Editor, Captain Drew A. Swank
Editorial Assistant, Mr. Charles J. Strong

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Update: Tax Benefits for Military Personnel in a Combat Zone or Qualified Hazardous Duty Area

Major Richard W. Rousseau
Professor, Administrative and Civil Law Department
The Judge Advocate General School, U.S. Army

"With our citizens working so hard to protect the people of Kosovo, they shouldn't have to worry about their taxes."
–President William J. Clinton[1]

"Our men and women serving in the Kosovo area should be focused on one thing and one thing only–keeping themselves safe from harm and achieving our mission. While our troops are under fire, they certainly don't need to be doing battle with the IRS as well."
–Ways and Means Committee Chair Bill Archer, R-Texas[2]

Introduction

As the individual tax filing deadline of 15 April 1999 drew near for most taxpaying Americans, Congress and the President focused their attention on tax issues relating to service members deployed in Operation Allied Force. President Clinton issued an executive order giving tax breaks to service members serving in Operation Allied Force on 13 April 1999.[3] Congress enacted similar legislation on 16 April 1999 providing tax relief to military personnel serving in the Kosovo area of operations by designating it as a qualified hazardous duty area.[4] President Clinton signed the legislation on 19 April 1999.[5] Judge advocates should be familiar with the details of the executive order, the legislation, and the accompanying administrative procedures regarding tax issues of service members serving in and in direct support of a combat zone or qualified hazardous duty area.

To understand recent tax developments, judge advocates must understand the basic concepts relating to "combat zone" designations, "qualified hazardous duty areas" for taxation purposes, the federal tax benefits of each designation, and the potential state tax implications of the designations. By understanding the legal foundations for each designation, the judge advocate can provide legal assistance to service members encountering combat zone and deployment tax issues with federal and state taxing authorities. Finally, judge advocates need to know how to "invoke" these benefits for soldiers.

Historical Development

Since the inception of the first modern income taxation in the United States in 1913,[6] special federal income tax benefits have been granted for service members in World War I, World War II, Korea, Vietnam, the Persian Gulf, Bosnia, and now Kosovo.[7] Federal tax benefits for service members during conflicts and deployments have ranged from income exclusions, extensions or delays to file tax returns, and assistance in handling tax matters, paying taxes, or receiving tax refunds. Contemporaneously with the historical development of federal tax benefits and relief for service members in a combat zone, the states also began to provide tax relief for their citizens serving in combat zones.

What is a Combat Zone or Qualified Hazardous Duty Area?

To understand the pertinent tax code provisions and regulations, the judge advocate must understand certain tax "terms" that have developed legislatively and administratively over time. The term "combat zone" may conjure up one set of images to the infantry soldier, but in the world of taxation, federal law specifically defines a "combat zone." A combat zone is an area in which the armed forces are or have engaged in

1. 70 Daily Tax Rept. G-1 (BNA) (Apr. 13, 1999).

2. 1999 Tax Notes Today 73-31 (Apr. 16, 1999).

3. Exec. Order No. 13,119, 64 Fed. Reg. 18,797 (1999). All executive orders are available at <www.access.gpo.gov>.

4. Pub. L. No. 106-21, 113 Stat. 34 (1999).

5. *Id.*

6. U.S. CONST. amend XVI.

7. Many articles provide a historical account of the development, underlying principles, and changes in the area of tax relief for service members in armed conflicts. *See, e.g.*, Edward A. Beck, III, *The Taxation of Members of the Armed Services: Legislative and Administrative Changes Arising From the Persian Gulf Conflict*, 38 FED. B. NEWS & J. 350 (Aug. 1991); Lieutenant Colonel George Hancock, *Tax Note: Final Combat Zone Compensation Rules*, ARMY LAW., Dec. 1993, at 31; Major Mark Henderson, *Bosnian Tax Relief*, ARMY LAW., May 1996, at 27; Major Bernard Ingold, *Tax Note: President Paves Way for Tax Benefits by Declaring Persian Gulf Area a Combat Zone*, ARMY LAW., Mar. 1991, at 54; Major Bernard Ingold, *Tax Note: DOD Designates Imminent Danger Areas*, ARMY LAW., Apr. 1991, at 46; Patrick J. Kusiak, *Income Tax Exclusion for Military Personnel During War*, 39 FED. B. NEWS & J. 146 (Feb. 1992).

combat.[8] The President of the United States designates combat zones by executive order. Service members may invoke combat zone tax relief only if they serve in a combat zone on or after the date designated in the executive order.[9] The President of the United States has issued combat zone executive orders for the Korean Conflict,[10] Vietnam,[11] the Persian Gulf,[12] and Kosovo.[13]

While an executive order creates a combat zone, legislation creates a "qualified hazardous duty area." Members serving in a qualified hazardous duty area receive the same tax treatment under the Internal Revenue Code as members serving in a combat zone.[14] The legislation will specify the date that members in the qualified hazardous duty area become eligible for tax relief. Congress has created two qualified hazardous duty areas.[15] In each, Congress has designated certain countries as qualified hazardous duty areas and has specified that each designated country will lose its status as a qualified hazardous duty area when the Department of Defense (DOD) stops paying members either imminent danger or hostile fire pay for service in that country.[16] Thus, the DOD, by controlling the payment of hostile fire or imminent danger pay to members in a particular country, can also control when members serving in that country will no longer be entitled to the special tax benefits applicable to service in a qualified hazardous duty area. "Hostile fire or imminent danger pay" is the name for a special pay for duty when a service member is subject to hostile fire or imminent danger.[17] The DOD starts and stops this pay.[18] Generally, hostile fire or imminent danger pay is includible in income for federal tax purposes. However, if a member becomes entitled to it while serving in a qualified hazardous duty area or combat zone, it will generally be excludable from income.[19]

How Does a Service Member Qualify for Service in a Combat Zone or Qualified Hazardous Duty Area?

Generally, to receive combat zone tax benefits, a member must serve in a combat zone or qualified hazardous duty area. Service members outside of a combat zone or a qualified hazardous duty area can receive combat zone tax benefits if their service directly (as opposed to remotely or indirectly) supports military operations in the combat zone. These service members must meet three basic conditions. First, the direct support of military operations must maintain, uphold, or provide assistance for those involved in military operations in the combat zone (or qualified hazardous duty area).[20] Second, the service must qualify the service member for hostile fire pay or imminent danger pay.[21] Finally, the reason for the imminent danger or hostile fire pay must be based on the risks or dangers related to the qualified hazardous duty area or combat zone.[22]

"The [DOD] determines whether service is in direct support of military operations in a combat zone or qualified hazardous duty area."[23] Within the DOD, the Assistant Secretary of Defense (Force Management Policy) has the general mission for administering combat zone tax benefits. The Assistant Secretary of Defense (Force Management Policy) has delegated direct support approval authority on four occasions: the United

8. I.R.C. § 112(c)(2) (West 1999).

9. *Id.* § 112(c)(3).

10. Exec. Order No. 10,195, 3 C.F.R. § 373 (1949-1953), *reprinted in* 26 U.S.C. § 23 (1952), *as cited in* Patrick J. Kusiak, *Income Tax Exclusion for Military Personnel During War*, 39 FED. B. NEWS & J. 146, at n.32 (Feb. 1992).

11. Exec. Order No. 11,216, 3 C.F.R. § 301 (1964-1965), 3 C.F.R. § 301 (1964-1965), *as cited in* Kusiak, *supra* note 10, at n.40.

12. Exec. Order No. 12,744, 56 Fed. Reg. 2661 (1991).

13. Exec. Order No. 13,119, 64 Fed. Reg. 18,797 (1999).

14. Pub. L. No. 104-117, §§ 1(a)(2), (b), (e)(1), 109 Stat. 827 (1996).

15. One qualified hazardous duty area was designated as Bosnia, Herzegovina, Croatia, and Macedonia. *Id.* The other qualified hazardous duty area pertains to the Federal Republic of Yugoslavia (Serbia/Montenegro) and Albania. Pub. L. 106-21, 113 Stat. 34 (1999).

16. *Id.* In addition, Congress could also enact legislation terminating the qualified hazardous duty area.

17. The pay is $150 per month. 37 U.S.C.A. § 310 (West 1999).

18. Members who come under hostile fire are automatically entitled to hostile fire pay. The unit commander certifies when members of his command have come under hostile fire. The Assistant Secretary of Defense (Force Management Policy) designates an area as an imminent danger pay area after reviewing the threat assessment submitted by the theater commander.

19. Due to the pay exclusion cap applicable to commissioned officers, some officers will not be able to exclude this pay from income. Because the pay exclusion cap is not applicable to enlisted and warrant officer members, these members will be able to fully exclude the pay when they earn it in a combat zone or qualified hazardous duty area. I.R.C. § 112(b), (c) (West 1999). For more information *see infra* notes 54-59.

20. Treas. Reg. § 1.112-1 (1999).

21. *Id.*

States Commander in Chief, Central Command, has direct support approval authority for Operation Desert Storm and follow-on operations; the United States Commander in Chief, Europe (USCINCEUR) has direct support approval authority for Joint Task Force Provide Comfort; the USCINCEUR has direct support approval authority for Operation Joint Endeavor and follow-on operations; and the USCINCEUR has direct support approval authority for service members supporting the Kosovo area of operations combat zone.[24]

As a practical matter, unit commanders generally initiate requests to extend combat zone tax benefits to service members based upon service in direct support of military operations in a combat zone or qualified hazardous duty area. Requests to extend combat zone tax benefits to service members in direct support are submitted through the chain of command to the unified commander who is responsible for the operation.[25] As appropriate, commanders should also initiate requests to stop combat zone benefits.[26]

Unless a service member has an independent basis for entitlement or qualification for hostile fire or imminent danger pay, a service member in a combat zone or qualified hazardous duty area while on leave from a duty station located outside a combat zone, or who passes over or through a combat zone during the course of a trip between two points, both of which lie outside a combat zone, or who is in a combat zone solely for his own personal convenience, is not considered eligible for combat zone tax benefits.[27] Service members assigned to official temporary duty in a combat zone or qualified hazardous duty area qualify for combat zone tax relief and entitlements.[28]

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22. U.S. DEP'T OF DEFENSE, DOD REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, para. 440103B.5 (July 1996). *See* Guidance, Office of the Assistant Secretary of Defense Force Management Policy (Military Personnel Policy), subject: Guidance for Requesting/Approving Combat Zone Tax Benefits for Service in "Direct Support" of Military Operations (22 Apr. 1999) [hereinafter Guidance]. The DOD has imposed this third requirement since 1991. Prior to 1970, only service members who actually served in a combat zone were entitled to the combat zone pay exclusion. I.R.C. § 112; Treas. Reg. § 1.112-1. Although the law had not changed, the IRS amended its regulation interpreting I.R.C. § 112 in November of 1970. The amended regulation made members of the armed forces who performed military service outside a combat zone eligible for the I.R.C. § 112 exclusion if: (1) the service is in direct support of military operations in the combat zone; and (2) their service qualifies them for hostile fire pay under 37 U.S.C.A. § 310. Section 310 was subsequently amended to create a new type of pay known as "imminent danger pay." In 1993, the IRS amended its regulation to reflect this change and broadened the second requirement to include imminent danger pay. The DOD imposed this third requirement because it believes it is fully consistent with the intent of the regulation and that it must fully adhere to this policy to maintain the public's trust and its good working relationship with the I.R.S. But for this requirement, members serving at a radar site far from the combat zone/qualified hazardous duty area, in a country designated as an imminent danger pay area because of a threat of domestic terrorism, could claim entitlement to these tax benefits whenever they directly support operations in the combat zone/qualified hazardous duty area. To prevent what it perceived to be an unwarranted extension of the tax benefits associated with combat zone/qualified hazardous duty area service, the DOD imposed the requirement that the reason for payment of imminent danger or hostile fire pay be based on the risks or dangers related to the combat zone/qualified hazardous duty area.

23. Rev. Rul. 70-621, 1970-2 C.B. 17. *See* Guidance, *supra* note 22.

24. Guidance, *supra* note 22.

25. *Id.*

> If the Assistant Secretary of Defense (Force Management Policy) has not delegated approval authority for that operation, the unified commander will submit the request through the Chairman's J-1 to the Assistant Secretary of Defense (Force Management Policy). Any commander in the chain may reject a request to extend combat zone tax benefits; only the unified commander who has been delegated direct support approval authority may approve a request to extend combat zone tax benefits to service members based upon service in direct support. If the Assistant Secretary of Defense (Force Management Policy) has not delegated approval authority, only the Assistant Secretary of Defense (Force Management Policy) may approve the request. Because the facts that support a determination that service is in direct support are subject to change, unit commanders must regularly reassess whether the facts justify the continuation of this benefit. Unit commanders will promptly notify higher headquarters of changes and will conduct formal, periodic (at least annual) reviews of whether the direct support determination should be continued. The unit commander will promptly initiate a request to stop combat zone benefits when circumstances merit. Unit commanders will submit these requests through their chain of command to the unified commander responsible for the operation. If the Assistant Secretary of Defense (Force Management Policy) has not delegated approval authority to the unified commander, and the unified commander determines it is appropriate to continue providing combat zone tax benefits, the unified commander will submit the request through the Chairman's J-1 to the Assistant Secretary of Defense (Force Management Policy). Any general or flag officer commander in the chain may approve a request (or independently determine that it is appropriate) to stop combat zone tax benefits. A general or flag officer commander who stops combat zone [tax benefits] will notify both Defense Finance and Accounting Service, the unified commander, and the Assistant Secretary of Defense (Force Management Policy) of the determination.

Only requests that meet the criteria as indicated in the DOD Financial Management Regulation Volume 7A, Chapter 44, paragraph 440103B.5 and Treasury Regulation § 1.112-1 will be approved. *Id.*

26. Guidance, *supra* note 22.

27. Treas. Reg. § 1.112-1(f)(1) (1999).

28. *Id*. § 1.112-1(f)(2).

Tax Benefits and Relief for Military Personnel in Combat Zone or Qualified Hazardous Duty Area

Extension of Time for Tax Actions

Generally, individual taxpayers must file their federal income tax returns by 15 April each year.[29] United States citizens and residents in military or naval service on duty, including permanent or short term duty outside of the United States and Puerto Rico, are allowed an additional automatic two-month extension to file taxes.[30] If a service member is out of the country on 15 April, he is not required to file a form to request an additional two-month extension. A service member filing his return must indicate on the return that he is claiming an extension.[31] The extension applies to both filing returns and paying the tax that is due.[32] However, service members using the automatic extension must pay interest on any unpaid tax from the original due date of the return until the date the tax is paid.[33]

Soldiers qualifying for service in a designated combat zone or qualified hazardous duty area are entitled to special extensions of time for completing various tax actions. The period for filing tax returns, paying taxes, or filing a claim for a refund of tax are suspended while the service member serves in a designated combat zone and hazardous duty area.[34] The deadline extension also applies to the filing of all tax schedules and forms that are attachments to the federal individual tax return. The suspension of time encompasses the period of service in the combat zone, as well as any time of continuous qualified hospitalization resulting from injury received in the combat zone and the next 180 days thereafter.[35]

The additional time is also disregarded in determining tax liability under the Internal Revenue Code (including interest, penalty, additional amount, or addition to tax).[36] The Internal Revenue Service (IRS) has determined that this extension runs consecutively, not concurrently, with the tax-filing season.[37] Consequently, soldiers serving in a combat zone may be entitled to up to 105 additional days for a total combat zone extension of 285 days to complete action on tax matters after leaving the combat zone.[38] If the IRS takes any tax action during the combat zone extension period or sends a notice of examination, the service member should return the notice to the IRS with the combat zone designation written across the top of the notice or letter. Service members who use the combat extension would have been entitled to interest on any refund due beginning from

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29. I.R.C. § 6072 (West 1999).

30. Treas. Reg. § 1.6081-5(a)(6).

31. *Id*. § 1.6081-5(b).

32. *Id*. § 1.6081-5(a).

33. I.R.C. § 6601(b). Several bills were introduced early in 1999 to create a specific provision in the Internal Revenue Code to exempt service members from the accrual of interest due to using the overseas extension. As of the date of publication of this article, none of the proposals were enacted into law. *See* Uniformed Services Filing Fairness Act of 1999, S. 308, S. 767, 106th Cong.

34. The suspension of time applies to the following acts pursuant to I.R.C. § 7508(a)(1):

(A) Filing any return of income, estate, or gift tax (except employment and withholding tax);
(B) Payment of any income, estate, or gift tax (except employment and withholding tax) or any installment thereof or of any other liability to the United States in respect thereof;
(C) Filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;
(D) Allowance of a credit or refund of any tax;
(E) Filing a claim for credit or refund of any tax;
(F) Bringing suit upon any such claim for credit or refund;
(G) Assessment of any tax;
(H) Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;
(I) Collection, of the amount of any liability in respect of any tax;
(J) Bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax; and
(K) Any other act required or permitted under the internal revenue laws specified in regulations prescribed under this section by the Secretary;

35. I.R.C. § 7508(a).

36. *Id*.

37. *Id.*

38. The length of the extension period depends on when the soldier began serving in the combat zone. For example, a soldier serving in the combat zone from 1 October 1999 until 1 May 2000, will have the full 285 days to file the 1999 tax return. This extension equals the 180-day extension, plus the full 105 days in the tax-filing season. Soldiers beginning service in the combat zone after 1 January 2000, will not have the full extension period. For example, a soldier arriving in the combat zone on 1 February 2000 and serving until 1 May 2000, will have 254 days. This period of time is equivalent to the full 180-day extension, plus the seventy-four days remaining in the filing season since 1 February 2000. *See* I.R.S. Notice 99-30, 1999-22 I.R.B. 1.

the original due date (15 April 1999 for 1998 tax returns, or 15 April 2000 for 1999 tax returns).[39]

Spouses of service members entitled to the combat zone tax benefits are entitled to the same suspension of time for handling tax matters.[40] The deadline extension provisions apply to both spouses whether filing a joint or separate return. If spouses choose to file a separate return, they will have the same extension of time to file and pay their taxes as the service member.[41] The combat zone extensions also apply to individuals serving in the combat zone in support of the U.S. Armed Forces. These include Red Cross personnel, accredited correspondents, and civilians acting under the direction of the U.S. Armed Forces in support of those forces (both DOD civilian employees and civilian employees of defense contractors).[42]

Generally, an individual may receive credit for contributing to an Individual Retirement Account (IRA) during the preceding tax year if he makes this contribution on or before the due date for the income tax return.[43] The due date is determined without regard to extensions. For example, a contribution made on 14 April 2000, by a calendar year taxpayer, could have the designation of a contribution for the 1999 tax year. On the other hand, a contribution made on 20 April 2000 could not be designated as a 1999 IRA contribution, even if the taxpayer obtains an extension to file his 1999 federal income tax return. The "combat zone" extension, however, provides the taxpayer with an additional period to contribute to an IRA for the preceding tax year.[44] To qualify, the taxpayer must make a contribution before the earlier of the end of the income tax return filing period established under the combat zone tax extensions[45] or the date on which the federal income tax return actually is filed. A contribution made on 1 June 2000 could be designated as a contribution for the 1999 tax year if it is made before the taxpayer's combat zone suspension period expires.[46] The taxpayer would have to designate the contribution as a contribution for the 1999 tax year to claim it on his 1999 income tax return.

Exclusion of Compensation of Service Members Received in a Combat Zone from Gross Income

Perhaps the greatest tax benefit for the majority of service members serving in combat is the exclusion of combat zone compensation. Under the combat zone compensation exclusion tax rules, gross income does not include certain combat zone compensation of members of the Armed Forces.[47] Any official presence in a combat zone during the month will qualify the service member for the combat zone exclusion for the entire month. Likewise, if a service member is hospitalized outside of the combat zone for part of a month as a result of wounds, disease, or injury incurred while serving in a combat zone, he qualifies for the combat zone exclusion for the full month, provided combatant activities remain in the combat zone.[48]

Enlisted personnel serving in a combat zone during any part of any month[49] may exclude from gross income all compensation received for active service for that month.[50] If the enlisted service member is hospitalized as a result of injuries, wounds, or disease incurred in a combat zone, all the military pay for the month is also excluded from gross income.[51] The same compensation exclusion rule applies to commissioned officers;[52] however, the exclusion from income is limited to the maximum enlisted amount.[53] "Maximum enlisted amount" means the

39. *See* I.R.C. § 7508(b). *See also* I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #24.

40. I.R.C. § 7508(c).

41. I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #17.

42. *Id.* Q & A #13.

43. I.R.C. § 219(f)(3).

44. I.R.S. Notice 91-17, 1991-23 I.R.B. 25; I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #21; Major George Hancock, *Tax Note: IRA Contributions By Desert Storm Personnel*, ARMY LAW., Sept. 1991, at 35.

45. I.R.C. § 7508.

46. I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #21.

47. I.R.C. § 112.

48. Treas. Reg. § 1.112-1(b)(3) (1999).

49. If a service member of the Armed Forces serves in a combat zone for any part of a month or is hospitalized for any part of a month as a result of wounds disease, or injury incurred while serving in the combat zone, the member is entitled to the exclusion for that month to the same extent as if the member has served in the combat zone for the entire month. Treas. Reg. § 1.112-1(b)(3).

50. I.R.C. § 112(a).

51. The exclusion is limited to hospitalization during any part of any month beginning not more than two years after the end of combat in the zone. *Id.* § 112(a)(2); Treas. Reg. 1.112-1(c).

highest rate of basic pay for such month to any enlisted member of the Armed Forces of the United States at the highest pay grade applicable to enlisted members plus the amount of hostile fire or imminent danger pay to an officer for the month.[54] For 1999, commissioned officers may exclude up to $4653 each month during any part of which they served in a combat zone.[55]

While the service member is entitled to the combat zone exclusion, income tax withholding does not apply to the excludable compensation.[56] The Defense Finance and Accounting Service does not report these amounts to the IRS on Form W-2 as "wages, tips, other compensation." Nevertheless, military pay for combat zone service is still subject to Social Security and Medicare taxes. The Form W-2 will report the excluded military pay in the boxes indicated "Social Security wages" and "Medicare wages and tips." It will also show the excluded amount in block 13, as a code "Q" item.[57] Compensation for active service includes basic pay and certain other forms of compensation. The other types of compensation excluded under the rules include: pay for accrued leave earned in any month served in a combat zone;[58] a reenlistment bonus if the voluntary extension or reenlistment occurs in a month served in a combat zone;[59] and awards for suggestions, inventions, or scientific achievements members are entitled to because of a submission they made in a month they served in a combat zone.[60]

As previously mentioned, service in direct support of military operations in a combat zone by performance of military service in an area outside the combat zone, results in the service member receiving combat zone tax benefits if they are receiving hostile fire or imminent danger pay. Service members meeting the criteria receive the same combat zone compensation exclusion benefits as individuals serving in the combat zone.[61]

IRA Contributions by Personnel in a Combat Zone

Service members who serve an entire calendar year in a combat zone may have no taxable compensation or very little taxable compensation. If taxable compensation is less than $2000 in a calendar year, the service member may not be eligible to make an IRA contribution.[62] In general, a service member may contribute any amount to an IRA that is more than the smaller of the service member's taxable compensation or $2000.[63] Any contribution to an IRA that is more than the contribution limit is an excess contribution and must be withdrawn to avoid a six- percent excise tax.[64]

A married service member filing a joint federal income tax return whose service in a combat zone results in less than $2000 of taxable income, but whose spouse is working and earns more than $2000 of taxable compensation can make contributions to his IRA up to the dollar limitation based upon the couples adjusted gross income.[65] Because of recent changes to the tax laws relating to spousal IRAs, it appears that the compensation limitation will only come into play for service members in the

52. The term "commissioned officer" does not include a commissioned warrant officer. I.R.C. § 112(c)(1).

53. *Id.* § 112(c)(5).

54. *Id.*

55. This represents the $4503 payable monthly to the Sergeant Major of the Army and to the other senior enlisted advisors of the other services plus $150 for imminent danger/hostile fire pay.

56. I.R.C. § 3401(a)(1).

57. Code "Q" represents military employee basic quarters, subsistence, and combat zone compensation.

58. Treas. Reg. § 1.112-1(b)(5) example 2 (1999); I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #6.

59. Treas. Reg. § 1.112-1(b)(4), (5) example 5, 6.

60. Treas. Reg. § 1.112-1(b)(5) example 4.

61. *Id.* § 1.112-1(e).

62. I.R.C. § 219(b)(1)(B) (West 1999).

63. *Id.* § 219.

64. An excess payment is defined as any amount paid into an account by the taxpayer, spouse, or employer exceeding the maximum amount (the taxpayer's taxable compensation or $2000). Taxpayers must pay a 6% excise tax each year on the excess amount left in an account (unless withdrawn before the filing deadline). *See* Shelley v. Commissioner, 68 T.C.M. (CCH) 584 (1994). Interest earned on excess contribution generally must also be withdrawn and included in gross income, and is subject to a 10% tax for early withdrawal. A taxpayer cannot reduce an excess payment by applying it against an earlier year in which less than the full amount was contributed. If contributed during the next year, the taxpayer can reduce the contribution by applying it against the next year, but the annual contribution limit may not be exceeded. I.R.C. § 4973.

65. I.R.C. § 219(c).

combat zone if the *combined* includible compensation of a husband and wife for the tax year is less than the sum of their dollar limitations. The service member in the combat zone who has less than $2000 taxable compensation for the calendar year can attribute his spouse's compensation to contribute to his IRA.[66]

Student Loan Repayment Made on Behalf of Service Members in a Combat Zone or Qualified Hazardous Duty Area

Another issue that arises periodically concerns the taxability of student loan repayments made on behalf of service members in a combat zone as part of the DOD Loan Repayment Program.[67] Generally, a loan repayment under the program is compensation for services, but it is excluded as combat zone compensation for the months in the combat zone.[68] If a service member serves one or more days in a combat zone during a particular month, and is able to exclude compensation for that month as combat zone compensation, the service member is also entitled to exclude one-twelfth of the loan repayment corresponding to that month's service.

Separation Payments to Leave the Military Accruing While a Service Member is in a Combat Zone or Qualified Hazardous Duty Area

Compensation earned in a combat zone or qualified hazardous duty area does not include pensions and retirement pay.[69] Similarly, the Fourth Circuit Court of Appeals ruled that a separation payment for an agreement to leave military service early in lieu of retirement, which accrues while the service member is on active duty in a combat zone, does not constitute compensation for active service in a combat zone, and is not excluded from gross income under the combat zone pay exclusion.[70] Separation payments do not fall within the definition of "compensation received for active service." A separation payment is not a payment for service in a combat zone, but rather in exchange for an agreement to leave military service early and forego any right to pension benefits.[71] Therefore, separation payments do not fall within the combat zone compensation rules. The time and place of acceptance of the separation payment are irrelevant to this determination.[72]

Exemption from Telephone Excise Tax

An excise tax is imposed on telephone or communications services, which are generally a percentage of amounts paid for the services.[73] The person paying for the communication services normally pays the tax.[74] The telephone excise tax is not imposed on any toll telephone service originating in a combat zone that is made by a service member.[75] If a service member uses a calling card or makes a collect call from a combat zone, a certificate of exemption must be furnished to the telephone service provider receiving payment for the call. The certificate, which is obtainable from the telephone service provider, should contain the signature and date of the telephone subscriber.[76] If there has been a payment of the federal excise tax for telephone services, a refund may be obtained either from the telephone service provider that collected the tax, or from the IRS by filing Form 8849 and providing an exemption certificate.[77]

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66. *Id.*

67. Pursuant to the DOD Educational Loan Repayment Program, the DOD may repay the greater of 33 1/3% or $1500 of an enlisted member's student loans for each year of completed service performed by the borrower. The DOD makes the payments to the lending institution. 10 U.S.C.A. § 2171 (West 1999).

68. Letter, from Department of the Treasury, Internal Revenue Service, Office of Associate Chief Counsel (Employee Benefits & Exempt Organizations), to Lieutenant Colonel Thomas K. Emswiler, Deputy Chief, Legal Assistance Policy Division, Office of The Judge Advocate General, U.S. Army (12 Dec. 1997) *available at* <http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/143d5070107567728525656300 6bb314?OpenDocument>.

69. I.R.C. § 112(c)(4).

70. Waterman v. Commissioner, 179 F.3d 123 (4th Cir. 1999). This opinion contained a well-reasoned dissent. As of the date of publication of this article, Waterman had not decided whether to appeal to the Fourth Circuit en banc.

71. *Id.*

72. *Id.*

73. I.R.C. § 4251(a).

74. *Id.*

75. *Id.* § 4253(d).

