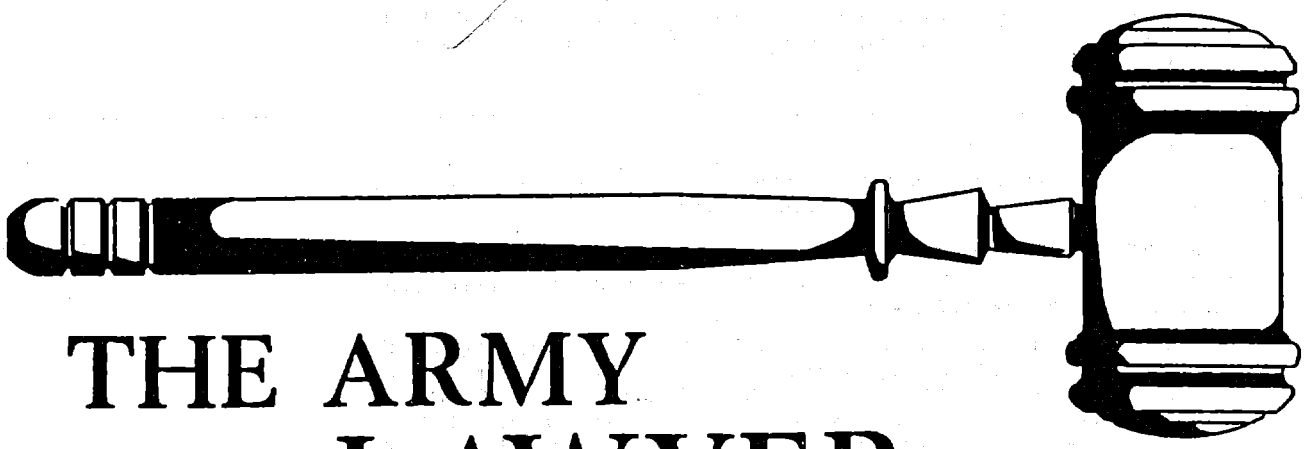

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Aiding and Abetting Involuntary Manslaughter and Negligent Homicide: An Unprincipled Extension of Principal Liability

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Introduction

Drunk driving kills. In 1989 alone, 22,415 people died in alcohol-related traffic accidents in America.[1] Society has demanded a solution.[2] Federal and state governments have responded with great vigor.[3]

Not surprisingly, the military services have responded aggressively as well. Each military department has established comprehensive programs to combat alcohol abuse.[4] These programs seek to "deglamorize" alcohol consumption,[5] to identify and treat abusers,[6] and, when appropriate, to sanction offenders.[7] In administrative proceedings, an offender faces reprimand,[8] loss of driving privileges,[9] and even discharge.[10] A drunk driver, moreover, may face criminal prosecution. If no death resulted from the offender's conduct, he or she may be prosecuted for drunk or reckless driving;[11] while the offenses for which he or she may be prosecuted when death results can range from negligent homicide[12] to murder.[13]

Although in drunk driving incidents the person facing criminal sanctions usually is the driver of the vehicle, other persons who in some way have assisted the driver also may risk prosecution. Other service members who may be charged include passengers, individuals who provided the drunk driver with a vehicle or keys to a vehicle, or even persons who provided the alcoholic beverages the drunk driver consumed. The criminal liabilities of these individuals might be founded on their own misconduct—on theories of culpable negligence or even simple negligence—or they may derive from their abetting the driver's criminally negligent act. In *United States v. Brown*[14] the Court of Military Appeals granted review to determine whether one can be "liable as an aider and abettor to another who commits a criminally negligent

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[1] In the same year, an additional 345,000 people suffered injuries—86,000 of them serious—from collisions involving alcohol. *See generally* J. Fell & C. Nash, National Highway Traffic Safety Administration, Intoxicated Drivers and Pedestrians on U.S. Public Roads: Collision Losses and Changes in the 1980's (1989).

[2] The birth and growth of organizations such as Mothers Against Drunk Drivers (M.A.D.D.) and Students Against Drunk Drivers (S.A.D.D.) reflect and fuel this demand.

[3] A federal statute allows a state to receive an incentive grant of up to eighty-five percent of its regular federal highway safety fund apportionment if the state enacts various antidrunk driving programs, including automatic license revocation procedures and prohibitions against alcohol consumption in a vehicle's passenger section; the amount of the incentive varies depending on the programs enacted. *See* Drunk Driving Prevention Act § 9002(a), 23 U.S.C. § 410 (1988), *amended by* Act of Nov. 5, 1990, 23 U.S.C.A. § 410 (West Supp. 1991).

