administrator v. United States, 92 U.S. 105, 106 (1875).

98. Additionally, the Court in *Vu Doc Guong* did not rule or comment on whether there was any distinction between the secrecy of Guong's sabotage activities and the secrecy of his contract. *See Vu Doc Guong*, 860 F.2d 1063. Hence, it can be argued that the Court did not abandon the language in *Totten* that: "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed." *Totten*, 92 U.S. at 106. The better argument, however, is that *Totten* was decided on the basis of an implied contract of secrecy, as demonstrated by the nature of the services provided, and the pursuit of a suit in a court is a breach of that implied contract provision.

99. Understandably, the *Totten* doctrine is also vital to the mission of the CIA. *See* Tenet Letter, *supra* note 75.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

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

Consumer Law Note

Fair Credit Reporting Act Changes Take Effect in September

The changes to federal consumer protection laws that are contained in the Omnibus Consolidated Appropriations Bill for Fiscal Year 1997[1] have been mentioned in several consumer law notes over the last six months.[2] Perhaps the most sweeping changes affecting the military legal assistance practice are those made to the Fair Credit Reporting Act (FCRA).[3] The majority of these changes (and all of the changes discussed in this note) take effect on 30 September 1997.[4] This allows the credit reporting agencies (CRAs) one year to adjust their procedures to comport with the new requirements. This note highlights some of the changes that are important to legal assistance practitioners.[5]

The FCRA provision relating to obsolete information in credit reports was the provision most in need of revision. The general rule is that adverse information contained in consumer credit reports becomes obsolete at ten years for bankruptcies and seven years for all other information.[6] Currently, the FCRA prohibits CRAs from reporting obsolete information unless the consumer: (1) applies for life insurance or credit in a face amount of $50,000 or more or (2) applies for employment with a salary of $20,000 or more.[7] This has been a major weakness in consumer protection because these low thresholds have enabled CRAs to include obsolete information in the credit reports of numerous consumers facing routine transactions, such as applying for a home mortgage or seeking a better job. The Consumer Credit Reporting Reform Act of 1996 (CCRRA) provides much needed relief by raising the dollar limits to $150,000 for insurance and credit and $75,000 for employment.[8] The changes in the thresholds will help average income consumers, like soldiers, to recover from adverse credit information.

Another change that will benefit those who are trying to "clean up" their credit report is the fixing of the "reasonable fee" that CRAs can charge for a copy of the report. Congress has fixed that amount at $8, beginning 30 September 1997.[9] This price will be adjusted each January based on the consumer price index.[10] Attorneys will have to remain cognizant of future changes in the price.

The Act also increases consumer access to their own credit information. Prior to the 1996 legislation, consumers were only entitled to disclosure of "the nature and substance" of the infor-

1. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

2. *See, e.g.*, Consumer L. Note, *The Fair Debt Collection Practices Act Notice Provisions Amended,* ARMY LAW., Mar. 1997, at 16; Consumer L. Note, *What's in a Name?*, ARMY LAW., June 1997, at 44 n.26.

3. Consumer Credit Reporting Reform Act of 1996 (CCRRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (to be codified in 15 U.S.C. § 1681). The CCRRA amends The Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970).

4. CCRRA § 2420.

5. The CCRRA is the first major reform of the Fair Credit Reporting Act since its initial passage in 1970. *Debt Collection, Credit Reporting, Other Consumer Credit Laws Amended*, Report 746 (Consumer Credit Guide (CCH)), Oct. 22, 1996, at 1 (on file with author). Consequently, a complete treatment of all of these sweeping reforms is beyond the scope of this note. More complete coverage is available in *Credit Reporting Reform, Other Consumer Credit Changes Enacted*, Report 745 (Consumer Credit Guide (CCH)), Oct. 8, 1996, at 4-10 (on file with author) and *Fair Credit Reporting Amendments*, 16 NCLC Reports, Consumer Credit & Usury Edition 5 (Sept./Oct. 1996).

6. 15 U.S.C.A. § 1681c(a) (West 1982).

7. *Id.* § 1681c(b).

8. CCRRA § 2406 (to be codified at 15 U.S.C. § 1681c).

9. *Id.* § 2410 (to be codified at 15 U.S.C. § 1681j).

10. *Id.*

mation in their files with the CRA.[11] The new provision makes clear that the consumer is entitled to "all information" in their files, with the exception of any credit scores or risk predictors in the file.[12]

Some of the more technical aspects of the statute have changed as well. Congress added a definition of "adverse action" to the statute.[13] While a detailed discussion of each provision of this definition is outside the scope of this note, having a definition is important. Taking adverse action based upon a credit report triggers certain requirements for users. Under current law, the user was simply told to notify the consumer and give him the name and address of the CRA that issued the report.[14] Beginning 30 September 1997, the user must not only notify the consumer, but must also provide the name, address, and telephone number of the credit reporting agency; a statement that "the consumer [sic] reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken;" and notice of the consumer's rights under the FCRA.[15] These rights include obtaining a copy of a consumer report from the CRA free of charge within sixty days of the adverse action and disputing the accuracy or completeness of the report.[16]

The most significant (and perhaps most controversial[17]) change to the FCRA is the establishment of duties for those who provide information to the CRAs. Correcting inaccuracies in credit reports has been a fairly daunting task, because information will often reappear after it has been removed. The imposition of duties on providers of information, in addition to the duties already placed on CRAs and users, is a step toward improving the situation.

The amendments in the CCRRA first establish a prohibition against providing information "if the person knows or consciously avoids knowing that the information is inaccurate."[18] Second, the amendments prohibit the furnishing of information to the CRAs if the person is notified by the consumer that the information is inaccurate and "the information is, in fact, inaccurate."[19] Third, all persons who "regularly and in the ordinary course of business" furnish information to the CRAs have an affirmative obligation to notify the CRA if they determine that information they have previously provided is incomplete or inaccurate and to cease providing the inaccurate information.[20] The notice of the error must include the corrections or additional information necessary to make the information accurate and complete.[21] Finally, if the person who is providing information is notified by the CRA that the consumer disputes the information provided,[22] that person must conduct a reasonable investigation and report the results to the CRA.[23] If the investigation reveals that the information is inaccurate or incomplete, the provider must notify all CRAs to whom that provider gave the information.[24] The provider of the information must complete all investigations, reviews, and reporting within thirty days from the date the CRA received its notice from the consumer.[25]

The amendments also place additional duties upon CRAs. The procedures for investigating disputed entries on credit reports are formalized under the CCRRA. Within five business days,[26] the CRA must notify the person who provided the dis-

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11. 15 U.S.C.A. § 1681g(a)(1).

12. CCRRA § 2408 (to be codified at 15 U.S.C. § 1681g).

13. *Id.* § 2402 (to be codified at 15 U.S.C. § 1681a).

14. 15 U.S.C.A. § 1681m.

15. CCRRA § 2411 (to be codified at 15 U.S.C. § 1681m). Although CRAs are normally referred to as "Credit Reporting Agencies" throughout the legislation, this section refers to them as "Consumer Reporting Agencies."

16. *Id.*

17. *See Credit Reporting Reform, Other Consumer Credit Changes Enacted*, *supra* note 5, at 4.

18. CCRRA § 2413 (to be codified at 15 U.S.C. § 1681s-2).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See infra* notes 27 - 28 and accompanying text.

23. CCRRA § 2413 (to be codified at 15 U.S.C. § 1681s-2).

24. *Id.*

25. *Id.* §§ 2409, 2413.

puted information to the CRA.[27] The notice must include all relevant information that is received from the consumer regarding the dispute.[28] The CRA must then reinvestigate the disputed information free of charge.[29] The CRA is required to complete this investigation within thirty days from the date they receive the notice of the dispute from the consumer.[30] After completing the investigation, the CRA must either record the current status of the information or delete the information.[31] The CRA must also inform the consumer of the results of the investigation within five business days of completion.[32]

Another change that should benefit consumers is that CRAs must follow new procedures before reinserting previously deleted information. Before reinsertion, the CRA must receive a certification from the provider of the information that the information is complete and accurate.[33] The CRA must then notify the consumer in writing within five business days of reinserting the information.[34] While these provisions will not necessarily prevent inaccurate information from reappearing, at least consumers will have affirmative notice of the problem before the information has an adverse impact on them.

As our society has become credit-driven, the importance of credit information has increased exponentially. All facets of a person's life, from his home to his job, can be impacted by this information. The 1996 amendments provide valuable tools for consumers to use in maintaining their credit reports, and legal assistance practitioners must use these tools effectively to protect their clients. Major Lescault.

Family Law Note

Retroactive Application of the Uniformed Services Former Spouses' Protection Act Clarified in Louisiana Case

The domestic relations laws of many states permit former spouses to return to court for partition of assets which were not disposed of in the original divorce proceedings. The passage of the Uniformed Services Former Spouses' Protection Act[35] (USFSPA) opened the door for thousands of such cases. Amendments to the USFSPA in February 1991, however, prohibit partition actions for omitted military pension benefits if the underlying divorce decree is dated prior to 25 June 1981, and if the decree does not either divide the pension or reserve jurisdiction to do so.[36]

In the Fifth Circuit, a federal district court answered for the first time two specific issues surrounding partition actions: (1) the meaning of the jurisdictional restrictions of 10 U.S.C. § 1408(c)(4)[37] and (2) an interpretation of the language of 10 U.S.C. § 1408(c)(1).[38] In *Delrie v. Harris*,[39] the plaintiff petitioned for a partition of military retirement benefits thirty-three years after the divorce action. Roberta and Harry Harris were married in 1943 and divorced in Louisiana in 1963, after approximately nineteen years of overlap between the marriage and Mr. Harris' military career. Although they entered into a voluntary community property settlement, the court did not order, ratify, or approve a property settlement incident to the divorce decree. Neither the divorce decree nor the voluntary community property settlement provided for any division of the military retirement benefit. Mr. Harris resided in Oklahoma at the time of the petition for partition of military retirement benefits.

These facts raised two issues for the district court. First, does 10 U.S.C. § 1408(c)(4) impose a heightened personal

26. *Id.* Interestingly, the amendments use the term "business day" in a number of provisions but do not define the term. It may be logical to use the ordinary meaning of that term—a day that the company is open for business—but, ordinarily in consumer legislation, terms that limit time periods are defined. Therefore, attorneys should carefully watch the CFR and FTC staff commentaries for a definition of this term.

27. *Id.* § 2409 (to be codified at 15 U.S.C. § 1681i). *See supra* notes 23-25 and accompanying text for a discussion of the responsibilities of providers of information upon receipt of the notice of the dispute from the CRA.

28. CCRRA § 2409 (to be codified at 15 U.S.C. § 1681i).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. 10 U.S.C.A. § 1408 (West 1996).

36. *Id.* § 1408(c)(1).

37. This section of the USFSPA requires a court to establish jurisdiction over the service member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court; (B) his domicile in the territorial jurisdiction of the court; or (C) his consent to the jurisdiction of the court.

jurisdiction requirement on courts which are looking at USFSPA issues; second, what is the correct interpretation of the prohibition on partitions contained in 10 U.S.C. § 1408(c)(1)? With respect to the personal jurisdiction issue, Mr. Harris contended that his residence in Oklahoma at the time of the petition for partition precluded Louisiana from acting without his consent. The court, however, ruled that the statute's jurisdiction provision is related more to the court's subject matter jurisdiction and not particularly to the personal jurisdiction over the service member for each particular case.[40] Therefore, the court found that the Louisiana court had jurisdiction over the issue at the time of the divorce and that by appearing and defending in one action a defendant consents to jurisdiction over suits incidental to that action.[41]

The second issue, involving interpretation of the specific language of 10 U.S.C. § 1408(c)(1), was dispositive of the case. Mrs. Delrie (the former Mrs. Harris) argued that the parenthetical phrase "(including a court ordered, ratified, or approved property settlement incident to such decree)"[42] limited the words "divorce, dissolution, annulment, or legal separation" so that unless a divorce included such a court ordered, ratified, or approved property settlement, the prohibition on partition was not effective. Mr. Harris argued that the parenthetical phrase merely illustrated the preceding words and did not limit them. The court found that the plain language of the statute and common sense supported Mr. Harris' interpretation.[43] At the time of the divorce in 1963, Louisiana courts recognized a military spouse's right to a share of military retirement benefits. The amendment to the USFSPA prevents a relitigation of that right.[44]

For the practitioner who advises military members and spouses, it is important to remember that the time to dispute jurisdiction to divide the military pension based on 10 U.S.C. § 1408(c)(4) grounds is at the original petition. As to the interpretation of the language in 10 U.S.C. § 1408(c)(1), which bars partition of cases decided prior to 25 June 1981, it remains a case of investigating the state domestic law. Louisiana signals a strict reading of the plain language of the statute, noting that it may work a financial hardship on many former military spouses.[45] Other jurisdictions do not necessarily apply the same strict reading and may be open to partition actions despite the language of the USFSPA amendment.[46] Major Fenton.

Tax Law Notes

Dependency Exemption for Children of Separated Parents

A recent tax court case demonstrates the different rules that apply when parents who are separated both want to claim their children as dependents on their tax returns. In order to claim someone as a dependent on a tax return, one must satisfy a five-part test. First, the dependent must earn less than the personal exemption amount.[47] This rule, however, does not apply if the dependent is a child of the taxpayer and is either: (1) under the age of nineteen or (2) under the age of twenty-four and a full-

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38. This section of the USFSPA states:

> A court may treat disposable retired pay payable to a member for pay periods beginning after 25 June 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C.A. § 1408(c)(1).

39. No. Civ. A. 97-0232, 1997 WL 266855 (W.D. La. May 8, 1997).

40. *Id.* at *3.

41. *Id.* at *2.

42. 10 U.S.C.A. § 1408(c)(1).

43. Louisiana state courts are split on this issue, as the *Delrie* court noted in citing *Meche v. Meche*, 635 So. 2d 614 (La. App. 3rd Cir. 1994). In *Meche*, a Louisiana circuit court adopted the same interpretation of the statute as argued by Mrs. Delrie. 635 So. 2d 614.

44. *Delrie*, 1997 WL 266855, at *4.

45. *Id.* at *5.

46. For example, Texas holds that its state domestic law constitutes a *built-in* reservation of jurisdiction to divide any omitted asset, including military retirement benefits. *See* Walton v. Lee, 888 S.W.2d 604 (Tex. Ct. App. 1994), *cert. denied*, 116 S. Ct. 190 (1995).