76. The certificate should contain the amount, the point of origin of call, the name of the service member in the combat zone, the name of the telephone service provider, and a statement that the charges are exempt from tax under I.R.C. § 4253(d). *See* I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #30.

77. I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #31.

Tax Benefits for Service Members Missing in Action or Prisoners of War

Several tax benefits accrue for service members that become prisoners of war (POW) or who are missing in action (MIA). A service member who becomes a POW or is MIA is considered to remain in active service in a combat zone and eligible for suspension of time for performing tax acts[78] pursuant to the combat zone tax rules previously discussed. The period of service in a combat zone includes the period of time during which a service member is entitled to benefits[79] pursuant to their status as missing.[80] A service member is in a "missing status" when he is officially carried or determined to be absent in a status of missing, missing in action, interned in a foreign country, captured, beleaguered, or besieged by a hostile force; or detained in a foreign country against his will[81] and is entitled to continued pay and allowances based upon the missing status.[82] A special rule applies to the spouse of a service member entitled to file a joint return for any taxable year when a service member is in a missing status[83] as a result of service in a combat zone.[84] The spouse is entitled to elect to delay filing a joint income tax return for a period up to two years after the date designated as the date of termination of combatant activities in the combat zone.[85]

Generally, the combat zone compensation exclusion rules apply only if the service member performs active service in a combat zone. Periods during which the service member is absent from duties because of internment by the enemy, or other lawful cause, will be considered periods of active service.[86] A service member in a combat zone who becomes a POW or is MIA is deemed to continue in active service in the combat zone for the period for which the service member is treated as a POW or as MIA for military pay purposes.[87] Therefore, the combat zone pay exclusion rules previously mentioned will be applicable to a service member that is MIA or a POW as a result of his time in the combat zone.

Death while Serving in a Combat Zone

Congress has attempted to ease some of the hardships on the survivors of service members who die as a result of service in a combat zone. The intent is to eliminate the need for the estate of a deceased service member to raise funds to satisfy an unpaid tax debt. A service member who dies while in a combat zone is entitled to an abatement of the income taxes for the tax year in which the death occurs.[88] The abatement also applies if the death occurred as a result of wounds, disease, or injury incurred while serving in a combat zone. The income tax liability of a deceased service member is canceled for the last taxable year, ending on the date of death. The income tax liability is also canceled for any prior taxable year ending on or after the first day the service member served in a combat zone.[89]

Upon the death of a service member as stated above, the service member will not be assessed any amount of income tax for prior taxable years.[90] A service member who dies in a combat zone is entitled to forgiveness of taxes for previous years in which the statute of limitations is still open.[91] The survivor is entitled to a refund of any taxes paid by the deceased service member in prior years for which the service member, if alive, could file an amended return. Generally, an individual can only file an amended return for three years.[92]

78. *See supra* note 34 and accompanying text.

79. I.R.C. § 7508(d).

80. "Missing status" is defined at I.R.C. § 6013(f)(3).

81. 37 U.S.C.A. § 551(2) (West 1999).

82. *Id.* § 552.

83. I.R.C. § 6013(f)(3).

84. *Id.* § 112.

85. *Id.* § 6013(f)(1).

86. *Id.* § 112; Treas. Reg. § 1.112-1(b)(1) (1999).

87. *Id.*

88. I.R.C. § 692(a).

89. *Id.* § 692(a)(1); Treas. Reg. § 1.692-1(a)(2)(I).

90. I.R.C. § 692(a)(2); Treas. Reg. § 1.692-1(a)(3).

91. I.R.C. § 692(a)(2).

92. *Id.* § 6511(a).

For example, if a service member were to die in a combat zone in 1999, taxes owed or paid by that individual for 1996, 1997, 1998, and 1999 would be forgiven, provided that the survivor files the appropriate returns prior to 15 April 2000. If the survivor fails to file an amended return by 15 April 2000, the survivor could still receive a refund for tax paid by the decedent in 1997, 1998, and 1999, provided that the survivor files the appropriate returns prior to 15 April 2001.[93] The survivor will also be entitled to a refund of any income taxes that were withheld from the service member's income during the tax year in which the service member died. If there is or has been an assessment of unpaid tax, the assessment is abated.[94] In addition, if the amount of unpaid tax was collected after the date of death of the service member, the amount collected will be credited or refunded as an overpayment.[95]

Where a service member has filed a joint return with his spouse, the tax abated, credited, or refunded will be prorated as a portion of the joint tax liability.[96] If the service member was in a missing status,[97] the date of the death will be considered to be the date on which a determination[98] of death is made.[99] However, there will not be a forgiveness, abatement, or refund of taxes beginning more than two years after the date of termination of combatant activities.[100] Therefore, where a service member has been MIA in a combat zone and is found to have died in an earlier year, the surviving spouse is allowed to treat the date of death as either the date on which the official determination is made that the service member died, or the date two years after combatant activities in the combat zone have terminated, whichever is earlier.[101]

Special Estate Tax Exemption Available to the Estates of Service Members Dying in a Combat Zone or by Reason of Combat Zone Incurred Wound

There is a special exemption from estate taxation for the estates of service members who were citizens or residents of the United States and are killed in action in a combat zone, or died as a result of wounds, disease, or injury suffered while serving in a combat zone and in the line of duty by reason of a hazard that was incident to service.[102] The estates qualifying for the exemption are exempt from the "additional estate tax."[103] The practical effect of this provision is a reduction of the estate tax by the amount of the "additional estate tax" for estates of service members killed in action in a combat zone while in active service.[104]

Tax Consequences of Military Survivor Benefits Attributed to Death in a Combat Zone

While this article primarily addresses the effect of the combat zone designation on income taxation, periodically questions arise regarding the tax consequences of military survivor benefits. One of the major benefits available to the survivors of service members whose death was due to service-connected[105] causes is the Dependency and Indemnity Compensation

93. To claim the refund, the surviving spouse needs to file a Form 1040, or a 1040X for amended return with the IRS. Rev. Proc. 85-35, 1985-2 C.B. 433. In addition, Form 1310 and a certification from the DOD or the Department of State that the death was the result of terrorist or military action outside the United States must be attached. If the return in question is for a joint return, an apportionment must be done between the decedent's income and the surviving spouse's income. *See* Treas. Reg. § 1.692.1(b); Rev. Rul. 85-103, 1985-2 C.B. 176; Major Mark Henderson, *Tax Law Note: Assisting Survivors When Spouse Died in a Combat Zone*, ARMY LAW., May 1997, at 68.

94. *Id.*

95. *Id.*

96. The amount abated, credited, or refunded shall be an amount equal to the portion of the joint tax liability which is the same percentage of the joint tax liability as a tax computed upon the separate income of the service member is the sum of the tax computed upon the separate income of the service member and his spouse. Treas. Reg. § 1.692-1(b).

97. I.R.C. § 6013(f)(3)(A).

98. 37 U.S.C.A. § 556 (West 1999).

99. I.R.C. § 692(b).

100. *Id.* § 692(b)(2).

101. *Id.* § 2 (a)(3); Rev. Rul 76-468, 1976-2 C.B. 202.

102. I.R.C. § 2201; Treas. Reg. § 20.2201-1 (1999).

103. I.R.C. § 2011(d) (Pursuant to the Internal Revenue Code of 1939, the "additional estate tax" was the difference between the "tentative tax" and the "basic tax." For most estates, the "additional estate tax," "tentative tax" or "basic tax" no longer applies. However, there is a "tax" and "credit for state death taxes." The net tax for estate tax purposes is the difference between the "tax" and the "credit for state death taxes," less any applicable credits. For purposes of the special exemption for service members, the "basic estate tax" is defined as 125 percent of the amount determined to be the maximum credit allowable for state death purposes. The additional tax is the difference between the regular estate tax and the basic estate tax, for servie members dying after 1976. *See* Rev. Rul. 78-361, 1978-2 CB 246.).

104. *See generally* Rev. Rul. 78-361, 1978-2 C.B. 246.

(DIC).[106] Dependency and Indemnity Compensation is a monthly payment from the Department of Veterans Affairs to eligible persons[107] with other allowances added under certain circumstances (such as for additional dependents,[108] children over the age of eighteen and permanently incapable of self-support,[109] or if a surviving spouse is so severely disabled as to be housebound or in need of regular aid and attendance[110]). Currently, surviving spouses under DIC receive $861 a month for life unless they remarry. Dependency and Indemnity Compensation is not includable in the decedent's gross estate,[111] and it is not taxable as income to the recipient.[112]

Service members who are on active duty and have completed twenty years of active federal service are automatically enrolled in the Survivor Benefit Plan (SBP).[113] If a service member completes twenty years of active service and dies on active duty, his beneficiary becomes eligible to receive payments under SBP. The payments to the beneficiaries are taxable as ordinary income despite the death occurring in a combat zone.[114] Generally, the present value of annuities, such as SBP are included in a decedent's gross estate.[115] Therefore, the present value of the SBP annuity could be subject to federal estate taxation. However, when the SBP annuity is payable to a surviving spouse there would be no estate tax because of the unlimited marital deduction.[116]

Most service members have life insurance coverage through the Servicemen's Group Life Insurance (SGLI) program.[117] The amount of SGLI benefits payable to the beneficiary is included in the decedent's gross estate for purposes of federal estate taxation,[118] but it is excluded from federal income taxation.[119]

Another payment to survivors is the death gratuity.[120] The death gratuity is payable if a soldier dies on active duty, or 120 days after release if the death results from disease or injury incurred while on active duty. The death gratuity is currently a lump sum payment of $6000 made by local finance offices. The lump sum payment amount does not depend on the rank or years of service of the deceased. The tax consequences of the death gratuity payment are that the recipient would exclude $3000 from ordinary income and $3000 would be taxable as gross income to the recipient.[121] Although the death gratuity may become payable because of a service members death in a combat zone, it will not be totally excluded from taxation.

Current Combat Zones and Qualified Hazardous Duty Areas

Operation Desert Storm (Persian Gulf Area) Combat Zone

President Bush signed an executive order on 21 January 1991, designating the Persian Gulf area a combat zone.[122] The combat zone designation is still open, and will remain open until terminated by another executive order. Service members serving in the Persian Gulf combat zone are still eligible for the previously mentioned benefits. The executive order designated the following locations within the combat zone: the Persian Gulf; the Red Sea; the Gulf of Oman; the Gulf of Arden; that

105. 38 U.S.C.A. § 1312 (West 1999).

106. *Id.* §§ 1301–1322.

107. *Id.* §§ 1304, 1311, 1313, 1315, 1318.

108. *Id.* § 1313.

109. *Id.* § 1314.

110. *Id.* § 1311.

111. Priv. Ltr. Rul. 82-06-089 (Nov. 10, 1981).

112. I.R.C. § 134(b) (West 1999).

113. 10 U.S.C.A. §§ 1447-1460B (West 1999).

114. I.R.C. § 72(a), (n). Compensation earned in a combat zone does not include pensions and retirement pay. I.R.C. § 112(c)(4).

115. *Id.* § 2039; Priv. Ltr. Rul. 50-22.004 (June 1, 1990); Major Mark Henderson, *Taxation of the Survivor Benefits*, ARMY LAW., Oct 1995, at 29.

116. *Id.* § 2056.

117. 38 U.S.C.A. §§ 1965-1976 (West 1999).

118. I.R.C. § 2042.

119. *Id.* § 101(a).

120. 10 U.S.C.A. §§ 1475-1480 (West 1999).

portion of the Arabian Sea that lies north of ten degrees north latitude and west of sixty-eight degrees east longitude; and the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates.[123] As previously mentioned, service members serving outside of the combat zone in direct support of the military operations within the Persian Gulf combat zone under conditions which they are entitled to hostile fire pay are entitled to the combat zone tax benefits.

Qualified Hazardous Duty Area of Bosnia, Herzegovina, Croatia and Macedonia (Operation Joint Forge)[124]

Tax relief was legislatively extended to service members in the qualified hazardous duty area of Bosnia, Herzegovina, Croatia, or Macedonia if they are serving in any of those areas and receiving hostile fire or imminent danger pay.[125] Congress specifically designated these areas as qualified hazardous duty areas, which resulted in service members receiving all the federal tax benefits of a combat zone as if it was designated by a presidential executive order. Therefore, all of the combat zone tax benefits previously mentioned apply to this qualified hazardous duty area. Service members assigned outside of the qualified hazardous duty area in direct support of the military operations within this designated qualified hazardous duty area under conditions for which they are not entitled to hostile fire pay are entitled to very limited combat zone tax benefits.[126]

Operation Allied Force (Federal Republic of Yugoslavia (Serbia/Montenegro) and Albania) Combat Zone

On 13 April 1999, President Clinton issued an executive order designating a combat zone for the area of the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, the Ionian Sea north of the thirty-ninth parallel, and the airspace above the locations.[127] The executive order designated 24 March 1999 as the date of commencement of activities in the combat zone.[128] Service members serving outside of the combat zone in direct support of the military operations within the Operation Allied Force combat zone under conditions which entitled them to hostile fire pay are entitled to the combat zone tax benefits.[129] The combat zone designation is still open, and has not been terminated by another executive order. Service members serving in the Operation Allied Force combat zone are still eligible for the previously described benefits.

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121. At one point in history, the death gratuity was entirely exempt from taxation. In 1955, the IRS ruled "amounts paid gratuitously to the beneficiary of a deceased officer or enlisted member of the Armed Forces . . . represents a gift by the United States and are, therefore, excludable from the gross income of such beneficiaries." Rev. Rul. 55-330, 1955-1 C.B. 236. In 1955, the death gratuity was equal to six months pay. Congress amended the death gratuity to make the payment $3000 for all service members. In 1986, Congress enacted 26 U.S.C. § 134, which made the amount of the death gratuity on 9 September 1986, excludable from gross income. Adjustments to the death gratuity enacted after 9 September 1986 are not considered excludable. I.R.C. § 134(b)(3). Following Operation Desert Storm, Congress increased the death gratuity to $6000. The increase was not excludable under I.R.C. § 134, but I.R.C. § 101(b) was applicable to exclude $2000 of the $3000 additional death gratuity enacted during the Persian Gulf conflict. However, I.R.C. § 101(b) was repealed for decedents dying after 20 August 1996. The result of the repeal of I.R.C. § 101(b) was to require the survivors of service members to pay tax upon the full post-1986 $3000 increase in the death gratuity. Legislation has been proposed to restore the full military death gratuity to its historical excludable position, but at the time of publication of this article, the prospects for passage of the legislation were not positive.

122. Exec. Order No. 12,744, 56 Fed. Reg. 2661 (1991).

123. *Id.*

124. On 20 June 1998, Operation Joint Guard was terminated and Operation Joint Forge commenced. Operation Joint Forge is a follow-on operation to Operation Joint Guard, which was a follow-on operation to Operation Joint Endeavor. Service members serving in the geographic area of this qualified hazardous duty area are not affected by a change of the name of the operation. The IRS has stated that personnel serving under Operation Joint Forge will be treated the same as personnel serving under Operation Joint Endeavor, because Operation Joint Forge is the substantive continuation of Operation Joint Endeavor. Letter from Tommy G. Deweese, District Director for the International District, Internal Revenue Service, to Lieutenant Colonel Thomas K. Emswiler, Armed Forces Tax Council, Department of Defense,(17July1998),*citedin*STAFFOFJOINTCOMM.ONTAXATION106THCONG.,DESCRIPTIONOFPRESENTLAWANDAPROPOSALRELATINGTOTAXRELIEFFORPERSONNEL INTHEFEDERALREPUBLICOFYUGOSLAVIA(SERBIA/MONTENEGRO),ALBANIA,THEADRIATICSEA,ANDTHENORTHERNIONIANSEA(Comm.Print1999)*in*WORLDWIDETAX DAILY (Apr. 15, 1999) *available at* Westlaw 1999 WTD 72-14 (describing present law and proposing tax relief for personnel in the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and the Northern Ionian Sea) [hereinafter Deweese Letter]. *See also* Information Paper, Office of The Judge Advocate General, U.S. Army, DAJA-LA, subject: Operation Joint Forge Tax Treatment (14 Aug. 1998) *available at* <http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/daf4ce7c63901d858525669100657a22?OpenDocument>; Major Mark Henderson, *Tax Law Note: Bosnian Tax Relief*, ARMY LAW., May 1996, at 27.

125. Pub. L. No. 104-117, § 1(a)(2), (b), (e)(1), 109 Stat. 827 (1996).

126. Service members who are performing services as part of the operation outside of the United States while deployed away from their permanent duty stations in support of the qualified hazardous duty area are allowed an extension of time for performing most acts required by the Internal Revenue Code. I.R.C. § 7508. This was the only combat zone tax provision extended to these individuals. Pub. L. No. 104-117, § 1(a)(2), (b), (e)(1), 109 Stat. 827 (1996).

127. Exec. Order No. 13,119, 64 Fed. Reg. 18,797 (1999); I.R.S. News Release IR-99-43 (Apr. 26, 1999) *available at* <http://www.fedworld.gov/pub/irs-news/ir-99-43.pdf>.

128. Exec. Order No. 13,119, 64 Fed. Reg. 18,797.

Operation Allied Force Qualified Hazardous Duty Area (Federal Republic of Yugoslavia (Serbia/Montenegro), and Albania)

On 19 April 1999, President Clinton signed legislation designating a qualified hazardous duty area for the area of the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and the northern Ionian Sea above the thirty-ninth parallel during the period that a service member is entitled to hostile fire or imminent danger pay for service performed in the designated area.[130] The areas mentioned were specifically designated as a qualified hazardous duty area and entitle service members to all the tax benefits of a combat zone as if it was designated by executive order by the President. All of the combat zone tax benefits apply to the specified geographic locations of the qualified hazardous duty area. Service members serving outside of the combat zone in direct support of the military operations within this designated qualified hazardous duty area under conditions for which they are not entitled to hostile fire pay are entitled to very limited combat zone tax benefits.[131]

The area of operations for Operation Allied Force has been designated as both a combat zone by executive order[132] and a qualified hazardous duty area by specific legislation.[133] Generally, the two provide the same tax benefits. However, the qualified hazardous duty area provides that service members performing services outside of the areas, but still a part of Operation Allied Force, would qualify for the suspension of time to perform various tax acts[134] during the periods in which they are not paid hostile fire or imminent danger pay provided the ser-

129. As previously indicated, the DOD, Assistant Secretary of Defense (ASD) (Force Management Policy (FMP)), delegated "direct support approval authority to the USCINCEUR for Joint Task Force Provide Comfort, Operation Joint Endeavor, and the Kosovo area of operations combat zone." Effective 31 May 99, the ASD (FMP) designated the following locations in Italy, Greece, and Hungary as Imminent Danger Pay areas:

> Italy: Land areas of Aviano Air Base; Cervia Air Base; Gioia del Colle Air Base; Trapani Air Base; Vicenza (areas bounded within military installations); San Vito Air Station; Brindisi (areas bounded within military installations); NSA Naples; NAS Sigonella; and NSA Gaeta. Greece: NSA Souda Bay; Thessaloniki, land area within a 25 kilometer radius of 40°27'N, 22°59'E; waters of Themaikos Kolpos north of 40°15'N. Hungary: Taszar, land area within 50 kilometer radius of 46°23N, 17°55E. Also effective 31 May 99, the USCINCEUR determined that all personnel assigned, attached, or deployed to these locations, whether permanent duty or temporary duty, are in direct support of combat zone operations in Kosovo, that the reason they receive imminent danger pay is directly related to the combat zone operations, and that they are eligible for combat zone tax relief.

Tax Day (CCH), F99-162-001 (June 11, 1999).

> Effective 15 September 1999, the ASD (FMP), terminated the following imminent danger area designations, including the airspace above:
>
> The Adriatic Sea and the Ionian Sea north of the 39th parallel.
>
> Italy: Land areas of Aviano Air Base; Cervia Air Base; Gioia del Colle Air Base; Trapani Air Base; Vicenza (all military installations and facilities); San Vito Air Station; Brindisi (all military installations and facilities); Naples (all military installations and facilities including the port of Naples); Sigonella and Augusta Bay (all military installations and facilities including the ports of Catania and Augusta Bay); Gaeta (all military installations and facilities including the port of Gaeta); and Bari (all military facilities).
>
> Greece: Land area of Souda Bay (all military installations and facilities including the port of Souda Bay); Thessaloniki, land area within a 25 kilometer radius of 40°27'N, 22°59'E; waters of Themaikos Kolpos north of 40°15'N.
>
> Hungary: Taszar, land area within 50 kilometer radius of 46°23N, 17°55E.
>
> The action of the ASD (FMP) does not end combat zone tax benefits for those actually serving in the Operation Allied Force combat zone or qualified hazardous duty area. However, many serving *in direct support of military operations* in the Balkans lose *imminent danger pay* and consequently, combat zone tax benefits. To qualify for combat zone tax benefits, service members performing military service outside of a combat zone or qualified hazardous duty area must receive imminent danger pay. Therefore, service members serving in a direct support role in these areas no longer qualify for combat zone tax benefits (after 15 September 1999). This does not end such benefits for those actually serving in the combat zone or qualified hazardous duty area.

See Termination of Imminent Danger Pay (IDP) for Locations in Italy, Greece, and Hungary and for the Adriatic Sea and Ionian Sea and Combat Zone (visited Oct. 12, 1999) <http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/?Open>.

130. The Act is generally effective as of 24 March 1999. Pub. L. No. 106-21, 113 Stat. 34 (1999).

131. Service members who are performing services as part of the operation outside of the United States while deployed away from their permanent duty stations in support of the qualified hazardous duty area are allowed an extension of time allowed for performing most acts required by the Internal Revenue Code. I.R.C. § 7508. This was the only combat zone tax provision extended to these individuals. Pub. L. No. 106-21, 113 Stat. 34 (1999).

132. Exec. Order No. 13,119; I.R.S. News Release IR-99-43.

133. Pub. L. No. 106-21, 113 Stat. 34.

134. I.R.C. § 7508.

vices are performed both outside the United States and while deployed away from the service member's permanent duty station.[135] The combat zone designation for Operation Allied Force will remain open until terminated by another executive order. Likewise, the qualified hazardous duty area will remain in effect until Congress terminates it, or until the IRS determines that any future follow-on operation is not a substantive continuation of the qualified hazardous duty area.[136] Although the Operation Allied Force area of operations is commonly referred to as the Operation Allied Force Combat Zone, judge advocates must not forget that the area has been designated a combat zone and a qualified hazardous duty area. If one of the designations is terminated in the future, relief may still be available under the rules of the other designation.

Filing Tax Returns for Combat Zone Participants

Service members who qualify for extensions of time to file federal tax returns pursuant to the combat zone extensions can file their returns according to the filing extensions previously mentioned. In addition, service members can elect to file their returns before the end of the extension period. Service members in a combat zone can authorize someone else to file their taxes in their absence by executing a special power of attorney, a general power of attorney, or the Internal Revenue Form 2848 (Power of Attorney and Declaration of Representative).[137] When someone will act on behalf of a service member to file a tax return using a power of attorney, the form, or a copy of the power of attorney, must be attached to the tax return.

Service members using a combat zone or qualified hazardous duty area extension to file any type of tax form should write the name of the combat zone or qualified hazardous duty area at the top of any tax return, reply notice, or other correspondence sent by the IRS (for example, "Operation Desert Storm combat zone," "Operation Joint Forge combat zone," "Operation Allied Force combat zone").[138] Many resources are available to judge advocates for use as preventive law handouts to service members on how to "invoke" the combat zone extensions and properly notify the IRS (and other taxing authorities) of the combat zone application.[139]

State Taxation Implications of Combat Zone Designations

Generally, most states follow the federal government's lead in granting tax relief for service members in combat zones or qualified hazardous duty areas. However, the manner in which the various states reach that determination, the amount of exclusion, and the amount of time extended to handle tax matters and file tax returns varies from state to state. Some states have enacted legislation, which in effect adopts the applicable sections of the federal Internal Revenue Code dealing with combat zone extensions, exclusions, and other benefits. Other states enact specific legislation dealing with each combat zone or qualified hazardous duty area designation.

The states are very diverse in the treatment of penalties and interest. Some states "waive" penalties and interest during the combat zone extension period. Other states "abate" or "forgive" penalties and interest during the combat zone extension period. A few states simply state in policy guidance that service members will not be charged interest and penalties during the combat extension period. Finally, some states simply do not provide explicit guidance regarding the treatment of interest and penalties.

While most states follow the lead of the federal government in providing combat zone tax relief, the judge advocate should avoid providing the general tax advice that "all states follow the federal government combat zone tax rules." This advice could lead to false assumptions that are contrary to applicable state laws. Judge advocates should also learn of the legal basis for a states' combat zone tax rules (based upon state statutes, administrative codes, and policy guidance) before providing tax advice to service members regarding individual state combat zone tax rules.

An appendix follows this article that summarizes state combat zone tax rules as of the date of publication. The summaries generally track the language found in the applicable state rules. While some states have extensive statutes, tax codes, and policy guidance regarding the combat zone tax rules, several of the states lack substantive guidance in all of the combat zone tax issues. The result is that the state summaries in the appendix appear to use some inconsistent terms (for example, for interest

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135. Pub. L. No. 106-21, 113 Stat. 34; *See* Deweese Letter, *supra* note 124.

136. The first qualified hazardous duty area was designated in 1996 for Operation Joint Endeavor. That qualified hazardous duty area remains open at this time. Service members serving in the geographic area of this qualified hazardous duty area are not affected by a change of the name of the operation. The IRS has stated that personnel serving under Operation Joint Forge will be treated that same as personnel serving under Operation Joint Endeavor since Operation Joint Forge is the substantive continuation of Operation Joint Endeavor. Deweese Letter, *supra* note 124. Although there is no clear precedent for terminating of a qualified hazardous duty area, it appears Congress would have to terminate the qualified hazardous duty area by legislation or if a successor operation is not considered to be a "substantive continuation" of Operation Allied Force, the IRS may administratively determine that the operation has ceased and thus the qualified hazardous duty area has ceased.

137. *Internal Revenue Service Form 2848* (visited Oct. 1, 1999) *available at* <http://ftp.fedworld.gov/pub/irs-pdf/f2848.pdf>.

138. I.R.S. News Release IR-99-43 (Apr. 26, 1999) *available at* <http://www.fedworld.gov/pub/irs-news/ir-99-43.pdf>.

139. *Tax Relief for those Affected by Operation Allied Force*, Internal Revenue Bulletin 1999-22 I.R.B. 1, Notice 99-30 (visited Oct. 1, 1999) <http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/dae956d24ef22d9e85256775005e0e4d?OpenDocument>; *IRS Publication 3, Armed Forces Tax Guide* (visited Oct. 1, 1999) <http://ftp.fedworld.gov/pub/irs-pdf/p3.pdf>.

and penalties, the various terms throughout the summaries include waiver, abatement, and no assessment).

Judge advocates can use this information as a "base line" from which to research applicable state combat zone tax provisions. State tax rules are constantly changing, and new guidance issued regularly by the state taxing authorities regarding combat zones. Judge advocates should use the Internet and electronic legal research information (such as LEXIS) to update state tax information before providing state combat zone tax advice.[140] Almost every state taxing authority maintains a web site where news releases, publications, and tax information can be obtained quickly and easily.[141]

Conclusion

Judge advocates must understand the basic concepts associated with the tax aspects of combat zones and qualified hazardous duty areas. The increase in deployment of service members to combat zones and qualified hazardous duty areas require active duty and reserve component judge advocates to educate service members on the tax benefits of the respective designations. The tax benefits for military personnel in deployments should be integrated into preventive law programs, family support briefings, and deployment briefings. Finally, tax assistance and preparation services are a part of the deployment arsenal of judge advocates serving in combat zones and qualified hazardous duty areas. Service members should remain focused on achieving the military mission while in a combat zone or qualified hazardous duty area. Judge advocates rendering tax assistance services allow service members to focus on mission accomplishment while providing a tremendous morale benefit.

140. Judge advocates researching state combat zone tax provisions should (at a minimum) research the following information: state statutes, state administrative codes, policy guidance (news releases and fact sheets), state tax authority web sites (*State Tax Agencies, available at* <http://www.taxsites.com/agencies.html>), tax service web sites (*State Tax Online, available at* <http://www.tax.org/state/state.htm>) and listings on LEXIS or Westlaw (for example, Commerce Clearing House, Tax Analyst, Bureau of National Affairs, Research Institute of America).

141. The following site lists web addresses for state taxing authorities: Kent Information Services, *Tax Resources Site Seeker,* (visited Oct. 1, 1999) <http://www.kentis.com/siteseeker/taxusst.html>.