At present, all fifty states have raised the minimum drinking age to twenty-one. Five states have lowered the minimum blood alcohol content for drunk driving from .10% to .08%. Twenty-nine states and the District of Columbia have adopted automatic license revocation procedures. Nine states allow judges to require a convicted drunk driver to install in his or her car a device that prevents the car from starting when a sensor on the device detects alcohol on the driver's breath. Some states also have extended civil liability to social hosts who provide alcohol to guests who later injure someone while driving. *See generally* R. Gastel, Drunk Driving and Liquor Liability, Insurance Information Institute Report, January 1991 (1991) [hereinafter Institute Report].

[4] *See, e.g.*, Army Reg. 600-85, Alcohol and Drug Prevention and Control Program (3 Dec. 1986).

[5] *See id.*, para. 2-5.

[6] *See id.*, ch. 3.

[7] *See, e.g.*, Army Reg. 190-5, Military Police: Motor Vehicle Traffic Supervision (8 July 1988). This regulation mandates that a soldier receive a general officer letter of reprimand if, while serving on active duty as a commissioned officer, warrant officer, or non-commissioned officer, he or she: (1) is convicted of drunk driving; (2) refuses to take or fails to complete legally requested tests to measure blood alcohol content; (3) operates a motor vehicle on a military installation when his or her blood alcohol content equals or exceeds 0.10%; or (4) operates a motor vehicle off post when his or her blood alcohol content equals or exceeds the state law standard. *Id.*, para. 2-7a. General officers, moreover, may issue a written reprimand to active duty enlisted soldiers in the rank of specialist and below under similar circumstances. *Id.*, para. 2-7b. The soldier's commander also must review the soldier's records to determine if an administrative reduction, a bar to reenlistment, or an administrative discharge are warranted. *Id.*, para. 2-7c.

[8] *Id.*, para. 2-7.

[9] *Id.*, para. 2-5.

[10] *See* Army Reg. 635-200, Enlisted Personnel: Personnel Separations, ch. 9 (20 July 1984) (separation for alcohol or drug abuse rehabilitation failure); *id.*, ch. 14 (serious misconduct).

[11] Uniform Code of Military Justice art. 111, 10 U.S.C. § 911 (1988) [hereinafter UCMJ].

[12] *Id.* art. 134. Under this article, a driver who kills another person may be found guilty of negligent homicide if, through simple negligence, he or she caused the death of another person. *See* Manual for Courts-Martial, United States, 1984, Part IV, para. 85 [hereinafter MCM, 1984]; United States v. Spicer, 20 M.J. 188 (C.M.A.) (summary disposition), *cert. denied*, 474 U.S. 924 (1985).

[13] UCMJ art. 118(3). Under this article, a driver who kills another person may be found guilty of murder if he or she was so intoxicated that his or her driving constituted an act inherently dangerous to others and showed a wanton disregard for human life in general. *See* United States v. Vandenack, 15 M.J. 230 (C.M.A. 1983).

[14] 22 M.J. 448 (C.M.A. 1986).

act."[15] Although the court's decision essentially left this issue unresolved, Judge Cox suggested that an accused indeed could be convicted as the aider and abettor to a homicide resulting from the culpable negligence of another party.[16]

This suggested extension of criminal liability is an unwarranted departure from authoritative precedents that provide that an aider and abettor must share a criminal purpose with the perpetrator. The cases Judge Cox cites to support his suggestion do not justify this departure. His proposed extension, moreover, affords too little deference to basic concepts of criminal liability. Finally, the availability of alternative theories of liability and of alternative means to encourage safe driving makes Judge Cox's extension unnecessary. To support these criticisms of the suggested extension of criminal liability, this article will review the development of the theory of aiding and abetting under military law.

Aiding and Abetting Under Military Law

Uniform Code of Military Justice article 77 establishes the gravamen of aiding and abetting under military law. Although the language of article 77 may appear extremely broad, both common sense and substantial precedent mandate a fairly narrow reading.