47. I.R.C. § 151(c)(1)(A) (West 1997). The personal exemption amount for 1996 is $2,550. *See* Rev. Proc. 95-53, 1995-2 C.B. 445. The personal exemption for 1997 is $2,650. *See* Rev. Proc. 96-59, 1996-53 I.R.B. 17.

time student.[48] Second, the dependent cannot have filed a joint tax return with a spouse.[49] Third, the dependent must either be related to the taxpayer or be a member of the taxpayer's household for the taxable year.[50] Fourth, the dependent must be a United States citizen or a resident of the United States, Canada, or Mexico.[51] Finally, the taxpayer must have provided over one-half of the dependent's support.[52]

When this five-part test is applied to married taxpayers who separate, the spouse who paid over one-half of a dependent's support would be entitled to the personal exemption for that dependent. Because of the extensive litigation between separating couples over who paid more than one-half of the support, Congress has provided a different rule which applies in certain circumstances.[53]

When two taxpayers are divorced, legally separated under a decree of divorce or separate maintenance, or separated under a written agreement, § 152(e) of the Internal Revenue Code (I.R.C.) requires the application of a different rule. Rather than looking at which parent paid the most support, the determining factor is who had custody of the child for more than one-half of the year.[54] Thus, when a couple is divorced, legally separated under a decree of divorce or separate maintenance, or separated under a written agreement, the parent who had custody of the child for more than six months of the year will be entitled to claim the child as a dependent on his tax return. On the other hand, if a couple is not divorced, separated under a decree of divorce or separate maintenance, or separated under a written agreement, the parent who provided the most support for the child is entitled to the dependency exemption.

In *Correale v. Commissioner*,[55] the issue was whether or not the taxpayers were separated under a decree of separate maintenance. The couple was married on 9 August 1974 and had four children. In August 1994, the couple separated. There was no dispute that Mr. Correale paid over one-half of the support for the couple's four children during 1994. The couple petitioned the circuit court in Illinois for dissolution of their marriage. In August 1994, the court issued an order which awarded custody of two children to Mr. Correale and two children to Mrs. Correale. As of the close of 1994, the couple was not divorced and had not entered into a written separation agreement. Thus, the only issue for resolution was whether the August court order meant that the couple was legally separated under a decree of separate maintenance. If they were separated under a decree of separate maintenance, I.R.C. § 152(e) would apply, and Mr. Correale would only be entitled to claim dependency exemptions for the two children who resided with him. If the couple was not separated under a decree of separate maintenance, however, Mr. Correale would be entitled to claim all four children as dependents, because he had paid over one-half of their support and I.R.C. § 152(e) would not apply. The tax court looked at Illinois law to determine whether the August court order was a decree of separate maintenance. Since Illinois law has separate statutes that apply to divorce and separation and because the couple had filed for a divorce, the tax court determined that the August court order was not a decree of separate maintenance.[56] Thus, I.R.C. § 152(e) did not apply, and Mr. Correale was entitled to claim all four children as dependents because he provided over one-half of the support for the children.

Legal assistance attorneys need to be cautious in this area as they advise separating couples who will be entitled to the dependency exemption. Also, attorneys should be aware that the written separation agreement legal assistance attorneys prepare will cause I.R.C. § 152(e) to apply. Depending on the client's specific circumstances, this may or may not be advantageous for the client. Lieutenant Colonel Henderson.

Nonmilitary Spouse's Joint Ownership of Personal Property Voids Soldiers' and Sailors' Civil Relief Act Personal Property Tax Protection

Legal assistance attorneys should advise their clients that the Soldiers' and Sailors' Civil Relief Act (SSCRA) only protects service members from multiple state personal property or ad valorem taxation.[57] Normally, individual personal property is taxed where it sits (situs).[58] The SSCRA provides the legal fiction that a military member's personal property which is titled solely in the name of the service member is sited in the state of domicile and can only be taxed by that state.[59] Further, the host state, where the service member is stationed on military orders,

48. I.R.C. § 151(c)(1)(B).

49. *Id*. § 151(c)(2).

50. *Id*. § 151(a).

51. *Id*. § 152(b)(3).

52. *Id*. § 152(a).

53. *Id*. § 152(e).

54. *Id*. § 152(e)(1)(A).

55. 73 T.C.M. (CCH) 2791 (1997).

56. *Id.*

may not tax a military member's personal property just because the domiciliary state did not tax the personal property.[60]

In contrast to military members, a nonmilitary spouse receives no SSCRA protection from multiple state personal property taxation for property titled solely in the nonmilitary spouse's name or any property titled jointly in the names of the service member and the nonmilitary spouse.[61] No reported appellate case has considered the issue of whether the SSCRA tax protections apply to nonmilitary spouses. Nonmilitary spouses can be taxed on their solely owned or jointly held personal property in the state where the property is physically located as well as in the state where the nonmilitary spouse is domiciled.[62] Community property states, such as California, do not fit neatly into the traditional common law concepts of joint tenancy or tenancy in common ownership. The rights of husband and wife regarding title to personal property vary from state to state depending on how each state interprets its statutory community property system.[63]

The most common problem area regarding personal property is whether a host state may tax motor vehicles titled jointly in the names of a military member and a nonmilitary spouse. The majority of states that utilize a personal property tax follow a policy of taxing jointly titled motor vehicles where one of the title holders is a military member.[64] The taxation formulas vary from state to state, ranging from half value to full value.[65] Only a few states do not attempt to tax jointly-held motor vehicles or other personal property owned in part by a military member and a nonmilitary spouse.[66]

What does this mean for legal assistance clients? Attorneys should advise their clients to title their motor vehicles, camping trailers, and boats solely in the military member's name. The SSCRA tax protection statute (Section 514) was enacted in the 1940s, when women did not have equal property rights to men and most military spouses did not work outside the home. Today, it is not uncommon for a nonmilitary spouse to work outside the home, and two income military families are the norm. Congress has not extended the SSCRA tax protections

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57. Soldiers' and Sailors' Civil Relief Act (SSCRA), ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 U.S.C. App. §§ 501-593 (1996)). Section 514 of the SSCRA, dealing with multiple state income and personal property taxation of service members, was added by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, ch. 581, § 17, 56 Stat 777; and was subsequently amended further by ch. 397, § 1, 58 Stat. 722 (1944); Pub. L. No. 87-771, 76 Stat. 768 (1962); and Pub. L. No. 102-12, § 9(24), 105 Stat. 41 (1991) (codified at 50 U.S.C. App. § 574). As to personal property taxes, SSCRA § 514, states:

> (1) For the purposes of taxation in respect of any person, or of his personal property . . . by any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property . . . of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled . . . personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: provided, that nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction.
> (2) When used in this section, (a) the term 'personal property" shall include tangible and intangible property (including motor vehicles).

58. SSCRA § 514.

59. *Id*.

60. Dameron v. Brodhead, 345 U.S. 322 (1953).

61. SSCRA § 514. This section provides no statutory protection against multiple state taxation of the income and personal property of nonmilitary spouses. *But cf.* SSCRA § 536 (explicitly setting forth SSCRA protections that apply to nonresident military spouses as to leases, mortgages, and contracts); Brunson v. Chamberlina, 53 N.Y.S.2d 172 (N.Y. Mun. Ct. 1945); Wanner v. Glen Ellen Corporation, 373 F. Supp. 983 (D. Vt. 1974). *See also* 1986 Op. Ariz. Att'y Gen. 111 (1986); Op. S.C. Att'y Gen. 3000 (1970); 1984-85 Op. Va. Att'y Gen. 363 (1984); 1976-77 Op. Va. Att'y Gen. 285 (1976).

62. 1983-84 Op. Va. Att'y Gen. 393 (1984).

63. 1976-77 Op. Va. Att'y Gen. (1976). 15 AM. JUR. 2D *Community Property* § 1 (1964). The following states have adopted some sort of community property system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

64. *See* 1986 Op. Ariz. Att'y Gen. 111 (1986); Op. S.C. Att'y Gen. 3000 (1970); 1984-85 Op. Va. Att'y Gen. (1984); and 1976-77 Op. Va. Att'y Gen. 285 (1976).

65. *See* Comment, *State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act*, 36 MIL. L. REV. 123 (1967). The State of Virginia taxes the full value of personal property held in the joint names of a military member and the nonmilitary spouse. *See* 1976-77 Op. Va. Att'y Gen. 285 (1976).

66. 1989 Op. Miss. Att'y Gen (1989).

to nonmilitary spouses. Until Congress acts, military families should keep their taxable personal property titled solely in the military member's name, if they wish to avoid host state taxation. Lieutenant Colonel Conrad.

Criminal Law Note

Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers From Possessing Military Weapons

Introduction

Recent amendments to the Federal Gun Control Act of 1968 (GCA)[67] effectively prohibit certain service members from possessing weapons and ammunition which are essential to their military duties. Under the 1996 changes to the GCA, known as the Lautenberg Amendment,[68] it is now a felony for any person who has been convicted of a misdemeanor involving domestic violence to receive or possess firearms and ammunition which have moved in interstate commerce.[69] Likewise, it is a felony to sell or otherwise transfer firearms and ammunition to such persons.[70] Unlike other provisions of the GCA, the new law does not exempt military or law enforcement personnel.[71]

Consequently, if a soldier with a state or federal domestic violence conviction draws an M16A2 from the arms room, both he and the company commander may have committed felony offenses punishable by up to ten years in prison and a $250,000 fine.[72] Because implementing guidance from the Department of Defense or Department of the Army has not been promulgated,[73] this note defines the salient features of the new law and suggests an interim approach toward compliance.

Background

The original GCA disqualified certain categories of people from receiving firearms or ammunition that had traveled in interstate commerce[74] and imposed criminal liability for the sale or transfer of firearms to disqualified people.[75] The Lautenberg Amendment, effective 30 September 1996, retains the basic structure of the GCA but adds to the list of disqualified people "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence."[76]

In expanding the scope of disqualified people, the Lautenberg Amendment also specifically limits a previous exemption which would have provided a haven for federal military and law enforcement personnel who have domestic violence convictions. The GCA formerly exempted from its prohibitions "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof."[77] However, the 1996 Act amended 18 U.S.C. § 925 to deny this "federal exemption" for individuals convicted of misdemeanors involving domestic violence.[78] Thus, the new disqualification applies to all service members, active and reserve. This is not a case of unintended consequences. Rather, the simultaneous amendment of § 925 demonstrates the

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67. 18 U.S.C.A. § 921 (West 1994).

68. Omnibus Consolidated Appropriations Act of 1997 (Treasury Department Appropriations Act Section 658), Pub. L. No. 104-208, 110 Stat. 3009-1101 (1996) (codified at 18 U.S.C. § 921). The amendment is named after its sponsor, Senator Frank Lautenberg (D., NJ).

69. 18 U.S.C.A. § 922(g) (West Supp. 1997).

70. *Id*. § 922(d).

71. *See infra* note 74 and accompanying text.

72. 18 U.S.C.A. §§ 942(a)(2), 3571(b)(3).

73. The provisions of the GCA are made applicable under clause three of Uniform Code of Military Justice art. 134, "crimes and offenses not capital," to all people who are subject to the UCMJ. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(4). The lack of implementing regulations or directives has no effect on the enforcement of the GCA against military personnel. The statute contains no requirement for implementing regulations by states or federal agencies.

74. 18 U.S.C.A. § 922(g) (amended 1997) (disqualifying felons, fugitives, drug addicts, the mentally ill, illegal aliens, and persons who have been dishonorably discharged from military service).

75. *Id*. § 922(d) (amended 1997).

76. *Id*. §§ 922(d), 922(g).

77. *Id.* § 925 (amended 1997).

78. *Id.* It should be noted that the Lautenberg Amendment retains the exemption for personnel who are subject to a domestic violence restraining order based upon threat of physical harm under 18 U.S.C.A. §§ 922(d)(8) and 922(g)(8) (conditioning the prohibition on an order issued after notice and judicial hearing that specifically prohibits the use or attempted use of physical force against an "intimate partner or child," or includes a finding that the individual represents "a credible threat to the physical safety of a partner or child").

unambiguous legislative purpose of bringing military personnel within the scope of the new disqualification.

As a result of these amendments, the disqualified soldier, arms room personnel, and commanders may be exposed to criminal liability for the routine transfer of military weapons or ammunition for duty purposes. The criminal prohibitions of the Lautenberg Amendment are incorporated into the Uniform Code of Military Justice (UCMJ) by operation of article 134, clause three ("crimes and offenses not capital").[79] Judge advocates must make commanders aware of these amendments to the GCA and encourage them to implement reasonable measures to protect themselves and their subordinates from potential criminal liability.

Conditions for Disqualification and Scope of Criminal Liability

Under the Lautenberg Amendment, any person convicted of a misdemeanor crime of domestic violence is prohibited from taking possession of any firearm or ammunition which has been transported in interstate or foreign commerce. The phrase "foreign commerce" has been interpreted in other contexts to permit extraterritorial application of the law.[80] The term "firearm" is defined broadly enough in the statute to encompass every weapon or potential weapon in the military inventory, from a starter pistol to an M1A2 Abrams Main Battle Tank.[81] Any transfer of a firearm or ammunition to a disqualified person, whether for sale or temporary use, is prohibited.[82] Both the person with the disqualifying conviction and the person who transfers, or causes the transfer of, the weapon are subject to criminal prosecution under the law.

The statute defines a "misdemeanor crime of domestic violence" as any offense that:

> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[83]

The Bureau of Alcohol, Tobacco, and Firearms elaborated upon the statutory definition, stating that "[t]his definition . . . includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery) . . . whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor."[84] The scope of the disability is extremely broad. The definition of the victim includes any present or *former* spouse or member of the offender's household, and the disability relates to all convictions both before and after the passage of the Act, no matter how old the conviction is.[85] Thus, under the Lautenberg Amendment, even if a soldier were convicted of committing a simple assault ten years ago upon a former spouse, that soldier is disqualified from drawing a weapon or ammunition.

Whether the conviction qualifies as a misdemeanor is to be determined under the law of the jurisdiction in which the proceedings were held.[86] A conviction is not considered valid for purposes of the firearm disability unless the accused was accorded, or knowingly and intelligently waived, the right to counsel and trial by jury (if applicable under the law of the jurisdiction).[87] If a previous conviction has been expunged or set aside, or if the person has been pardoned or accorded a full restoration of civil rights by the proper authority, the disability is removed.[88]

The elements of the offenses under the Lautenberg Amendment differ according to who is being prosecuted. The disqual-

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79. *See supra* note 73. Prior to the Lautenberg Amendment, the federal exemption under § 925 precluded prosecution of GCA violations under clause three of UCMJ art. 134. For an example of prosecution under a related provision of the federal criminal code, see *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978) (prosecution under art. 134 for violation of 18 U.S.C. § 842(h), possession of stolen explosives).