APPENDIX

ALABAMA: Compensation paid to service members in a combat zone designated by an executive order is not subject to state income taxation.[142] The exclusion applies equally to all ranks. Personnel serving in a combat zone are granted a 180-day income tax filing extension following the end of their service in the area. The period of service is further extended for those injured as the result of services for the period of any continuous hospitalization, provided the hospitalization does not exceed five years. The extensions also apply to the member's spouse. Service members serving in Bosnia, Croatia, Herzegovina, and Macedonia are granted an automatic filing extension of 180 days following the service member's termination of service in the qualified hazardous duty area. Alabama applies the combat zone exclusion rules to service members in the qualified hazardous duty area of Bosnia, Croatia, Herzegovina, and Macedonia.[143]

ALASKA: Alaska currently has no state individual income tax.

ARIZONA: To the extent that military pay earned while serving in a designated combat zone is exempt from taxation under federal law, it also is exempt under Arizona law.[144] Unlike federal law, Arizona law provides that all of an officer's pay earned in a designated combat zone is exempt from state taxation.[145] Military members are not required to file Arizona tax returns until at least 180 days after they leave the combat zone. Applicable penalties and interest run from the 181st day until the tax due is paid. The extension also applies to the service member's spouse, providing a joint Arizona income tax return is filed. Service members serving outside the United States as a result of combat zone activities, but not inside the combat zone, are required to file Arizona tax returns within thirty days of their return to the United States, or by the date of their federal extension, whichever is later. Applicable penalties and interest run from the later of those dates until the tax due is paid.[146] Arizona also has a special provision regarding income taxes of service members upon death.[147]

ARKANSAS: For enlisted personnel, gross income does not include compensation received while on active duty in a combat zone or while hospitalized as a result of serving in a combat zone to the same as extent as federal law.[148] With respect to commissioned officers, gross income shall not include compensation received while on active service in a combat zone or while hospitalized as a result of serving in a combat zone the same as federal law.[149] Although Arkansas does not have a specific state statute or regulation pertaining to combat zone extensions for tax actions and the filing of tax returns, generally, Arkansas grants an extension of time to file a state tax return corresponding to the federal extension.[150] Arkansas did grant an extension of time for filing income tax returns for service members in Bosnia for 180 days after the service member's "release from active duty" (or departure from combat zone).[151]

CALIFORNIA: In general, California follows federal tax law regarding combat pay exclusion and qualified hazardous duty area.[152] California follows the federal combat zone tax provisions relating to extensions of time for performing certain tax acts.[153]

COLORADO: Because income excluded for federal income tax purposes is also excluded for Colorado income tax purposes, military pay received while serving in a combat zone is also excluded from income in Colorado.[154] Colorado follows the income tax

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142. ALA. CODE § 40-18-3 (1999).

143. 97 State Tax Notes 34-2 (Tax Analyst) 97-4840 (Feb. 20, 1997).

144. ARIZ. REV. STAT. § 43-1022(19) (1999).

145. *Id.*

146. Arizona Department of Revenue News Release, *Tax Relief For Combat Troops* (visited Oct. 1, 1999) <http://www.revenue.state.az.us/news.htm>.

147. ARIZ. REV. STAT. § 43-568 (1999).

148. ARK. TAX REG. § 1.26-51-306(a)(4) (1999).

149. *Id.*

150. ARK. CODE ANN. § 26-51-807(a)(2) (Michie 1999).

151. 97 State Tax Notes 9-4 (Tax Analyst) 97-519 (Dec. 2, 1996).

152. CAL. REV. & TAX. CODE § 17142.5 (West 1999); *See* State of California–Franchise Tax Board, *California Tax Information for Military Personnel Involved in Operation Allied Force, Operation Joint Endeavor or Operation Desert Storm*, F.T.B. Pub. 1021 (visited Oct. 1, 1999) <http://www.ftb.ca.gov/forms/misc/1021.pdf>.

153. CAL. REV. & TAX. CODE § 18571.

filing guidelines set by the IRS regarding service members. State law authorizes service members serving in a combat zone or in support of a combat zone a grace period of 180 days after such service for filing returns and paying their current and previous years taxes.[155] Interest and penalties are abated during this period.[156]

CONNECTICUT: To the extent that military pay earned while serving in a designated combat zone is exempt from taxation under federal law, it also is exempt under Connecticut law.[157] The Connecticut income tax return of any individual in the U.S. armed forces serving in a combat zone or injured and hospitalized while serving in a combat zone is due 180 days after returning.[158] During the period of delay penalties and interest are not charged.[159] Combat zone tax provisions apply to service members in support of combat zones and qualified hazardous duty areas designated by Congress.[160] Therefore, service members serving in Bosnia and Herzegovina, Croatia or Macedonia, are eligible for the combat zone tax provisions and extensions.

DELAWARE: Delaware follows the federal income tax rules. Service members in combat zones may exclude the same amount of income as under federal law.[161] Generally, the same extensions for filing tax returns and handling tax actions apply as under federal law, except the extension for filing a tax return is for a period of 195 days after departure from the combat zone.[162]

DISTRICT OF COLUMBIA: To the extent that military pay earned while serving in a designated combat zone is exempt from taxation under federal law, it also is exempt under District of Columbia law.[163] The same extensions for tax filing and actions apply as under federal law.[164]

FLORIDA: Florida income tax is limited in its application to corporations and other artificial entities. The tax does not extend to "natural persons." Income tax does not apply to individual residents of Florida, and state income tax is not withheld.

GEORGIA: Georgia follows the federal rules on income. Service members who serve in a combat zone may exclude the same amount of income as under federal law.[165] The same extensions for tax filing and tax actions apply in Georgia as under federal law.[166]

HAWAII: Hawaii follows the Internal Revenue Code in excluding from gross income the military pay earned while serving in a combat zone.[167] The same period of extension is allowed as under the federal law. The Hawaii provisions apply to personnel in a combat zone or in support of a combat zone. The service member will not be charged penalties or interest for a late return filed or tax payments made during the extension period.[168]

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154. COLO. REV. STAT. ANN. § 39-22-104(1) (West 1999).

155. *Id.* § 39-22-610.

156. Colorado Department of Revenue, Revenue Bulletin, No. 92-7, 1992 COLO. TAX LEXIS 27.

157. CONN. GEN. STAT. ANN. § 27-102a (West 1999); *Gavin Explains Tax Filing Extension For Military Personnel Serving In Kosovo Region* (Apr. 23, 1999) (visited on Oct. 1, 1999) <http://www.state.ct.us/drs/news/23apr99.htm>; *Connecticut Income Tax Information for Military Personnel and Veterans* (visited Oct. 1, 1999) <http://www.state.ct.us/drs/pubs/ip922-4.html>.

158. CONN. GEN. STAT. ANN. § 12-724.

159. *Id.*

160. *Id.* § 12-724(a)(2).

161. DEL. CODE ANN. tit. 30 §§ 376, 529, 1171 (1999).

162. *See* 96 State Tax Notes 616-61 (Tax Analyst) 96-9220 (Mar. 20, 1996).

163. D.C. CODE ANN. § 47-1803.2 (1999).

164. *Id.*

165. GA. CODE ANN. §§ 48-7-27, 48-7-37 (1999).

166. *Id.* § 48-7-36.

167. HAW. REV. STAT. §§ 235-1, 235-2, 235-2.3, 235-2.4, 235-2.5, 235-3, 235-7 (1999).

168. *Id.* § 231-15.8; Department of Taxation Announcement No. 99-7, *Extension of Time for Taxpayers Serving in Kosovo Conflict* (visited Oct. 1, 1999) <http://www.state.hi.us/tax/99ann07.htm>.

IDAHO: Idaho allows a deduction from taxable income for pay received for military services performed outside of Idaho.[169] Idaho follows federal law with respect to pay earned while in a combat zone and extensions of time to file returns. Returns are not due for individuals serving in a combat zone or hospitalized as a result of serving in a combat zone until 180 days after the period of qualified service or qualified hospitalization, whichever last occurs.[170]

ILLINOIS: A subtraction (deduction) is allowed from state base income of any sum which is paid to a resident by reason of being on active duty in the armed forces (including service members missing in action or prisoner of war).[171] In addition, Illinois automatically grants an "exclusion" benefit because the state income tax computation of taxable income begins with the federal adjusted gross income. A service member serving in a combat zone and subject to a filing extension in accordance with a Presidential executive order incurs no interest or penalty for the applicable tax year.[172]

INDIANA: Military pay earned while on active duty in a combat zone is excluded from income, to the same degree as under federal law. Indiana follows federal law since state taxable income is based on the federal adjusted gross income.[173] Returns are timely filed within 210 days of the date the service member leaves the combat zone.[174] Interest and penalties that accrue on past liabilities owed by Indiana residents who serve in a combat zone are forgiven for the period of the extension.[175]

IOWA: Income excluded under federal law is also excluded for Iowa income tax purposes.[176] Therefore, combat zone pay is excluded on the Iowa return because it is also excluded for federal income taxation purposes. The same rules apply for extensions for combat zones, qualified hazardous duty areas, and troops in direct support.[177] Service members are given an additional 180 days after leaving the hazardous-duty area or other areas where persons were in support of the troops in the hazardous area to file state tax returns.[178]

KANSAS: Kansas follows the federal rules regarding active duty pay earned while in a combat zone, and pay excluded from income for federal purposes is also excluded for Kansas purposes.[179] The same rules apply for extensions for combat zones, qualified hazardous duty areas, and troops in direct support. Service members will be given an additional time period for filing state returns of 180 days after leaving the hazardous-duty area or other areas where persons were in support of the troops in the hazardous area. Kansas does not assess penalties or interest during the period of extension.[180]

KENTUCKY: Any income earned in a combat zone that is exempt for federal tax purposes is also exempt for Kentucky tax purposes since the Kentucky state tax is based upon the federal adjusted gross income.[181] Service members in a combat zone who are required to file a state tax return, and pay income taxes to Kentucky are not required to file the return or pay taxes until twelve months after the combat zone service.[182] A taxpayer granted an extension of time for filing a federal income tax return is granted the same extension of time for filing a Kentucky income tax return.[183] An automatic extension was granted for those serving outside the United States in support of Operation Joint Endeavor in order to retain or renew any licenses, file any return, report or other document, pay

169. IDAHO CODE § 63-3022(J) (1999); IDAHO ADMIN. CODE § 35.01.01.121 (1999).

170. IDAHO CODE § 63-3033.06; IDAHO ADMIN. CODE § 35.01.01.815.

171. 35 ILL. COMP. STAT. ANN. § 5/203(a)(2)(E) (West 1999).

172. *Id.* § 5/602(b).

173. IND. CODE ANN. §§ 6-3-1-3.5, 6-3-1-8 (West 1999); IND. ADMIN. CODE tit. 45, r. 3.1-1-5 (1999).

174. Indiana Department of Revenue News Flash (May 25, 1999) *available at* <http://www.ai.org/dor/pubs/press/5-25-99.html>.

175. *Id.*

176. IOWA CODE ANN. § 422.1 (West 1999).

177. *Id.* § 422.21; IOWA DEPT. REV. & FIN. R. §§ 701-39.12(422), 701-39.14(422) (1999).

178. *Id.*

179. KAN. STAT. ANN. §§ 79-32,109, 79-32,117(1999).

180. *Id.* § 79-3221; New Release, *Tax Relief for Kansas Troops in Bosnia* (Mar. 22, 1996) *available at* <http://www.ink.org/public/kdor/news/032296news.html>.

181. KY. REV. STAT. ANN. § 141.010 (Michie 1999).

182. *Id.* § 141.215.; 103 KY. ADMIN. REGS. 17:041 (1999) *available at* <http://www.lrc.state.ky.us/kar/103/017/041.htm>.

any tax, fee or other charge, which became due or expiring during the period the service member was outside the United States. The extension expires ninety days after the individual returns to the United States.[184] A penalty is not assessed during the period of extension.

LOUISIANA: The Louisiana income tax calculation starts with federal adjusted gross income. Therefore, military pay earned while serving in a combat zone, which is also excluded from federal income, is excluded from Louisiana income.[185] Service members in the Persian Gulf area or associated with Operation Desert Shield were specifically granted tax relief to the full extent of such relief granted by federal law."[186] A reduction or waiver of interest or penalties, or any extension of time to pay or file that is granted for federal purposes due to participation in Operation Desert Storm is also granted for Louisiana individual income tax purposes. Tax relief was granted to military personnel in Bosnia by specific legislation to the full extent of such relief granted by federal law.[187] Besides the specific legislation, generally an extension of time to file a federal income tax return automatically extends time to file a Louisiana tax return.[188] Therefore, the combat zone extensions under federal law will operate to extend the time for filing a Louisiana return. Louisiana has a "Louisiana Military Powers of Attorney" code provision that "mandates" or allows a service member to designate someone to handle all state and local tax matters by way of a military power of attorney.[189]

MAINE: Maine follows federal income tax provisions in determining what income is taxable. The taxable income of a service member from Maine is equal to the individual's federal adjusted gross income as defined by federal law.[190] Therefore, federal combat zone pay exclusion provisions apply to Maine taxation. As a general rule, a Maine income tax return must be filed on or before the date that a federal income tax return is due, without regard to whether an extension is granted.[191] However, the state tax assessor can grant a reasonable extension of time to file,[192]and in the case of Operation Allied Force, specifically announced that service members would have the number of days served in the combat zone plus 180 days after they leave the combat zone or their supporting operation to file their Maine returns. [193] All return examinations and collection actions are suspended during the extension period.[194] During this time, no interest or penalty will be added to any tax due.[195] The governor had made a similar announcement for peacekeeping in Bosnia.[196]

MARYLAND: Any income earned in a combat zone that is exempt for federal income tax purposes is also exempt for Maryland tax purposes since state tax is based upon the federal adjusted gross income.[197] Besides the combat zone exclusion, military income received while serving outside the United States is subtracted from the federal adjusted gross income of a Maryland service member to determine Maryland adjusted gross income (up to $15,000 annually). Any amount above $15,000 declines dollar for dollar that the military income exceeds $15,000 and at $30,000 the modification is zero.[198] Time periods for filing income tax returns, estimated tax, refund claims, and tax appeals are extended similar to the federal combat zone extensions.[199]

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183. 103 KY. ADMIN. REGS. 15:050, *available at* <http://www.lrc.state.ky.us/kar/103/015/050.htm>.

184. Governor of Kentucky Exec. Order No. 96-243 (Feb. 26 1996).

185. LA. REV. STAT. ANN. § 47:293(1) (West 1999).

186. *Id.* § 47:292.1.

187. *Id.* § 47:292.2.

188. *Id.* § 47:103(D).

189. *Id.* § 9:3882.

190. ME. REV. STAT. ANN. tit. 36, §§ 5102, 5121 (West 1999).

191. *Id.* § 5227.

192. *Id.* § 5231.

193. Press Release, "G*overnor Announces State Tax Relief for Combat Zone Troops*" (Apr. 1999) (visited Oct. 1, 1999) <http://janus.state.me.us/revenue/yugo.pdf>.

194. *Id.*

195. *Id.*

196. 96 State Tax Notes 66-65 (Tax Analyst) 96-9982 (Mar. 1996).

197. MD. CODE ANN., TAX-GEN. § 10-203 (1999).

198. *Id.* § 10-207.

MASSACHUSETTS: Massachusetts's gross income is based on federal gross income.[200] Massachusetts adopted the federal Internal Revenue Code as of 1 January 1998.[201] Massachusetts excludes from income, to the same extent as under federal tax law, compensation earned by service members for service in a combat zone. Massachusetts also grants an extension of time to file income tax returns and pay taxes due for those serving in a combat zone. Similar to federal law, Massachusetts extends the income tax filing and payment deadlines similar to federal law for 180 days (including individuals serving in support of the armed forces who are serving in a combat zone during the designated period).[202] Massachusetts has issued specific guidance for service members for Kosovo and the Persian Gulf combat zones.[203]

MICHIGAN: Service members who are legal residents of Michigan, but maintain an abode elsewhere, are required to file a Michigan income tax return. Taxable income in Michigan is federally defined adjusted gross income.[204] However, all military pay is exempt. Service members are allowed to deduct, to the extent included in adjusted gross income, compensation received for services in the armed forces.[205] Michigan law provides that military personnel assigned to a combat zone on the income tax return due date may delay filing and paying any state income tax due until 180 days after the period of such service. The period of service includes continuous hospitalization due to injuries received while serving in the combat zone. These provisions apply to the spouse as well as the individual entitled to the benefits. Persons claiming a refund may file any time within four years following the due date of the return.[206]

MINNESOTA: Minnesota state tax is based upon the service member's federal taxable income as defined by federal law.[207] Therefore, Minnesota follows the federal rules regarding pay earned in a combat zone.[208] Minnesota state tax law is identical to federal tax law for extending the time for filing returns, paying taxes, claiming refunds, collecting taxes, claiming refunds, or appealing Tax Court decisions to the Supreme Court.[209] Minnesota, like its federal counterpart, suspends assessing and collecting interest and penalties on income tax during the extended period.[210] The time is extended for assessing tax, penalty, and interest for an additional six months beyond the extension period and includes a further six-month period to commence a collection action on the assessment.[211] Income tax is not imposed for the year of death when an individual dies while serving in the military.[212] For prior taxable years, income taxes yet to be assessed will not be assessed, and if assessed and unpaid will be abated. Income taxes paid for any year in which the decedent was in active service will be refunded, but the refund claim must be filed within seven years after the return was filed. An uncodified provision was enacted to apply combat zone income tax extensions available to soldiers in the combat zone designated by the President, to military personnel directly supporting Operation Allied Force who are away from their permanent duty stations but are not within the combat zone.[213]

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199. *Id.* §2-111; *See* 96 State Tax Notes 70-38 (Tax Analyst) 96-9465 (Apr. 10, 1996).

200. MASS. GEN. LAWS ANN. ch. 62 § 2(a) (West 1999).

201. *Id.* § 1(c).

202. *Id.* § 81.

203. Technical Information Release 99-6 (Apr. 14, 1999), *Personal Income Tax Military Personnel Serving in Kosovo* (visited Oct. 1, 1999) <http://www.magnet.state.ma.us/dor/rul%5Freg/tir/99/tir99%5F6.htm>; Technical Information Release 91-3 (Apr. 12, 1991), *Massachusetts Income Tax Filing Extensions for Military Personnel in the Persian Gulf*, 1991 MASS. TAX LEXIS 35.

204. MICH. COMP. LAWS ANN. § 7.557(130) (West 1999).

205. *Id.* § 206.30(1)(e).

206. *See* State of Michigan Department of Treasury, *Income Tax Exemption, Household Income Determination, Filing Requirements, and Income Tax Collection Deferment for Military Personnel Serving in Operation Desert Storm*, Revenue Administrative Bulletin 1991-2, 1991 MICH. TAX LEXIS 12 (Jan. 31, 1991).

207. MINN. STAT. ANN. § 290.01 subd. 19 (West 1999).

208. *See* Minnesota Department of Revenue, *Military Personnel, Income Tax Fact Sheet 5* (visited Oct. 1, 1999) <http://www.taxes.state.mn.us/individ/factshts/individ/ifs5.pdf>.

209. MINN. STAT. ANN. § 289A.39, subd. 1.

210. *Id.* § 289A.39, subd. 2.

211. *Id.* § 289A.39, subd. 3.

212. *Id.* § 289A.39, subd. 6.

MISSISSIPPI: Enlisted service members may exclude from gross income all pay received for any month they serve in a combat zone.[214] Officers may exclude up to $500 per month.[215] In addition, all amounts paid to a service member for hazardous duty pay in a combat zone designated by executive order by the President is excluded from gross income.[216] Compensation received by persons who are POW/MIA is treated the same as under the federal Internal Revenue Code.[217] The state tax commissioner has the discretion to automatically recognize extensions of time authorized and granted by the IRS for filing annual income tax returns.[218]

MISSOURI: A domiciliary who is a member of the Armed Forces is exempt from Missouri income tax if: (1) he maintained no permanent place of abode in the state during the tax year; (2) maintained a permanent place of abode elsewhere; and (3) did not spend more than thirty days of the tax year in Missouri.[219] Service members in a military conflict in which reserve components have been called to active duty under the authority of 10 U.S.C. § 672(d) or 10 U.S.C. § 673b or any such subsequent call or order by the President or Congress for any period of thirty days or more are relieved from various provisions of state law.

Any person with an indebtedness, liability or obligation for state income tax or property tax on personal or real property who is performing such military service, or a spouse of such person filing a combined return or owning property jointly, is granted an extension of time to handle tax actions similar to federal law.[220] Any tax due is not subject to penalties or interest if paid within the 180-day period.[221] The period of service in a combat zone plus any period of continuous hospitalization outside of Missouri attributable to service in the combat zone plus the next 180 days are disregarded in determining whether various tax matters were performed within time limits.[222] Death of a service member in a combat zone or because of wounds, disease, or injury incurred while in a combat zone results in relief from of various taxes.[223]

For Operation Allied Force, the Department of Revenue specifically addressed tax relief for combat zone troops. For tax year 1998, members of the U.S. Armed Forces serving in Operation Allied Force in the Kosovo area and their spouses are granted an extension for filing their Missouri individual income tax returns and paying the tax due.[224] The extension is until the later of fifteen days after any extension provided by the IRS or one year.[225] Affected military personnel and their spouses have an extended time to file returns, pay taxes, or perform other acts related to their taxes, such as making contributions to individual retirement arrangements.[226] During the extension of time, no interest or penalty charge will accrue and Missouri will not pursue any tax enforcement actions, such as an audit or collection activity.[227]

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213. The effective date of this state provision was tied to the effective date of the similar federal law, which was 24 March 1999. *See* Minnesota Department of Revenue Bulletin (1999) *available at* <http://www.state.mn.us/ebranch/mdor/laws/99bull/collect.html>).

214. MISS. CODE ANN. § 27-7-15(4)(n) (1999); MISS. TAX COMM. INCOME TAX REG. § 704 (1999).

215. *Id.*

216. MISS. CODE ANN. § 27-7-15(4)(j).

217. *Id.* § 27-7-15(5).

218. *Id.* § 27-7-50; MISS. TAX COMM. INCOME TAX REG. § 111.

219. MO. ANN. STAT. § 143.101 (West 1999). *See* Paulson v. Missouri Dep't of Revenue, 961 S.W.2d 63 (Mo. 1998); Willenburg v. Director of Revenue, 1992 Mo. Tax LEXIS 159 (Mo. Admin. Hearing Comm'n Oct. 23, 1992).

220. MO. ANN. STAT. § 41.950.

221. *Id.*

222. *Id.* § 143.991.1.

223. *Id.* § 143.991.2.

224. News Release, Missouri Department of Revenue (June 30, 1999), *Tax Relief for Combat Zone Troops* (visited Oct. 1, 1999) <http://dor.state.mo.us/news/kosova.htm>.

225. *Id.*

226. *Id.*

227. *Id.*

The relief also applies to civilians in the combat zone who are in support of the combat operations, such as relief workers. The extension continues until 180 days after leaving the combat zone or the supporting operation, plus the number of days in the combat zone during the tax filing season after the air strikes began on 24 March 1999.[228] Enlisted personnel will not pay income taxes on any pay received for any month they were in the combat zone.[229] Officers in the combat zone may exclude up to the maximum amount excludable for enlisted personnel.[230] In addition, no income taxes are withheld on such pay.[231]

MONTANA: Salaries received by Montana residents serving on active duty in the regular armed forces and who entered into active duty from Montana are exempt from state income tax.[232] Military pay earned as a result of service performed under the authority of Title 10 of the United States Code is exempt from Montana taxation. Pay earned as a result of service performed under any other authority (for example Title 32 or Title 5) is subject to state tax.[233] Montana defines "gross income" as the taxpayer's gross income for federal income tax purposes as defined by federal law.[234] Therefore, combat pay is excluded pursuant to this definition. Montana also applies its state "Soldiers' and Sailors' Relief" for any tax by the state on income. The collection of any state income tax is deferred for a period extending not more than six months after the termination of military service if the service member's ability to pay the tax is materially impaired by their service. During the deferral, no interest or penalty will accrue due to nonpayment.[235] If a service member is claiming exempt military wages, they need to attach verification, such as orders, which specify that the service member is serving under the authority of Title 10.

NEBRASKA: Nebraska adjusted gross income is based upon the service members federal adjusted gross income.[236] Therefore, Nebraska follows the federal rules regarding pay earned in a combat zone. This exclusion also extends to periods of hospitalization resulting from injury or sickness suffered while serving in the combat zone. Members of the armed forces and support personnel serving in the combat zone will receive an automatic extension of time to file of 180 days after the later of the last day in a combat zone (or the last day the area qualifies as a combat zone), or the last day of any continuous qualified hospitalization for injury from service in the combat zone.[237] The extension also applies to the service member's spouse who wishes to file a joint return. A statement must be attached to the return noting the entitlement to the extension.[238] Despite the extension of time for payment of tax, interest will be imposed from the due date of the return until the day payment is received.[239]

NEVADA: Nevada currently does not have a state individual income tax.

NEW HAMPSHIRE: New Hampshire does not tax military compensation. Any "full time" service member is exempt from payment of the residence tax.[240] The exemption of service member's salaries also applies to the New Hampshire "commuter income tax."[241] A special provision applies to surviving spouses of service members killed in wars, conflicts, armed conflicts, or combat zones, and allows the survivor to receive a tax credit for the taxes due upon the surviving spouse's real and personal property.[242]

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228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. MONT. CODE ANN. § 15-30-116(2) (1999).

233. MONT. ADMIN. R. § 42.15.111 (1999).

234. MONT. CODE ANN. § 15-30-101(7).

235. *Id.* §§ 15-30-313, 314.

236. NEB. REV. STAT. § 77-2714.01(1) (1999).

237. *Id.* § 77-27,123.

238. NEB. ADMIN. R. & REGS. § 22-014.02C (1999).

239. *Id.* § 22-014.03.

240. N.H. REV. STAT. ANN. § 72:3-a (1999).

241. *Id.* § 77-B:2.

242. *Id.* § 72:29-a.

NEW JERSEY: While New Jersey does not have a specific statutory or administrative provision relating to exclusion of income earned in a combat zone, the definition of "resident" and "nonresident" provides some state income tax relief. Residents are taxed on their entire gross income after deductions and personal exemptions. Nonresidents are taxed on their gross income only from New Jersey sources.[243]

Service members who are domiciled (defined as place the service member regards as permanent home) in New Jersey, but who meet all of the following conditions for the entire year, are considered nonresidents for state income tax purposes: (1) did not maintain a permanent home in New Jersey; and (2) maintained a permanent home outside of New Jersey; and (3) did not spend more than thirty days in New Jersey during the taxable year.[244] A resident is also defined as an individual who is domiciled in New Jersey, or if not domiciled in New Jersey, has a permanent place of abode in New Jersey and spends more than 183 days of the tax year in the state (however, service members stationed in New Jersey, but New Jersey is not their domicile, are not residents under this definition). A service member maintaining an apartment or house for himself and family in another state, whether the dwelling is on a military base or private property, is considered a permanent place of abode. A barracks room, bachelor officers quarters, and billets are not considered a permanent place of abode.[245] Compensation paid to service members not domiciled in New Jersey is excludable from income.[246]

If a domiciliary of New Jersey meets the three conditions for nonresident status, the service member should file a Form DD-2058-1, State Income Tax Exemption Test Certificate, with their finance officer to stop New Jersey income tax from being withheld from military pay. Service members and civilians providing support to the armed forces who are serving in a designated combat zone, qualified hazardous duty area, or were hospitalized outside the United States as a result of an injury received while serving in a combat zone are granted an extension of time for filing individual income tax returns and paying tax for the period of combat service or hospitalization, plus 180 days. The extensions of time for performing tax actions closely mirror the federal law.[247] This extension is also granted to the taxpayer's spouse who files jointly. No penalty, interest, or addition to tax will be assessed for late filing or late payment of the tax pursuant to this section.[248] New Jersey also provides for specific relief for service members who die in a combat zone.[249]

NEW MEXICO: There is no provision in New Mexico law expressly exempting a service member's combat zone compensation from taxation or extending tax filing deadlines. However, most income exempt under the federal Internal Revenue Code is exempt from New Mexico taxation. New Mexico adjusted gross income equals federal adjusted gross income.[250] Therefore, combat zone pay is excluded from New Mexico taxation to the same extent as federal law. New Mexico allows for an extension of time to file state income taxes when an extension has been granted under the Internal Revenue Code. Automatic extensions (without giving notice to the state) are allowed for no more than four months from the date upon which payment of New Mexico income tax or the filing of any New Mexico income tax return is required.[251] For any income tax imposed upon a service member serving in a combat zone under orders of the President of the United States, interest accrues beginning the day after any applicable extension.[252]

NEW YORK: Combat zone pay is exempt from New York taxation to the same extent as it is from federal taxation because state adjusted gross income is defined as federal adjusted gross income.[253] Recent legislation conformed New York's tax relief provisions to the federal tax relief provisions granted to service members serving in a qualified hazardous duty area as part of Operation Allied Force.[254] New York grants service members extensions of time for handling tax matters and interest on overpayments of tax from the

243. N.J. STAT. ANN. § 54A:2-1.1 (West 1999).

244. *Id.* § 54:8A-3.