Article 77 defines a principal as

> Any person punishable under this chapter who—
>
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him [or her] would be punishable by this chapter.[17]

Thus, under the theory of abetment, any person who aids the commission of an offense is as guilty as the actual perpetrator. Clearly, the word "aids" must be interpreted carefully. To impose criminal liability solely on the ground that someone "aids" a perpetrator in the commission of an offense otherwise could subject nearly anyone to criminal liability. If, for example, a first sergeant assigned soldier *A* to room with soldier *B*, and *A* then took advantage of this unexpected access to soldier *B*'s wall locker to steal *B*'s property, the first sergeant conceivably could be said to have "aided" *A*'s theft. No one could argue reasonably, however, that the first sergeant violated article 77.

Military courts long have recognized the need to restrict the reach of this theory. The Court of Military Appeals first attempted to define the scope of "aiding" in *United States v. Jacobs*,[18] a decision interpreting the predecessor provision to article 77. The court expressly rejected a broad reading of aiding and abetting,[19] observing, "The aider and abettor must share the criminal intent or purpose of the active perpetrator of the crime, and must by his presence aid, encourage, or incite the major actor to commit it."[20] The court added, "The proof must show that the aider or abettor did in some sort [sic] associate himself with the venture, that he participated in it as something he wished to bring about, [or] that he sought by his action to make it successful."[21]

The military appellate courts advanced these principles in their early decisions interpreting article 77. The first reported military decision actually to cite article 77 is *United States v. Boyles*.[22] In *Boyles*, the Air Force Board of Review expressly ruled that the principles set out in *Jacobs* applied to article 77.[23] The Court of Military Appeals first discussed article 77 the following year. In *United States v. Dolliole*[24] the court affirmed the accused's robbery convictions based on aiding and abetting under article 77. The court, however, limited its detailed discussion of article 77 to the article's effect on the evidentiary requirement for the Government to corroborate a confession.[25] Not until eight months later, in *United States v. Freeman*,[26] did the Court of Military

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[15] *Id.* at 449.

[16] *Id.* at 449-50. Involuntary manslaughter—homicide resulting from the accused's culpable negligence—is a violation of UCMJ art. 119(b)(1). Culpable negligence requires a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others. *See* MCM, 1984, Part IV, para. 44. Negligent homicide in violation of UCMJ art. 134 requires merely simple negligence. *See* MCM, 1984, Part IV, para. 85.

This article discusses only the propriety of applying abetment to an accused who assists another whose criminally negligent drunk driving results in the death of another person. Although the analysis in this article might be applied persuasively to non-drunk driving homicides, this article makes no attempt whatsoever to cover those other types of conduct.

[17] UCMJ art. 77.

[18] 2 C.M.R. 115 (C.M.A. 1952).

[19] *Id.* at 117; *see also*, Manual for Courts-Martial, United States, 1949, para. 27 ("Anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal; and anyone who causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such"); Frederick B. Weiner, The Uniform Code of Military Justice: Explanations, Comparative Text, and Commentary 190 (1950).

[20] *Jacobs*, 2 C.M.R. at 117.

[21] *Id.* (citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).

[22] 4 C.M.R. 553 (A.F.B.R. 1952).

[23] *Id.* at 556.

[24] 11 C.M.R. 101 (C.M.A. 1953).

[25] *Id.* at 104-05.

[26] 15 C.M.R. 76 (C.M.A. 1954).

Appeals specifically address the scope of aiding and abetting under article 77; in this decision, however, the court expressly quoted and approved the principles set forth in *Jacobs*.[27]

In later decisions, the Court of Military Appeals has required consistently that an aider consciously share the perpetrator's criminal intent or purpose.[28] In *United States v. Pritchett*,[29] the Court of Military Appeals' most recent decision interpreting aiding and abetting under article 77, the court reaffirmed the vitality of the principles it established in *Jacobs*. In *Pritchett* the court again quoted from Judge Learned Hand's "classic interpretation of the aiding and abetting rule of law,"[30] stating that to sustain a charge of aiding and abetting the evidence must show that the accused "in some sort [sic] associate[d] himself with the venture, that he [or she] participate[d] in it as in something that he [or she] wishe[d] to bring about, [and] that he [or she sought] by his [or her] action to make it succeed."[31] The *Pritchett* court emphasized that "[w]hat is required on the part of the aider is sufficient knowledge and participation to indicate that he [or she] knowingly and willfully participated in the offense in a manner that indicated he [or she] intended to make it succeed."[32]

Because aiding and abetting so clearly requires knowing and willful participation in an offense with an intent that the offense succeed, expanding the doctrine to reach an offense based on negligence marks a radical departure from precedent. Any extension of this sort is especially surprising given that, of the 130 reported military decisions that cite article 77, only two in any way suggest that the government may prosecute an accused as an aider or abettor of an offense stemming from the negligence of another.