80. *Id.* § 922(g). *See* United States v. Thomas, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990) (finding the inclusion of the phrase "interstate or foreign commerce" sufficient to extend extraterritoriality to a child pornography statute).

81. *See* 18 U.S.C.A. § 921(a)(3) (defining firearms to include "any weapon (including a starter pistol) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive . . . or any destructive device").

82. *Id.* § 922(d) (stating that it is unlawful to "sell or *otherwise dispose* of any firearm" to any disqualified person) (emphasis added).

83. *Id.* § 921(a)(33).

84. Letter from John W. Magaw, Director, Bureau of Alcohol, Tobacco, and Firearms, to All State and Local Law Enforcement Officials (Nov. 26, 1996) (on file with author) (containing no restriction on the date of the conviction).

85. *See* 18 U.S.C.A. §§ 922(d), 922(g) (containing no restrictions on the date of the conviction).

86. *See id.* § 921(a)(20).

ified person who receives or possesses a firearm is criminally liable under 18 U.S.C. § 922(g) only if the following elements are proven: (1) that the accused was convicted of a misdemeanor crime of domestic violence; (2) that the accused thereafter knowingly received or possessed a firearm or ammunition; and (3) that the firearm or ammunition had been transported in interstate or foreign commerce.[89] Courts have consistently held that the only mens rea element required for conviction under § 922(g) is that the accused had knowledge that the instrument possessed was a firearm.[90] Thus, any defense based upon an alleged mistake of fact or law concerning the existence or nature of the disqualifying conviction would generally not be viable.[91]

The culpability of the transferor depends upon a different standard of knowledge. In a prosecution under 18 U.S.C. § 922(d), the government must prove that (1) the accused transfered a firearm or ammunition to a certain person with a conviction for a misdemeanor crime of domestic violence and (2) at the time of the transfer, the accused knew or had reasonable cause to believe that the person had the disqualifying conviction.[92] Thus proof that the accused had actual knowledge of the prior conviction, or some reasonable basis to suspect it, is necessary to establish liability for a prohibited transfer.

The "reasonable cause to believe"standard under § 922(d) has not been extensively litigated and is not defined in the statute. Existing case law suggests that the government must show that the accused had personal knowledge of specific, credible information which would cause a reasonable person to suspect that the disqualifying condition exists.[93] Courts that have addressed the issue have engaged in a fact-specific analysis akin to the application of the "probable cause" standard in Fourth Amendment law.[94]

In the commercial context, licensed firearms dealers are required by Treasury Department regulations to have all buyers complete a form certifying their eligibility to purchase a firearm under federal law.[95] Compliance with these procedures is normally sufficient to shield a seller from liability under § 922(d), even where the buyer falsely certifies his status.[96] Absent independent sources of information indicating that a buyer may be disqualified, the seller is entitled to rely upon the buyer's responses on the official form.[97] Courts have specifically held that Congress did not impose on the transferor a general duty to conduct a background investigation before every transfer.[98]

The standard of reasonable cause raises unique issues in the military context. By virtue of his position, the commander bears greater responsibility than a commercial dealer. Commanders have the authority and obligation to enforce the law within their commands.[99] Moreover, the commander's duty to monitor the morale and welfare of the soldiers within his command, and his close daily supervision of his soldiers, may make it difficult for him to disavow knowledge of any conviction occuring after his assumption of command. Similarly, knowl-

87. *Id.* § 921(a)(33)(B)(i). Based upon these restrictions, a summary court-martial conviction or punishment imposed under Article 15, UCMJ, would not count as a disqualifying "conviction" under the Lautenberg Amendment. *See generally* United States v. Brown, 23 M.J. 149 (C.M.A. 1987) (holding that an Article 15 is not a "prior conviction" under MIL. R. EVID. 609); United States v. Rogers, 17 M.J. 990 (A.C.M.R. 1984) (holding that a summary court-martial in which the accused was not represented by counsel was not a "prior conviction" for impeachment purposes under MIL. R. EVID. 609(a)).

88. 18 U.S.C.A. § 921(a)(33)(B)(ii) states that a person shall not be considered convicted of the offense if the "conviction . . . has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored unless [the] pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

89. *See* United States v. Mains, 33 F.3d 1222 (10th Cir. 1994).

90. *See* United States v. Field, 39 F.3d 15 (1st Cir. 1994) (relying on United States v. Freed, 401 U.S. 601, 607 (1971); s*ee also* United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988) (discussing knowledge elements under the GCA).

91. *See* United States v. Turcotte, 558 F.2d 893 (8th Cir. 1977) (mistake of law generally not a defense under § 922). Since Congress requires no proof of a mental state as to the first element of the crime, the defense of mistake as to the prior conviction is not generally available. *See generally* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1(a) (1986) ("[I]gnorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged."). However, a limited exception has been recognized where the accused reasonably relied upon an official government assurance that a previous conviction did not prohibit a sale under federal law. United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987).

92. 18 U.S.C.A. § 922(d) (West Supp. 1997). *See* United States v. Murray, 988 F.2d 518 (5th Cir. 1993).

93. *See, e.g.*, United States v. Xavier, 2 F.3d 1281 (3rd Cir. 1993); *Murray*, 988 F.2d 518; United States v. Garcia, 818 F.2d 136 (1st Cir. 1987).

94. *See Xavier*, 2 F.3d 1281; *Murray*, 988 F.2d 518.

95. *See* 27 C.F. R. § 178.124 (1996) (requiring that Treasury Form 4473 (U.S. Firearms Transaction Record) be completed by the customer before a firearm may be sold).

96. *See* Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532 (S.D. Ga. 1995); Jamison v. Dance's Sporting Goods, Inc., 854 F. Supp. 248 (S.D.N.Y. 1994).

97. *Jamison*, 854 F. Supp. 248.

98. *See Knight*, 889 F. Supp. at 1538 (citing cases and legislative history to support the holding that § 922(d) does not impose a general duty to investigate).

edge of information contained in official military files may be imputed to the commander responsible for maintaining such files. While the Lautenberg Amendment does not strictly require commanders to conduct background investigations of every soldier, commanders have a duty to take reasonable steps to identify disqualified personnel and to inform their soldiers of the consequences of violating the law.

Advice to Practitioners

Commanders should take reasonable steps to ensure that they and their soldiers comply with the law. Since the novelty and severity of the law make self-reporting unlikely, commanders should implement some sort of screening process. This could be accomplished initially by briefing the unit on the meaning and effect of the law and requiring all assigned personnel to complete a form certifying their understanding of the law and their eligibility to receive weapons and ammunition.[100] The screening procedure could be included as a routine part of unit inprocessing.

Commanders should remind their personnel of the severe criminal penalties that might result from a false answer to the screening questions.[101] In cases where the chain of command is aware of information indicating that a soldier may be disqualified, the commander should attempt to verify the facts by direct inquiry and, if necessary, a records review. Finally, a sign should be posted at the arms room reminding soldiers and arms room personnel that it is illegal for a soldier convicted of a misdemeanor of domestic violence to draw a weapon or ammunition.

Conclusion

Since its enactment, the Lautenberg Amendment has come under fire from critics within Congress and elsewhere[102] who recognize the potentially harsh impact the Amendment may have on individuals in the military. A soldier who cannot lawfully possess a military weapon is unqualified for service and subject to administrative discharge, regardless of military occupational specialty.[103] Based on a single incident from years ago, career soldiers could thereby suffer loss of employment and retirement benefits after years of honorable service. The severity of this result is of special concern to the military services.

The strict application of the law to the military is also questionable in light of the circumstances surrounding the use of weapons in the military setting. Unlike a commercial sale, weapons issued in the military remain under the constructive control of the commander during training and deployment missions. Soldiers, unlike civilian law enforcement personnel, are not permitted to take their weapons home during nonduty hours. Soldiers remain under the personal supervision of the unit commander during periods when weapons are in their possession. Because of these conditions, it is extremely unlikely that a military weapon will be used in a crime of domestic violence.

Several amendments to the Lautenberg Amendment have been proposed to take into account the unique circumstances of military service and the disproportionately harsh results that the law can impose on service members. The President recently vetoed a proposal which would have limited the law to prospective application.[104] As of the writing of this note, a bill which would exempt the military from firearms prohibitions applica-

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99. This obligation is rooted in the nature of command authority, the commander's role in the military justice system, and the commissioned officer's oath of office. *See generally* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, paras. 2-1b and 4-1 (30 Mar. 1988) (discussing the duties and responsibilities of commanders generally).

100. The form could include language such as:

> A. It is against the law for any soldier who has been convicted of a misdemeanor crime of domestic violence to possess a weapon or ammunition. The maximum penalty for violating this law is a fine of up to $250,000 and imprisonment of up to ten years. A misdemeanor crime of domestic violence is a federal or state law misdemeanor which involves physical force or threatened use of a weapon by one family member against another. If you have any questions concerning the definition of a "misdemeanor crime of domestic violence" consult the commander prior to signing this form. _____ (initial).
>
> B. By signing this form, I certify that I have never been convicted of a misdemeanor crime of domestic violence. _____ (initial).
>
> C. I am not currently under a court order to refrain from contact with any person based upon a previous act or threat of violence to that person. _____ (initial).
>
> D. I will notify my commander if I am convicted of a misdemeanor crime of domestic violence in any court after signing this form. _____ (initial).

101. *See* UCMJ art. 107 (West Supp. 1996).

102. *See, e.g.*, Bruce T. Smith, *Disarming the Soldier*, FED. LAW., May 1997, at 16.

103. Readiness to deploy to hostile environments is an inherent requirement in all specialties. Soldiers who are permanently disqualified to perform essential duties may be subject to discharge under U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 5-3 (17 Oct. 1990).

ble by reason of a misdemeanor domestic violence conviction is gathering support in the House of Representatives.[105]

Until modified, the Lautenberg Amendment remains the law. Judge advocates should advise commanders to take reasonable steps to protect their soldiers and to comply with the law. Since the statute authorizes the Secretary of the Treasury to grant individual exceptions on a case-by-case basis, some soldiers may be able to have their disqualification removed.[106] Commanders should direct their disqualified soldiers to the Legal Assistance office for help in seeking to have their disqualification removed. Concerns regarding the implementation of interim measures should be raised through command and legal channels. Major Einwechter and Captain Christiansen.

104. On 13 May 1997, Congressman Barr proposed an amendment that would make "firearms prohibitions applicable by reason of a domestic violence misdemeanor conviction" not applicable if the conviction was obtained prior to 30 September 1996. 143 CONG. REC. H2590-04, *H2591 (1997). The proposal amended the Supplemental Appropriations, FY97, H.R. 1469, 105th Cong. (1997). H.R. 1469 was vetoed by President Clinton on 9 June 1997. 143 CONG. REC. D586-02 (1997).

105. On 9 January 1997, Congressman Stupak proposed an amendment that would "provide that the firearms prohibitions applicable by reason of a domestic violence misdemeanor do not apply" to the military. 143 CONG. REC. D183-01, *H153 (1997). As of 5 May 1997, the proposal, H.R. 445, 105th Cong. (1997), was still pending in the House of Representatives. 143 CONG. REC. H2168-03 (1997).

106. 18 U.S.C.A. § 925(c) (West Supp. 1997).

Note from the Field

Medicaid Planning

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An aging population with increased longevity due to advanced health care, combined with the increasing cost of prolonged health care, has increased the role of Medicaid as an ancillary to estate planning.[1] Your client may be elderly or, more likely, a soldier with an elderly relative who is concerned with saving something for the family when he is facing nursing home care.

Adequate civilian health insurance coverage combined with Medicare will normally cover hospital and doctor charges, but they do not cover prolonged skilled nursing home costs, which can run around $5,000 to $6,000 per month.[2] When insurance runs out or is not available, the program which covers such costs is Medicaid.[3] However, Medicaid requires the applicant to meet certain financial criteria to obtain coverage.[4] Securing the help necessary to care for the elderly relative while preserving assets for a family requires an understanding of Medicaid rules.

Although Medicaid is a federal program, the states administer it, within certain parameters established by the federal statute.[5] Accordingly, each state can have different financial criteria, provided that the criteria rest within the federal parameters.[6] It is imperative to learn the rules within the state where the application for Medicaid is to be made.

Spousal Impoverishment Rules

If the applicant for Medicaid is married and the non-applicant spouse lives at home, the law permits the spouse living at home to retain a certain level of monthly income[7] called the Community Spouse Monthly Income Allowance. New York, for example, permits a spouse to keep $1,976 in monthly income for the year 1997, with additional amounts if dependents reside with the spouse.[8] In addition, the community spouse is entitled to keep some resources called the Community Spouse Resource Allowance.[9] New York permits the spouse to keep a personal vehicle, a principal residence (whatever its value), and an additional $79,020 in other assets.[10] The levels of income and resources can change each year and from state to state.[11] The assets of both spouses are added together to determine the operative values.

"Spending Down" Assets

When there is no community spouse, the applicant must "spend down" his assets to a burial fund before qualifying for Medicaid benefits. To "spend down" means to use up those assets in arms-length transactions. In the application process, the case worker will require the applicant to submit thirty-six months worth of detailed records.[12] The case worker will examine the bank statements for any substantial transfer, usually anything in excess of $1,000. A substantial transfer will

1. 42 U.S.C. § 1396 (1996); Atkins v. Rivera 477 U.S. 154 (1986), 42 C.F.R. §§ 430-56 (1997).

2. Attorneys can obtain updated cost estimates for prolonged skilled nursing home care in New York from the New York Department of Health, Long Term Care Reimbursement, by calling (518) 474-1057.

3. 42 U.S.C. § 1396 (1996); 42 C.F.R. §§ 430-56.

4. 42 U.S.C. § 1396p.

5. *Id.* § 1396a.

6. *Id.* § 1396p.

7. *Id.* § 1396r-5(d)(3).

8. *Id.*

9. *Id.* § 1396r-5(f)(2). The Health Care Financing Administration (HCFA) publishes a memo for its regional offices which sets forth the protected resource amounts.

10. *Id.*

11. *Id.* § 1396r-5(g).