245. *See* 98 State Tax Notes 65-14 (Tax Analyst) 98-10776 (Apr. 6, 1998).

246. N.J. STAT. ANN. § 54A:6-7.

247. *Id.* § 54A:9-16.

248. N.J. ADMIN. CODE § 18:35-6.2 (1999).

249. N.J. STAT. ANN. § 54A:9-16(c).

250. N.M. STAT. ANN. § 7-2-2A (Michie 1999).

251. *Id.* § 7-1-13E.

252. *Id.* § 7-1-67.

253. N.Y. TAX LAW § 612 (a) (McKinney 1999).

original due date similar to federal law.[255] The same relief provisions apply to those hospitalized as a result of injury sustained while serving in a qualified hazardous duty area. Spouses of those qualifying under these provisions are also entitled to the relief.[256] If a member of the armed forces or support personnel dies as a result of serving in a qualified hazardous duty area, no New York state personal income tax or gift tax will be imposed for any tax year during which the decedent served in the area.[257] Further, the New York state estate tax will be forgiven. Using discretionary power, the New York State Tax Department is granting members of the armed forces and support personnel impacted by Operation Allied Force, who are not serving in a qualified hazardous duty area, a six-month extension of time to file their 1998 New York income tax return and to pay any tax due. However, interest will be due on any unpaid tax from the original due date of the return.[258]

NORTH CAROLINA: Combat zone pay is exempt from North Carolina taxation to the same extent as it is from federal taxation as state gross income is defined as federal gross income.[259] Service members are granted an extension of time to file a return or take other tax actions concerning North Carolina state tax for any period during which the combat zone provisions apply.[260] Interest and penalties are not assessed against a service member for any period that is attributable to a combat zone in determining the tax liability for federal tax purposes. North Carolina applies the same rules regarding income taxes of a service member upon death in a combat zone as federal law.[261]

NORTH DAKOTA: All income excluded for federal income tax purposes is similarly excluded for North Dakota income tax purposes. North Dakota computes state income based on federal adjusted gross income and federal taxable income.[262] Therefore, since combat pay is excluded for federal purposes, it will be excluded for state taxation. A service member serving outside of the United States may defer the filing of an income tax return and the payment of the income tax until the federal income tax return is required to be filed. No penalty or interest will apply during the extension period.[263]

OHIO: Military pay and allowances received by service members that are not included in gross income under federal law are not included in Ohio adjusted gross income.[264] Ohio also has exemptions for service members who die in a combat zone.[265] Ohio statutes, administrative codes, and policy statements do not address the issue of extensions of time to file a state income tax return for service members in a combat zone.[266] However, as a matter of practice, Ohio automatically grants an extension of time to file a state tax return when a federal extension has been granted. When the service member files the Ohio return, he should write the combat zone designation on the top of the return and the date of exit from the combat zone.

OKLAHOMA: Income excluded for federal income tax purposes is similarly excluded for Oklahoma income tax purposes. The term's "taxable income," "adjusted gross income," and "Oklahoma adjusted gross income" in state law are the same as defined under federal law in the federal Internal Revenue Code.[267] Therefore, as combat pay is excluded for federal purposes, it is excluded for state

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254. *See* New York State Department of Taxation and Finance News Release N-99-9 (May 3, 1999*), New York State Tax Information for Operation Allied Force (Kosovo) Personnel* (visited Oct. 1, 1999) <http://www.tax.state.ny.us/pubs and bulls/n-99-9.htm>.

255. N.Y. TAX LAW § 696.

256. *Id.* § 696(g).

257. *Id.* § 696(d).

258. *See* New York State Department of Taxation and Finance News Release N-99-9 (May 3, 1999*), New York State Tax Information for Operation Allied Force (Kosovo) Personnel* (visited Oct. 1, 1999) <http://www.tax.state.ny.us/pubs and bulls/n-99-9.htm>. *See generally New York State Tax Information for Military Personnel and Veterans*, Publication 361 (Jan. 1999) *available at* <http://www.tax.state.ny.us/pdf/publications/income/pub361199.pdf>.

259. N.C. GEN. STAT. §§ 105-134.1(1), (5), 105-228.90(b)(1a), 105-134.5 (1999).

260. *Id.* § 105-249.2.

261. *Id.* § 105-158.

262. N.D. CENT. CODE §§ 57-38-01.2, 57-38-30.3(1999).

263. *Id.* § 57-38-34.

264. OHIO REV. CODE ANN. §§ 5747.01, 5747.024 (Anderson 1999).

265. *Id.* § 5747.023.

266. *Id*. § 5747.08 (providing general information on filing of return); *id*. § 5703.35 (providing information on extensions); OHIO ADMIN. CODE §5703-7-01 (1999) (detailing information on time for filing returns); *id.* § 5703-7-05 (providing information on extensions, interest, and penalties).

taxation. Also, the salary or any other form of compensation received from the United States by a service member is deducted from taxable income during the time in which the person is detained by the enemy in a conflict, is a prisoner of war, or is missing in action and not deceased.[268]

Whenever the filing of a timely income tax return by a service member is made impracticable or impossible of accomplishment by reason of absence from the state of Oklahoma while on active duty, outside the United States, or confinement in a hospital within the United States for treatment of wounds, injuries or disease, the time for filing a return and paying an income tax is extended. Filing an extension precludes incurring liability for interest or penalties, to the fifteenth day of the third month following the month in which the service member does one of the following: returns to the United States, returns to Oklahoma if the extension is granted for reason of being absent from the state, or from the date of discharge from a hospital if the extension is granted due to the service members confinement for treatment of wounds, injuries, or disease. If an executor, administrator, or conservator of the estate of a service member is appointed, the time for filing a return and paying taxes is extended until the fifteenth day of the third month following the month of whichever event occurs the earliest. The tax commission has the discretion to grant any service member an extension of time for filing of income tax returns and payment of income tax without incurring liabilities for interest or penalties. The extension may be granted for good cause and for a period in excess of six months.[269]

OREGON: Oregon attempts to conform its state personal income taxation laws to the federal Internal Revenue Code.[270] Terminology used in Oregon state taxation laws has the same meaning as those in federal income taxation.[271] "Taxable income" for purposes of Oregon taxation is the same as taxable income defined by federal law, with some additions, subtractions, and adjustments.[272] Therefore, as combat pay is excluded for federal purposes, it is excluded for state taxation.[273] Specific legislation was passed for income exclusion for Operation Desert Shield. Compensation received for active service in the "Persian Gulf Desert Shield area" is excluded from gross income.[274]

In addition, if service members from Oregon are stationed outside of Oregon, they may be considered a nonresident for tax purposes and not subject to Oregon taxation of military pay. If a service member from Oregon does not have a permanent residence in the state for himself or his family for any part of the tax year, maintains a permanent residence outside of Oregon during the entire tax year, and spends less than thirty-one days in Oregon during the tax year, then the service member will be considered a nonresident for tax purposes and subject to Oregon taxation.[275] Generally, Oregon allows an extension of time for filing tax returns equal in length to the extension periods allowed under the Internal Revenue Code and its regulations.[276] The time for performing tax acts and filing returns are generally postponed by reason of service in a combat zone to the same extent as the federal law.[277] Oregon will waive penalty and interest because of late filing and late payment of personal income tax in situations where the IRS does the same for persons who served in a combat zone.[278] Interest is paid on refunds of service members in a combat zone from the due date of the original return.[279] Oregon law also allows for a forgiveness of income tax liability for service members whose death is attributable to their service in a combat zone.[280]

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267. OKLA. STAT. ANN. tit. 68 § 2353.1, .10, .11, .13 (West 1999).

268. *Id.* § 2358 D6.

269. *Id.* § 2358 D 5.

270. OR. REV. STAT. § 316.007 (1999).

271. *Id.* § 316.012.

272. *Id.* § 316.022.

273. OR. ADMIN. R. 150-314.870 (1999).

274. OR. REV. STAT. § 316.789.

275. *Id.* § 316.027.

276. *Id.* § 314.385(1)(c).

277. *Id.* § 314.870; OR. ADMIN. R. 150-316.789.

278. OR. ADMIN. R. 150-314.385(c)-(A).

279. OR. REV. STAT. § 314.870(2).

280. *Id.* § 314.870(3).

PENNSYLVANIA: Any compensation received by a service member serving in a combat zone is not taxable by Pennsylvania.[281] Combat zone extensions in Pennsylvania are similar to federal combat zone extensions and disregard interest, penalties, and additions to tax.[282] For Pennsylvania local earned income tax purposes, wages or compensation paid to persons on active military service, regardless of whether or not the person is a resident or nonresident individual and regardless of whether or not the service is performed within or outside the Commonwealth, is not taxable.[283] Combat zone extensions for local taxation are similar to federal combat zone extensions.[284] Pennsylvania law also allows for a waiver of local income tax liability for service members whose death occurs in a combat zone.[285] Pennsylvania law uses the term combat zone and does not mention the term qualified hazardous duty area. However, Pennsylvania did announce that it would extend personal income tax deadlines to file and pay taxes for service members serving in Bosnia-Herzegovina, Croatia, and Macedonia for one hundred and eighty days after they leave the qualified hazardous duty area.[286]

RHODE ISLAND: Rhode Island income of a resident individual means adjusted gross income for federal income tax purposes, with some modifications.[287] Likewise, the Rhode Island income of a nonresident is based upon the net amount of items of income entering his federal adjusted gross income derived from or connected with Rhode Island sources. Military compensation paid to a service member not domiciled in Rhode Island does not constitute income derived from Rhode Island sources.[288] Rhode Island policy guidance indicates that federal income tax provisions governing armed forces pay while serving in a combat zone or in an area under conditions that qualify for hostile fire pay are applicable for state tax purposes. Therefore, pay relating to a combat zone is excluded to the same extent as federal law.[289] An estate of a service member who has been classified as MIA shall be exempt from estate and transfer taxation.[290]

However, the Rhode Island tax statutes and regulations do not specifically deal with combat zone extensions.[291] For Bosnia, Rhode Island issued guidance that it would follow the lead of the IRS by granting an automatic extension to service members serving in "Operation Joint Endeavor." An automatic extension to file returns for service members serving in Bosnia on or after 15 March 1995 had an automatic extension of time to file their 1995 return until 15 December 1996. The extension ensured that service members would not be assessed either a failure to file or failure to pay penalty.[292] Despite the lack of written authority in Rhode Island for combat zone extensions, Rhode Island Division of Taxation is still applying the same rules as the federal combat zone extension for state taxation purposes.

SOUTH CAROLINA: South Carolina has applied the federal Internal Revenue Code to state tax laws.[293] Adjusted gross income for South Carolina purposes means adjusted gross income for federal income tax purposes.[294] Likewise, taxable income in South Carolina is computed as determined under the federal Internal Revenue Code.[295] Therefore, to the extent combat pay is excluded for

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281. PA. STAT. ANN. tit. 72 § 7301(d)(vii) (West 1999).

282. *Id.* § 7330.

283. PA. STAT. ANN. tit. 53 § 6913 (West 1999).

284. PA. STAT. ANN. tit. 72 § 4753-1(a) (West 1999).

285. *Id.* § 4753-1(b).

286. *Id.* § 7330. *See* News Release, Commonwealth of Pennsylvania, Department of Revenue, *Tax Deadline Extension for Troops in Hazardous Duty Areas* (Apr. 2, 1996) (visited Oct. 1, 1999) <http://www.revenue.state.pa.us/news/press/1996/040296.htm>.

287. R.I. GEN. LAWS § 44-30-12(a) (1999).

288. *Id.* § 44-30-32. *See id.* § 44-30-5 (defining "resident" and "nonresident").

289. 1998 General Instructions for RI-1040, Rhode Island Income Tax Return (visited Oct. 1, 1999) <ftp://www.doa.state.ri.us/tax/forms/1998/pers/1040.pdf>.

290. R.I. GEN. LAWS § 44-22-2.

291. *R.I. Personal Income Tax Reg. 90-10* (visited Oct. 1, 1999) <http://www.tax.state.ri.us/regs/regs/pit90-10.htm>.

292. *R.I. Tax News*, Spring 1996 (visited Oct. 1, 1999) <http://www.tax.state.ri.us/news/vol10no3.htm>.

293. S.C. CODE ANN. § 12-6-40 (Law Co-op. 1999).

294. *Id.* §§ 12-6-40(C), 12-6-1120.

295. *Id.* §§ 12-6-560, 1110, 1130.

federal purposes, it is excluded for state taxation. In general, when a taxpayer in South Carolina has been granted an extension of time to file a federal income tax return, the taxpayer is not required to apply to South Carolina for an extension of time to file a state return.[296] In addition to the general rule, military personnel serving in Bosnia, Herzegovina, Croatia, and Macedonia have been granted at least 180 days after the service member departs the area to file state tax returns.[297] For service members serving in Bosnia, Herzegovina, Croatia, and Macedonia, South Carolina will waive any penalties and interest that accrue because of any extension or suspension of collection activities.[298] South Carolina issued guidance for the Operation Desert Storm combat zone and tax issues.[299] For the Operation Desert Storm combat zone, South Carolina applied all the federal combat zone exclusions and extensions. As of 1 October 1999 South Carolina has not issued specific guidance on the most recent combat zones and qualified hazardous duty area extensions.

SOUTH DAKOTA: South Dakota currently does not have a state individual income tax.

TENNESSEE: Tennessee does not levy a personal income tax upon the earnings of its citizens. Tennessee income tax does not apply to salaries and wages. Tennessee does apply an income tax to individuals, partnerships, associations, and trusts that are legally domiciled in the state.[300] A person who is legally domiciled in another state but maintains a place of residence in Tennessee for more than six months of the year is also subject to the tax. However, this does not apply to military personnel and full-time students legally domiciled in another state. The income (non-earnings, wages) a person receives while legally domiciled in Tennessee is subject to the tax. Most income from stocks, bonds, and notes receivable is taxable. Tennessee does provide for an exclusion of interest, penalties, and assessments of tax or liabilities for service members serving in a combat zone.[301]

TEXAS: Texas currently has no individual income tax.

UTAH: Because Utah's tax system is tied to the federal tax system, combat pay that is exempt from federal income taxation will also be exempt from the state income tax.[302] Income excluded from federal adjusted gross income as combat pay is exempt from withholding.[303] Utah does grant an extension of time to file tax returns for service members in a combat zone that coincides with the federal rules. The Utah return will be due on the same day as the federal return. Service members that are Utah residents and stationed outside the United States, are granted an extension of time to file returns to the fifteenth day of the fourth month after returning to the United States, or their discharge date, whichever is earlier.[304] Utah residents receiving combat pay qualify for an extension of time to pay income taxes for a period not to exceed the extension for filing returns.[305] No penalty or interest is charged on unpaid tax provided service members file their returns and pay any taxes due within the applicable extended time period. The Utah Tax Commission will also suspend audits and collection activities for back taxes owed by service members serving in the combat zone.[306]

VERMONT: Vermont's income tax laws are intended to conform to the federal Internal Revenue Code.[307] Adjusted gross income under Vermont tax laws means the federal adjusted gross income.[308] Military pay for full-time active duty earned outside of the state

296. *Id.* § 12-6-4980(B).

297. S.C. REV. PROC. NO. 96-2 (June 12, 1996) *available at* <http://www.dor.state.sc.us/search?NS-search-page=document&NS-rel-doc-name=/dor/policy/rp96-2.html&NS-query=96-2&NS-search-type=NS-boolean-query&NS-collection=Website&NS-docs-found=9&NS-doc-number=5>.

298. *Id.*

299. *S.C. Tax Information Letter #91-18* (July 1, 1991) (visited Oct. 1, 1999) <http://www.dor.state.sc.us/search?NS-search-page=document&NS-rel-doc-name=/dor/policy/il91-18.html&NS-query=91-18&NS-search-type=NS-boolean-query&NS-collection=Website&NS-docs-found=12&NS-doc-number=10>.

300. TENN. CODE ANN. § 67-2-101 (1999).

301. *Id.* § 67-2-114.

302. UTAH CODE ANN. § 59-10-117 (1999).

303. UTAH ADMIN. CODE R865-9I-47A (1999).

304. UTAH CODE ANN. § 59-10-516; UTAH ADMIN. CODE R865-9I-23C.

305. UTAH ADMIN. CODE R865-9I-47B.

306. Utah Tax Bulletin 3-91, (visited Oct. 1, 1999) <http://www.tax.ex.state.ut.us/cgi-bin/folioisa.dll/bulletin/query=combat+!7Aone/doc/{@5222}?>.

307. VT. STAT. ANN. tit. 32 § 5820 (1999).

308. *Id.* § 5811.

is exempt from Vermont taxation (limited amounts of pay of service members of the National Guard are exempted from state taxation).[309] Therefore, based upon the nature of Vermont's individual tax law, as a minimum, service members from Vermont would have the same combat zone exclusions as under federal law. Service members in a combat zone or serving in an area treated by federal law as if it were a combat zone, are entitled to all the combat zone tax extensions to the same extent as under federal law.[310]

VIRGINIA: Generally, Virginia's taxable income of a resident means federal adjusted gross income for the tax year, and specifically excludes combat pay for service members as provided by federal law.[311] However, Virginia law was amended in 1998 to provide additional benefits beyond federal law. All military pay and allowances, to the extent included in federal adjusted gross income and not exempted while serving in a combat zone or qualified hazardous duty area, which is treated as a combat zone for federal tax purposes, are exempt from state taxation.[312]

The practical effect of this new provision is to exclude all officer compensation earned in a combat zone or qualified hazardous duty area instead of only partial exclusion for state taxation. Virginia law specifically addresses military service in the former Yugoslavia. All military pay and allowances earned by service members for military service in any part of the former Yugoslavia, including air space above or any waters subject to related naval operations in support of Operation Joint Endeavor as part of the NATO Peace Keeping Force is excluded from state taxation until the service member completes service in the area.[313]

Generally, an extension of time to file a Virginia tax return is granted to service members to the first day of the seventh month following the close of the taxable year for service members outside of the United States.[314] However, service members that qualify for the federal combat zone extension are allowed an extension by Virginia for filing income tax returns and paying the tax. The extension is for fifteen days after the date on which the federal period of postponement terminates, if the date is greater than one year from the original due date of the return.[315] This extension has also been specifically applied to service members in any part of the former Yugoslavia in support of Operation Joint Endeavor as part of the NATO Peace Keeping Force.[316]

Virginia indicated that all estimated tax payments, installment payments, and collection activities will be suspended during these extension periods for Operation Allied Force.[317] Interest and penalties will not accrue during the extension period.[318] The basic rules have been applied for service members in the former Yugoslavia as part of Operation Joint Endeavor.[319] The Commonwealth of Virginia Department of Taxation issued a bulletin in regards to the Operation Desert Storm combat zone. However, service members must make sure to apply the recent tax law changes to the guidance issued for Operation Desert Storm.[320]

WASHINGTON: Washington currently does not tax individual income.

WEST VIRGINIA: Combat zone pay is exempt from West Virginia taxation to the same extent it is from federal taxation as state adjusted gross income is defined as federal gross income as defined under federal law.[321] West Virginia's requirement to withhold taxes from wages does not apply to payments by the United States to service members.[322] West Virginia has not enacted a general

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309. *Id.* § 5823.

310. *Id.* § 5830d.

311. VA. CODE ANN. § 58.1-322A (Michie 1999).

312. *Id.* § 58.1-322 D 21.

313. *Id.* § 58.1-322 D 18.

314. *Id.* § 58.1-344 D.

315. *Id.* § 58.1-344 F 2.

316. *Id.* § 58.1-344 G.

317. Commonwealth of Virginia, Department of Taxation, Tax Bulletin, No. 99-5 (May 1, 1999), 1999 WL 313892 (Va. Dept. Tax.).

318. *Id.*

319. Commonwealth of Virginia, Department of Taxation, Tax Bulletin, No. 96-2 (Apr. 23, 1996), 1996 Va. Tax LEXIS 89.

320. Commonwealth of Virginia, Department of Taxation, Tax Bulletin, No. 91-3 (Apr. 1, 1991), 1991 WL 352435 (Va. Dept. Tax.).

321. W. VA. CODE § 11-21-12(a) (1999).

combat zone extension provision. West Virginia law allows an automatic extension of time to file a tax return where there is an extension of time for federal income tax purposes.[323] West Virginia law requires taxes shown due on an annual return to be paid on or before the due date of the return, determined without regard to extensions of time for filing a return. Nevertheless, West Virginia law allows the tax commissioner to grant extensions of time to file or pay West Virginia personal income tax.[324] Extensions of time to pay are limited by the law to not more than six months. However, in the case of persons who are outside of the United States, extensions of time for paying West Virginia personal income tax are not limited to a set period of time.[325]

For service members participating in peacekeeping efforts in Bosnia, Herzegovina, Croatia and Macedonia, extensions of time for paying state personal income tax and to file personal income tax returns have been granted to all persons who are subject to the extensions of time for filing or paying federal income taxes allowed under federal law. For service members participating in peacekeeping efforts in Bosnia, Herzegovina, Croatia, and Macedonia the extensions of time to pay the West Virginia personal income tax and to file personal income tax returns granted apply to the current tax period and future periods until revoked or otherwise amended.[326] Statutory authority exists for Operation Desert Shield, which applies state law very similar to federal combat zone extensions for the Persian Gulf area.[327] West Virginia law is similar to federal law regarding income taxes of service members that die while on active duty in a combat zone or as a result of wounds, disease or injury incurred while so serving and for service members MIA.[328]

WISCONSIN: Wisconsin adjusted gross income means federal adjusted gross income with some modifications.[329] For purposes of withholding taxes, Wisconsin wages does not include remuneration paid for active service in a combat zone or during hospitalization as a result of wounds, disease, or injury incurred while in a combat zone.[330] Therefore, military pay, that is exempt for federal tax purposes is also exempt for Wisconsin taxation.[331] A specific statute relating to Operation Desert Storm combat zone is still found in the Wisconsin statutes. Under the statute, all enlisted compensation and up to $500 per month of officer compensation earned in the Operation Desert Storm Combat Zone is specifically subtracted from gross income under Wisconsin law.[332]

While this specific combat zone provision is still in the Wisconsin statutes, it appears that the current general definition of adjusted gross income and the policy guidance recently issued have effectively amended the Operation Desert Storm officer exclusions. The monthly compensation of service members is excluded from gross income if the taxpayer served in a combat zone similar to federal law. Areas in eastern Europe, including the countries of Croatia, Bosnia, Herzegovina, Serbia, Macedonia, Montenegro, Hungary, Austria, Slovakia, Czech Republic, and Slovenia, are currently designated as a hazardous duty area, and the exclusion is available for military personnel serving in that area. The exclusion for commissioned officers is limited to the maximum amount that enlisted personnel may exclude.[333] Wisconsin allows the same combat zone pay exclusion for qualified hazardous duty areas.[334] Any extension of time allowed under federal law for filing a federal income tax return also applies to Wisconsin income tax returns.[335] Taxes

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322. *Id.* § 11-21-71.

323. W. VA. CODE STATE R. tit. 110, §§ 52.1.1, 52.1.1.1 (1999).

324. W. VA. CODE § 11-21-52.

325. *Id.* § 11-21-57.

326. West Virginia Department of Tax and Revenue, Administrative Notice 96-24, *Personal Income Tax–Implementation of West Virginia Personal Income Tax Relief for Military Personnel Deployed in Bosnia and Herzegovina, Croatia and Macedonia, Pursuant to the Provisions of Pub. L. No. 104-117*, 1996 W. Va. Tax LEXIS 26 (June 10, 1996).

327. W. VA. CODE § 11-21-61.

328. *Id.* § 11-21-62.

329. WIS. STAT. ANN. § 71.01(13) (West 1999).

330. *Id.* §§ 71.63(6)(a), 71.19(5)(a).

331. Wisconsin Department of Revenue, Publication 104 (Oct. 1998), *Wisconsin Taxation of Military Personnel*, (visited Oct. 1, 1999) <http://www.dor.state.wi.us/pubs/98pb104.pdf>.

332. WIS. STAT. ANN. § 71.05(6)(b)(13), (14).

333. Wisconsin Department of Revenue, *Wisconsin Individual Income Tax, Individual Summary, 1998*, (visited Oct. 1, 1999) <http://www.dor.state.wi.us/ra/sum98ind.html#Combat Pay>.

334. *Id.*; Wisconsin Department of Revenue, "*Wisconsin Taxation of Military Personnel,"* Publication 104 (Oct. 1998).

that are payable upon the filing of the return do not become delinquent during the period of the extension, but are subject to interest at the rate of twelve percent per year during the period.[336]

WYOMING: Wyoming currently does not have an income tax.

335. WIS. STAT. ANN. § 71.03(7).

336. *Id.* §§ 71.03, 71.85.

Tax Law Note

Update for 1999 Federal Income Tax Returns

In the summer of 1999, Congress passed a massive package of tax changes. However, President Clinton vetoed the legislation. Despite the lack of a comprehensive tax package for 1999, several changes took effect for tax year 1999. The following article is a brief update of current tax issues and includes information that is important for taxpayers in the military community. This article is not intended to serve as an in-depth review or explanation of each topic discussed, rather its intent is to inform legal assistance attorneys of updates in numerology and new tax changes for the upcoming tax season.

Key Changes for 1999

Child Tax Credit

In 1998, taxpayers were able to claim a child tax credit of $400 for each "qualifying child"[1] that was under the age of seventeen.[2] In 1999, the child tax credit increases to $500 for each child under seventeen. The amount of the child tax credit is subject to limitations based upon the taxpayers modified adjusted gross income (MAGI).[3] For most taxpayers, the credit is nonrefundable and is subject to other limitations based upon tax liabilities.[4] However, an additional child tax credit applies to families with three or more qualifying children.[5] Families with three or more qualifying children may be able to take the credit as a refundable tax credit.[6]

ried filing separately phase out limitations are $0 - $10,000;

Last year, the child tax credit had a tremendous impact on military taxpayers with children under seventeen by increasing the size of tax refunds and decreasing overall taxes. Many military taxpayers that did not adjust their federal income tax withholding in 1998 saw their overall tax liability decrease or the size of refunds increase. Military taxpayers that received a large refund due to the child tax credit should consider a corresponding reduction in wage withholding.

Student Loan Interest Deduction

In 1998, for the first time, taxpayers legally obligated to pay student or educational loans could take an above-the-line deduction or adjustment to income for the interest paid on these loans.[7] In 1998, this above-the-line deduction was capped at $1000.[8] In 1999, the maximum deduction increases to $1500 of interest per year. Although most personal interest is nondeductible for federal income tax purposes, the student loan interest deduction is an adjustment to income, and the taxpayer does not have to itemize to take the deduction.

Individual Retirement Arrangements (IRAs)

More service members will be eligible to take a deduction for traditional IRAs in 1999 due to an increase in the phase out limitations. Because service members are active participants in a retirement plan, deductible IRA contributions are subject to limitations.[9] For 1999, taxpayers who are married and filing a joint return are subject to phase-out limitation if their AGI exceeds $51,000 and eliminated if AGI exceeds $61,000 (marphase out for singles is $31,000 to $41,000).[10]

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1. A "qualifying child" is a son, daughter, stepchild, eligible foster child, or other descendant for whom the taxpayer can claim a dependency deduction for the tax year. The "qualifying child" must also be a citizen or resident of the United States. I.R.C. § 24(c) (West 1999).

2. *Id.* § 24.

3. For joint taxpayers, the credit will be reduced by $50 for every $1000 of adjusted gross income (AGI) above $110,000. Likewise, it will be reduced in a similar manner for unmarried individuals with AGI above $75,000 and those taxpayers that are married filing separately with an AGI in excess of $55,000. *Id.* § 24(b).

4. *Id.* § 26.

5. The additional credit is computed by adding the taxpayer's social security taxes paid for the tax year to the tax liability limitations of I.R.C. § 26, and subtracting that amount by all nonrefundable credits, the earned income credit (not including the supplemental child credit as specified in I.R.C. §32(n)). *Id.* § 24(d).

6. *Id.* § 24(d).

7. The deduction is limited to interest paid during the first 60 months in which payments are required. *Id.* § 221.

8. *Id.* § 221(d)(1).

9. *Id.* § 219(g)(1); I.R.S. Notice 87-16; Morales-Caban v. Commissioner, T.C. Memo 1993-466, 66 T.C.M. (CCH) 995 (1993).