A Suggestion to Extend the Theory of Aiding and Abetting

United States v. Brown[33] is the most recent of the two decisions suggesting that the principles of abetment may be applied to offenses based on negligence. *Brown*'s facts are fairly straightforward. One evening, the accused attended a party at the home of another soldier. He arrived at the party after it was already in progress. During the hour-and-a-half to two hours he spent at the party, Brown saw a fellow soldier named Robinson drink approximately one quart of beer. Robinson, moreover, had consumed three beers and two shots of liquor before Brown arrived at the party, though Brown apparently was not aware of this. When the party ended, Robinson asked Brown if he could drive Brown's car. At first, Brown refused, protesting that Robinson had no license, but when Robinson replied, "Yes, I do," Brown gave his car keys to Robinson without further discussion. The two soldiers left the party in Brown's car. A short time later, Robinson ran off the road; he travelled for 150 meters with two wheels on the shoulder of the road and knocked over three road markers. Brown later claimed that he grabbed the steering wheel and brought the car back onto the road and that he told Robinson "to stop the car because he could have gotten us killed." His warning came too late. Eighty-five meters farther down the road, the car struck two boys riding mopeds. One boy died; the other suffered serious injuries. In blood alcohol tests conducted two hours after the collision, Brown registered 0.44 milligrams of alcohol per milliliter of blood, and Robinson registered 1.62 milligrams.[34]

Given these facts, the court's decision to affirm Brown's conviction for involuntary manslaughter is not surprising. Judge Cox and former Chief Judge Everett ruled that Brown's surrendering the operation of his car to an intoxicated person was itself a culpably negligent act; they also agreed that Brown's culpable negligence justified affirming Brown's conviction for involuntary manslaughter. Judge Sullivan did not participate in the decision.

Brown's most disturbing feature is Judge Cox's suggestion that an accused could be convicted of involuntary manslaughter for aiding and abetting a drunk driver.

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[27] *Id.* at 83-84.

[28] *See, e.g.*, United States v. Jackson, 19 C.M.R. 319, 327-28 (C.M.A. 1955); United States v. Burroughs, 12 M.J. 380, 383 (C.M.A. 1982); United States v. Knudson, 14 M.J. 13, 15 (C.M.A. 1982); United States v. Hill, 25 M.J. 411, 412 (C.M.A. 1988).

The Manual for Courts-Martial, moreover, expressly provides:

> If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:
>
> (i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and
>
> (ii) Share in the criminal purpose of [sic] design.

MCM, 1984, Part IV, para. 1b(2)(b).

[29] 31 M.J. 213 (C.M.A. 1990).

[30] *Id.* at 217 (citing United States v. Raper, 676 F.2d 841, 849 (D.C. Cir. 1982)).

[31] *Id.*

[32] *Id.* at 217 (citing *Raper*, 676 F.2d at 849, but adding its own emphasis by setting out the entire passage in italics).

[33] 22 M.J. 448 (C.M.A. 1986).

[34] *Id.* at 449.

Judge Cox remarked that "this Court recognized that one other than the driver could be held accountable for a death if he affirmatively aided or encouraged the driver's culpably negligent operation of a vehicle."[35] As authority for this proposition, he cited *United States v. Waluski*,[36] a 1956 Court of Military Appeals decision. Judge Cox added that "[c]onvictions of involuntary manslaughter have been upheld [by courts in other jurisdictions] against the owner of a car who has permitted an intoxicated driver to operate the car on the public highways if death results from the operation of the vehicle."[37] To support this statement, Judge Cox cited four nonmilitary decisions—*Story v. United States*,[38] *State v. Whitaker*,[39] *Freeman v. State*,[40] and *Stacy v. State*.[41]

In his concurring opinion, former Chief Judge Everett recognized the difficulty inherent in Judge Cox's proposed extension of abetment to a crime of culpable negligence. He wrote,

> Although *United States v. Waluski* ... may indicate the contrary, I am not yet convinced that a service member can be convicted of aiding and abetting a crime that is predicated on negligence. Certainly there is substantial authority that aiding and abetting ... requires a sharing of purpose [citation omitted]; and, if so, it is hard to convict someone on a premise that he shared a purpose with another person who had no purpose but was only culpably negligent.[42]

Chief Judge Everett's opinion essentially restates existing precedent concerning principal liability. As the reasons discussed below reveal, the Chief Judge expressed the better view.