12. The look-back period is three years for outright transfers. However, a transfer into an inter vivos trust extends the period to five years. *Id.* § 1396p(c)(1)(A).

prompt an inquiry into the use of the funds. If they are for the purchase of an item or service for the benefit of the applicant, the inquiry stops. If the transfer is a gift, a penalty period is calculated. These rules exist to prevent applicants from divesting themselves of assets in favor of relatives or friends in order to qualify for Medicaid benefits.

The Look-Back Period and Computing the Penalty Period

The social service department, by federal law, has a "look-back" period of three years.[13] When a person makes an application, he must supply the previous three years worth of all financial records (i.e., bank accounts, bonds, stocks, real estate, mortgages, notes, life insurance, business interests, etc.). If there has been a transfer without full consideration within the three year look-back period, a calculation is made to determine the penalty or ineligibility period for the applicant. The penalty period is determined by taking the value of any gift and dividing it by an amount deemed to be the cost of nursing home care in the area where the application is being made.[14] For example, an application made in the western part of New York State requires the value of the gift to be divided by approximately $4,300, which is the deemed value of nursing home care in that region. The quotient of that equation determines the number of months from the date of the gift that the applicant is ineligible for Medicaid. Accordingly, a gift of $43,000 to a child, or spread among children, will result in about 10 months of ineligibility from the date of the gift.[15]

What About a Living Trust?

The look-back period involving certain trusts has been extended to five years.[16] This rule has made the use of most kinds of "living trusts" ineffective in most Medicaid plans. However, there is a growing industry in which firms invite the public to attend free seminars to avoid attorneys, probate, Medicaid, taxes, and all sorts of other evils by the creation of living trusts. Some clients report having gone to these seminars and being convinced that they would lose everything they owned unless they purchased a living trust.

Many of these "free" seminars are really designed to sell pre-packaged, one-size-fits-all trust instruments. Some of the fees charged for such services are excessive. When asked about such programs, attorneys should determine whether the specific goals and desires of the client are being met by the trust, taking into account income taxes, estate taxes, Medicaid rules, the family make-up, and the ability to handle assets. A trust must be tailored to the client's individual needs and desires.

Further, if a trust is needed or desired, it must be funded to have value. Transferring assets, such as mutual funds, securities, insurance policies, bonds, and real property, into the hands of the trustee(s) is where much of the work lies. In some cases, people have been told that probate would be avoided by the creation of a trust, only to find that the trust was never funded and, accordingly, had no value. The usual excuse given for this outcome is that the clients were told to fund their trusts on their own and that the failure to do so was the clients' fault and not that of the service provider.

The Rule of Halves

Planning around these considerations involves transferring assets. Some of these transfers can be made at the last minute by taking advantage of the local method for computing the ineligibility period. The most common last-minute device is called the "rule of halves."[17] If an applicant gives away some of his assets, but keeps enough to pay his or her own way until the ineligibility period caused by the gift is exhausted, one can safely transfer assets and qualify for Medicaid at the end of the process.[18] For example, a widow who recently suffered a stroke and who had assets totaling $80,000 could probably give away $40,000 or less. The $40,000 retained, along with normal social security and railroad retirement and/or pension benefits, could carry her past the penalty period created when the $40,000 was given away. To compute the penalty period, one needs to know the deemed value of nursing home care in the applicant's locality.

As part of such planning, keep in mind that donors must file a gift tax return if, in the aggregate, the transfers exceed $10,000 per person per year.[19] This is a gift tax rule which must not be confused with the Medicaid penalty period rules. As a practice tip, always have the donor sign and file the gift tax return, if it is possible. This recognizes the potential for a family dispute over the making of a gift where family members did not receive a lifetime gift that would match their intestate (no will) share or a share that would have been received under a will. When the gift tax return is signed by the donor, it becomes

13. *Id.*

14. *Id.* § 1396p(c)(E).

15. *Id.* § 1396p(c)(1)(D).

16. *Id.* § 1396p(c)(1)(B).

17. *See* JOHN J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY 10-111 (Matthew Bender, 1996).

18. *Id.*

19. I.R.C. § 2503(b) (1994).

a business record of the Internal Revenue Service that can be retrieved for evidence in court to establish donative intent.[20]

Secrecy in making gifts tends to work against the intent of the donor when such family disputes break out, because the burden lies with a donee to establish donative intent, and the donee is usually barred from testifying in most jurisdictions that have a "dead man" statute.[21] Dead man statutes are rules of evidence which require the court to exclude testimony of any transaction with a decedent when the witness will directly benefit from the testimony given.[22] Therefore, the practitioner must find ways to preserve evidence of a gift so that the gift will not be litigated and declared invalid after the death of the donor.

Real Estate Transfers with Life Use Reserved

An applicant with real property and either sufficient time or other assets to cover the ineligibility period can convey real property to children or others and retain a life estate in the property. Attorneys should note that the value of such a gift is significantly less than an outright gift when computing both the gift and the ineligibility period.[23] Further, such a gift will complicate matters should the client change his mind and desire to sell the property after a transfer is made. First, the co-owners must execute a deed, and they may be unable or unwilling to do so. Second, the elderly client may be entitled to a lifetime exemption of $125,000 for income tax purposes, but the co-owners might not be entitled to the exemption[24] or may not desire to use their lifetime exemption.[25]

If the property is sold, the proceeds become a resource vulnerable to the Medicaid resource rules. Therefore, the strategy of conveying real property and retaining a life estate is best suited to a client who does not intend ever to sell his residence. When using this strategy, clients must not forget to arrange for the new co-owners to be named as additional insureds on the hazard and liability coverage for the dwelling and should make sure that the liability coverage is adequate to protect the new co-owners. Further, clients should be prepared to file a gift tax return on the value of the remainder interest to the new co-owner. The tax trade off, however, is that real estate with a life use is taxable to the life tenant's estate and results in a stepped up basis that will alleviate income tax consequences to the new co-owners when they sell the property.[26]

Life Insurance

Life insurance has an owner, an insured, and a beneficiary. The owner and the insured are not always the same person.[27] A gift of insurance which takes into account the penalty period based upon cash surrender value (not the higher, date of death value) can be part of the plan. To change the owner of a policy, the client needs to obtain the appropriate form from the insurance carrier which allows the owner to assign the ownership to another person.

Not only is this technique appropriate for Medicaid planning, it is an excellent device for estate planning. For estate tax purposes, the insurance will remain includable in the estate of the donor should the donor die within three years of the transfer of ownership.[28] For this reason, if insurance is acquired later in life, make the beneficiary the owner of the policy at the outset. These arrangements may also involve an insurance trust so that the proceeds of a policy might be applied as desired by the donee once the donor has surrendered control of the policy.

Annuities

An annuity is a contract between an annuitant (customer) and an insurance company, whereby the annuitant pays the insurance company a sum of money in exchange for a guaranteed stream of income.[29] If the applicant has an annuity contract that is still accumulating income without paying out, the contract becomes a resource that must be liquidated and spent down.[30] To avoid this consequence, sellers of annuities have recommended that the contract be "annuitized," in other words,

20. 28 U.S.C. § 1731 (1996); N.Y. C.P.L.R 4518 (McKinney 1996); *In re* Maijgren's Estate, 84 N.Y.S.2d 664 (1948).

21. N.Y. C.P.L.R. 4519 (McKinney 1996).

22. *Id.*

23. While an outright gift is taxed based upon its fair market value at the time of the gift, a transfer of real estate with a life use reserved is taxed based upon the fair market value less the value of the life use. The value of the life use can be determined from IRS tables that indicate a percentage (based upon age at the time of the gift) of the fair market value to be attributed to a life use. The table for calculating the percentage attributed to a life tenant can be found at Rev. Rul. 92-13, Table 5, promulgated in accordance with I.R.C. § 7520.

24. To qualify for the exemption, the co-owners must be at least 55 years of age and must use the premises as a principal residence.

25. Treas. Reg. § 1.1034-1(c)(3)(i) (1996).

26. I.R.C. § 1014.

27. The exception would be a group policy acquired by an employer for all of its employees.

28. I.R.C. § 2035.

29. *See* Regan, *supra* note 17, at 2-35.

that the contract commence with monthly payments which are intended not to exhaust the contract value, so that after death a balance will be available to the family. However, the law has changed and requires that the annuity period correspond with the life expectancy of the annuitant so that the fund and life expire at the same time.[31] An annuitized period exceeding the reasonable life expectancy of the annuitant will be considered a transfer of a resource in violation of the transfer rules. Because of this change in the law, it may be more practical to liquidate the annuity and make a partial transfer using the concept of the rule of halves.

Joint Bank Accounts

Many applicants think that the creation of a joint bank account establishes half ownership in the cotenant and that the account might not be considered to be a resource of the applicant. The law, however, has changed this presumption for Medicaid purposes.[32] The present Medicaid law presumes that a joint bank account belongs to the applicant unless the cotenant can overcome the presumption by showing that his own funds went into the account. The federal law preempts state law. Therefore, an amount determined by the rule of halves would have to be transferred out of the joint account to shelter those funds.

IRA's, 401(k) Plans, & Other Retirement Plans

Retirement plans which allow the retiree to retrieve lump sum benefits are considered a resource for Medicaid planning purposes.[33] They do not enjoy exemption from Medicaid qualifying rules.[34] This point is important because similar retirement rules in the area of bankruptcy law do enjoy protection, and many practitioners inadvertently mix those rules.[35] Accordingly, it requires as much tax planning as Medicaid planning to handle such assets.

Exemptions

In addition to the special treatment given to community spouses of applicants, there are certain other exemptions that exist.[36] Attorneys need to determine if their jurisdictions allow them. In New York, for example, a home can be transferred to a minor (under eighteen years of age) or a disabled adult child;[37] to a child who has resided in the home and cared for the applicant for two or more years; or to a brother or sister of the applicant with an equity interest in the house and who has resided there for more than one year.[38]

Many jurisdictions are adopting laws that permit the creation of special needs trusts.[39] When these trusts are funded by the applicant, the funds are allowed to remain in the trust for the applicant, provided that the remainder interest of the trust passes to the department of social services upon the death of the trust beneficiary. This can be extremely helpful to the victim of an injury with a substantial court award. Many negligence attorneys are seeking the assistance of elder law attorneys to work toward this end.

When the trust is funded by resources other than those of the applicant, the remainder of the trust may pass, upon the death of the beneficiary, to other persons designated by the settlor or grantor of the trust. This is a device now available to parents with severely disabled children who would otherwise disinherit those children so that government assistance is not interrupted. When a special needs trust is not self-funded, there is no limitation on the amount of assets that can fund such a trust.

The Burial Fund Scam Eliminated

Historically, Medicaid rules have permitted prepayment of certain funeral expenses by applicants.[40] The amount spent on those expenses was unlimited. Many applicants took advantage of this loophole by over-funding those expenses with the understanding that the undertaker would charge less than anticipated for the actual funeral and would remit the overage back to surviving family members.

30. 42 U.S.C. § 1396p (1996).

31. *HCFA Transmittal No. 64,* amending STATE MEDICAID MANUAL § 3258.9(B)(Nov. 1994).

32. 42 U.S.C. § 1396p(c)(3).

33. *Id.* § 1396p(e); *HCFA Transmittal No 64,* amending STATE MEDICAID MANUAL § 3257(B)(3)(Nov. 1994).

34. 42 U.S.C. § 1396p(e).

35. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974); Patterson v. Shumate, 504 U.S. 753 (1992).

36. 42 U.S.C. § 1396p(c)(2).

37. *Id.* § 1396p(c)(2)(A).

38. N.Y. COMP. CODES R. & REGS. tit. 18, § 360-4.4(c)(ii) (1996).

39. *See, e.g.,* N.Y. EST. POWERS & TRUSTS LAW § 7-1.12 (McKinney 1996).

40. 42 U.S.C. §§ 1382b, 1396p; 20 C.F.R. § 416.1231 (1997).

Beginning on 1 January 1997, undertakers will be required to set up a burial account for a Medicaid applicant as an irrevocable trust where any residue is paid to social services.[41] Though anyone can prepay a funeral without the trust arrangement, once the owner of the funeral funds becomes an applicant for Medicaid, the requirement to set up a trust kicks in; it requires any existing burial fund to be transferred into an irrevocable trust, with any remainder going to social services, in order to qualify for Medicaid.

Criminalization

Effective 1 January 1997, federal law provides criminal penalties for whoever "knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a state plan under Title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance" under the transfer rules.[42] Further, 18 U.S.C. § 2 imposes criminal penalties on an attorney who "aides, abets, counsels, commands, induces, or procures" another person to commit an offense. Penalties can include a fine up to $10,000 or one year imprisonment or both.

The legislative intent of the statute was to make criminal behavior such as the passing of bearer bonds or cash among relatives without disclosing those assets upon applying for Medicaid.[43] The language of the statute, however, appears broader than its intent and will, no doubt, require a test case to determine whether it is too vague or broad and to test the application of other provisions which concern mens rea.

In the meantime, attorneys should carefully apply two criteria to any Medicaid application. First and foremost, applicants should make the application complete in every detail. The disclosure should include all the planning transfers. This must be done to avoid any inference of fraud or misrepresentation that might indicate that the transfers were illegal. This issue goes to mens rea. If the transfers are timed properly, the disclosure will be harmless to the claim.

Second, and very important, an attorney must compute the penalty period based on the law in his or her jurisdiction. The applicant must make sure that he does not apply for Medicaid until the time period has run out, with a buffer of a month. There are two reasons for this advice. One is that application after the penalty or ineligibility period has expired takes the matter out of the criminal definition entirely.[44] The other reason has to do with the computation of ineligibility and jumbo gifts. With a jumbo gift (i.e., a gift valued well in excess of the cost of three years worth of nursing home care), the applicant should wait out the entire three years from the date of the gift. If the applicant makes a large gift within three years of applying for Medicaid, the ineligibility period can extend indefinitely.[45] For example, if an applicant gives $1,000,000 to his son and waits three years and one month to apply for Medicaid, the transfer is not in the look-back period, and it cannot be considered in the transfer rules that determine the period of ineligibility. However, if the applicant gives the same gift and applies within three years, the applicant would be ineligible for $1,000,000 divided by $4,300 (using western New York State standards) or approximately 233 months (over nineteen years).

Planning Documents

Each client should work on an inventory to determine which assets ought to be retained or transferred. He should examine wills to make sure that bequests are not passing outright to persons in nursing home care. Attorneys should consider using special needs trusts, if permitted in their jurisdictions. For a married couple with one spouse in a nursing home, the clients should consider changing their wills to leave assets to children, and each spouse should execute a waiver of any right to elect against the will.