10. *Id.* § 219(g).

No Legislative Relief for Military Taxpayers on the Sale of a Home

For principal residences sold after May 1997, a single taxpayer may exclude up to $250,000 of gain, and married taxpayers that file jointly may exclude up to $500,000.[11] To qualify for excluding the gain, the taxpayer must have owned and used the property as a principal residence for two or more years during the five year period ending on the date of sale.[12] The changes in the Internal Revenue Code in 1997 repealed the old "roll over" rules that allowed homeowners to defer the gain from the sale of a principal residence by purchasing a new home of equal or greater value.[13] An abundance of case law developed under the old roll over provisions allowed a homeowner to be absent from his principal residence for extended periods of time without the home losing the status as the principal residence. In addition, the repealed roll over provisions provided military taxpayers with as much as eight years after the sale of a principal residence to purchase a new residence and roll the gain into the new home to defer the tax.[14]

The new Internal Revenue Code provision regarding the sale of principal residence for homes sold after May 1997 means that a taxpayer must actually "own and use" the home for two years out of the last five years immediately preceding the sale to qualify the property for a complete tax exclusion.[15] This rule is strictly applied under the tax code, and the prior facts and circumstances test of the old roll over rules no longer applies. The new exclusion of gain provisions is a tremendous tax benefit for the majority of homeowners. However, applying the provisions to military taxpayers results in the failure of homeowners that are assigned away from the home to meet the "own and use" test of the new provisions. Many military taxpayers absent from their homes for extended periods of time assumed they could roll over the gain upon the sale of the home. For sales after May 1997, the assumption may no longer be applicable. Under current tax laws, there is no special relief for service members absent from their home due to military service. During 1998 and 1999, there were numerous legislative attempts to provide specific relief for military homeowners away from their home due to military service. As of the date of publication, none of the legislation has been enacted into public law. Therefore, the military taxpayer must read and apply a literal interpretation of the current provisions of the tax code regarding the use and ownership of a principal residence. The Armed Forces Tax Council is continuing to pursue relief for service members.

1999 Tax Year in Review

Service Members Assigned to NATO May Not Elect Foreign Earned Income Exclusion for Military Compensation

The Internal Revenue Service (IRS) issued a technical assistance memorandum[16] addressing whether military personnel assigned to the North Atlantic Treaty Organization (NATO) are eligible to exclude from gross income the compensation earned during assignment to NATO under the foreign earned income exclusion.[17] Generally, the foreign earned income exclusion provides that gross income earned from sources within a foreign country may be excluded up to a specified amount.[18]

In distinguishing service members from other types of employees, the IRS noted that service members assigned to NATO are still members of the United States military. Because the federal government provides service members with benefits, pays the salaries of service members, maintains authority to hire, fire, and discipline service members while assigned to NATO, then service members remain employees of the United States government. The IRS cited and distinguished *Adair v. Commissioner*,[19] and concluded that service members are employees of the United States, and are not allowed to take the foreign earned income exclusion for military compensation while assigned to NATO.

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11. *Id.* § 121.

12. *Id.*

13. *Id.* § 1034 (repealed 1997).

14. *Id.* § 1034 (h) (repealed 1997).

15. *Id.* § 121.

16. Memorandum, Chief, Branch 2, Employee Benefits and Exempt Organizations, subject: Computation of Excluded Military Retired Pay Under Internal Revenue Code § 122 (31 Mar. 1999) *in* TAX NOTES TODAY (June 1999) *available at* LEXIS 1999-TNT 104-64 [hereinafter Employee Benefits Memorandum].

17. I.R.C. § 911.

18. For 1999, the exclusion is $74,000; 2000 it will be $76,000; 2001 it will be $78,000 ,00; and 2002 and years thereafter will be $80,000. *Id.* § 911(b).

19. 70 T.C.M. (CCH 998) (1995), *acq.*, 1996-1 C.B.1.

Income Tax Exclusion of VA Disability Benefits vs. Inclusion of Military Retirement Pay

In 1999, the IRS reiterated that military retirement pensions based upon number of years of service, and not disability, are not excludable from gross income.[20] Likewise, in a similar case, the United States Tax Court held that a retired officer was not entitled to exclude any portion of his military service retirement pension from taxable income even though the Veterans Administration (VA) gave the retiree a disability rating after he retired.[21]

In both of these cases, the retiree received military retirement pay based on years of service. The retirees had not retired due to disabilities, but applied for disability benefits after retirement. Following retirement, the VA made determinations that the retirees had disabilities. Based upon the percentage disability determined by the VA, the retirees elected to waive years of service retirement benefits to the extent of VA benefits so that they could receive the VA benefits tax-free. However, in both of these cases the retirees went on to reduce their military retirement by a disability exclusion ratio. The retirees made the reduction to their retirement pay after the Defense Finance and Accounting Service (DFAS) reduced retirement pay by the amount waved to receive the VA benefit. Because the taxpayers were retired for years of service and not for disability, the retirees could not exclude the amount calculated as disability exclusion.[22] The retirement pay was not received for personal injury or sickness, and was not excludable. The retirees already had their taxable retired pay reduced by the amount of VA benefits, and were not entitled to a second exclusion because of the same disability. The DFAS had properly reported the taxable amount of the retirement benefits, on Form 1099-R, and did not include the VA disability benefits.

A VA disability determination does not convert a military service retirement into a disability pension. The retiree has the burden of proving that pension payments that are received for a disability are incurred during active service in the military.[23] Otherwise, there is a presumption that retirement pay for length of service will not be exempt from federal income taxation.

Quarters and Subsistence Allowances Are "Earned Income" for Purposes of the Earned Income Tax Credit

Judge advocates have long preached the gospel that for purposes of computing the Earned Income Tax Credit (EITC)[24] service members must include (in the calculation) the amount of military quarters and subsistence allowances received in payment or in-kind during a tax year. Nevertheless, in *Neff v. United States*,[25] a service member filed an amended tax return in 1997 claiming an EITC. In the amended return, the military taxpayer did not include the amount of military quarters and subsistence allowances in the EITC calculation. However, the military taxpayer did include a lengthy, hand written letter of explanation attached to the amended return arguing that quarters and subsistence allowances should not be considered earned income. The IRS disallowed the claim for EITC in the amended return, and the military taxpayer filed a complaint in the Court of Federal Claims. Summary judgment was granted for the government, but the court included a very detailed analysis of the EITC as it relates to military taxpayers (specifically addressing quarters and subsistence allowances).

The court closely examined the statutory basis and legislative history of the EITC. The service member contended that quarters and subsistence allowances are not compensation for purposes of EITC. However, the court held that Congress intended "regular compensation" or "regular military compensation" to include not only basic pay, but also basic allowance for quarters (including variable housing allowance or station housing allowance), and basic allowance for subsistence.[26] The court went on to indicate that because "compensation" constitutes earned income under the EITC,[27] the value of quarters and subsistence allowances must be included in earned income. The court analyzed the legislative history of military pay, allowances, and the EITC.[28] In deciding what constitutes "earned income" under the EITC, the Court of Federal Claims noted that the Tax Court has also held that quarters and subsistence allowances are earned income.[29]

Legal assistance attorneys and tax center personnel are often challenged by military taxpayers regarding the inclusion of

20. Employee Benefits Memorandum, *supra* note 16.

21. Holt v. Commissioner, No. 187-98 T.C.M. (CCH) 1999-348 (1999).

22. I.R.C. § 104(a)(4).

23. Scarce v. Commissioner, 17 T.C. 830, 833 (1951).

24. I.R.C. § 32.

25. 43 Fed. Cl. 659 (1999).

26. 37 U.S.C.A. § 101(2) 1999).

27. I.R.C. § 32(c)(2)(A)(i).

28. Uruguay Round Agreements Act, Pub. L. No. 103-465 § 721, 108 Stat. 4809 (1994) (adding subparagraph 10 to I.R.C. § 6051(a); . H.R. REP. NO. 103-826, pt. 1, at 180-81 (1994).

quarters and subsistence allowances in the calculation of EITC during tax preparation. *Neff* provides a clear explanation and authority to military taxpayers as to the legal basis for the inclusion of these "nontaxable" allowances in the calculation of the EITC.

29. Jones v. Commissioner of Internal Revenue Service, 66 T.C.M. (CCH) 368, 370 (1993).

1999 Numerology

Tax Rates

The 1999 tax rates are: 15%, 28%, 31%, 36%, and 39.6%. The 1999 tax rates by filing status are:

Married Filing Jointly and Surviving Spouses:

Taxable Income	Marginal Tax Rate
$1 - 43,050	15%
43,050 - 104,050	28%
104,050 - 158,550	31%
158,550 - 283,150	36%
over 283, 150	39.6%

Single

Taxable Income	Marginal Tax Rate
$1 - 25,750	15%
25,750 - 62,450	28%
62,450 - 130, 250	31%
130,250 - 283,150	36%
over 283,150	39.6%

Head of Household:

Taxable Income	Marginal Tax Rate
$0 - 34,500	15%
34,550 - 89,150	28%
89,150 - 144,400	31%
144,400 - 283,150	36%
over 283,150	39.6%

Married Filing Separately:

Taxable Income	Marginal Tax Rate
$1 - 21,525	15%
21,525 - 52,025	28%
52,025 - 79,275	31%
79,275 - 141,575	36%
over 141,575	39.6%

Standard Deduction:

Married Filing Jointly or Qualifying Widow(er) – 1999: $7200 ($7100 in 1998; $7350 projected for 2000).

Single – 1999: $4300 ($4250 in 1998; $4400 projected for 2000).

Head of Household – 1999: $6350 ($6250 in 1998; $6450 projected for 2000).

Married Filing Separately – 1999: $3600 ($3550 in 1998; $3675 projected for 2000).

Reduction of Itemized Deductions

Otherwise allowable itemized deductions are reduced if AGI in 1999 exceeds:

Married Filing Separately - $63,300 (projected at $64,475 for 2000).

All other returns - $126,600 (projected at $128,950 for 2000).

Personal Exemptions

Personal exemption deduction - $2750 ($2700 in 1998).

Phase Out of Personal Exemptions:

Taxpayer	Begins After
Married Filing Jointly	15%
Single	28%
Head of Household	31%
Married Filing Separately	36%
over 283,150	39.6%

Major Rousseau.

Legal Assistance Note

Involuntary Allotments: Another Weapon in the Family Support Arsenal

A legal assistance client comes to you with a support order in hand and says that he has not received child support payments from his soldier spouse for several months. *Army Regulation (AR) 608-99* requires soldiers to comply with the financial support provisions of all court orders,[30] and allows commanders to punish a soldier who falls into arrears.[31] However, there is currently no mechanism in place to allow commanders to force their soldiers to pay arrears.[32] What do you do?

Involuntary allotments are an effective method of collecting child and spousal support from soldiers who lag behind in their support obligations. Questions arise concerning when an involuntary allotment can be initiated against a soldier.

Two prerequisites must be met before initiating an involuntary allotment. First, there must be an order of child support.[33] Second, there must be arrearages.[34] The order for support can

30. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, para. 2-4a (1 Nov. 1994).

31. Paragraph 2-5(c) of *AR 608-99* states in part that "[p]unishment in such instances is based on the failure to provide financial support when due, not for failure to pay arrearages." *Id.*

32. *Id.* "Although the collection of arrearages . . . may be enforced in court, there is no legal means for the military to enforce collection of arrearages . . . ."

33. 42 U.S.C.A. § 665(a)(1) (West 1999).

be from either a court or an administrative agency,[35] and must be for either child support alone or for child support and spousal support.[36] The amount of arrearages must equal or exceed the amount of support required over a two-month period.[37] This requirement sometimes causes confusion. Separated and former spouses often want an involuntary allotment initiated if their monthly support check is less than the ordered amount for two consecutive months. Under 42 U.S.C.A. Section 665 (a)(1), the arrearages must *total* at least two months support, not underpayments in two consecutive months.[38] For example, if a family member receives $400 a month in child support instead of the required $500 a month, the total amount of arrears must equal at least two months' support, or $1000.

Once those prerequisites have been satisfied, an "authorized person,"[39] usually a state child enforcement agency representative or court clerk, sends the request for an involuntary allotment to the Defense Finance and Accounting Service (DFAS).[40] The DFAS notifies the soldier involved and his commander of the proposed action.[41] Barring an appropriate and timely response from the soldier,[42] the involuntary allotment begins.

Soldiers also mistakenly believe that they can stop an involuntary allotment once they are no longer in arrears. This is not the case. Under the statute, an involuntary allotment remains in effect until the "authorized person" asks that it be stopped.[43]

Involuntary allotments are a valuable tool in ensuring that soldiers meet their support obligation. Legal assistance attorneys should know the requirements to initiate one, as well as the possible defenses to such an initiation. Major Boehman.

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34. *Id.*

35. 32 C.F.R. pt. 54.3(f) (1999). This regulation defines support order as:

> Any order providing for child or child and spousal support issued by a Court of competent jurisdiction within any State, territory, or possession of the United States, including Indian tribal courts, or in accordance with administrative procedures established under State law that affords substantial due process and is subject to judicial review.

Id.

36. *Id.*

37. 42 U.S.C.A. § 665(a)(1).

38. *Id*. The statute states, in relevant part, that "the resulting delinquency in such payments is in a total amount equal to the support payable for two months or longer."

39. *Id.* § 665(b). An "authorized person" is defined as:

> [A]ny agent or attorney of a State having in effect a plan approved under this part who has the duty or authority under such plan to seek to recover any amounts owed by such member as child or child and spousal support (including, when authorized under the State plan, any official of a political subdivision); and (2) the court which has authority to issue an order against such member for the support and maintenance of a child, or any agent of such court.

Id.

40. Although this note focuses on Army personnel, similar procedures exist for initiating an involuntary allotment against members of any service. The official from each military service designated to accept service of the request for an involuntary allotment is listed in 32 C.F.R. pt. 54.6(f). For the Army, the designated official is the Commander, U.S. Army Finance and Accounting Center, ATTN: FINCL-G, Indianapolis, Indiana, 46249-0160, telephone (317) 542-2155. The Navy's designated official for service is the Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, Ohio, 44199, telephone (216) 522-5301. The Air Force's designated official for service is the Commander, Air Force Accounting and Finance Center, ATTN: JA, Denver, Colorado, 80279, telephone (303) 370-7524. The Marine Corps' designated official for service is the Commanding Officer, Marine Corps Finance Center (Code AA), Kansas City, Missouri, 64197, telephone (816) 926-7103.

41. *See* 32 C.F.R. pt. 54.6 (d)(1). The DFAS serves the service member with written notice that a request for involuntary allotment has been received, along with a copy of all documents received, information about the maximum amount subject to allotment, and notice that the service member can submit affidavits or other evidence on his behalf to show that the information contained in the notice is incorrect.

42. *Id*. The service member has 30 days to from date of notice to submit substantial proof of error, such as that the support payments are not delinquent, or that the underlying support order has been amended, superseded, or set aside.

43. The "authorized person" or the person receiving the allotment must notify the designated official promptly if the court order that gave rise to the allotment is vacated, modified, or set aside. *See* 32 C.F.R. pt. 54.6 (e)(5).

Contract and Fiscal Law Note

A–76 Cost Studies and Conflicts of Interest: The General Accounting Office and the Office of Government Ethics Square Off

Picture it: You are the legal advisor to a steering group responsible for the cost comparison study of installation support services, conducted under the procedures in Office of Management and Budget (OMB) Circular A-76.[44] You find yourself offering advice regularly on diverse issues in contract law, labor law, and standards of conduct. One day, the contracting officer approaches you with news that the technical team, which will evaluate proposals from private sector offerors, includes members whose jobs are on the line. Under these circumstances, may these team members evaluate the proposals fairly and impartially? Should they evaluate the proposals at all? For guidance, you turn to two key sources: the General Accounting Office (GAO) and the Office of Government Ethics (OGE). You discover, however, that each has rendered a different answer to the question you face.

The GAO Approach: Protecting the Integrity of the Procurement Process.

During 1999, the GAO issued several opinions analyzing the Department of Defense's cost studies under OMB Circular A-76.[45] In one decision, the GAO highlighted how a conflict of interest, which affects the integrity of the procurement process, can bring a cost study to a screeching halt. In *DZS/Baker LLC*,[46] the GAO sustained a protest filed by two offerors in connection with an Air Force OMB Circular A-76 cost study. The Air Force issued a solicitation for civil operations and maintenance services at Wright-Patterson Air Force Base, Ohio, opting to use the two-step sealed bid procurement method for the cost study.[47] The solicitation required private offerors to submit initial technical proposals to perform maintenance, operation, repair, and minor construction services for facilities, utilities, and infrastructure at the installation. The Air Force then would issue an invitation for bid to offerors submitting acceptable technical proposals.

Both DZS/Baker and Morrison Knudsen submitted proposals. After advising offerors of the initial evaluation results, the Air Force requested revised technical proposals. The technical team evaluating the revised proposals, however, found them unacceptable. As a result, the Air Force cancelled the solicitation and continued in-house performance of the services.[485] DZS/Baker and Morrison Knudsen protested the Air Force's decision, arguing that fourteen of the sixteen agency evaluators who reviewed the technical proposals held positions that would have been contracted out under the solicitation.[49]

The GAO agreed, finding the evaluation process "fundamentally flawed as a result of a conflict of interest."[50] In its decision, the GAO focused on various Federal Acquisition Regulation (FAR) provisions dealing with conflicts of interest. It cited FAR 3.101-1, which enunciates the "impeccable standard of conduct" that applies to government business and requires agency employees to avoid even the appearance of a conflict of interest:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest

44. FEDERAL OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983) [hereinafter OMB Circular. A-76]. The OMB Circular A-76 describes the executive branch policy and procedures for determining whether contractors or government employees should perform commercial activities.

45. *See, e.g.*, RTS Travel Serv., B-283055, 1999 U.S. Comp. Gen. LEXIS 162 (Sept. 23, 1999) (finding the agency adjusted properly the contractor's price for contract administration costs to reflect the addition of a full-time equivalent quality assurance evaluator); BMAR & Assocs., B-281664, Mar. 18, 1999, 99-1 CPD ¶ 62 (finding that requirement to submit a lump sum bid in a OMB Cir. A-76 proposal imposed an unwarranted risk to the offeror and an unfair advantage to the in-house offer); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison even though the agency failed to seal the government's management plan and most efficient organization); Gemini Indus., Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (finding the agency acted properly when it evaluated proposals against the estimate of proposed staffing); Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (finding that offerors who participate in the private sector competition, but not selected for comparison with the in-house offer, are entitled to a post-award debriefing).

46. B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19.

47. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 14.5 (June 1997) [hereinafter FAR]. Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are unavailable. *Id*. at 14.501. This section goes on to state: "An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the [g]overnment's requirements, including an adequate technical data package, so that subsequent acquisitions may be made by conventional sealed bidding." *Id.* Step one consists of the agency requesting and evaluating technical proposals. In step two, offerors who prepared acceptable technical proposals submit sealed bids. *Id.*

48. *DZS/Baker*, 99-1 CPD ¶ 19 at 2.

49. *Id.* at 3. The technical evaluation team consisted of 16 members. Of those 16 persons, 4 core evaluators and 10 technical advisors held positions under study. A core evaluator reviewed the entire proposal, while a technical advisor reviewed specific portions. *Id*.

50. *Id*.

> degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in [g]overnment-contractor relationships.[51]

Nowhere in the opinion, however, did the GAO quote or analyze the "except as authorized by statute or regulation" language of FAR 3.101-1. Noting that FAR subpart 3.1 does not address scenarios when agency employees may be unable to render impartial advice to the government, the GAO instead turned its attention to the organizational conflict of interest provisions of FAR subpart 9.5. Relying on several provisions of FAR subpart 9.5, the GAO found it "self evident" that the agency evaluators in this case were potentially unable to advise the contracting officer impartially.[52] In fact, the GAO noted that the agency evaluators were in effect evaluating a competitor's proposal:

> Where, as here, a private-sector offeror submits a technical proposal as part of an A-76 cost comparison study for work currently performed in-house by an agency, and agency personnel holding positions under the study and thus subject to being contracted out are involved in evaluating the commercial offeror's proposal, it seems self-evident that, as addressed in FAR Section 9.501(d), the agency evaluators are potentially unable to render impartial assistance or advice to the contracting officer—their objectivity in performing the evaluation being impaired.[53]

The Air Force asserted that it took steps to mitigate the conflict of interest. It had segregated the evaluators from the other team members, appointed a procurement analyst whose position was not subject to the OMB Circular A-76 cost study as the technical evaluation team chief, and increased training and surveillance of the cost study. Unpersuaded, the GAO concluded that these steps failed to eliminate or mitigate the conflict.[54] Moreover, the GAO dismissed the contracting officer's claim that no one but the sixteen employees could perform the technical evaluations, finding it "implausible that there were no other personnel available in the Department of the Air Force who were qualified to evaluate proposals for installation civil operations and maintenance services."[55] In light of the "significant conflict of interest," the GAO concluded that the contracting officer failed to take appropriate remedial action and sustained the protest.[56]

The OGE Approach: Financial Conflict of Interest.

In *DZS/Baker*, the GAO did not address the financial conflict of interest provisions of 18 U.S.C.A. Section 208.[57] That statute prohibits employees from participating in a particular matter if doing so would have a direct and predictable effect on their financial interests. The OGE implementing regulations, however, exempt employees from the financial conflict of interest coverage in limited situations. In September 1999, nearly nine months after the GAO issued *DZS/Baker*, the Director of the OGE issued a memorandum criticizing the GAO for these "significant omissions" in its analysis.[58]

First, the OGE focused on FAR 3.101-1, upon which the GAO relied as the starting point for its discussion about protect-

51. FAR, *supra* note 47, at 3.101-1.

52. *DZS/Baker*, 99-1 CPD ¶ 19 at 5. The GAO cited FAR 9.501(d), which finds a conflict of interest when, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired." FAR, *supra* note 44, at 9.501(d). The GAO also relied on another FAR provision that prohibits a contractor from evaluating its own products or services, or those of a competitor, without proper safeguards to protect the government's interests. *Id*. at 9.505-3. It analogized the 16 agency evaluators to contractors who may lack objectivity when evaluating a competitor's proposal. *DZS/Baker*, 99-1 CPD ¶ 19 at 5. Finally, the GAO observed that the FAR vested contracting officers with the duty to identify and mitigate potential organizational conflicts of interest. *Id. See* FAR, *supra* note 44, at 9.504 (charging contracting officers with the responsibility to recognize and either avoid, neutralize, or mitigate organizational conflicts of interest before contract award).

53. *DZS/Baker*, 99-1 CPD ¶ 19 at 5.

54. *Id*. at 6. The GAO further explained:

> In our view, given the breadth and severity of the conflict of interest here, the conflict could not be mitigated by an action short of reconstituting the evaluation team. . . . So long as contracting officials relied on the evaluators for their expertise and input, we fail to see how, in this situation, mere additional oversight of the evaluation process would be adequate to mitigate a conflict of interest. Accordingly, assigning an individual without a conflict to be the evaluation team chief, while a step in the right direction, is insufficient to mitigate the conflict. Finally, while segregation may resolve a conflict of interest relating to an offeror's unfair access to information, it is virtually irrelevant to a conflict of interest involving potentially impaired objectivity.

Id.

55. *Id.* The contracting officer admitted that she "could not help but be aware of the potential for a conflict of interest from the Technical Evaluation Team . . . ." *Id*. She stated, however, that she could not find anyone else available and qualified to serve on the team. *Id.*

56. *Id.* at 7. On resolicitation, the government group performing these functions won the cost study. *See* Leroy H. Armes, *Contracting Out: Government Apparent Winner of Contract for Wright-Patterson Engineering Support*, Fed. Cont. Daily (BNA), Oct. 5, 1999, *available in* LEXIS, News Library, BNAFCD File.

57. 18 U.S.C.A. § 208 (West 1999).

ing the integrity of the process.[59] The OGE chastised the GAO, however, for ignoring the first sentence of FAR 3.101-1, which requires officials to conduct government business in a manner above reproach, "except as authorized by statute or regulation." The OGE opined that had the GAO addressed this language and considered both 18 U.S.C.A. Section 208 and its regulations, it might have reached a different conclusion.[60]

In its memorandum, the OGE recognized that evaluating bids or proposals of contractors offering to perform the employee's duties creates a financial conflict of interest under 18 U.S.C.A. Section 208. As such, the employee could not evaluate the bids or proposals absent a waiver or exemption.[61] The OGE noted, however, that it has exempted from the coverage of 18 U.S.C.A. Section 208 employees who evaluate bids or proposals in an OMB Circular A-76 cost study.[62] Moreover, the OGE reminded readers that this exemption means that the employee's participation in the matter outweighs any concerns a reasonable person may have about the integrity of the procurement process.[63]

What's It All Mean?

The OGE and the GAO have marshaled different approaches and viewpoints when piecing together the conflict of interest puzzle in an OMB Circular A-76 cost study. The GAO zeroed in on the integrity of the procurement process to find a conflict; conversely, the OGE couched the issue as one of a financial conflict of interest subject to an exemption. Both entities offer compelling reasons to anchor their positions. For practitioners, however, the question is much more immediate: who has the last word, the GAO or the OGE? Certainly, the ethics "turf" belongs to the OGE, while the GAO monitors the procurement landscape. When the two areas collide, as they did in *DZS/Baker*, the GAO's approach is arguably better reasoned but creates unique issues of its own. For example, will agencies have the staffing to keep the process as clean as the GAO says it must be? Regardless, at every milestone, those responsible for the cost study must be sensitive to *all* conflicts of interest. The agency must exercise good business judgment to avoid situations that taint the overall procurement. In this area, practitioners can perform a valuable service for their clients by helping them identify and then resolve the conflicts of interest.

Until this standoff is resolved, practitioners and their clients are wise to follow the adage: "Better safe than sorry." Otherwise, an unhappy private offeror may cry "foul" to the GAO. As a ready avenue for relief, the GAO has sent a ringing message to agencies: avoid the pitfalls of *DZS/Baker*, or risk starting over. Major Harney.

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58. Memorandum, Director, Office of Government Ethics, to Designated Agency Ethics Officials, subject: Section 208 Exemptions for Disqualifying Financial Interests that are Implicated by Participation in OMB Circular A-76 Procedures (Sept. 9, 1999) [hereinafter Section 208 Memorandum], *available at* <http://www.usoge.gov/daeogram/1999>.

59. *See supra* note 51 and accompanying text.

60. Section 208 Memorandum, *supra* note 58, at 2. The OGE also stated:

> The Comptroller General did not address the Office of Government Ethics (OGE) exemption under 18 U.S.C. § 208 for employees who participate in particular matters where the disqualifying interest arises from [f]ederal [g]overnment employment. We are issuing this Memorandum to reaffirm the applicability of the exemption at 5 C.F.R. § 2640.203(d) for employees who participate in matters conducted under OMB Circular A-76 procedures.

Id. at 1-2.

61. *Id*. at 2.

62. *Id*. at 1-2 (citing 5 C.F.R. § 2640.203(d) (1999)). This section exempts employees from a financial conflict of interest when the disqualifying financial interest arises from federal employment. Thus, the exemption permits an employee to make determinations affecting an entire office or group of employees, even though the employee is a member of that group. The employee may not, however, make determinations that would affect only his salary and benefits. *Id*.

63. *Id*. at 2 (citing 5 C.F.R. § 2635.501).

Legal Aid Societies, The Internet, & Legal Assistance

Lieutenant Colonel Byron K. Bonar
Legal Assistance Policy Division

Introduction

Legal assistance providers will find it helpful to know about their nearby legal aid society. It may be an alternative free source of legal advice for persons eligible to receive legal assistance or an informative source about state law and local procedures. Even without referring a client to a local legal aid program, or talking to a local office, legal assistance officers can benefit from the many legal aid web sites that are freely available to them.

What Legal Aid Societies Do

Legal aid societies, sometimes called legal services societies, represent people who are below or near the poverty level, and sometimes the elderly (regardless of their income level), in a wide variety of non-criminal legal matters. Similar to legal assistance offices, legal aid societies provide legal service on family cases, landlord-tenant disputes, consumer complaints, and government benefits cases. They also prepare documents such as powers of attorney and advanced medical directives.

Some legal aid programs also offer *pro bono* service by private attorneys. The volunteer private attorneys expand the amount and types of cases legal aid offers. Some *pro bono* programs are organized directly by the legal aid societies. To be eligible for these programs, clients must qualify for legal aid. Other *pro bono* programs are separate and independent, but many still require potential clients to be qualified and referred by the local legal aid society.