Attorneys should also prepare health care proxies, living wills, and powers of attorney for their clients. Attorneys must be cautious, however, about any provision in a power of attorney allowing the attorney in fact to make gifts. Bear in mind that a provision in a power of attorney to make unlimited gifts will be construed as a power of appointment in the event of the death of the attorney in fact. That event would require that the assets of the principal be included in the estate of the attorney in fact. Again, the applicant must be prepared to file gift tax returns should the applicant's gifts exceed $10,000 per person per year.

Conclusion

When entering this realm of legal advice, an attorney must first identify his or her client and must always be conscious of the fact that family members can have conflicting motives and desires with regard to making gifts. If the client is the applicant, the attorney should make sure that the client wants to participate in the plan and will always be in a position to succeed in obtaining assistance through the Medicaid program if the plan is executed. Most of the planning techniques that exist benefit the family or friends of the Medicaid applicant and not neces-

41. 20 C.F.R. § 416.1231(b)(3)-(6).

42. 42 U.S.C. § 1320a-7b(a)(6).

43. *Id.*

44. 18 U.S.C. § 2 (1996); 42 U.S.C. § 1320a-7b(a)(6).

45. 42 U.S.C. § 1396p(c)(1)(E)(i).

sarily the applicant, who must give up control of wealth to execute most plans.

Finally, there is a dramatic change going on in the construction of new nursing home facilities. The new facilities are not only fresher, cleaner, and nicer smelling, but there are new efforts to separate resident populations more sensibly. There are generally two categories of people who inhabit nursing homes: those who are physically infirm but have their full mental faculties and those who are physically mobile but suffer from dementia or Alzheimer's Disease. When the populations are mixed, the dementia patients tend to wander about the facility and into and out of other patients' rooms, to the distress of the physically infirm but mentally alert patients. Many new facilities are separating these populations.

If a potential patient applies to a facility as a private pay patient, the facility receives about twenty-five percent more income than it will get from a Medicaid patient. If a client wants to go to the head of the list at the new facility or the one nearest his spouse or child, the client needs to show the ability to privately pay for several months.[46] Once in the nursing home, the patient cannot be thrown out of the nursing home for becoming Medicaid qualified.[47] He can only lose his bed by an absence from the facility (i.e., a prolonged hospital stay). Furthermore, the only difference between a private pay patient and a Medicaid patient is that the privately paying patient is entitled to a private room, while Medicaid reimbursement is limited to a double room occupancy.[48]

46. Patricia Nemore, *Drawbacks of Medicaid for Nursing Home Residents*, 1 ELDER L. REP. 4 (1990).

47. *Id.*

48. 42 C.F.R. § 483.70 (1997).

USALSA Report

United States Army Legal Services

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the second quarter of Fiscal Year 1997 (FY97) are shown below. For comparison, the previous quarter and Fiscal Year 1996 (FY96) processing times are also shown below.

General Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97
Records received by Clerk of Court	793	169	192
Days from charges or restraint to sentence	62	66	63
Days from sentence to action	86	86	94
Days from action to dispatch	9	7	11
Days en route to Clerk of Court	9	11	9

BCD Special Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97
Records received by Clerk of Court	167	42	35
Days from charges or restraint to sentence	45	56	38
Days from sentence to action	85	83	82
Days from action to dispatch	6	5	15
Days en route to Clerk of Court	8	11	8

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial rates for the first and second quarters of fiscal year 1997 are shown below.

Rates per Thousand

First Quarter Fiscal Year 1997; October-December 1996

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.35 (1.38)	0.37 (1.47)	0.50 (2.02)	0.13 (0.53)	0.38 (1.52)
BCDSPCM	0.12 (0.49)	0.12 (0.49)	0.14 (0.58)	0.15 (0.62)	0.38 (1.52)
SPCM	0.01 (0.04)	0.01 (0.04)	0.02 (0.07)	0.00 (0.00)	0.00 (0.00)
SCM	0.13 (0.53)	0.16 (0.62)	0.09 (0.36)	0.07 (0.26)	0.00 (0.00)
NJP	17.81 (71.22)	20.02 (80.09)	14.76 (59.04)	11.50 (46.01)	27.75 (111.01)

Note: Based on average strength of 485,283.

Figures in parenthesis are the annualized rates per thousand.

Rates per Thousand

Second Quarter Fiscal Year 1997; January-March 1997

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.36 (1.46)	0.36 (1.44)	0.59 (2.37)	0.26 (1.04)	0.78 (3.10)
BCDSPCM	0.16 (0.65)	0.14 (0.56)	0.32 (1.29)	0.22 (0.87)	0.00 (0.00)
SPCM	0.00 (0.01)	0.00 (0.01)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.22 (0.90)	0.29 (1.17)	0.04 (0.14)	0.00 (0.00)	0.78 (3.10)
NJP	20.71 (82.85)	22.26 (89.06)	15.92 (63.66)	23.49 (93.97)	29.45 (117.81)

Note: Based on average strength of 481,065.

Figures in parenthesis are the annualized rates per thousand.

Litigation Division Note

Interrogatories—to Answer or not to Answer, That is the Question: a Practical Guide to Federal Rule of Civil Procedure 33

Introduction

In theory, there could not be a simpler, more efficient, and less expensive discovery method than sending written questions to the opposing party and having him send back the sworn written answers. In practice, however, interrogatories often are frustrating, costly, and ineffective for both parties. Interrogatories serve two primary functions: identifying the sources of available evidence (e.g., witnesses and documents) and narrowing disputed issues of fact. Historically, however, practitioners have used interrogatories as a litigation tactic to harass and to overwhelm an opponent or to delay the resolution of a dispute.[1] In an attempt to curb the misuse of interrogatories in federal practice, the discovery rules of the Federal Rules of Civil Procedure (Rules) have been refined to ensure that interrogatories serve their intended purposes.[2]

In federal litigation, Rule 33 governs the propounding and answering of interrogatories. The rule generally provides for written questions of one party to be answered under oath by another party. As part of the discovery scheme of the Rules, Rule 33 incorporates the general discovery provisions of Rule 26 (scope of inquiry), Rule 29 (time limits to respond), and Rule 37 (sanctions for failing to appropriately respond). To reduce the frequency, and to increase the efficiency, of interrogatory practice, Rule 33 has been revised numerous times.[3] The most recent revisions limit the number of interrogatories that a party may propound[4] and emphasize the responding party's duty to provide complete answers.[5] While debate remains about whether these revisions are improving the discovery process, attorneys practicing federal litigation need to understand Rule 33 to effectively use interrogatories. This article provides an overview of Rule 33 and a practical guide to propounding, answering, and objecting to interrogatories.

Propounding Interrogatories

Experienced litigation attorneys know the benefits of timely and properly propounded interrogatories. Without great expense in time or money, interrogatories narrow the issues and reveal vital evidence in a case. When employed early,[6] they allow a party to focus discovery resources on relevant issues and impose an obligation on an opposing party to supplement its answers throughout the course of litigation.[7] The responsibility for propounding interrogatories rests primarily with the trial attorneys,[8] but the field attorney[9] who drafted the litigation report may have the best insight into the right questions to ask an opposing party. A thorough litigation report should include draft interrogatories or at least identify potential questions to be asked of an opposing party.

When drafting interrogatories, attorneys must know what information is sought and for what purpose it will be used. The attorney should target the interrogatories at discrete issues, rather than employ a shotgun approach.[10] The questions should be direct, unambiguous, and nonargumentative to avoid drawing objections or nonresponsive answers. For example, if receipt of notice about an event is at issue in a case, an interrogatory asking whether the opponent "received notice" of the event will invite an objection or an evasive answer. A better interrogatory would ask what written and oral communications the opponent received about the event, leaving the conclusion regarding notice to be drawn at trial.[11] Avoid the temptation to use boilerplate interrogatories. They are of little benefit and usually insult the court.[12] Similarly, the use of lengthy defini-

1. *See* FED. R. CIV. P. 33 advisory comm. notes (1993).

2. *See* FED. R. CIV. P. 26 (General Provisions Governing Discovery; Duty of Disclosure); FED. R. CIV. P. 33 (Interrogatories to Parties); FED. R. CIV. P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes); and FED. R. CIV. P. 37 (Failure to Make Disclosure or Cooperate in Discovery: Sanctions).

3. *See* FED. R. CIV. P. 33 advisory comm. notes (1993).

4. FED. R. CIV. P. 33(a).

5. *See* FED. R. CIV. P. 33 advisory comm. notes (1993) (regarding Subdivision (b)).

6. FED. R. CIV. P. 33(a) (purposely limiting the speed with which interrogatories can be served on the opposing party) "Without leave from the court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d)." *Id*. The intent of the discovery rules is to allow parties to meet and to discuss their claims and defenses and to promote early resolution of an action before extensive discovery begins.

7. FED. R. CIV. P. 26(e).

8. The trial attorneys include the Army's Litigation Division attorneys, Assistant United States Attorneys, and Department of Justice attorneys who may actively participate in the trial.

9. The field attorneys are the local command attorney advisors, such as claims attorneys, labor counselors, and administrative law attorneys.

10. WILLIAM W. SCHWARZER ET AL., CIVIL DISCOVERY AND MANDATORY DISCLOSURE § 4-5 (2d ed. 1994).

tions and instructions preceding interrogatories become "counter productive when the definitions become so complex that they are ignored."[13] Rather than draft all-encompassing definitions, use simple language with plain meaning that cannot be evaded. The discovery rules themselves contain adequate definitions that can be incorporated by reference to guide the respondent in answering the questions.[14] Global definitions tend to be ineffective and invite objections that render the entire set of interrogatories useless.

Limits & Scope

Over the entire course of litigating a case, Rule 33 limits a party to twenty-five interrogatories.[15] While each question can have related subparts,[16] asking more than twenty-five interrogatories requires either a written stipulation from the opposing party or court approval.[17] The reason for the limit on the number of interrogatories is twofold. First, much of the information previously obtained through interrogatories, such as the names of witnesses, descriptions of documents, damage computations, and insurance coverage, is now part of mandatory preliminary disclosure.[18] Second, the limit prevents a party from inundating the opposing party with excessive interrogatories.[19] The rule's aim is not to limit necessary discovery, but to provide judicial scrutiny before parties make excessive use of this discovery device.[20]

The revisions to the Rules broaden the scope of proper interrogatories. Underlying these revisions is the philosophy that parties to civil actions are entitled to disclosure of all relevant facts that are not specifically privileged.[21] The days of surprise witnesses are gone, and interrogatories *can* be a "fishing expedition."[22] Today, the Rules allow inquiry into any matter, not privileged, which is relevant to the subject matter of the pending action, so long as it appears reasonably calculated to lead to the discovery of admissible evidence.[23] Even inquiry into the opinions and contentions of an opposing party that relate to facts or the application of law to facts are allowed by the Rules.[24] These inquiries, called "contention interrogatories," are appropriate if used sparingly and with factual specificity. They can be invaluable in narrowing the issues, laying foundations for motions, and preparing a thorough trial defense.

While blanket inquiries will likely draw objections, focused inquires regarding specific contentions will require responses. It is appropriate to inquire about specific issues, such as whether the opponent relies on a negligence liability theory and the factual basis of that theory. However, asking a party to state *all* theories of liability and *every* fact supporting those theories is objectionable. Similarly, it is improper to attempt to use contention interrogatories as a substitute for one's own work (for example, asking an opposing party to state potential defenses and the factual problems anticipated with each). Contention interrogatories are best employed later in the litigation process, when the party can be expected to have the information necessary to respond.

The final step in propounding interrogatories is to ensure compliance with the local rules of court. Each jurisdiction has modified the federal discovery rules, some allowing more interrogatories, some less. Local rules may also require a particular format, or may modify the timing of interrogatories.[25] When in doubt as to whether the local rules modify Rule 33, consult the trial attorney in the district or the Army Litigation Division attorney assigned to the case.

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11. *Id.*

12. G. Ross Anderson, *Discovery Sanctions*, 6 S.C. LAW. 14 (1995).

13. SCHWARZER ET AL., *supra* note 10, § 4-6.

14. FED. R. CIV. P. 34(a).

15. FED. R. CIV. P. 33(a).

16. *See* FED. R. CIV. P. 33 (The advisory committee notes for the 1993 amendments state, "Parties cannot evade this presumptive [25 question] limitation through the device of joining as 'subparts' questions that seek information about discrete separate subjects.").

17. FED. R. CIV. P. 33(a).

18. FED. R. CIV. P. 26(a)(1).

19. *See* FED. R. CIV. P. 33 advisory comm. notes (1993).

20. *Id.*

21. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 81 (4th ed. 1983).

22. *Id.* § 82.

23. FED. R. CIV. P. 33(c) (incorporating FED. R. CIV. P. 26(b)(1)). *See also,* Dart Indus., Inc. v. Liquid Nitrogen Processing Corp., 50 F.R.D. 286, 292 (D. Del. 1970).

24. *Id.*

Answering Interrogatories

Interrogatories served on the United States can be answered by any officer or agent who can furnish the requested information.[26] Typically, the person answering the interrogatories is the field attorney who prepared the litigation report (for example, a claims attorney in tort cases or a labor counselor in Title VII cases). Historically, the burden of answering interrogatories in Army litigation rarely fell on the trial attorney, but rather, on the local command and its advising attorneys. For that reason, field attorneys must be aware of the federal interrogatory rules. Rule 33 requires the person making the answers to sign them, attesting to their truthfulness; it also requires the trial attorney to sign the objections.[27] Having the field attorney verify and sign for the responses is appropriate for two reasons. First, the field attorney often has either personal knowledge to formulate the answers or the best resources to gather the information needed to answer the interrogatories. Second, it prevents the trial attorney from becoming a potential witness in the trial, which would disqualify him from representing the United States.

As a general rule, answering interrogatories requires a responding party to furnish all information available to him.[28] Consequently, the responding party must make a reasonable search of his records and a reasonable inquiry of his personnel to respond to interrogatories.[29] Attorneys must decide on a case-by-case basis the extent to which a responding party must conduct research to answer an interrogatory. As a rule, if the responding party would gather the information in preparation of its own case, the research must be done.[30] If an interrogatory seeks information which is not in a responding party's possession, custody, or control, the responding party generally need not do independent research to respond.[31] While the Rules preclude discovery of matters subject to a privilege or "attorney work product" protection, they still require disclosure of a description of the information claimed to be protected.[32] The fact that a requester already possesses requested information or that information is a public record does not relieve a party of the requirement to answer the interrogatory.[33]

When the answer to an interrogatory must be derived from records of the responding party, Rule 33 provides the responding party the option to make the records available to the requesting party, rather than ascertaining the answer itself.[34] This method of response can only be used when the burden of compiling or extracting an answer from the records would be the same for both parties; also, the task must be beyond mere reference to the records.[35] Additionally, the records must be in sufficient order and specifically identified so that the requesting party can ascertain the requested answers as easily as the responding party could.[36]

The simple goal of Rule 33 is to ensure that a party answers the relevant questions of an opposing party. That is not to say that a party must divulge all information in his possession to the opposing party. Answers to interrogatories should be responsive, accurate, and complete, but they should be made with the understanding that they will be used against the responding party. Consequently, interrogatories should be approached with a defensive frame of mind. Words should be chosen carefully, with an eye toward their use at trial.

Interrogatories require answers within thirty days of service.[37] This time limit can be extended or shortened as the parties agree or by order of the court.[38] In addition, local rules may

25. For example, Local Rule 8.2.2 of the District Court for the Central District of California requires that interrogatories be numbered consecutively throughout the sets of interrogatories propounded.

26. FED. R. CIV. P. 33(a).

27. FED. R. CIV. P. 33(b)(2).

28. FED. R. CIV. P. 33(a).

29. *See* FED. R. CIV. P. 26(g)(1). The advisory committee note provides that a "reasonable inquiry" is ultimately based on the totality of the circumstances. *Id*.

30. 2 JOHN M. CARROLL ET AL., FEDERAL LITIGATION GUIDE § 12.01 (1996), *citing* Gerling Int'l Ins. Co. v. Commissioner, 839 F.2d 131 (3rd Cir. 1988). *See also,* American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680 (D.R.I. 1959).

31. La Chemise LaCoste v. Alligator Co., 60 F.R.D. 164, 171 (D. Del. 1973); United States v. Columbia Steel Co., 7 F.R.D. 183, 184 (D. Del. 1947).

32. FED. R. CIV. P. 26(b)(5) (providing that a claim of privilege must be expressly made and "shall describe the nature of the documents, communication, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the other parties to assess the applicability of the privilege or protection").

33. Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494 (S.D.N.Y. 1958).

34. FED. R. CIV. P. 33(d).

35. T.N. Taube Corp. v. Marine Midland Mortgage Corp., 136 F.R.D. 449 (W.D.N.C. 1991).

36. Herdlein Tech., Inc. v. Century Contractors, Inc., 147 F.R.D. 103 (W.D.N.C. 1993).

37. FED. R. CIV. P. 33(b)(3).

impose different limits on when responses to interrogatories are due. Generally, a response may not be delayed indefinitely until a complete answer is available.[39] Unlike the general rule, however, the court may order that answers to contention interrogatories be delayed until discovery is completed or a pre-trial conference is held.[40] Failing to timely answer may subject a party to a motion to compel and sanctions.[41] Therefore, it is vital that interrogatories receive prompt attention.

The process of answering interrogatories requires a coordinated effort between the trial attorney (usually an Assistant United States Attorney (AUSA)), an attorney from the Litigation Division, and the field attorney designated to answer the questions. In a typical case, the AUSA receives a set of interrogatories from the plaintiff's counsel and forwards them to the Army's litigation attorney. After review, the interrogatories are forwarded to the appropriate field attorney for preparation of the draft answers. Prior to completion, the draft answers are reviewed by the Litigation Division attorney. Upon approval of the answers, the field attorney signs the verification or Jurat, attesting to the truthfulness of the answers. The signed answers are sent to the AUSA, who must sign for any objections raised and certify compliance with the discovery rules.[42]

Objections

An interrogatory must be fully answered unless objected to, "in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable."[43] Any ground for objection which is not stated in a timely manner is waived. [44] In some jurisdictions, objections must be made and filed with the court *prior* to the expiration of the thirty days established under Rule 33. If an objection is based on a privilege or attorney work product doctrine, it must be expressly stated with sufficient detail to allow the other party to assess the applicability of the privilege or doctrine.[45]

The litigation attorneys are primarily responsibility for raising objections to interrogatories, but often the field attorney is in the best position to know when a request is objectionable. For example, a medical claims judge advocate may recognize that a certain interrogatory seeks disclosure of protected medical information. In that case, the medical claims attorney must raise this objection to the litigation attorneys, who may be unaware of the protected nature of the information.

There are many possible grounds for objecting to interrogatories. Sample objections are provided below. These samples are not intended to serve as boilerplate objections to be asserted in every case. Rather, they should assist in identifying valid objections to be asserted when appropriate.

Sample General Objections

In providing these responses to the discovery request, the Government reserves the right to supplement, clarify, revise, or correct any or all of the responses herein at any time.

In providing these responses to the discovery request, the Government does not in any manner admit or imply that it considers any of the interrogatories or responses thereto, or any documents produced pursuant to the discovery request, to be relevant or material to the subject matter of this action or to the claims or defenses of any party herein or that such discovery request or documents are reasonably calculated to lead to the discovery of admissible evidence.

The Government does not waive, and hereby reserves its right to assert, any and all objections to the admissibility into evidence at the trial of this action, or in any other proceeding, of any response to the discovery request or any document produced or referred to in response to the discovery request, on any and all grounds, including, but not limited to, competency, relevance, materiality, and privilege. The Government does not waive any objection that it might have to any other discovery request involving or relating to the subject matter of the discovery request.

The factual information sought by the discovery request is not within the personal knowledge of any one employee or several employees of defendant. Information necessary to answer those interrogatories seeking factual information was provided by a review of available records, responses to discovery, and information gathered collectively from persons having personal knowledge of the matters discussed.

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38. *Id.*

39. Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).

40. FED. R. CIV. P. 33(c).

41. *See* FED. R. CIV. P. 37 (allowing the moving party to receive reasonable expenses, including attorney's fees from the noncompliant party).

42. FED. R. CIV. P. 33(b)(2), 26(g).

43. FED. R. CIV. P. 33(b)(1).

44. FED. R. CIV. P. 33(b)(4).

45. FED. R. CIV. P. 26(b)(5).

These responses to the discovery request are accurate to the best of the Government's knowledge as of this date. The Government's investigation, however, is continuing, and the Government may obtain additional information relevant to the subject matter of this action through discovery and further review of documents which plaintiff may produce in this action. The Government reserves the right to rely in this action on subsequently discovered information.

The Government reserves the right to object to the use of its responses to the interrogatories in any proceeding other than the above-captioned action.

Sample Specific Objections[46]

The United States objects to Interrogatory/Request No. ___ to the extent that it seeks the date of birth, home address, and social security number of _____ on the ground that any disclosure would be in violation of the Privacy Act, 5 U.S.C. § 552a.

The United States objects to Interrogatory/Request No. ___ on the basis that such information is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

The United States objects to Interrogatory/Request No. ___ to the extent that it seeks information protected by the attorney-client privilege and the work product doctrine.

The Government objects to Interrogatory/Request No. ____ on the grounds that it is vague and ambiguous. Specifically, _____.

The United States objects to Interrogatory/Request No. ____ on the grounds that it seeks information beyond the scope of Local Civil Rule ____.

The United States objects to Interrogatory/Request No. ___ on the ground that it is overly broad. Specifically, _____.

The United States objects to Interrogatory/Request No. ___ on the grounds that it seeks analysis, recommendations, findings, and conclusions from the safety investigation conducted by the United States Army Safety Center that is protected under the deliberative process privilege. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963).

The United States objects to Interrogatory/Request No. ___ on the grounds that it seeks Quality Assurance documents protected from disclosure pursuant to 10 U.S.C. § 1102.

The United States has not yet determined which (witnesses)(expert witnesses)(exhibits) will be used at trial. At the appropriate time, and in compliance with the court's scheduling order, the government will designate its _____ and provide a supplemental response to this Interrogatory.

Sample Jurat

Based upon the information available to me, the substantive answers given in response to Interrogatories __ through __, with respect to the factual contentions of the defendant in this lawsuit, are true and correct. After a reasonably diligent search of our files in the appropriate offices, the documents produced in response to Request for Production Numbers __ through ___ are all those known to be within the possession, custody, or control of the Department of the Army that are responsive and are not otherwise objectionable, objected to, or privileged. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ___ day of _____. Signed _____.

Conclusion

Interrogatories should be interpreted and answered so as to promote, rather than impede, the fair exchange of information.[47] However, attorneys must be ever mindful that the answers to interrogatories are sworn testimony and may significantly impact the later defense of a case. Employed properly, interrogatories are an effective discovery device. Misused, they frustrate the discovery process, delay resolution of cases, and subject parties to sanctions. Questions regarding proper use of Rule 33 should be directed to the Litigation Division. Major Bradley.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS) and on the ELD website (http://160.147.194.12/eld/eldlink2.htm). The *Bulletin*, volume 4, number 9, is reproduced below.

EPA Issues Final Rule on Land Disposal Restrictions (LDR) Phase IV and Issues Supplemental Proposed Rule

46. Any objection should normally be followed with: "Without waiving said objection, the United States responds that . . . ."

47. SCHWARZER ET AL., *supra* note 10, § 4-6 (2d ed. 1994).

On 12 May 1997, the EPA finalized portions of the Land Disposal Restrictions (LDR) Phase IV rule.[48] The final rule reduces reporting and record-keeping, finalizes treatment standards for wood-preserving wastes, and clarifies the exception for de minimis amounts of characteristic wastewater from LDR requirements. The rule also changes the definition of solid waste to exclude from Resource Conservation and Recovery Act (RCRA) regulation all processed scrap metal and shredded circuit boards that are being recycled. The recently issued rules are the most recent portion of the LDR program, which was mandated by the 1984 Hazardous and Solid Waste Amendments (HSWA) of the RCRA.[49] The HSWA prohibits land disposal of hazardous waste unless the waste meets the EPA's established treatment standards. Phase IV is the latest in a series of LDR rules which establish treatment standards for newly identified and listed wastes. The Army Environmental Center is currently writing an Army impact analysis on the final rule.

The EPA also issued a supplemental proposed rule that revises LDR treatment standards for mineral processing wastes, certain metal wastes, and metal constituents that are hazardous wastes.[50] The proposed rule revises the "mixture rule" exemption for mineral processing wastes and revises the universal treatment standards for twelve metal constituents. The supplemental proposal clarifies the EPA policies on variances from hazardous waste treatment which are granted by the EPA and on the acceptable use of hazardous waste as fill material.

The ELD and the Army Environmental Center will be reviewing the supplemental proposed rule and will draft the DOD comments, to be submitted to the EPA by 12 August 1997. Judge advocates are encouraged to read the proposed rule and submit any comments as soon as possible, but not later than 21 July 1997. Please mail comments to Bob Shakeshaft at the following address: Commander, Army Environmental Center (ATTN: SFIM-AECECC, Mr. Shakeshaft), Aberdeen Proving Ground, MD 21010-5401. Comments can also be faxed (DSN 584-1675 or (410) 612-1675) or sent via e-mail (rashakes@aec.apgea.army.mil). Major Anderson-Lloyd.

Endangered Species Act—Legislation and Litigation Update

Legislative proposals and court decisions indicate that the Endangered Species Act (ESA),[51] as it applies to Federal agencies, remains viable and soon may be stronger. Currently, Congress is contemplating a "discussion draft" of a bill to reform the ESA.[52] While the draft bill is geared primarily toward relieving what have been viewed as past hardships upon private interests, the consequence may be to increase the responsibilities of federal land managers. Meanwhile, litigation over numerous aspects of implementation of the ESA continue to prove that the ESA can indeed be the pit bull of environmental laws.[53]

Plaintiffs continue to press the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service to speed up listing actions and to designate critical habitat for listed species. In one recent case, the plaintiffs and the Department of Interior (DOI) agreed to a settlement and a joint stipulation to set specific deadlines for listing decisions on over eighty species.[54] The DOI agreed to publish either a proposed rule for listing a species as threatened or endangered or a determination that the species no longer warranted listing according to the following schedule: determinations made for forty-one identified candidate species by 1 April 1998 and determinations made for another forty-three species by 31 December 1998.

In addition to facing litigation over not listing species quickly enough, the DOI also faces several cases in which the plaintiffs are questioning the DOI's decision not to identify critical habitat.[55] The United States Court of Appeals for the Ninth Circuit recently strengthened this avenue of attack by scrutinizing a specific designation decision made by the USFWS.[56] The case involved a USFWS decision not to designate critical hab-

48. *See* Land Disposal Restrictions-Phase IV: Treatment Standards for Wood-Preserving Wastes, Paperwork Reduction and Streamlining, Exemptions From RCRA for Certain Processed Materials, and Miscellaneous Hazardous Waste Provisions, 62 Fed. Reg. 25,998 (1997) (to be codified at 40 C.F.R. pts. 148, 261, 268, and 271).

49. Pub. L. No. 98-616, 98 Stat. 3221 (1988) (codified as amended at 42 U.S.C. §§ 6901-92).

50. *See* Land Disposal Restrictions Phase IV: Second Supplemental Proposal on Treatment Standards for Metal Wastes and Mineral Processing Wastes, Mineral Processing and Bevill Exclusion Issues, and the Use of Hazardous Waste as Fill, 62 Fed. Reg. 26,041 (1997) (to be codified at 40 C.F. R. pts. 148, 261, 266, 268, and 271).

51. The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1996).

52. *Kemmpthorne, Chafee Circulate Species Draft While Young Seeks Administration Proposal*, ENVIRONMENTAL AND ENERGY WEEKLY BULLETIN (Environmental and Energy Study Conference, Wash., D.C.), Feb. 21, 1997, at 1 ("Senators Kempthorne and Chafee are circulating a 'discussion draft' of legislation to comprehensively reform the ESA."). A copy of the discussion draft is on file with the author at the ELD. The ELD assisted the Department of Defense in preparing comments to the discussion draft; the comments were submitted on 21 March 1997.

53. David D. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?*, 143 MIL. L. REV. 161, 174 (1994) (citing Robert D. Thornton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991)).