Local legal aid societies that are funded by Legal Services Corporation (LSC),[1] which is subject to certain restrictions set by Congress, may set their own priorities and determine the types of cases they will handle. While it is not entirely predictable what types of cases any local program will handle, the most common are family law, housing, employment, government benefits, and consumer matters.

Potential legal aid clients qualify for legal assistance in two different ways. First, they can qualify by being sufficiently poor. Second, they can sometimes qualify by being a senior citizen. The maximum income levels for programs funded by LSC is 125% of the federal poverty guidelines.[2] For example, for a family of four, the limit is $20,875. Many junior military members (E-1 to E-4, and some E-5s with two children) may qualify for assistance from legal aid societies based on their annual military pay. For individual cases, programs can make exceptions to the maximum income levels up to 187% of the federal poverty guidelines. Poverty guidelines change annually–usually in April.

Senior Citizens

Another way legal assistance personnel may find legal aid societies helpful is by referring military retiree-senior citizens (age sixty or older) to them. Local agencies on aging that are funded by the U.S. Administration on Aging, a part of the Department of Health and Human Services, cover every region of the United States. These regional agencies on aging fund legal services for senior citizens. Frequently, but not always, they contract with the local legal aid office to provide legal services to senior citizens. While there are web sites that index local aging services, the easiest way to find the legal service provider for senior citizens is to contact the local legal aid office. If the local office is not the legal service provider, the staff there will refer you to the organization that is the legal service provider for aging citizens in that area.

An installation legal assistance program may benefit from the availability of these services because there are no maximum income limits for senior citizens. This means that many military retirees are eligible for assistance. For example, this option is helpful for a retiree who is over sixty, who needs a power of attorney or advance medical directive, and who lives far from a military installation or cannot obtain assistance as quickly as desired. The legal assistance office could refer the caller to the nearest local legal aid office, saving them a trip to the military legal assistance office.

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1. On 23 July 1974, President Nixon signed legislation that created the LSC. Pub. L. No. 93-355 (1974) (codified as amended at 42 U.S.C. § 2996 (1976)). Legal Services Corporation is a quasi-governmental organization that distributes federal funds to 258 local legal aid programs serving every county and congressional district in the United States and every area in U.S. territories. In addition to federal funding, some LSC programs receive state, local, and private funding, while some programs are completely funded by state, local, or private funding. Legal Services Corporation recently celebrated its 25th anniversary at the White House on 27 July 1999, where President Clinton stated, "Legal Services Corporation has helped millions of our poorest citizens solve important, sometimes life-threatening legal problems, while ensuring that all Americans have equal access to justice." National Legal Aid & Defender Association, *President Hosts 25th Anniversary Celebration for LSC* (visited Oct. 7, 1999) <http://www.nlada.org/n-brief.htm>.

2. A chart listing the maximum income levels can be found in Appendix A of 45 C.F.R. § 1611 (1999) *available at* <http://www.lsc.gov/1611.html#Appxa>. Because federal regulations do not mandate how legal aid programs should treat military entitlements, such as the basic subsistence allowance (BAS) or the basic housing allowance (BAH), different programs may treat them differently.

Referrals

Even if a legal assistance attorney is not referring a retiree-senior citizen to a local legal aid office, referrals of clients that are income eligible are frequently possible. A dependant spouse seeking to divorce a service member is a common referral. In addition, very junior enlisted soldiers with families frequently have incomes below 125% of the federal poverty guidelines and could qualify for legal services at a legal aid society.

Legal Aid Web Sites

Legal assistance attorneys also may benefit from legal aid web sites. Some legal aid web sites are designed to assist legal aid attorneys search the Internet by providing hyperlinks for legal research and other useful information. These are usually state support center web sites. However, many legal aid web sites are designed for legal aid client use too.

A list of LSC-funded programs with web sites is at the LSC web site (<http://www.lsc.gov/>). A more extensive list of legal aid programs with web sites is at the Pine Tree Legal Assistance web site (<http://www.ptla.org/links.htm>). This site even links to web sites of legal aid programs around the world and includes legal aid programs in Africa, Asia, Australia, Canada, and Europe.

An example of a legal aid web site intended for legal aid attorney use is the Ohio State Legal Services web site (<http://www.iwaynet.net/~oslsa/>). It provides extensive links for legal research. It lists web sites that search the United States Code, the Code of Federal Regulations, the Ohio Revised Code, the Ohio Administrative Code, and Ohio cases. It also links to other sites, that provide additional legal research links such as the American Bar Association's web site. In addition, it links to federal and state agencies such as the Department of Veterans Affairs and the Social Security Administration. It also lists an Ohio Legal Aid Directory, which includes the addresses, telephone numbers, e-mail addresses, and the counties covered for all Ohio legal aid offices.

Most legal aid web sites are designed to be helpful to clients rather than legal aid attorneys. Some sites are more useful than others. Many have self-help pamphlets available online. For example, Legal Services of North Texas has a web site (<http://www.lsnt.org/>) that has an online pamphlet titled "Texas Tenant Handbook Online." It includes a fairly extensive discussion of tenant's rights, duties, remedies, and consequences. Another pamphlet that the Legal Services of North Texas has available online is "Texas Unemployment Compensation: Representing Yourself at the Hearing." Many legal aid web sites link to governmental organizations which provide self-help pamphlets. For example, Pine Tree Legal Assistance (<http://www.ptla.org/links.htm>) has links to the State of Maine Judicial Branch which has online self-help pamphlets.

Other legal aid sites provide links to local community social services. For example, Appalachian Legal Services (<http://www.lsnc.org/als/ >) in North Carolina provides links to the local counsel on aging and county child care services. Still others may not have self-help pamphlets available but they do provide information on how to apply for legal services, who is eligible, and what services are available.

Legal assistance officers may find it helpful to explore the various legal aid web sites or at least the legal aid web sites for the state in which their installation is located. Also, it may be useful for a non-lawyer assistant to review legal aid web sites for referral purposes.

MTF Compliance with the Americans with Disabilities Act Standards

Major John J. Siemietkowski
48th Graduate Course

The Americans with Disabilities Act[3] (ADA) was enacted in 1990. The ADA mandates equal opportunity for individuals with disabilities in terms of employment,[4] and in terms of access to both public services[5] and public accommodations operated by private entities.[6] Statutorily, the ADA does not apply to the military.[7] However, other laws and regulations require the same compliance. This article demonstrates how those other laws and regulations require military treatment facilities (MTF) to comply with standards similar to those prescribed by the ADA, especially in terms of patients, employees, and visitors. This article also discusses how MTF can meet ADA-like standards and how to process complaints when standards are not met. Finally, this article suggests the role of judge advocates in helping MTF achieve and maintain the same standards established by the ADA.

3. 42 U.S.C.A. § 12101 (West 1999).

4. *Id.* § 12112.

5. *Id.* § 12132.

6. *Id.* § 12182.

7. *Id.* §§ 12111(5)(B)(i), 12131(1), 12181(6).

The Americans With Disabilities Act

Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," having found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing."[8]

The ADA prohibits employment discrimination against disabled individuals, both in terms of hiring and conditions of employment.[9] The ADA prohibits an employer from asking an applicant about a disability unless such inquiry is shown to be job-related and consistent with a business necessity.[10] Once on the job, employers must make "reasonable accommodation" for those with disabilities.[11] The ADA does not require an employer to accommodate an employee if the employee poses a "direct threat" to the health or safety of the employee or others.[12] "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.[13] An employer does not have to provide an accommodation if doing so imposes an "undue hardship," defined as "significant difficulty or expense."[14]

Along with prohibiting employment discrimination, the ADA also prohibits discrimination in the participation in, or benefits of, "the services, programs, or activities" of non-federal government entities.[15] Disabled individuals often invoke this section of the ADA to demand special accommodations in prisons, schools, and universities.[16] The ADA further prohibits discrimination by private entities that offer public accommodations.[17] The definition of "private entity" is very broad, and includes most businesses with buildings or offices accessible by the public.[18]

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.[19] "Major life activities" are those activities that the average person can perform with little or no difficulty. They do not include temporary, non-chronic impairments of short duration.[20] For the most part, the "test for whether a person qualifies as disabled under the ADA centers *not* on the condition itself, but on whether the condition *substantially limits* them."[21]

Although Congress applied the ADA to the legislative branch, it did not apply the ADA to the executive or judicial branches.[22] This, along with the definitions at sections 12111(B), 12131(1), and 12181(6), means that the ADA does not apply to the military. Despite this statutory non-applicability, MTFs must comply with ADA-like requirements.

Why MTFs Must Comply With ADA-Like Requirements

Several federal statutes require MTF compliance with ADA standards. The Rehabilitation Act of 1973 states that

> no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or

8. *Id.* § 12101.

9. *Id.* § 12112(a).

10. *Id.* §§ 12112(d)(2)(A), 12112(d)(4)(A); William A. Harding, Putting the Pieces Together: The Family and Medical Leave ADA, The Americans With Disabilities ADA and Workers' Compensation, National College of District Attorneys 14 (1998) (unpublished seminar materials).

11. 42 U.S.C.A. § 12112(a).

12. *Id.* § 12113(b).

13. *Id.* § 12111(3); Harding, *supra* note 10, at 8.

14. 42 U.S.C.A. § 12111(10).

15. *Id.* § 12132.

16. *See generally id.* headnotes 7, 13.

17. *Id.* § 12182.

18. *Id.* § 12181.

19. *Id.* § 12102(2).

20. 29 C.F.R. § 1630.2(j) (1999); 45 C.F.R. § 84.3(j)(2)(ii) (1999).

21. Harding, *supra* note 10, at 1 (emphasis in original).

22. 42 U.S.C.A. § 12209.

> be subjected to discrimination under any program or activity receiving [f]ederal financial assistance or under any program or activity conducted by any Executive agency.[23]

Like the ADA, the Rehabilitation Act also prohibits discrimination in hiring and employing of handicapped individuals.[24] Because the Rehabilitation Act applies specifically to the executive branch, MTF must by definition follow its guidelines.

The Architectural Barrier Act of 1968 requires all federal buildings designed, constructed, or altered after 1968 to be accessible and usable by persons with disabilities.[25] Section 4154 of this act specifically requires the Secretary of Defense to insure that handicapped individuals have access to Department of Defense buildings.[26] This statute therefore requires post-1968 MTF to comply with ADA-like standards.

Along with these general laws, two other statutes address handicapped access in specific areas within the federal workplace. The Telecommunications Enhancement Act of 1988 requires that federal telecommunications systems be fully accessible "to hearing-impaired and speech-impaired individuals, including federal employees, for communications with and within federal agencies."[27] Congress also amended the Rehabilitation Act of 1973 to require federal agencies to provide access by disabled individuals to computer and information technology.[28]

Beyond federal statutes, federal regulations also require MTF compliance with ADA-like standards. Title 36 of the Code of Federal Regulations section 1190.1 requires that buildings constructed with federal funds be "designed, constructed, or altered so as to be readily accessible to, and usable by, physically handicapped persons." Section 1191.1 prescribes accessibility guidelines for purposes of compliance with the ADA.

Army Regulation (AR) *600-7, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army*, establishes compliance requirements similar to those found under the ADA.[29] Section 1.4 of this regulation states, "[t]he Army's policy is that no qualified handicapped person will be subjected to discrimination on the basis of handicap in any program or activity that receives or benefits from [f]ederal financial assistance disbursed by [the Department of the Army]." The regulation tasks the heads of installations and activities with implementing the regulatory guidance, with the assistance of EEO officers.[30] The regulation prohibits discrimination in employment and accessibility matters.[31]

For existing Army facilities, a

> [Department of the Army] component will operate programs or activities so that they are readily accessible to, and usable by, handicapped persons. However, this does not necessarily require a recipient or [Department of the Army] component to make each of its existing facilities or every part usable by handicapped persons.[32]

For further guidance in determining accessibility of Army facilities, the regulation refers readers to the *Office of the Chief of Engineers Manual 1110-1-103*.[33] The regulation also suggests several specific examples of compliance, such as redesign of telephone equipment, relocation of classes or services to accessible buildings, use of sign-language interpreters, home visits, and delivery of health services at accessible alternative sites.[34] The regulation also states that, in choosing among alternative methods of compliance, the organization "will give priority to methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with non-handicapped persons."[35] The regulation also man-

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23. 29 U.S.C.A. § 794 (West 1999).

24. *Id.* § 791.

25. 42 U.S.C.A. §§ 4151-4157.

26. In light of 42 U.S.C.A § 4154, the military exclusion in § 4151 appears aimed at training facilities designed for "able bodied" soldiers, as opposed to hospitals, headquarters buildings, and Army and Air Force Exchange Services facilities designed as much for non-soldiers as for soldiers.

27. 40 U.S.C.A. § 762(a) (West 1999).

28. 29 U.S.C.A. § 794(d).

29. U.S. DEP'T OF ARMY, REG. 600-7, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF THE ARMY (15 Nov. 1983) [hereinafter AR 600-7].

30. *Id.* paras. 1.7, 1.8.

31. *Id.* para. 2.5, sec. 3.0.

32. *Id.* para. 3.2a.

33. *Id.* para. 3.2a(1).

dates that "new facilities and alterations to existing facilities will be designed and constructed to be accessible and usable by handicapped persons."[36]

Like the ADA itself, *AR 600-7* only requires "reasonable accommodation" to the "known physical or mental limitations of an otherwise qualified handicapped" person.[37] Reasonable accommodation is not necessary if the organization demonstrates "that the accommodation would impose an undue hardship."[38] The regulation offers several suggestions for "reasonable accommodation," including modified work schedules and sign-language interpreters.[39] The regulation also suggests factors in defining "undue hardship," such as the size of the activity, the number of employees, the activity's budget, and the nature and cost of the accommodation needed.[40]

Along with *AR 600-7*, another Army regulation addresses access by the disabled to Army facilities and programs. The Army Community Service (ACS) regulation, *AR 608-1*, states: "No qualified disabled person will, on the basis of disability, be excluded from participation in, be denied the benefit of, or otherwise subjected to discrimination under ACS programs."[41] This regulation also emphasizes "reasonable accommodation" and offers suggestions for making such reasonable accommodations.[42] These suggestions include electronic devices and sign-language interpreters for those with impaired sensory skills.[43]

Major General Cuddy, the Army Medical Command (MEDCOM) Chief of Staff, also emphasized accommodation for disabled individuals in a memo addressed to all MEDCOM subordinate commanders dated 12 June 1998.[44] He stressed compliance in employment matters, as well as for those who use MEDCOM facilities.[45] He mandated awareness training for staff, especially in terms of what to do if someone files a complaint.[46]

Aside from these statutory and regulatory reasons, compliance with the ADA is a requirement of the Joint Commission on Accreditation of Health Care Organizations (JCAHO) at least in terms of hiring and employment.[47] Through informal policy guidance, the Army has stated that it will comply with JCAHO standards.[48] Therefore, when a JCAHO survey team comes to inspect a MTF, that MTF must be prepared to demonstrate compliance with ADA-like standards. Therefore, although the ADA does not technically apply to MTF, it is clear that other laws, regulations, and command guidance mandate MTF compliance with standards as stringent as those found in the ADA.

Putting ADA-Like Standards Into Practice in MTF

Rather than searching for and applying several different laws and regulations perhaps it is simpler for an MTF staff to ensure compliance with ADA standards. So where does a MTF staff turn for guidance when putting all this into practice at a particular MTF? Information is available on ADA standards from the Department of Justice (DOJ), the Equal Employment Opportunity Commission (EEOC), other government entities,

34. *Id.* para. 3.2c.

35. *Id.* para. 3.2e.

36. *Id.* para. 3.3.

37. *Id.* para. 3.4a.

38. *Id.*

39. *Id.* para. 3.4b.

40. *Id.* para. 3.4c.

41. U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE PROGRAM, para. 1.8a (23 Feb. 1998)

42. *Id.* para. 1.8b.

43.[2] *Id.*

44. Memorandum, Office of the MEDCOM Chief of Staff, to MEDCOM subordinate commanders, subject: Reasonable Accommodation and Access to Services for Individuals with Disabilities (12 June 1998).

45. *Id.*

46. *Id.*

47. JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, 1998 HOSPITAL ACCREDITATION STANDARDS 251 n. (1998).

48. Though not found in any specific directive or regulation, JCAHO compliance has become the standard adopted by all the services. Electronic Mail, from Lieutenant Colonel Rodney Hudson, MEDCOM Deputy Staff Judge Advocate and Captain Jeanette Stone, MEDCOM staff attorney, to author, 9 September 1999.

and private organizations. The DOJ ADA Information Line is 1-800-514-0301 (1-800-514-0383 TDD). The DOJ also has a wealth of ADA information available on its web site: <www.usdoj.gov.crt/ada>. The EEOC has an ADA website at: <www.eeoc.gov/fADAs/fs-ada>. The Architectural and Transportation Barriers Compliance Board offers technical assistance at: <www.access-board.gov>. The President's Committee on Employment of People with Disabilities answers employment questions at: <www.pcepd.gov>. The Council for Disability Rights has a great "frequently asked questions" section on its web site at: <www.disabilityrights.org>. The National Center for Law and Deafness also offers assistance at 1-800-651-5381 (fax) (1-800-651-5373 TDD).

An MTF staff must put this guidance into practice at its respective MTF to prevent complaints. As of June 1998, the MEDCOM Equal Employment Opportunity (EEO) Office was investigating two ADA-type complaints filed by family members. In one case, the MTF staff allegedly did not provide a deaf military dependent with a sign language interpreter, even though the dependent had given sufficient notice of the request. In the second case, the staff allegedly did not give a wheelchair-bound family member the assistance necessary for a routine exam.[49]

When applying ADA-like standards in MTF, remember that accommodations need only be "reasonable," and will not be required if they create an "undue hardship." Staff of an MTF must view a proposed accommodation in light of how difficult and expensive it will be to implement, how often it will be used, and alternative accommodations. Handicapped parking spaces and curbside ramps may be fairly easy and inexpensive to install to facilitate visitor and employee access. Likewise, providing a number of wheelchairs near an entrance probably is not overly burdensome.

Being burdensome, though, would not necessarily mean that an MTF could avoid making an accommodation. It may be expensive to install a special telephone system[50] for patients (and staff) who have difficulty hearing. But if the MTF has a large patient and staff population with hearing problems, the law probably requires spending the money to install the TDD system. If a voice-activated computer system[51] costs an extra $1000, the law probably requires assuming that extra financial burden for an employee without the use of her hands.[52]

The key to ADA compliance seems to be finding reasonable alternatives which are satisfactory to the disabled individual and to the MTF. If a disabled patient cannot reach a particular clinic because there is no elevator access, it probably makes more sense to refer the patient to an accessible civilian clinic rather than moving the military clinic itself. As an alternative, the military provider could see the patient in another clinic that is accessible to the patient. If a blind patient wants to bring her Seeing Eye dog into a sterile area and this is not possible for sanitary reasons, the patient would probably accept a staff member as an escort instead. On the other hand, the law may require a Seeing Eye dog for a blind employee in a nonsterile area in lieu of a constant staff escort. If a deaf family member cannot hear what the doctor is saying regarding a loved one, the MTF could provide a sign-language interpreter. Or perhaps the doctor could just write down what he is saying for the deaf family member.[53] Although not always possible, the key to ADA-like compliance in MTFs is finding reasonable accommodation alternatives for patients, employees, and visitors.

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49. Information Paper, MEDCOM Office of EEO Programs, Reasonable Accommodation and Access to Services for Individuals with Disabilities (4 June 1998) [hereinafter MEDCOM Office of EEO Programs Information Paper].

50. "TTY" is an abbreviation for "teletypewriters." They are

> [m]achinery or equipment that employs interactive text based communications through the transmission of coded signals across the standard telephone network. [Teletypewriters] can include, for example, devices known as TDDs (telecommunication display devices or telecommunication devices for deaf persons) or computers with special modems. [Teletypewriters] are also called text telephones.

Architectural and Transportation Barriers Compliance Board, *Telecommunications Act Accessibility Guidelines*, sec. 1193.3 (last modified Feb. 3, 1998) <http://www.access-board.gov/rules/telfinl2.htm#3>.

51. A voice-activated computer system refers to personal computers that execute their commands through recognition of the user's voice, rather than through typing on a keyboard. These personal computers are quite useful for those with limited or no use of their hands. For example, "Home Access" is a commercial software program that allows an individual to execute computer commands by speaking into the computer. MRF Adaptive Resources, *Home Access Voice Activated Environmental Control System* (visited Oct. 18, 1999) <http://www.adaptiveres.com/prod01.htm>.

52. On the other hand, if that same system costs an extra $100,000, purchasing it would probably be an undue hardship.

53. When discussing examples, it is worthy to note that Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency virus (HIV) are considered disabilities under the ADA to the extent they substantially limit major life activities. United States v. Morvant, 898 F. Supp. 1157 (E.D. La. 1995); Hoepfl v. Barlow, 906 F. Supp. 317 (E.D. Va. 1995); Saladin v. Turner, 936 F.Supp. 1571 (N.D. Okla. 1996). However, simply being a transvestite may not qualify someone as "disabled." 42 U.S.C.A. § 12208 (West 1999).

Processing Complaints

Paragraph 4.1 of *AR 600-7* has a long and detailed discussion of how MTF should process complaints from disabled individuals. Disabled individuals should present their complaints to the EEO office. The EEO office then has the lead for addressing those complaints.

As a practical matter, disabled individuals may also want to lodge complaints with the patient representative or the inspector general. In certain circumstances, it may also be appropriate for an individual to seek assistance from the civilian personnel advisory center or from a legal assistance attorney.

The Role of the Judge Advocate

To secure ADA-like compliance, MEDCOM recommends establishing a clear policy, developing and distributing easily understood standard operating procedures (SOP), and conducting the right training for the right people.[54] Judge advocates should take an active role in these activities.[55]

Attorneys, familiar with the law and with the facts of their particular MTF, can formulate a compliance policy. The policy ought to be a very brief (one page) summary of compliance requirements, the MTF commitment to those compliance requirements, and complaint processing procedures. The MTF should post this policy in employee handbooks and in public areas for patients, employees, and visitors.

Judge advocates should also get involved in developing easily understood SOP. Those closer to compliance issues (perhaps the patient administrative division or the patient rights committee) should take the lead with developing an SOP because they will know what types of compliance questions the staff will need answered in an SOP. Although longer than the policy, the SOP should also be short enough to ensure easy access and understanding by the staff.

Judge advocates should also be proactive in providing the right training for the right people. They should try to sift through all the legalese and condense both ADA requirements and the requirements of applicable laws, regulations and command guidance, into easily understood concepts. Judge advocates should then try to disseminate these concepts through customer relations training, newcomers, birth-month orientations, and articles in the MTF newsletter. Most importantly, they must encourage staff (including the EEO office) to seek legal advice when compliance issues arise. Judge advocates clearly do not bear the entire burden for policy, SOP, and training guidance, but they are in a unique position as the command's legal counsel to help transform legal requirements into practical applications.

Conclusion

The ADA mandates equal opportunity for individuals with disabilities in terms of employment, and in terms of access to both public services and public accommodations operated by private entities. Statutorily, the ADA does not apply to the military. In effect, however, several other laws and regulations require the same compliance. Because of these other laws and regulations, all MTFs must comply with standards similar to those prescribed by the ADA in terms of patients, employees, and visitors. Judge advocates should play an active role in policy drafting and staff training.

54. MEDCOM Office of EEO Programs Information Paper, *supra* note 49.

55. Judge advocates taking a role in these activities should familiarize themselves with the Supreme Court's three 1999 decisions interpreting the ADA: Murphy v. United Parcel Service, 119 S. Ct. 2133 (1999); Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999); Albertson's, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999). Although not in the contexts of either the military or of hospitals, these cases present the Court's views on what constitutes a "disability" under the ADA.

The Art of Trial Advocacy

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

Coping with the Forgetful Witness (The One-Two Punch)

You are questioning a key witness. Things are going well. You have developed a good rapport and the witness is effectively relating information to the panel. An important part of the witness's testimony is the license plate number of the get-away car. You ask the witness the license plate number and she says, "I don't remember." You feel your face getting flushed. Beads of sweat start dripping down your forehead. The knot in your stomach gets even tighter. You pause and then you ask, "Don't you remember that the license plate number is . . . " "Objection, leading," shouts the opposing counsel. The judge sustains the objection. You try another tactic. "Don't you remember in my office yesterday when you told me that the license plate number was . . . " "Objection, leading and hearsay," shouts opposing counsel. The judge sustains the objection. Now what do you do? You feel trapped. The witness looks at you, wide-eyed and helpless. You cannot seem to get critical information out and any rapport that you had with this witness and the panel is now lost.

Forgetful witnesses are common. In spite of solid pre-trial preparation, this situation cannot always be avoided. If you are prepared for it and know the rules, you can glide over these rough spots quickly and easily without missing a beat. When a witness forgets, you have two options: (1) You can try to refresh the witness's memory, or (2) you can attempt to introduce documents containing the forgotten information as a past recollection recorded. You should view this as a two-step process.

If your witness forgets something, you should first try to refresh the witness's recollection. Attempting to refresh a witness's recollection is important for three reasons. First, the process is fairly simple. Second, a witness who testifies from a refreshed memory is more persuasive and credible than a witness that cannot remember the information. Third, and most important, by attempting to refresh the witness's recollection, you can lay much of the foundation to introduce the document if the witness's memory cannot be refreshed.

Using the example above, assume that the witness made a statement to the police on the day of the crime, and in the statement, she included the license plate number of the get-away car. On the stand, she cannot remember the number. You can now use her statement to refresh her recollection. Here is how you do it. First, ask her if the sworn statement she made would help refresh her memory. If she says yes, have the statement marked, show it to opposing counsel and then take it to the witness. Next, ask her to read the pertinent part of the statement silently to herself. Once she is done, retrieve the statement from the witness, and ask her if her memory is refreshed. If she says yes, ask her the license plate number.[1] See Appendix 1 for a list of sample questions.

This is a simple process but it is important to keep a few things in mind. Military Rule of Evidence 612[2] states that if you use a document to refresh a witness's recollection, the judge may require you to provide a copy of the document to opposing counsel. Opposing counsel can then inspect the document, cross-examine the witness with the document, and even introduce relevant portions of the document. Always have a copy for opposing counsel so that you can easily satisfy this requirement.

You must remember to retrieve the document from the witness before you ask her to testify about the information. If you do not retrieve the document first, the witness is not testifying from a refreshed recollection, she is testifying right from the document, which will probably draw a hearsay objection. Likewise, when you hand the document to the witness, be very clear that she is to read the document silently. This instruction will help to prevent her from simply reading the contents aloud.

Unfortunately, some witnesses are too nervous, or the information is so complex, that refreshing the witness's recollection may not work. Do not give up hope. Military Rule of Evidence 803(5)[3] provides a method to introduce the document itself as a hearsay exception when the witness cannot completely or accurately recall the facts even after reviewing the document.

Back to our example. The witness simply cannot remember the license plate number even after you attempt to refresh her recollection. To introduce the document as a past recollection recorded, here is what you need to do. First, ask the witness if she had personal knowledge of the license plate number at one time. Next, ask if she recorded that information in her statement. Third, you must establish that the events were still fresh in her mind when she made the statement. Fourth, ask the witness if the license plate number recorded in her statement is accurate. Get the witness to explain why she was able to remember the license plate number and the steps she took to make sure that information was accurately recorded in her statement. Finally, show that the witness cannot completely and accurately recall the license plate even after looking at her statement. Once you lay the foundation and get the document

1. EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 348 (4th ed. 1998).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 612 (1998).

3. *Id.* MIL. R. EVID. 803(5).

entered into evidence, you can have the witness read the license plate number off the document. The document itself, however, does not go back with the members during deliberations.[4] See Appendix 1 for a list of sample questions.

As you can see from this example, introducing the document instead of a refreshed memory will probably not be as persuasive. You may, however, have no choice, and it is certainly better than not getting important information to the fact finder. Some important points to remember. The witness does not have to personally write the information, provided she acted to adopt it. In this case, the police officer likely prepared the statement. As long as the witness signed the document, she adopted it.

Remember to have the witness explain how she knew that her statement was accurate when she made it although she cannot accurately remember the information now. This can be a challenge. You will need to focus on the steps the witness took to ensure the accuracy of the information at the time she made the recording. To preserve the witness's credibility, you should also have the witness explain why her memory cannot be refreshed.

To ensure the smoothest use of these tools with a forgetful witness, use the refreshed recollection and past recollection recorded in a one-two combination. As soon as the witness says she does not remember, lay the first four foundational elements of a past recollection recorded. Then show the document to the witness and attempt to refresh her recollection. If this fails, the witness's inability to recall the information lays the last of the foundation and now you can get the document entered into evidence.