54. The Fund for Animals Inc. v. Babbitt, No. 92-0800, 1997 WL 355239 (D.D.C. Jan. 30, 1997) *as reported in* WILDLIFE L. NEWS Q., Spring 1997, at 11.

itat for a listed, threatened bird (the California gnatcatcher). The court found the USFWS decision arbitrary and capricious, even though the USFWS decision had been previously upheld by the United States District Court for the Middle District of California. In yet another listing case, the Court of Appeals for the Ninth Circuit held that the Secretary of Interior must publish the final regulation regarding a listed species within one year after the proposed notice is published.[57]

The ESA also recently withstood a constitutional attack, when land developers argued that Congress only has the power to regulate interstate commerce and that the "takings" provision of the ESA was unconstitutional if applied to a solely intrastate species. A coalition of land developers alleged that a California fly that lives only in a localized area of California could not affect interstate commerce.[58] The court found, however, that the Delhi Sand Flower-Loving Fly (a federally-listed species), and other wildlife that live within one state's borders, could be a part of the stream of interstate commerce and could have an effect on interstate commerce. Therefore, the Court found that the Delhi Sand Flower-Loving Fly was subject to Congressional power to regulate interstate commerce, despite the fact that the species lives only in California. Major Ayres.

Fifth Circuit Determines a Release Above Background Levels Does Not Trigger the Need for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Response

In *Licciardi v. Murphy Oil USA, Inc.*,[59] the United States Court of Appeals for the Fifth Circuit held that whether a defendant is liable for Superfund response costs depends on whether the hazardous substance released justifies incurring cleanup costs. The allegations involved the migration from Murphy Oil of lead contamination in excess of background levels. The Fifth Circuit reversed a district court finding of liability based on exceeding the background level for lead as established by U.S. Geological Survey data. The Court of Appeals found that this is not a regulatory standard, that the background level was based on measurements some thirty miles from the site, and that the Toxic Concentration Leaching Procedure was below regulatory standards.[60]

The *Licciardi* ruling expanded the Fifth Circuit's 1989 ruling in *Amoco Oil Co. v. Borden, Inc.*,[61] which held that a plaintiff who is seeking to recover response costs must prove that the release violates, or the threatened release is likely to violate, an applicable state or federal regulatory standard. Simply proving the release of a CERCLA hazardous substance in any quantity is not sufficient. Lawyers for Murphy Oil said that the appeals court's focus on whether a release posed a threat to the public or the environment was consistent with the purpose of CERLA. Plaintiff's counsel said they will file a certiorari petition with the United States Supreme Court. Lieutenant Colonel Lewis.

Tenth Circuit Denies Attempt To Regulate Tooele Stack Emissions Under CWA

On 22 April 1997, the United States Court of Appeals for the Tenth Circuit denied an attempt by advocacy groups to force regulation of the stack emissions from the Army's Tooele Chemical Agent Disposal Facility (TOCDF).[62] The groups, which are opposed to the incineration of chemical weapons, sought regulation of the TOCDF under the Clean Water Act (CWA). The Army has a Clean Air Act permit for the facility's incinerator stack emissions, but the plaintiffs alleged that the CWA, which places an absolute ban on the discharge of any chemical warfare agent into navigable waters, applied to the stack emissions.

The TOCDF's Clean Air Act permit specifically authorizes limited amounts of chemical warfare agent particles to be discharged into the atmosphere as part of the incinerator's emissions. The plaintiffs argued that § 301(f) of the Clean Water Act[63] absolutely and unambiguously prohibited the discharge of chemical warfare agents from the TOCDF's stack emissions that could eventually be deposited by atmospheric deposition into navigable waters. The plaintiffs further contended that the text of the provision placed no limitation on the form of chemical agent discharged or on the manner by which it enters navi-

55. In a case of immediate concern to the Army, the plaintiffs want the Department of Interior to designate critical habitat for 278 plant species in Hawaii, some of which exist only on military installations. Conservation Council for Hawaii v. Babbitt, No. 97-00098 (D. Haw. filed May 21, 1997).

56. Natural Resources Defense Council v. United States Dep't of Interior, 113 F.3d 1121 (9th Cir. 1997).

57. Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334 (9th Cir. 1996).

58. National Ass'n of Home Builders v. Babbitt, 949 F. Supp. 1 (D.D.C. 1996).

59. 111 F.3d 396 (5th Cir. 1997).

60. *Id.*

61. 889 F.2d 664 (5th Cir. 1989).

62. Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485 (10th Cir. 1997).

63. 33 U.S.C. § 1311(f) (1994).

gable waters. Absent such limitations, the plaintiffs urged the court to read § 301(f) broadly, to include discharge by way of atmospheric deposition, to comply with the Congressional intent of the CWA.

The Utah district court had rejected the plaintiffs' broad reading of the CWA to include the stack emissions of the facility and found that such a reading would lead to an irreconcilable conflict with the provisions of the Clean Air Act permit. Consequently, the district court dismissed the case for failure to state a claim.[64]

In affirming the district court's dismissal of the Clean Water Act allegation, the Tenth Circuit also declined to construe the Clean Water Act as broadly as plaintiffs proposed. The court held that the plaintiffs' proposed reading of the CWA "would lead to irrational results . . . [and] would create a regulatory conflict between the Clean Water Act and the Clean Air Act."[65] The argument that atmospheric deposition of the emissions from even cars and chimneys that could find their way to navigable waters could be regulated by the EPA under a nationwide permit was rejected by the Tenth Circuit as "exposing the absurdity of [the] position."[66] The court held that although the plaintiffs "may be correct in arguing that an object may fly through the air and still be "discharged . . . into the navigable waters" under the Clean Water Act, common sense dictated that the TOCDF's stack emissions constitute discharges into the air, not water, and are therefore beyond the reach of §301(f).[67] Major Mulligan.

Environmental Compliance Assessment System (ECAS) Program Information Notebook Update

The ECAS Program Information Notebook (PIN), which is under revision, is a compendium of guidance documents for the Army's in-house environmental inspection system. The portion of the PIN dealing with legal issues has been consolidated into one memorandum from the ELD.[68] The ELD's guidance is that ECAS documents are working documents until completion of the final Environmental Compliance Assessment Report; therefore ECAS documents are not to be released under the Freedom of Information Act (FOIA). The ELD has further advised commanders of the importance of ensuring that all environmental problems which are identified are promptly addressed, through either correction or appropriate funding requests. For Army lawyers at installations being assessed under the ECAS, the ELD emphasizes the importance of active attorney involvement, including advising on reporting requirements, FOIA issues, and funding priorities. Mr. Nixon.

Environmental Compliance Compendium

Environmental Compliance in Virginia, published by Business & Legal Reports, Inc. (BLR) is an easy-to-use service covering federal and state environmental regulations. To review the volumes that cover a state's regulations, contact BLR at 39 Academy Street, Madison, Connecticut 06443-1513. Similar services are available from the Bureau of National Affairs, Inc. and other publishers of environmental compliance information. The same information is also available in the Environmental Compliance Assessment System Protocol Manual that may be ordered from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

64. Chemical Weapons Working Group Inc. v. United States Dep't of the Army, 935 F. Supp. 1206 (D. Utah 1996).

65. *Chemical Weapons Working Group*, 111 F.3d at 1490.

66. *Id.*

67. *Id.*

68. The ELD memorandum is located in the ELD Online Information area of the ELD Environmental Law Links website (http://160.147.194.12/eld/eldlink2.htm), as well as in the Environmental Files area of the LAAWS BBS.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Requests for Reconsideration

Requests for reconsideration of personnel claims are important actions. Often, they involve difficult personnel claims issues and a great deal of money. Claims personnel may be required to draft a seven paragraph memorandum and may need to forward the request through the local staff judge advocate to the Commander, U.S. Army Claims Service (USARCS) for final action. Because of the importance of the requests and the amount of work involved, it is critical to process these actions properly. This note discusses some of the problems frequently encountered in processing requests for reconsideration.

A claims judge advocate may always reconsider his action on a personnel claim if he makes a mistake.[1] However, he *must* reconsider the action if the claimant, or someone acting on behalf of the claimant, submits a written request for reconsideration which clearly states the factual or legal basis for relief.[2] Only written requests for reconsideration should be forwarded through the staff judge advocate to the USARCS for final action.[3] Oral requests for reconsideration should not be forwarded, and written submissions should not be forwarded if they do not include a specific written request for reconsideration. For example, if a claimant orally requests reconsideration and submits an additional repair estimate which purportedly substantiates the request, the request should not be forwarded. Claims personnel should tell the claimant that only a written, signed, request for reconsideration which identifies the items at issue will be considered by higher authority.

A claimant has only sixty days from the date a claim is settled to request reconsideration.[4] Staff judge advocates may waive this time period in exceptional cases,[5] and waivers should be granted liberally, as long as the government's recovery rights are not prejudiced. For example, the staff judge advocate should waive the sixty-day time limit, even if the claimant's excuse for the delay is weak, if a claimant requests reconsideration seventy days after the settlement date, and either: (1) the recovery action against the carrier has not been completed, or (2) no recovery action is possible (as is usually the case in claims for damages caused by fire, flood, hurricane, or other unusual occurrences). In this situation, difficulty in obtaining additional estimates would be an adequate excuse for the delay. On the other hand, if recovery action is already complete, the staff judge advocate should waive the sixty-day time limit only if the claimant has a compelling excuse for the delay, such as the claimant's hospitalization or temporary duty for a significant part of the sixty-day period.[6]

A claims judge advocate may take final action on a written request for reconsideration only if the judge advocate properly advises the claimant of the reconsideration process and the claimant is completely satisfied with the action taken.[7] For example, if a claimant requests reconsideration and asks for an additional $100 for a damaged couch, the claims judge advocate may take final action on the request by paying the claimant an additional $50, as long as the claimant is satisfied with this payment and is advised of all of her rights, including the right to have the request forwarded to the USARCS for final action. Claims judge advocates should always contact a claimant who has requested reconsideration and determine whether the claim-

1. U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES, CLAIMS, para. 11-20a (1 Aug. 1995) [hereinafter AR 27-20]. This paragraph states that a settlement or approval authority may reconsider his or her action if the original action was in error or is incorrect based on new facts. The head of an area claims office (typically a staff judge advocate) has the authority to settle personnel claims up to $25,000. *Id.* para. 11-2a(2)(b). However, the authority to approve claims may be (and typically is) delegated to a subordinate judge advocate or claims attorney. *Id.* para. 1-5f.

2. *Id.* para. 11-20b.

3. Currently, a written request for reconsideration must be forwarded to the USARCS for final action if the claimant is not satisfied with the action taken by the field claims office. As an exception, the Chief, U.S. Army Claims Service Europe can take final action on any reconsideration request forwarded there by a subordinate office, as long as it does not involve approving a waiver of a maximum allowance. *Id.* para. 11-20b(4). The USARCS is considering an amendment to the claims regulation which would give staff judge advocates more authority to take final action on requests for reconsideration.

4. *Id.* para. 11-20c. The time period for filing a request for reconsideration used to be one year, but the 1995 regulation changed the time period to 60 days.

5. *Id.*

6. This distinction is not contained in either the claims regulation or the relevant Department of the Army pamphlet. However, since the purpose for the 60-day time limitation is to enable recovery action to be taken promptly, this distinction makes sense. *See* U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS (15 Dec. 1989) [hereinafter DA PAM 27-162], and AR 27-20, *supra* note 1. While there is no definition of what constitutes a "compelling excuse" for purposes of waiving the 60-day time limit, the incidents which excuse a claimant's failure to provide timely notice of loss to a carrier (hospitalization or officially recognized absences) should be adequate, since they deal with the same issue: the government's inability to recover against the carrier responsible for the loss. *See* AR 27-20, *supra* note 1, para. 11-21a(3); DA PAM 27-162, *supra*, para. 2-52.

7. AR 27-20, *supra* note 1, para. 11-20b(3).

ant is satisfied with the initial action taken on the request. The best way to do this is to send the claimant a letter explaining the action taken and the claimant's rights and specifically asking the claimant if she wants the request forwarded.

If the claimant insists on having the request for reconsideration forwarded, the claims judge advocate who initially settled the claim must prepare a seven paragraph memorandum of opinion and forward the file through the staff judge advocate to the USARCS for final action.[8] The seven paragraph memorandum should recommend what specific action should be taken on the request for reconsideration and should explain the reasons for the recommendation.[9] If a claims judge advocate believes the requester should be paid an additional amount, the additional amount should be paid before the request is forwarded.[10] For example, if the claimant in the illustration above insists that the request for reconsideration of the couch be forwarded, the claims judge advocate should pay the claimant the additional $50 offered, prepare a seven paragraph memorandum, and forward the request through the staff judge advocate to the USARCS. The staff judge advocate must personally sign the memorandum or an endorsement to show that the staff judge advocate has taken personal action on the request.[11]

If any additional payment is made on a request for reconsideration, the chronology sheet and the DD Form 1844, List of Property and Claims Analysis Chart, must reflect the additional payment.[12] The best way to do this is to write "reconsideration" and the additional amount paid in block 25 (the amount allowed column) of the DD Form 1844. This should be done in red or some other color which is different from the other entries on the DD Form 1844. If the file is forwarded, the outside of the file must be clearly marked "RECONSIDERATION."[13] The claimant should be told that the claim has been forwarded, but not what was recommended.[14]

The reconsideration process provides important rights to claimants. It is crucial that claims personnel properly process requests for reconsideration to ensure that these rights are safeguarded. Lieutenant Colonel Masterton.

New Personnel Claims Management Program

The U.S. Army Claims Service (USARCS) has been developing a new personnel claims management program (also known as the "claims database") for the past year to replace the program currently being used in claims offices around the world. The new program performs all of the functions the current program does and also contains many enhancements, including: (1) working within a windows environment; (2) network capability, which allows multiple users to access the database simultaneously; (3) increased ease in managing the claims expenditure allowance; (4) better tracking of carrier recovery demands and deposits; and (5) a built-in query capability that will allow users and managers to access specific information they may need.[15]

The USARCS anticipates fielding the program late this summer. The program has been extensively tested by personnel at the USARCS and field claims offices to ensure that it is the best program possible. The USARCS has already conducted training at claims offices throughout the world to ensure that field claims office personnel can effectively use the program when it is fielded. The training was advertised extensively on the Claims Forum of the Legal Automation Army-Wide System Bulletin Board Service (LAAWS BBS) and at claims video-teleconferences. Judge advocates can obtain future information on the program through the Claims Forum or by contacting the Personnel Claims and Recovery Division at the USARCS. Ms. Kathie Zink and Lieutenant Colonel Pete Masterton.

Claims Training Course Offered

The U.S. Army Claims Service will conduct its 1997 training course 27-31 October 1997 at the Maritime Institute, Linthincum, Maryland. Reservations for the course are managed by the Army Training Requirements and Resources System.