This two-step process will ensure a smooth presentation of evidence, even when you have a forgetful witness. Applying these skills, you can confidently cope with the forgetful witness. Not only will you develop important evidence, you will maintain your rapport with the witness and the panel. Major Hansen.

4. IMWINKELRIED, *supra* note 1, at 344-45.

Appendix

Sample Questions

Q. Ms. Jones what was the license plate number of the car you saw drive away?
A. I do not remember.

Q. What, if anything, would help you remember?
A. I made a statement to the police after the incident, and I told the officer the license plate number.

Q. How soon after the incident did you make the statement?
A. About ten minutes.

Q. How clear was your memory when you gave the license plate number to the police officer?
A. Very clear, I wrote the number down on my hand as the car was driving away, and then read the number off my hand to the police officer.

Q. Was the statement you made to the police written down?
A. Yes, the officer wrote down the all the information I gave him, and then I read over it, checked it for accuracy, and signed the statement.

Q. Did the statement accurately reflect the information you gave to the officer?
A. Yes.

At this point request that the statement be marked as a prosecution or defense exhibit for identification and show it to opposing counsel.

Q. Ms. Jones I am showing you prosecution/defense exhibit __ for identification, do you recognize it?
A. Yes, this is the written statement I gave to the police officer.

Q. How do you recognize it?
A. From the information in the statement, and I recognize my signature at the bottom of the page.

Q. Please read paragraph 1 of the statement silently to yourself and look up when you are done.

Retrieve the document from the witness.

Q. Does this refresh your memory?
A. Yes.

Q. What is the license plate number?
A. KLR666.

Note, if the witness says she still cannot remember, proceed with the final steps to get the document introduced.

Q. Does this refresh your memory?
A. No, I still can't remember.

Q. Why can't you remember?
A. I am very nervous, and I do not have a good memory of numbers under pressure, and I do not want to say the wrong number.

At this point, you have met the last element you need to admit the document as a past recollection recorded under Military Rule of Evidence 803(5). Now you can move to admit the document as prosecution or defense exhibit and then ask:

Q. Ms. Jones, please read out loud the license plate number in paragraph 1.
A. KLR666.

The Advocacy Trainer, A Manual for Supervisors

> "*Nothing is more important than military justice, whether effectively and fairly prosecuting cases or ardently and ethically defending fellow soldiers. The training in this book is performance-oriented, designed to develop and hone the central skills of trial advocacy for counsel of all skill and experience levels.*"
>
> *From the Foreword to* The Advocacy Trainer.

In October 1997, The Criminal Law Department, The Judge Advocate General's School, United States Army, (TJAGSA) published *The Advocacy Trainer, A Manual for Supervisors* (*The Advocacy Trainer*). *The Advocacy Trainer* is a comprehensive supervisor's guide to training judge advocates of all experience levels in the fundamentals of trial advocacy. Its tabular design allows supervisors to conduct long-term building block training, or short-term targeted "deficiency" training. Recognizing the demands and time constraints of supervisors and counsel, *The Advocacy Trainer* provides a ready package of easily digested and executed training vignettes that enhance critical litigation skills.

The Advocacy Trainer contains five principal chapters, subdivided into training modules.[5] Each module provides an easily digested training session on a specific trial skill, such as impeachment with a prior inconsistent statement or laying the foundation for a photograph. Every module contains a Supervisor's Guide, Skill Drills (the actual training vignettes), Counsel Handouts, and Sample Solutions.

The Supervisor's Guide is the trainer's "cheat-sheet." It covers the fundamental substantive aspects of the relevant skill, and pragmatic advocacy practice pointers. The Skill Drills follow the Supervisor's Guide and are the "meat" of *The Advocacy Trainer.* In this section, short factual scenarios are followed by a series of drills for counsel. This section also provides the necessary evidence for use in the drills, such as lab reports, photographs, or bad checks. A Counsel Handout that alerts the trainee to the subject of the upcoming training, the fact pattern(s) involved, relevant law and practical tips follows the Skill Drills. The last section of every module is a sample solution that is given to the student at the conclusion of each training session.

In addition to providing supervisors a "soup-to-nuts" training plan that covers almost every aspect of the trial process, *The Advocacy Trainer* removes the typical deterrents to training: (1) not enough time to plan training, (2) supervisors are unsure of the substantive law, and (3) sterile discussions and theoretical classes that do not give students a chance to practice. *The Advocacy Trainer* answers all three concerns. First, planning is already done by *The Advocacy Trainer* authors who drafted the training scenarios, removing the need for busy supervisors to create training scenarios. Second, providing the law and practical advice to supervisors defeats a supervisor's disinclination to teach and coach. Third, *The Advocacy Trainer* is practice-oriented, so counsel pay attention and profit from *doing*. They learn from the productive pressure generated from being on their feet at each training session. The sample solution gives them something to carry away, file, and review when they are ready to put these skills to the test in court.

The Advocacy Trainer will be updated and supplemented annually by the Criminal Law Department, TJAGSA. The manual is now available electronically. You can access *The Advocacy Trainer* under the Publications listing on TJAGSA's home page at <http://www.jagcnet.army.mil/tjagsa>.

For more information about *The Advocacy Trainer*, contact Major Martin Sitler, Criminal Law Department, The Judge Advocate General's School (TJAGSA) at phone: (804) 972-6343 or e-mail: Martin.Sitler@hqda.army.mil. Major Sitler.

5. The five principal chapters are (1) Learn the Skill, (2) Apply the Skill, (3) Develop the Skill: Impeachment, (4) Develop the Skill: Foundations, and (5) Hearsay.

Environmental Law Division Notes

Documenting the Decision Not to Supplement

The Third Circuit Court of Appeals recently affirmed a decision approving the way a federal agency documented its decision that supplementing an environmental analysis was not necessary. In *South Trenton Residents Against 29 v. Federal Highway Administration*,[1] local residents protested the building of a highway segment called the Riverfront Spur. The Federal Highway Administration (FHA) had completed an environmental impact statement (EIS) in accordance with the National Environmental Policy Act of 1969 (NEPA)[2] for a complex of highways in 1981. By 1996, all portions of the project had been completed except the Riverfront Spur, but it became very obvious that the spur was needed to alleviate traffic problems.

The New Jersey Department of Transportation (NJ-DOT) held a series of public meetings and prepared an analysis of alternatives for the Riverfront Spur. The analysis, completed in 1997, recommended a four-lane highway, rather than the six-lane design analyzed in the EIS.

The EIS was now sixteen years old. Recognizing this, NJ-DOT prepared an environmental reevaluation in accordance with FHA regulations.[3] The purpose of the reevaluation was to determine whether a supplement to the EIS was needed.[4] The reevaluation incorporated the NJ-DOT alternatives study as well as new information on issues such as traffic, wetlands, hazardous waste, and air quality. The reevaluation concluded that the impacts of the proposed four-lane project would be much less than the previously proposed six-lane project. The FHA adopted NJ-DOT's reevaluation and published a decision document in which it found that EIS supplementation was not necessary because the proposed action did not have significant new adverse impacts. The plaintiffs brought suit, claiming that EIS supplementation was necessary and that the public meetings and alternatives analysis prepared by NJ-DOT were not adequate.

The court began by stating the standard of review: the agency's decision to revise an EIS must be reasonable under the circumstances.[5] The court then reviewed the FHA regulations, which require NEPA supplementation only when "substantial changes are made in the proposed action that will introduce new or changed environmental effects of significance to the quality of the human environment, or . . . significant new information becomes available concerning the action's environmental aspects."[6] The key question, according to the court, is whether the proposed roadwork would have significant impact on the environment in a manner not previously evaluated and considered.[7]

The court considered that there had been many changes to the affected environment since the original EIS. Although this information could be in one sense "very important or interesting, and thus significant in one context," supplementation would only be required if there would be a change in anticipated impacts to the action.[8] In this case, the court determined that the worsening pedestrian safety conditions cited by plaintiffs did not require NEPA supplementation because they did not result in creating new environmental impact to the project. In fact, the overall impact of the scaled-back project was less than the impact anticipated when the EIS was prepared. The court upheld the agency decision not to supplement because, through the environmental reevaluation, it had considered the new information and reasonably determined that there was no significant new environmental information.

In one respect, the decision is troublesome. The plaintiffs had contended that the agency did not adequately consider alternatives to the project, some of which were not known at the

1. 176 F.3d 658 (3rd Cir. 1999).

2. 42 U.S.C.A. § 4321 (West 1999).

3. 23 C.F.R. § 771.129 (1999).

4. *Id.* § 771.129(a). The regulation requires a written evaluation on the question of whether NEPA supplementation is necessary if the existing environmental document is more than three years old and the project has not begun.

5. The court compared this standard to the "arbitrary and capricious" standard of review, but concluded that in terms of deference to the agency, the distinction between the two is not that great. *South Trenton Residents Against 29*, 176 F.3d at 663 n.2.

6. 23 C.F.R. § 771.130. The regulation states "Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an [environmental assessment] to assess the impact of the changes."

7. *South Trenton Residents Against 29*, 176 F.3d at 663 (quoting Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987) ("The new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.")).

8. *Id.* at 664 (quoting FHA rules in 1987, 52 Fed. Reg. 32,646, 32,656 (1987)).

time of the original EIS. The court referred to the fact that the NJ-DOT looked at twelve alternative plans in its environmental reevaluation and reasonably selected the design it chose. This raises the question of whether the existence of new alternatives constitutes significant new information, thus requiring the NEPA supplementation. Considering these alternatives in a document without the public participation components of a NEPA analysis does not seem sufficient. The court did not consider this question. It would appear that the length and thoroughness of the environmental reevaluation led the court implicitly to treat it as if it had been a NEPA document.

The Army NEPA regulation does not have a specific document to memorialize a decision on supplementation. A record of environmental consideration (REC) is required when a determination is made that a proposed action is adequately covered by an existing environmental assessment or EIS.[9] In some sense, this is a decision that supplementation is not necessary, but there is no guidance as to what the REC should contain. To fill this gap, the Army has occasionally produced very large RECs, constituting thorough reviews of all new information and its significance.[10] Without the detailed regulations such as those published by the FHA, however, the Army runs the risk that a court could find that new information requires the NEPA supplementation, even when there is ultimately no new significant impact. The current review of the Army NEPA regulation presents an opportunity to provide this guidance and to improve on the FHA regulations by taking into account newly available alternatives to proposed actions. Lieutenant Colonel Howlett.

Strange Justice

This updates the earlier article[11] reporting that the U.S. Court of Appeals for the Ninth Circuit was deciding whether Section 120[12] of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides an independent authority for cleanups of federal facilities. The case was *Fort Ord Toxics Project v. California Environmental Protection Agency.*[13] On 2 September 1999, the Ninth Circuit held that Section 120 was in fact an independent authority to conduct remedial action.[14]

The former Fort Ord is on the National Priorities List.[15] The Army was conducting a CERCLA remedial action that involved designating a landfill as a Corrective Action Management Unit (CAMU)[16] after coordination with the California Environmental Protection Agency (CALEPA). The Fort Ord Toxics Project (FOTP) sued CALEPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act (CEQA).[17] The FOTP named the Army as a real party in interest and sought to enjoin the Army's remedy.

The Army immediately removed this challenge to the district court[18] and, citing CERCLA Section 113(h),[19] sought to have it dismissed. Section 113(h) provides that:

> No [f]ederal court shall have jurisdiction under [f]ederal law . . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to clean up standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title.

9. U. S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, para. 2-3d(1) (23 Dec. 1988).

10. These are often referred to as "Mayfield RECs" after the Army lawyer who pioneered their use in the mid-1990s.

11. *Under What Authority Do Federal Facilities Perform CERCLA Cleanups*, ARMY LAW. Sept. 1999, at 36.

12. 42 U.S.C.A. § 9620 (West 1999). This article will refer to the corresponding CERCLA sections.

13. Fort Ord Toxics Project v. California Environmental Protection Agency, No. 98-16100 (9th Cir., July 22, 1999).

14. Fort Ord Toxics Project v. California Environmental Protection Agency, 189 F.3d 828 (9th Cir. 1999). As the opinion is not yet paginated, further cites will be to 1999 U.S. App. LEXIS 20951 (9th Cir. Sept. 2, 1999).

15. The National Priorities List (NPL) is the prioritized list of sites needing clean up, updated annually, called for in accordance with 42 U.S.C.A. § 9605(a)(8)(B) (West 1999).

16. California state law generally prohibits disposal on the land of all hazardous waste, however the regulations permits the designation of a CAMU into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition. CAL. CODE REGS. Tit. xxii, § 66264.552(a)(1).

17. CAL. PUB. RES. CODE §§ 21000–21178.1 (1999). The CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

18. The basis for the Army's removal was 28 U.S.C.A. § 1442(a) (West 1999), which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

19. 42 U.S.C.A. § 9613(h).

The FOTP responded that, among other arguments,[20] the cleanup activities on federal facilities are selected under CERCLA Section 120 and not Section 104. Therefore, the FOTP reasoned that the Army could not avail itself of CERCLA Section 113(h), which was limited to actions taken under Section 104 or ordered under Section 106.

The FOTP argued that remedies on federal facilities are not selected under Section 104, but under Section 120(e)(4)(A) of CERCLA. This section is entitled "Contents of Agreement" and states: "Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following: A review of alternative remedial actions and selection of a remedial action by the head of the relevant agency." The FOTP said that Congress passed CERCLA Section 120 in 1986 to create a special program to address hazardous substance remediation at federal facilities. This separate program, reasoned the FOTP, was created in response to concerns both about the magnitude of toxic waste at these sites and about the lack of attention this problem was receiving under CERCLA. Excluding Section 120 clean ups from the Section 113(h) jurisdictional bar was thus consistent with Congress's efforts to enhance public oversight of federal facility clean ups. In further support of its position, the FOTP pointed out that other sections of CERCLA distinguish between Sections 104 and 120, such as Section 113(g)[21] and Section 117.[22]

Unlike the FOTP, which relied strictly on statutory interpretation, the Army noted that the issue of Section 120 constituting an independent remedial authority for federal facilities outside the reach of Section 113(h) has been examined by a number of courts and rejected.[23] The Army argued that the FOTP's interpretation was directly at odds with the judicially recognized purpose of Section 113(h) to expedite clean ups by insulating agency efforts from judicial review until they have been implemented.

The district court agreed with the Army. It found that the Fort Ord remedy was selected under Section 104 as delegated to the Secretary of Defense and that Section 120 "establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities."[24] The court adopted the logic of *Werlein*[25] that Section 120 "provides a road map for the application of CERCLA."[26] The court specifically rejected the FOTP's reliance on CERCLA Section 113(g) as misplaced. To the contrary, the court found the reference in this section to the President taking the action as supporting the Army's case.[27]

The FOTP appealed the district court's order arguing that the lower court erred in not finding that Section 120 was a separate authority for remedy selection. The FOTP argued that by creating Section 120, Congress moved the authority for the selection of remedial action from Section 104 to Section 120 to prevent the President from delegating authority to select a remedy. It argued that the language and structure of CERCLA demonstrate a clear distinction between actions taken under Section 120 and those taken under 104. The Army reiterated its successful district court position.

In its opinion, the Ninth Circuit found the FOTP's other two claims to be without merit, stating that "[w]e do not believe that Congress intended, nor do we believe that statutory language mandates such an absurd rule of law." Regarding the argument that Section 120 was a separate cleanup authority falling outside of the protections of Section 113(h), the court said that this argument "like the preceding two, would lead to a rule that is intuitively unappealing." The court then found this issue to be one of first impression. Though the court had twice previously applied the protections of Section 113(h) to remedial actions at federal facilities,[28] it determined that it was not bound by such *sub silento* holdings on jurisdictional issues.

The Ninth Circuit noted that those district court decisions that had analyzed Section 120 supported the Army's interpretation, as did some legislative history.[29] Having said that, the court then found that the Army's position was not supported by the statutory text.

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20. The FOTP also claimed that the CERCLA section 113(h) does not bar challenges brought under state laws such as CEQA that are not applicable or relevant and appropriate requirements, and if it does, this challenge must be remanded to state court.

21. 42 U.S.C.A. § 9613(g)(1).

22. 42 U.S.C.A. § 9617.

23. *See* Werlein v. United States, 746 F. Supp. 887, 892 (D. Minn. 1992), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992); Hearts of America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265, 1279 (W.D. Wash 1993). *See also* Worldworks, Inc. v. United States Army, 22 F. Supp. 2d 104 n.6 (D. Co. 1998).

24. Fort Ord Toxics Project v. California Environmental Protection Agency, Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8 (on file with author).

25. *Werlein*, 746 F. Supp. at 887.

26. *Id.* at 10.

27. *Id.*

28. Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1998); McCellan Ecological Seepage Situation v. Perry, 47 F.3d 325, (9th Cir. 1995).

The court opined that CERCLA Section 120(g)[30] seemed to "create a grant of authority separate from Sections 104 and 106." It found that other sections of CERCLA identified Section 120 as a separate authority for performing clean ups. It cited the sections identified by the FOTP, Section 113(g)[31] and Section 117.[32] The problem with relying on these two sections is that they refer to the President as taking the action. Section 120 does not have the President acting, only the administrator. The President acts under the authority of Section 104 alone. Adding to the strangeness of this opinion is that the court then determined that it could find no authority under Section 120 for CERCLA removal actions[33] and held that they were performed under Section 104 and, therefore, fall within the timing of review limitations of Section 113(h). The court cited to a *Tulane Law Review* article[34] to support this interpretation, though the court said that "[w]hether the legislators who voted for Section 113(h) subjectively intended this distinction is unclear to us." The court strangely abandoned examining the intent of Congress in analyzing Section 120, after performing such an analysis for the FOTP's other two arguments.

The Army, Navy, Air Force, Department of Energy, and Department of Agriculture have asked the Department of Justice to petition the Ninth Circuit for a rehearing *en banc* in this case. The DOJ's decision will be the basis of a future article in the Environmental Law Division Bulletin and *The Army Lawyer.* Notify the ELD if this strange case is offered as authority to challenge one of your cleanups. Mr. Lewis.

Issues Regarding Perchlorate Sampling

Recently, certain installations–particularly some located in the western states–have been approached by regulators requesting that their facilities sample water for the presence of ammonium perchlorate (perchlorate). Perchlorate is an oxygen-adding component in solid fuel propellant for rockets, missiles, and fireworks. The substance is highly soluble and has been found in isolated drinking water sources in California, Texas, and Nevada. Questions have been raised about whether perchlorate can affect thyroid function, but the issue is still being researched. Some state regulators have indicated that they may request perchlorate sampling at specific military installations.

At present, there are no promulgated standards for perchlorate testing, though interim levels have been suggested. Normally, testing is not required for chemicals that have no promulgated standard. The Environmental Protection Agency has placed perchlorate on a Contaminant Candidate List, but the agency also acknowledges that further study is required to determine if perchlorate requires regulation. As a result, the Department of Defense has formed an action team to gather scientific data regarding perchlorate. In the meantime, installation technical staff should obtain guidance from their respective major commands if they are asked to conduct perchlorate sampling. Ms. Barfield.

Litigation Division Notes

Federal Agency "Joint Employer" Liability: Employment Discrimination Claims by Independent Contractor Employees

As current privatization initiatives encourage increased reliance on the services of independent contractors,[35] the Army should anticipate an increase in the number of work-related discrimination complaints from individuals who are not federal employees.[36] While independent contractor employees are not "employees" in the federal civil service,[37] federal courts have

29. In keeping with the strange justice of this opinion, the court, using a form of citation never seen before, "See Pub. L. 99-499 at 2877," quotes a passage pertaining to CERCLA Section 121 and not Section 120. Fort Ord Toxics Project v. California Environmental Protection Agency, 1999 U.S. App. LEXIS 20951, at *12 (9th Cir. Sept. 2, 1999).

30. CERCLA § 120(g) (stating that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise . . .").

31. CERCLA § 113(g) (stating that "if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 . . .").

32. CERCLA § 117 (stating that "[b]efore adoption of any plan for remedial action undertaken by the President, by a state, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall . . . ").

33. CERCLA § 101(23) (defining removal actions is distinguished from section 101(24) defining a remedial action in that remedial actions are action s consistent with a permanent remedy).

34. Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h),* 8 TUL. ENVTL. L.J. 353 (1995).

35. *See, e.g.*, FEDERAL OFFICE OF MANAGEMENT & BUDGET (OMB) CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1966) [hereinafter OMB CIR. A-76] (detailing policy of federal government to obtain goods and services from the private sector by using justified outsourcing); OMB REVISED SUPPLEMENTAL HANDBOOK (1976) (containing new guidance for OMB CIR. A-76); QUADRENNIAL DEFENSE REVIEW (QDR) (1997) (emphasizing cost savings by privatization); DEFENSE REFORM INITIATIVE (1997) (expanding on QDR to propose more streamlining and outsourcing).

36. The types of workplace discrimination complaints likely to be asserted are based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e-16 (West 1999); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 791, 794a (West 1999); and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a.

held that, in certain circumstances, such individuals may be deemed "de facto" employees for purposes of federal employment discrimination laws. As such, an independent contractor employee may sue both the Army and his actual employer as "joint employers."

In the past year, Civilian Personnel Branch, Army Litigation Division, has witnessed a significant increase in the number of employment discrimination lawsuits filed by independent contractor employees.[38] The purpose of this note is to review the circumstances in which an independent contractor employee may be deemed an Army "employee," and thus assert a complaint of employment discrimination against the Army before the Equal Employment Opportunity Commission (EEOC) or a federal court.

Background

As originally enacted, Title VII of the Civil Rights Act of 1964 did not prohibit employment discrimination in the federal workplace.[39] In 1972, however, Congress amended Title VII to protect federal employees and waived sovereign immunity to allow employees to sue the federal government for workplace discrimination.[40] Congress enacted a separate provision, 42 U.S.C. § 2000e-16, entitled "Employment by Federal Government," which provides: "all personnel actions affecting employees or applicants for employment . . . in military departments [and other specified federal government agencies] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[41] Under this provision, only "employees" or "applicants for employment" may file suit against the federal government under Title VII. In seeking to determine who is an "employee," however, the statute offers little help, simply defining "employee" as "an individual employed by an employer."[42]

The statutory language supports the conclusion that Title VII only protects those persons "in a direct employment relationship with a government employer."[43] As independent contractor employees lack an employment relationship with the federal government, they are generally not covered by Section 2000e-16.[44] But the line between independent contractor employee and federal employee is often blurred. Courts have therefore developed tests to determine when an independent contractor employee is a "de facto" employee for purposes of federal sector Title VII protection.

Courts have applied three tests to determine whether an individual should be treated as an employee or an independent contractor.[45] First, a traditional common law test of "agency" has been applied, which tests the employer's right to control the employee.[46] Second, under the "economic realities" test, "employees are those who, as a matter of economic reality, are dependent upon the business to which they render service."[47] The majority of courts, however, have adopted a third test, the "hybrid" test, which was first described by the Circuit Court for the District of Columbia in *Spirides v. Reinhardt*.[48]

The Spirides Test

In *Spirides v. Reinhardt*,[49] the Circuit Court for the District of Columbia reviewed whether an independent contractor who

37. Independent contractors are not protected by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, which provides a specific statutory definition of "employee" and requires an employee to be "appointed in the civil service." 5 U.S.C.A. § 2105(a) (West 1999). Nevertheless, this definition applies only to CSRA protections, and not to claims of employment discrimination. Spirides v. Reinhardt, 613 F.2d 826, 830-31 (D.C. Cir. 1979).

38. During fiscal year 1998, the Litigation Division handled only one case filed by an independent contractor employee. In fiscal 1999, the Litigation Division handled five such cases pending.

39. *See* 42 U.S.C.A. § 2000e(b) (excluding the federal government from the definition of "employer").

40. *Id.* § 2000e-16.

41. *Id.* § 2000e-16(a).

42. *Id.* § 2000e(f). *See* 29 U.S.C.A. § 633(a) (West 1999) (noting ADEA definition of employee same as Title VII definition); 29 U.S.C.A. § 794a (Rehabilitation Act) (incorporating the remedies, procedures, and rights set forth in 42 U.S.C. § 2000e-16).

43. Spirides v. Reinhardt, 613 F.2d 826, 830-31 (D.C. Cir. 1979).

44. *Id.*

45. *See generally* Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (reviewing the "three tests devised by courts to unravel the employee/independent contractor conundrum").

46. Id.

47. Hickey v. Arkla Indus., 699 F.2d 748, 751 (5th Cir. 1983) (quoting Bartels v. Birmingham, 332 U.S. 126, 130 (1947)).

48. *See Spirides*, 613 F.2d at 826. *See also Mares*, 777 F.2d at 1067 (adopting the *Spirides* test in discrimination case against the Army, and concluding that the majority of federal courts have adopted hybrid *Spirides* test); King v. Dalton, 895 F. Supp. 831, 838 (E.D. Va. 1995) (adopting the *Spirides* test in discrimination case against the Navy).

performed services for the United States International Communication Agency could qualify as an employee entitled to sue under Title VII for alleged sex discrimination. Noting that Title VII does not describe the "elements of the employment relationship that must exist to trigger equal employment coverage in the public sector," the court devised a hybrid test, combining the common law "right to control" test with the "economic realities" test.[50] Under this analysis, the court considers "all of the circumstances surrounding the work relationship," with no one factor being determinative.[51] The "most important factor," however, is the "extent of the employer's right to control the 'means and manner' of the worker's performance."[52] Additional matters that must be considered include:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; [that is] by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[53]

Finding that the district court failed to properly review all the circumstances surrounding the plaintiff's work relationship, the circuit court remanded the case for further findings.[54] In particular, the court noted that the district court had relied almost exclusively on the language of the contract between the agency and the independent contractor. The court held that, while contract language "may be indicative of the intentions of the parties, it is not necessarily controlling."[55]

Applying the Spirides Test to Independent Contractor Cases

In *Spirides*, the D.C. Circuit Court held that, because Title VII is "remedial in character, it should be *liberally construed*, and ambiguities should be resolved in favor of the complaining party."[56] The Fifth Circuit, however, while adopting the *Spirides* factors, concluded that, "[i]nasmuch as 42 U.S.C. § 2000e-16 is a waiver of sovereign immunity, its coverage ought to be *strictly construed* to limit remedies to persons who are clearly under the control of the federal government."[57] Whether the particular circuit applies *Spirides* broadly or narrowly, courts consistently agree that the extent of the federal agency's right to control the "means and manner" of the worker's performance is the most important factor in determining whether an independent contractor employee should be considered a de facto federal employee under Title VII.

A certain degree of control over an independent contractor employee will not necessarily require a finding that the worker should be deemed a de facto employee. In *King v. Dalton*,[58] for example, the District Court for the Eastern District Court of Virginia reviewed the degree of control exerted by the Navy over an independent contractor employee assigned to work on a Navy satellite communications system project. The court held that, although the Navy supervisor in charge of the project

49. 613 F.2d at 826.

50. *Id.* at 830-31.

51. *Id.* Although the *Spirides* factors were developed in a context where there was only one possible employer, the test also applies in analyzing the status of a putative co-worker. *See King*, 895 F. Supp. at 838 & n.9 (applying *Spirides* to a sexual harassment case where an independent contractor employed the plaintiff to work on a contract with the Navy).

52. *Spirides*, 613 F.2d at 831 ("If the employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."). *See Mares*, 777 F.2d at 1068 ("We are persuaded that a test which focuses on the extent of control exercised by the employer, against the backdrop of the other factors, is particularly suited for claims by alleged federal employees.").

53. *Spirides*, 613 F.2d at 832.

54. Id.

55. Id.

56. *Id.* at 831 (emphasis added). *See King*, 895 F. Supp. at 837 ("While § 2000e-16 indisputably requires an employment relationship between the government and the aggrieved individual, it is consistent with the underlying remedial purposes of Title VII to accord a liberal interpretation of its requirements.").

57. *Mares*, 777 F.2d at 1068.

58. 895 F. Supp. at 837.

worked closely with the independent contractor employee, played an active and integral role in overseeing the project, and may have requested the contractor to remove the employee from the project, under the "totality of the circumstances," the Navy could not be found to be a joint-employer.[59] The court further held:

> Without greater specificity regarding the details of their working relationship, [plaintiff's] statements are inconclusive with respect to whether [the Navy project supervisor] controlled the means and manner of her work. In the typical client-contractor relationship, the client will "review" the work performed by the contractor to determine whether it meets his expectations. In addition, while suggestive of control, [plaintiff's] statement that [the Navy project supervisor] "supervised" her work is also somewhat ambiguous. Presumably, any large government contract will be supervised to some extent by the relevant government agency. Yet, the word "employee" in § 2000e-16 clearly does not encompass every government contractor.[60]

It follows from *King* that an important factor will be whether the independent contractor retained ultimate authority to determine the "means and manner" of the worker's performance. Thus, even if the federal agency exerts *some* influence over the worker's performance, if the contractor retains ultimate authority over the worker, the agency will not be found to be a joint employer. In *King*, the court noted that, "while [the Navy project supervisor] may have given assignments to [plaintiff] through the [plaintiff's contractor supervisor], it was always up to [the contractor] to determine the best method and manner in which to complete the assignments."[61]

EEOC Adopts Spirides Test

In determining whether an independent contractor employee who is assigned to work for a federal agency may qualify as a de facto employee of that agency, the EEOC has adopted the *Spirides* test.[62] Thus, according to the EEOC, a federal agency may qualify as a "joint employer" of a worker assigned to it by an independent contractor if the federal agency exercises control over the "means and manner" of the worker's performance, or otherwise qualifies as a joint employer based on the various *Spirides* factors.[63]

The EEOC has held that a federal agency may not reject a discrimination complaint by an independent contractor employee until the administrative record is sufficiently developed to make a factual determination as to the complainant's status.[64] Thus, installation labor counselors must ensure that the administrative record is sufficiently developed to support a factual determination of the complainant's status. To this end, in October 1998, the Army published interim "EEO Joint Employer Guidance"[65] to provide guidance in processing such complaints.

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59. *Id.* at 840-43.

60. *Id.*

61. *Id.* at 839. *See* Brug v. National Coalition for the Homeless, 45 F. Supp. 2d 33, 39 (D.D.C. 1999) (finding based on *Spirides* analysis, that despite some influence over the independent contractor employee's work product, the Department of Housing and Urban Development had not exerted sufficient control over the worker to be deemed a joint employer).

62. Puri v. Department of the Army, EEOC Appeal No. 01930482, Request No. 05930502, 1994 EEOPUB LEXIS 3068 (Mar. 24, 1994); Abramoff v. Department of Navy, EEOC Appeal No. 01940809, Request No. 05940476, 1994 EEOPUB LEXIS 4869 (Dec. 22, 1994); DaVeiga v. Department of the Air Force, EEOC Request No. 05920107 (1992) (on file with author). The EEOC recently published guidance to its private sector case investigators on whether equal employment opportunity laws apply to temporary, contract, and other contingent employees. The EEOC opined that an independent contractor employee may, in appropriate circumstances, file a discrimination suit against both his actual employer (the independent contractor) and the contractor's client as "joint employers." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: APPLICATION OF EEOC LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS, EEOC 915.002 (Dec. 3, 1997).

63. Following *Spirides*, the EEOC has focused on the federal agency's control over the independent contractor employee as the most important factor in the analysis. The EEOC has held that an agency that plays a "minor role in the hiring process" does not necessarily amount to sufficient control to qualify a worker as a joint employee where the contractor retains authority to reject the agency's hiring recommendations and retains authority to supervise, evaluate, and terminate the employee. Grosselfinger v. Agency for Int'l Dev., EEOC Appeal No. 01921949, 3338/E5 (1992) (on file with author). However, where the agency controls these aspects of the employment relationship, it likely will be held to be a joint employer for Title VII purposes. Stone v. Tennessee Valley Authority, EEOC Appeal No. 01965608, 1997 EEOPUB LEXIS 2400 (July 28, 1997).

64. Ward v. Secretary of Navy, EEOC Appeal No. 01954535, 1996 EEOPUB LEXIS 941 (Aug. 12, 1996) (finding agency had not adequately investigated whether it controlled the "means and manner" of the performance of the individual in the position sought by the complainant, and remanding case for further development of the record to determine if complainant was an "applicant for employment"). Moreover, the EEOC will treat the agency's refusal to offer pre-complaint counseling to a complainant as a final agency decision and remand the complaint to the agency for additional investigation. Jordan v. Tennessee Valley Authority, EEOC Appeal No. 01930304 (1992) (on file with author).

Army Guidance

The Army interim "EEO Joint Employer Guidance" provides installation equal employment opportunity (EEO) officers and labor counselors with the following guidelines for processing discrimination complaints by independent contractor employees.[66]

First, upon inquiry by an independent contractor employee, the individual should be referred to the EEO officer, who will determine the nature of the inquiry.[67] If the individual has a complaint against the contractor, the EEO officer shall instruct the individual on the process for filing a private sector complaint. If, however, the individual has a complaint against the Army, the complaint should be processed as any other EEO complaint under Army Regulation 690-600 and Section 1614 of Title 29 of the Code of Federal Regulations. If informal resolution is not possible, the EEO counselor should provide the complainant with notice of the right to file a formal complaint.

Prior to accepting a formal complaint by the independent contractor employee, the EEO officer must coordinate with the servicing labor counselor for a "fact-based analysis" and a legal opinion as to whether the individual should be treated as a de facto "employee" for Title VII purposes.[68] The guidance also instructs EEO officers to contact appropriate management officials to obtain information relevant to the inquiry.[69] In conducting the analysis, the labor counselor should employ the *Spirides* test.[70] If the labor counselor finds that the individual should not be deemed an "employee" under Title VII, the complaint should be dismissed for failure to state a claim.[71] The notice of dismissal should include notice of appeal rights to the EEOC Office of Federal Operations.[72]

The Impact of Administrative Processing of Complaints by Independent Contractor Employees on Future Court Litigation

Exhausting administrative remedies is a jurisdictional prerequisite to filing suit in federal court,[73] and failure to do so against any defendant will result in dismissal of that defendant. In the "joint employer" context, therefore, an independent contractor employee will be required to exhaust both private sector and public sector administrative processes.

As part of the federal sector administrative process, a complainant must, in a timely manner and prior to filing a formal complaint of discrimination, attempt to informally resolve the matter by consulting with an EEO counselor within forty-five days of the date upon which the discriminatory event occurred.[74] If informal counseling does not resolve the dispute, a formal complaint must be filed within fifteen days of receiving notice of the right to file.[75] Failure to timely file within the prescribed periods may result in dismissal of the claim.[76] These requirements are not, however, jurisdictional prerequisites, but statutes of limitations, subject to equitable tolling.[77] The time limits may be subject to estoppel upon a showing of affirmative misconduct[78] or carelessness[79] on the part of the agency. For example, in *Weick v. O'Keefe*,[80] the Fourth Circuit held that a civilian employee who timely contacted an EEO counselor was not required to file a formal administrative complaint within the requisite time period where the counselor neglected to provide the employee notice of termination of the counseling.[81] The court held that, due to the carelessness of the agency, filing of the formal complaint *three years* after the discriminatory event was nonetheless timely.[82]

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65. EEO JOINT EMPLOYER GUIDANCE, INTERIM GUIDANCE, ARMY EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE AND COMPLAINT REVIEW AGENCY (Oct. 1998).

66. The guidance applies to complaints brought by

> independent contractors, volunteers, employees of government contractors, individuals participating in training, work-study or fellowship programs and all other individuals working on Army installations or projects without being on the activity's payroll or meeting the definition of a civil service employee under 5 U.S.C.A. § 2105(a) or a nonappropriated fund employee described at § 2105(c).

Id. para. 1.

67. *Id.* para. 4.

68. *Id.* para. 5.

69. *Id.* The guidance provides, as an attachment, a list of pertinent questions designed to elicit from management officials sufficient factual information to make a fact-based analysis. *Id.* at attachment 1.

70. *Id.* para. 6. *See supra*, text and accompanying footnotes 15-21 (describing *Spirides* test).

71. *Id.* para. 7. The guidance also notes that, since the status of the complainant as an employee is jurisdictional, this issue may be raised–and should be preserved–at all stages of complaint processing or litigation.

72. *Id.* para. 8.

73. Brown v. General Serv. Admin., 425 U.S. 820, 829-32 (1976) (stating that administrative exhaustion requirements are not mere technicalities, but integral parts of Congress's statutory scheme of achieving a "careful blend of administrative and judicial enforcement powers"); Kizas v. Webster, 707 F.2d 525 (D.C. Cir. 1983); Grier v. Secretary of Army, 799 F.2d 721 (11th Cir. 1986).

The possibility of equitable tolling of the administrative time limits is increased for complaints filed by independent contractor employees, where EEO counselors may be unfamiliar with the "joint employer" concept. Litigation Division has encountered two cases in which an EEO counselor summarily declined to counsel an independent contractor employee, declaring that the Army's EEO program was not available to non-federal employees. In these cases, the Army will likely be estopped from later claiming that the worker failed to timely exhaust the administrative process. With the statute of limitations tolled, the worker may file suit years later, after the contract has expired, witnesses have moved on, and memories have lapsed.

The Army's interim guidance on handling complaints by independent contractor employees is designed to prevent this potential problem. As discussed earlier, the guidance requires: (1) processing of initial inquiries from these employees; (2) a "fact-based analysis" and legal determination of their status; and (3) either continued processing of their complaints, if they are determined to be an "employee," or the right to appeal, if they are not. Assuming the Army has followed these procedures, it should not be estopped from later claiming the worker failed to timely exhaust the appeal rights or timely file suit in federal court.

Conclusion

All players in the Army's EEO program, from EEO counselors to labor counselors to litigation attorneys, must be aware of the likely increase of discrimination complaints filed by independent contractor employees. As this note has described, these employees may, in appropriate circumstances, be deemed "de facto" employees for purposes of federal sector Title VII protections. By carefully following the Army's interim guidelines, installations can ensure the best possible defense of these claims in both the administrative and federal court forums. Major Gilligan.

Offers of Resolution: EEOC's New Counterpart to Federal Rule of Civil Procedure 68

Introduction

On 9 November 1999, revisions to the regulations governing the procedures for federal employee discrimination complaints took effect.[83] One change made by the Equal Employment Opportunity Commission (EEOC) is the introduction of an offer of resolution. This provision allows an agency to make a settlement offer to a complainant during the administrative process, and if the complainant does not accept the offer and does not recover at least as much as the agency offered, the agency may avoid further liability for attorney's fees and costs. While this new rule does not have all of the advantages of its offer of judgment counterpart in the Federal Rules of Civil Procedure,[84] an offer of resolution can be an important agency tool during the administrative process.

74. 29 C.F.R. § 1614.105(a) (1999). The EEOC regulations set forth "preconditions" that must be satisfied before federal employees may file suit in district court. The "pre-complaint" requirement provides:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of . . . race, color, religion, sex, national origin, age, or handicap must consult a [c]ounselor prior to filing a complaint in order to try to informally resolve the matter. (1) An aggrieved person must initiate contact with a [c]ounselor within [forty-five] days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within [forty-five] days of the effective date of the action.

Id.

75. *Id*. § 1614.106(b).

76. The Supreme Court has repeatedly upheld dismissal or summary judgment in cases where a plaintiff has failed to raise an administrative discrimination complaint in a timely manner. Delaware State College v. Ricks, 449 U.S. 250 (1980); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984); Lorance v. A.T. & T. Tech., 490 U.S. 900 (1989) (holding dismissal is appropriate where plaintiff fails to raise administrative discrimination complaint in a timely manner).

77. Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982); Boyd v. United States Postal Serv., 752 F.2d 410 (9th Cir. 1985); Zografov v. Veteran's Admin. Med. Ctr., 779 F.2d 967 (4th Cir. 1985); Henderson v. Veterans Admin., 790 F.2d 436 (5th Cir. 1986); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Rennie v. Garrett, 896 F.2d 1057 (7th Cir. 1990); Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990).

78. *Zografov*, 779 F.2d at 969.

79. Weick v. O'Keefe, 26 F.3d 467 (4th Cir. 1994).

80. Id.

81. *Id.* at 470.

82. Id.

83. 29 C.F.R. § 1614 (1999).

84. FED. R. CIV. P. 68.

The New Rule

To minimize the potential liability for attorney's fees, the agency should consider the use of an offer of resolution as early as possible in the administrative process. If an attorney represents the complainant, the offer of resolution can be made any time after the filing of the written complaint, but not later than thirty days prior to the hearing before an EEOC administrative judge.[85] The complainant has thirty days from receipt of the offer of resolution, to accept the offer.[86]

The offer must be in writing, and explain the consequences of failing to accept the offer. These consequences are that if the complainant prevails, and is awarded less than the offer of resolution, "except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the expiration of the [thirty]-day acceptance period."[87]

In addition, the offer must include attorney's fees, costs, and specify any non-monetary relief.[88] In cases in which the agency decides to use an offer of resolution, and desires the most protection from future fees if the offer is not accepted, it is advisable to offer the complainant a lump sum, any appropriate non-monetary relief, and reasonable attorney's fees and costs.[89] This is done to avoid the uncertainty concerning the amount of complainant's current attorney's fees. For example, if the offer of resolution is for $10,000 plus reasonable costs and attorney's fees, and the administrative judge finds for complainant and awards $6000 in damages, complainant will not receive any attorney's fees or costs incurred after thirty days from receipt of the offer. If, however, the offer of resolution is for $10,000 total, and the administrative judge finds for complainant and again awards $6000 in damages, the situation may be different. If complainant can demonstrate he accrued costs and attorney fees of over $4000 by thirty days after receipt of the offer, than the full relief granted by the administrative judge will be more than the offer, and the agency will potentially be liable for all costs and attorney fees.

Advantages and Uses of Offers of Resolution

The first advantage of an offer of resolution–limiting potential attorney's fees in the administrative process–has already been noted. The second advantage, and perhaps more likely result, is that an offer will force a complainant's counsel into serious settlement negotiations. From Litigation Division's experience with Rule 68 of the Federal Rules of Civil Procedure (Offers of Judgment), nothing brings counsel into settlement negotiations faster than the realization that, in spite of the employee-client prevailing at trial, counsel might not be awarded all fees incurred. With this in mind, offers of resolution should normally be used early in cases that have problematic facts.

Likewise, Litigation Division's experience with offers of judgment is that they are normally most effective when the complainant is requesting solely monetary relief or relatively minor non-monetary relief. To limit attorney's fees, an offer of judgment must include any non-monetary relief that complainant is likely to be awarded. Therefore, an offer of resolution in a termination case may not be practical if the agency does not want to reinstate the complainant. Any offer not including reinstatement would almost automatically be less favorable than a decision reinstating the complainant, and thus the attorney's fees and costs limiting provisions of the offer of resolution would not apply.

A final advantage of an offer of resolution is that, unlike an offer under Rule 68 of the Federal Rules of Civil Procedure, an offer of resolution does not require the agency to have a judgment taken against it. Therefore, the case can be settled without the agency admitting liability.

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85. 29 C.F.R. § 1614.109(c)(1)(2). As the largest advantage of the offer of resolution is the potential to limit attorney's fees, in most cases the offer will be used only when the complainant has legal representation. However, an offer of resolution can be proposed to a pro se complainant once an administrative judge is appointed and up to thirty days prior to the hearing. *Id*. § 1614.109(c)(2).

86. *Id.* § 1614.109(c)(3). This is actually one of the most troublesome aspects of the offer of resolution from an agency perspective. Under Rule 68 of the Federal Rules of Civil Procedure, the accrual of attorney's fees immediately ceases upon the making of the offer. Under the EEOC's offer of resolution rule, however, the agency's liability for future fees continues to accrue for thirty days after the offer. In essence, a labor counselor who makes an offer of resolution without any limit on fees is writing a blank check to a complainant's attorney for the next thirty days.

87. *Id.* § 1614.109(c)(3) (1999). The EEOC is not clear concerning the "interest of justice exception" to the offer of resolution. There is no such provision in Federal Rule of Civil Procedure 68. The EEOC has indicated that "[w]e do not envision many circumstances in which the interest of justice provision will apply." Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37648 (1999). The only example provided by the EEOC involves a complainant who received an offer of resolution, "but was informed by a responsible agency official that the agency would not comply in good faith." *Id.*

88. 29 C.F.R. § 1614.109(c)(3).

89. This provides the Army the greatest protection under the offer of resolution, however, labor counselors should be aware that in essence such a conjunctive is granting plaintiff's counsel a blank check for the next thirty days to run up the bill.

Offers of judgment are regularly used very early in the judicial process, to possibly limit attorney's fees and costs and to force plaintiff's counsel into realistic settlement negotiations. If properly used, the new offer of resolution provision can have the same advantages in the administrative process and beyond.[90] Major Martin.

90. While obviously no precedent exists in this new area, there is a clear argument that an offer of resolution may also give the agency protection from future fees in court, as well as in the administrative process, if the ultimate relief received by the employee at trial does not exceed the offer. As an extra measure of caution, when the installation learns that the recipient of an offer of resolution has filed suit in federal court, the labor counselor should immediately coordinate with the Litigation Division to decide whether to file an offer of judgment that mirrors the prior offer of resolution.

Sample Offer of Resolution[91]

JOHN SMITH
Complainant,

v. Case No. XXXXX

LOUIS CALDERA
Secretary of the Army,
Defendant.

OFFER OF RESOLUTION

To:Complainant's Attorney, Esq.
Address

Pursuant to 29 C.F.R. § 1614.109(c) (1999), defendant hereby makes an Offer of Resolution. Defendant offers the amount of five thousand dollars ($5000) [and][92] [to include][93] reasonable costs and attorney's fees accrued by thirty days from receipt of this Offer of Resolution. The defendant makes this Offer of Resolution with no admission of liability.

Pursuant to 29 C.F.R. § 1614.109(c) (1999), should complainant fail to accept this Offer of Resolution, and the relief awarded during the administrative process is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the defendant of attorney's fees or costs accrued after the expiration of the thirty day acceptance period.

DATED this ___ day of December 1999.

Signature Block

91. This sample is modeled after language used by Litigation Division in offers of judgment. Labor counselors should be aware that the EEOC has stated it will include model language in a future version of its *Management Directive. See* Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37644, 37648 (1999).

92. The choice of "and" in this case would obviously signify that the amount the agency is offering is larger than $5000. This provides the Army the greatest protection under the offer of resolution, however, labor counselors should be aware that in essence such a conjunctive is granting plaintiff's counsel a blank check for the next thirty days to run up the bill.

93. While the choice of "to include" avoids the blank check problem discussed above, this would not afford the Army as much protection from future attorney's fees under the offer of resolution provisions. Quite simply, an attorney might be able to show years later that he had incurred fees and costs that when combined with the other relief ultimately received by the employee exceeded the offer. The labor counselor must consider the tactical purpose of the offer of resolution in the particular circumstances of the individual case to decide which option is preferred.

Guard and Reserve Affairs Items

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

GRA On-Line!

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

Colonel Tom Tromey,.....Thomas.Tromey@hqda.army.mil
Director

Dr. Mark Foley,.....Mark.Foley@hqda.army.mil
Personnel Actions

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

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

1999-2000 Academic Year On-Site CLE Training

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

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

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

USAR/ARNG Applications for JAGC Appointment

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

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

(800) 336-3315

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

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

Reserve AGR JAG (USAR) Professor Position Vacancy Board Announced

The Judge Advocate General and the Commandant, The Judge Advocate General's School, U.S. Army, announce that there is a vacancy for the Reserve Professor position (USAR-AGR) at The U.S. Army Judge Advocate General's School, starting the Summer of 2000. This is a four-year USAR tour. Candidates for this position will submit a packet for consideration by an OTJAG designated selection board. Packets for consideration are due NLT 3 January 2000.

The Reserve Professor serves as the school subject matter expert to the Commandant, the Academic Director, and the faculty on Reserve (USAR) issues. The Reserve Professor currently teaches classes on Reserve Component Military Personnel Law, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Soldiers' and Sailors' Civil Relief Act (SSCRA), Mobilization Law, Standards of Conduct for Reserve Component Commanders and Judge Advocate Officers, Administrative Remedies (Article 138 and related remedies), Administrative Investigations, and Reserve Component Legal Issues (Graduate Course Seminar). The Reserve Professor researches and writes educational material on Reserve Component subjects for worldwide distribution via the JAGCNET, *The Army Lawyer*, and the *Military Law Review.* The Reserve Professor manages the Reserve Component Judge Advocate Officer Advanced Course and serves as a mentor to Reserve Component students attending the Graduate Course, the resident Officer Basic Course, and short courses.

Interested candidates need to meet the following requirements:

a. Rank of lieutenant colonel, or major with a date of rank of 1994 or earlier.

b. Must be educationally qualified for promotion to lieutenant colonel (completed 50% of CGSOC).

c. Must be a current USAR AGR judge advocate officer.

Candidate Packet must include the following tabs:

a. Memorandum of Intent indicating why you wish to be considered for the position. Note any teaching experience, legal writing published, and highlight your Reserve experience (e. g., deployments, TPU, IMA, and/or AGR service).

b. Military Biography (typed) [ORB will not be substituted].

c. Last five OERs (profiled only).

d. Current Military Photograph, dated and signed with height/weight data on back.

e. Writing Sample (less than 10 pages) optional.

Send all packets to:

Commandant, The Judge Advocate General's School, U.S. Army
ATTN: JAGS-AD (COL Merck)
600 Massie Road
Charlottesville, VA 22903-1781

Packets are due no later than 3 January 2000.

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

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
8-9 Jan 2000	Long Beach, CA 78th MSO	AC GO MG Altenburg RC GO BG O'Meara GRA Rep TBD	Administrative & Civil Law (4 hrs): Separation Boards Criminal Law (2 hrs): Urinalysis Testing	POC: MAJ Jacqueline Jackson (619) 594-2012 corlett@rohan.sdsu.edu Host: COL Dan Allemeier (310) 317-5851
7-9 Jan	New Orleans, LA 2d LSO	AC GO MG Huffman RC GO COL (P) Walker GRA Rep TBD	International & Operational Law (4 hrs): Law of War Criminal Law (2 hrs)	POC: LTC William Baker (405) 377-8644 Host: COL Kenneth Densmore (580) 442-5846
29-30 Jan	Seattle, WA 6th MSO/70th RSC	AC GO MG Altenburg RC GO COL (P) Walker GRA Rep TBD	Criminal Law International & Operational Law	POC: LTC Scotty Sells (360) 336-9462 scottys@co.skagit.wa.us Host: COL Matt Vadnal (206) 553-0940
5-6 Feb	Columbus, OH 9th MSO	AC GO BG Barnes RC GO COL (P) Walker Contract Law Int'l Law GRA Rep TBD	Contract Law Administrative Law	POC: LTC Mark Landers (937) 255-3203, ext. 215
19-20 Feb	Salt Lake City, UT 87th MSO/UTARNG	AC GO BG Marchand RC GO COL (P) Walker GRA Rep TBD	Criminal Law: Fraternization Administrative & Civil Law	POC: MAJ Jay Woodall (801) 531-0435 Host: COL Christiansen ((801) 366-7861
26-27 Feb	Indianapolis, IN INARNG	AC GO BG Barnes RC GO COL (P) Walker Criminal Law Int'l & Op Law GRA Rep TBD	CLAMO: Legal Issues in JRTC Training Criminal Law Professional Responsibility tape to be shown.	POC: LTC George Thompson (317) 247-3491/3449 Host: COL George Hopkins (765) 457-4349
4-5 Mar	Washington, DC 10th MSO	AC GO BG Barnes RC GO BG DePue Criminal Law Int'l & Ops Law GRA Rep TBD	Criminal Law Administrative & Civil Law	MAJ Gerry P. Kohns kohnsg@hq.navfac.nav.mil Host: COL Jan Horbaly (202) 633-9615
11-12 Mar	San Francisco, CA 75th LSO	AG CO BG Romig RC GO BG O'Meara GRA Rep TBD	Contract Law Administrative & Civil Law: POR—How to get ready to deploy	POC MAJ Douglas Gneiser (415) 673-2347 Host: COL Charles O'Connor (415) 436-7180

18-19 Mar	Chicago, IL 91st LSO	AC GO BG Marchand RC GO BG DePue	Contract Law International & Operational Law	POC: MAJ Tom Gauza (312) 443-1600 Host: COL Johnny Thomas (210) 226-5888
25-16 Mar	Charleston, SC 12th LSO	AC GO MG Altenburg RC GO BG DePue Int'l & Operational Law Criminal Law GRA Rep TBD	International & Operational Law Criminal Law: Fraternization	COL Robert P. Johnston (704) 347-7800 Host: COL Dave Brunjes (912) 267-2441
1-2 Apr	Orlando, FL FLARNG	AC GO BG Romig RC GO BG O'Meara Criminal Law Int'l & Operational Law GRA Rep TBD	Administrative & Civil Law Contract Law	Ms. Cathy Tringali (904) 823-0132 Host: COL Henry Swann (904) 823-0132
16-20 Apr	Spring Workshop GRA			
21-23 Apr	Easter Weekend			
29-30 Apr	Newport, RI 94th RSC	AC GO MG Huffman RC GO BG O'Meara GRA Rep TBD	International & Operational Law: ROE Criminal Law: New Developments requested. (But a possible substitution by CLAMO was discussed with a focus on Domestic Operations)	POC: MAJ Jerry Hunter (978) 796-2140 1-800-554-7813
6-7 May	Gulf Shores, AL 81st RSC/ALARNG	AC GO BG Barnes RC GO BG DePue GRA Rep TBD	Criminal Law Administrative & Civil Law	Host: COL Bernard Pfeiffer (706) 545-3285
12-14 May	Omaha, NE 89th RSC	AC GO BG Romig RC GO COL (P) Walker	Contract Law Administrative & Civil Law	POC: LTC Jim Rupper (316) 681-1759, ext. 1397 Host: COL Mark Ellis (402) 231-8744

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

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

1999

December 1999

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

January 2000

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

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

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

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).

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

April 2000

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

May 2000

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

June 2000

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

July 2000

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

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August-24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August-1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).

25 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

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

November 2000

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

December 2000

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

2001

January 2001

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

February 2001

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

March 2001

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

April 2001

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

May 2001

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

June 2001

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

July 2001

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

3. Civilian-Sponsored CLE Courses

2 December ICLE	Environmental Law Marriott Gwinnett Place Hotel Atlanta, Georgia
2 December ICLE	Professionalism and Ethics: Judges and Lawyers Marriott Gwinnett Place Hotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program

Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

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

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

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

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

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2000 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2000 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2000 JAOAC.

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

Current Materials of Interest

1. The 50th Anniversary of the Uniform Code of Military Justice.

Call for Papers

Deadline for Submissions is March 1, 2000

The journals, *Military Law Review* and *The Army Lawyer*, seek submissions for a special issue and commemorative series on **The 50th Anniversary of the Uniform Code of Military Justice**. We are interested in papers based on empirical research as well as commentary on the history and current status of the Uniform Code of Military Justice (UCM).

Of particular interest are papers about notable courts-martial, influential judge advocates, and comparisons of the military and civilian justice system. The UCMJ was ahead of its time in some respects (Art. 31 rights warnings, providence inquiry, appointment of appellate defense counsel, etc.). Is the UCMJ still in the innovative lead? How has the Supreme Court addressed UCMJ issues?

Papers about the UCMJ and the *Manual for Courts-Martial (MCM)* during different eras in American history are also of interest. Specifically, articles dealing with the drafting and enacting of the UCMJ and *MCM* 1945-1951, employment of the UCMJ and *MCM* during the Korean War, the Vietnam War, the Cold War, Desert Storm, and during deployments in the 1990s (Haiti, Grenada, Bosnia, etc.).

Papers that critically review the roles of the various players in the military justice system are also invited. Does the commander have too much authority over the court-martial process? What should be the role of the staff judge advocate? Is the trial defense service sufficiently independent, or should civilian attorneys serve as trial defense counsel? How should military judges be selected? Should military judges have a fixed term of office? Should the role of the Court of Appeals for the Armed Forces be expanded?

Historical and critical reviews of courts-martial procedure are also invited. Do the pretrial and investigatory procedures offer sufficient constitutional protections for service members? Should service members be entitled to grand jury investigations, or is the Article 32b process sufficient? Should court members (jurors) be selected by the convening authority, or is it time for random selection? Historically, how has command influence affected the credibility of courts-martial? Does the Fourth Amendment (search and seizure) apply to service members in the barracks? Is the providence inquiry/guilty plea process sufficient, or over-kill? Are the military capital proceedings constitutional?

Deadline for submissions is March 1, 2000. Please send proposal, papers, or inquires to: Captain Mary J. Bradley, Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, 600 Massie Road, Charlottesville, Virginia 22903; (804) 972-6395; Mary.Bradley2@hqda.army.mil.

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

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

3. Regulations and Pamphlets

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

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

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

5. TJAGSA Publications Available Through the LAAWS BBS

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

6. Article

The following information may be useful to judge advocates:

Daniel Pickard, *When Does Crime Become a Threat to International Peace and Security?*, 12 FLA. J. INT'L L. 1 (Spring 1998).

7. TJAGSA Legal Technology Management Office (LTMO)

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

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel

are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

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

8. The Army Law Library Service

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

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