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8. A written request for reconsideration must be forwarded to the USARCS for final action if the approval or settlement authority does not grant additional relief, if the claimant does not wish to accept an additional payment as full relief, or if the claimant does not respond by the suspense date. As noted above, the U.S. Army Claims Service, Europe, may take final action on certain requests for reconsideration from its subordinate offices. *Id.* para. 11-20b(4).

9. The seven paragraph memorandum of opinion should be arranged as follows: (1) claimant's name and address; (2) date and place the incident giving rise to the claim occurred; (3) the amount of the claim, the date it was filed, and the date reconsideration was requested; (4) the chapters under which the claim was considered and a brief description of the incident or issues raised on reconsideration; (5) facts; (6) opinion; and (7) recommended action. *Id.* para 11-19b.

10. *Id.* para. 11-20b(4).

11. The head of an area claims office is required to act personally on requests for reconsideration. *Id.* para. 1-5f. *See also* DA PAM 27-162, *supra* note 6, para. 2-59d.

12. DA PAM 27-162, *supra* note 6, para. 2-59d.

13. *Id.*

14. *Id.* The field claims office generally should not provide the claimant with the telephone number for the USARCS so the claimant can call to inquire about the status of the request. Such inquiries should be made through the field claims office.

15. This will enable judge advocates to generate statistics such as the number of claims which were filed for more than $1,000 in the last month.

For more information, please contact Audrey Slusher at (301) 677-7009, extension 206 or DSN 923-7009, extension 206.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

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

The following is the current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office (LAAWS) and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

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

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at *riveraju@otjag.army.mil*. Major Rivera.

GRA On-Line!

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

COL Tom Tromey,.....tromeyto@otjag.army.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera,.....riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

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

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

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1997-1998 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
27-28 Sep	Pittsburgh, PA 99th RSC Pittsburgh Airport Marriott 100 Aten Road Coraopolis, PA 15108 (412) 788-8800	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	 BG John F. DePue MAJ Janet Fenton MAJ Norman Allen	CPT Kenneth L. Ford Office of the SJA 99th RSC 5 Lobaugh Street Oakdale, PA 15071-5001 (412) 693-2151 fax (412) 693-2149
17-19 Oct	San Antonio, TX 1st LSO Hilton Airport Hote1 611 NW Loop 410 San Antonio, TX 78216 (210) 340-6060	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	 BG Richard M. O'Meara MAJ Gregory Coe MAJ Geoffrey Corn	LTC Jim Jennings 1920 Harry Wurzbach San Antonio, TX 78209 (210) 221-6120 e-mail: 71134.3012@ compuserve.com or lbrown906@aol.com
1-2 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55425 (612) 854-3411	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 BG Thomas W. Eres MAJ John Moran LTC Karl Ellcessor	MAJ Tom Tate P.O. Box 41 South St. Paul, MN 55075 (612) 455-4448
15-16 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 BG Richard M. O'Meara MAJ Jacqueline Little MAJ Kay Sommerkamp	COL Myron J. Berman 370 Lexington Avenue Suite 715 New York, NY 10017 (212) 696-0165 Fax (212) 696-0493
10-11 Jan 98	Long Beach, CA 78th MSO	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	 BG John F. DePue MAJ Martin Sitler CDR Mark Newcomb	LTC Andrew Bettwy 5241 Spring Mountain Road Las Vegas, NV 89102 (702) 876-7107

31 Jan-1 Feb	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Criminal Law Contract Law GRA Rep	BG Richard M. O'Meara MAJ Charles Pede MAJ David Wallace	LTC David F. Morado 909 lst Avenue, #200 Seattle, WA 98199 (206) 220-5190, ext. 3531 email: david_morado@hud.gov
7-8 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG John F. DePue CPT Stephanie Stephens MAJ Marsha Mills	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: tdonne2947@aol. com
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas W. Eres MAJ Stephen Parke LTC James Lovejoy	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
7-8 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Richard M. O'Meara LTC Mark Henderson MAJ John Einwechter	COL Robert P. Johnston/ Ruth Blackmon Office of the SJA 12th LSO 5116 Forest Drive Fort Jackson, SC 29206 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John F. DePue MAJ Stewart Moneymaker MAJ Scott Morris	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thoms W. Eres MAJ Christopher Garcia LTC Lawrence Morris	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol. com
21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John F. DePue MAJ Thomas Hong LTC Richard Jackson	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60008 (312) 443-6064

28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364
25-26 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Trng Ctr 360 Eliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Richard M. O'Meara MAJ Maurice Lescault LTC Stephen Henley	MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (508) 796-2140/2143 or SSG Jent, e-mail: jentd@usmc-emhw.army.mil
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Thomas W. Eres LTC John German MAJ Michael Newton	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
16-17May	Kansas City, MO	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

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-ZHA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

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

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

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

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

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

2. TJAGSA CLE Course Schedule

1997

August 1997

4-8 August	1st Chief Legal NCO Course (512-71D-CLNCO).
4-15 August	139th Contract Attorneys Course (5F-F10).
5-8 August	3d Military Justice Managers Course (5F-F31).
11-15 Aug.	8th Senior Legal NCO Management Course (512-71D/40/50).
11-15 Aug.	15th Federal Litigation Course (5F-F29).
18-22 Aug.	66th Law of War Workshop (5F-F42).
18-22 Aug.	143d Senior Officers Legal Orientation Course (5F-F1).
18 Aug. 1997-28 May 1998	46th Graduate Course (5-27-C22).

September 1997

3-5 September	USAREUR Legal Assistance CLE (5F-F23E).
8-12 September	USAREUR Administrative Law CLE (5F-F24E).
8-19 September	8th Criminal Law Advocacy Course (5F-F34).

October 1997

1-14 October	144th Basic Course (Phase 1, Fort Lee) (5-27-C20).
6-10 October	1997 JAG Annual CLE Workshop (5F-JAG).
14-17 October	4th Ethics Counselors Workshop (5F-F201).
15 October-19 December	144th Basic Course (Phase 2, TJAGSA) (5-27-C20).
20-21 October	USAREUR Criminal Law CLE (5F-F35E).
20-24 October	41st Legal Assistance Course (5F-F23).
21-25 October	USAREUR Trial Advocacy Course (5F-F34E)

27-31 October	49th Fiscal Law Course (5F-F12).
27 October-7 November	28th Operational Law Seminar (5F-F47).

November 1997

3-7 November	144th Senior Officers Legal Orientation Course (5F-F1).
17-21 November	21st Criminal Law New Developments Course (5F-F35).
17-21 November	51st Federal Labor Relations Course (5F-F22).
17-21 November	67th Law of War Workshop (5F-F42).

December 1997

1-5 December	145th Senior Officers Legal Orientation Course (5F-F1).
1-5 December	USAREUR Operational Law CLE (5F-F47E).
8-12 December	Government Contract Law Symposium (5F-F11).
15-17 December	1st Tax Law for Attorneys Course (5F-F28).

1998

January 1998

5-16 January	JAOAC (Phase 2) (5F-F55).
6-9 January	USAREUR Tax CLE (5F-F28E).
12-15 January	PACOM Tax CLE (5F-F28P).
12-16 January	USAREUR Contract Law CLE (5F-F15E).
20-22 January	Hawaii Tax CLE (5F-F28H).
20-30 January-	145th Basic Course (Phase 1, Fort Lee) (5-27-C20).
21-23 January	4th RC General Officers Legal Orientation Course (5F-F3).
26-30 January	146th Senior Officers Legal Orientation Course (5F-F1).
31 January-10 April	145th Basic Course (Phase 2, TJAGSA) (5-27-C20).

February 1998

9-13 February	68th Law of War Workshop (5F-F42).
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).
23-27 February	42nd Legal Assistance Course (5F-F23).

March 1998

2-13 March	29th Operational Law Seminar (5F-F47).
2-13 March	140th Contract Attorneys Course (5F-F10).
16-20 March	22d Admin Law for Military Installation Course (5F-F24).
23-27 March	2d Contract Litigation Course (5F-F102).
23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).
30 March-3 April	147th Senior Officers Legal Orientation Course (5F-F1).

April 1998

20-23 April	1998 Reserve Component Judge Advocate Workshop (5F-F56).
27 April-1 May	9th Law for Legal NCOs Course (512-71D/20/30).
27 April-1 May	50th Fiscal Law Course (5F-F12).

May 1998

4-22 May	41st Military Judge Course (5F-F33).
11-15 May	51st Fiscal Law Course (5F-F12).

June 1998

1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).
1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
8-12 June	28th Staff Judge Advocate Course (5F-F52).
15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
29 June-1 July	Professional Recruiting Training Seminar.

July 1998

6-10 July	9th Legal Administrators Course (7A-550A1).
6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).
7-9 July	29th Methods of Instruction Course (5F-F70).
13-17 July	69th Law of War Workshop (5F-F42).
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
22-24 July	Career Services Directors Conference.

August 1998

3-14 August	10th Criminal Law Advocacy Course (5F-F34).
3-14 August	141st Contract Attorneys Course (5F-F10).
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
14-18 September	USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1997

August

22 August GICLE	Nuts and Bolts of Family Law Atlanta, GA
22 August GICLE	Law of Torts Atlanta, GA

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

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, Va 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

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

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 229054.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually

Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the July 1997, *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Rights Under Select Federal Statutes (http://www.lib.umich.edu/chdocs/rights/Statutes.html).

This Web Site contains useful information about the Freedom of Information Act, the Privacy Act, and consumer protection issues. It features the U.S. Government FOIA Request Kit and a step-by-step guide to using the FOIA. It has an overview of the Privacy Act and a guide to requesting government records. It also contains useful consumer credit information and links to the Consumer Information Center Catalog and U.S. Consumer Product Safety Commission.

b. Department of Defense Publications (http://web7.whs.osd.mil/corres.htm).

This is the best site to find official Department of Defense policy. You will find at this site the latest DOD directives,instructions, publications, administrative instructions, and directive-type memoranda. You can also search the extensive database for older directives and publications.

c. Find Law (http://www.findlaw.com/index.html).

This is a great legal search engine to find virtually anything legal on the Internet. Search for any legal topic here.

d. National Defense University Library (http://www.ndu.edu/ndu/library/home01.html).

This site has a comprehensive Internet Resources Guide and numerous links to other military libraries, as well as DOD and international military links.

e. Perscom Online (http://www-perscom.army.mil/).

This is a good site to find out about personnel issues and policies. The general subjects area contains articles on many different personnel matters. You will also find the latest promotion board information and promotion lists, as well as links to the Enlisted and Officer Personnel Management Directorates.

2. TJAGSA Materials Available through the Defense Technical Information Center

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

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1, or send an e-mail to bcorders@dtic.mil.

Contract Law

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

Legal Assistance

AD A263082	Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).
AD A323770	Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (59 pgs).
AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
*AD A326316	Model Income Tax Assistance Guide, JA 275-97 (106 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).
AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A297426	Wills Guide, JA-262-97 (150 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A280725	Office Administration Guide, JA 271-94 (248 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
AD A322684	Tax Information Series, JA 269-97 (110 pgs).
AD A276984	Deployment Guide, JA-272-94 (452 pgs).

Administrative and Civil Law

AD A310157	Federal Tort Claims Act, JA 241-97 (136 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A311351	Defensive Federal Litigation, JA-200-96 (846 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).
AD A311070	Government Information Practices, JA-235-96 (326 pgs).
AD A259047	AR 15-6 Investigations, JA-281-96 (45 pgs).

Labor Law

AD A323692	The Law of Federal Employment, JA-210-97 (288 pgs).
*AD A318895	The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302312	Senior Officers Legal Orientation, JA-320-95 (297 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

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

Reserve Affairs

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

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

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

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

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

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

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

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

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

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

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

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

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

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

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

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

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

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

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

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

Bulletin Board Services (BBS).

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

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

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

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

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

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

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

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

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

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

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

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

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

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

c. Telecommunications setups are as follows:

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

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

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

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

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

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

IP Address = 160.147.194.11

Host Name = jagc.army.mil

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

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

(1) Terminal Users

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

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone

lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

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

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

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

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

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

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

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

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

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

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

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

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

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

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

(e) Press the "Clear" button.

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

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

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

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

(j) Click on the "Download" button.

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

(l) From here your computer takes over.

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

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

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

5. TJAGSA Publications Available Through the LAAWS BBS

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

FILE NAME	UPLOADED	DESCRIPTION
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.
ALAW.ZIP	June 1990	*The Army Lawyer*/ *Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA of actual class instructions presented at the school in Word 6.0, May 1997.
CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advances Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, (Part 1), November 1995.
FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview, (Part 2), November 1995.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
21ALMI.EXE	April 1997	Administrative Law for Military Installations Deskbook, March 1997.
50FLR.EXE	June 1997	50th Federal Labor Relations Deskbook, May 1997.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.
JA210DOC.ZIP	April 1997	Law of Federal Employment, May 1997.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA215.EXE	June 1997	Military Personnel Law Deskbook, June 1997.

JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	April 1997	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	June 1997	Federal Tort Claims Act, May 1997.
JA250.EXE	April 1997	Readings in Hospital Law, January 1997.
JA260.ZIP	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA262.ZIP	June 1997	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.DOC	December 1996	Tax Information Series, December 1996.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA275.EXE	June 1997	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	February 1997	15-6 Investigations, December 1996.
JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.
JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/ Reference), February 1997.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.

JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.

JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate

proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

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

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

6. *The Army Lawyer* on the LAAWS BBS

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

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

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

(2) Double click on "Files" button.

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

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

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

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

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

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

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

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

For example: c:\wp60\wpdocs
or C:\msoffice\winword

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

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

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

PKUNZIP AUGUST.ZIP

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

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

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these

instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. Articles

The following information may be useful to judge advocates:

Mary Hayes, *Reconciling Protection of Children with Justice for Patients in Cases of Alleged Child Abuse*, 17 LEGAL STUD. 1 (March 1997).

8. TJAGSA Information Management Items

a. The Judge Advocate General's School, United States Army has upgraded its network server to improve capabilities for the staff and faculty, and many of the staff and faculty have received new pentium computers. These initiatives have greatly improved overall system reliability and made an efficient and capable staff and faculty even more so! The transition to Windows 95 is almost complete and installation of Lotus Notes is underway.

b. The TJAGSA faculty and staff are accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling IMO.

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

9. The Army Law Library Service

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

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