Judge Cox's Analysis in *Brown*—An Unpersuasive Interpretation of Past Precedent

The Waluski *Decision*

Judge Cox's characterizations notwithstanding, *Waluski* did not hold that "one other than the driver could be held accountable for a death if he affirmatively aided or encouraged the driver's culpably negligent operation of a vehicle."[43] The facts in *Waluski* are straightforward. Two Marines, Waluski and a companion named Hauf, were hitchhiking along a road in Korea. A Turkish major and his driver gave the two a ride in their jeep. After travelling a short distance, the driver stopped the jeep and both the driver and the major got out. A moment later, the Marines drove off in the jeep. The vehicle later struck and killed a pedestrian walking alongside the road. No eyewitness could identify the driver with any certainty; substantial circumstantial evidence, however, convinced the court that Hauf was driving the jeep when the accident occurred. Considerable evidence also showed that Hauf and Waluski both had been intoxicated when they took the jeep. Both were convicted of involuntary manslaughter.

The language in *Waluski* that suggests that the theory of aiding and abetting may be applied to impose criminal liability for culpably negligent involuntary manslaughter is, at best, mere dicta. Although the Court of Military Appeals upheld the involuntary manslaughter conviction of Hauf as the driver, the court reversed Waluski's manslaughter conviction. The court specifically concluded that it had no basis to find either that Waluski was guilty as a perpetrator or that he had aided or encouraged the driver "in the commission of the homicide."[44] The court's reversal of Waluski's manslaughter conviction eliminated the precedential value of any language in that case that would have supported an accused's conviction for abetting a second person's criminally negligent act.

Waluski, moreover, reveals the thorny question inherent to the concept of applying abetment to a criminally negligent act—that is, where does one draw the line between conduct that aids and abets a criminally negligent act and conduct that is itself negligent? *Waluski*, like *Brown*, was a two-judge opinion. Chief Judge Quinn wrote, "Homicide caused by the operation of a motor vehicle is an offense normally committed only by the driver. If both accused are to be held accountable for the victim's death, the liability of one must be predicated upon the fact that he aided and abetted the other."[45] The Chief Judge added that to support a conviction predicated upon abetment the evidence "must show [the alleged abettor provided] affirmative aid or encouragement to the person who actually commit[ted] the offense."[46]

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[35] *Id.*

[36] 21 C.M.R. 46 (C.M.A. 1956).

[37] *Brown*, 22 M.J. at 449.

[38] 16 F.2d 342 (D.C. Cir. 1926), *cert. denied*, 274 U.S. 739 (1927).

[39] 43 N.C. App. 600, 259 S.E.2d 316 (1979).

[40] 211 Tenn. 27, 362 S.W.2d 251 (1962).

[41] 228 Ark. 260, 306 S.W.2d 852 (1957).

[42] *Brown*, 22 M.J. at 451 (Everett, C.J., concurring) (citing Wayne R. La Fave & Austin W. Scott, Criminal Law § 64, at 510 (1972)).

[43] *Brown*, 22 M.J. at 449.

[44] *Waluski*, 21 C.M.R. at 54.

[45] *Id.* at 52.

[46] *Id.*

To imagine a form of affirmative aid or encouragement sufficient to constitute aiding and abetting that, nevertheless, is insufficient to constitute culpable negligence in its own right, is indeed difficult. Judge Latimer's concurring opinion shows the intellectual quagmire that results when one tries to apply the doctrine of abetment to a criminally negligent act. Judge Latimer wrote, "If the evidence had shown that Hauf drove at an excessive speed, and that Waluski had actively encouraged him to do so under an agreement that the latter would watch for pedestrians, I would have no difficulty in concluding that the two accused acted 'jointly and in pursuance of a common intent' in the doing of culpably negligent acts."[47] Here, Judge Latimer confused two distinct theories of criminal liability—essentially equating negligence with specific intent. Moreover, by referring to an agreement, he also blurred the distinction between abetment and conspiracy.

Significantly, neither Judge Latimer nor Chief Judge Quinn cited a single decision, either military or civilian, that imposed criminal liability for the abetment of a criminally negligent act. Moreover, no subsequent military case has imposed this liability, either independently or in reliance on *Waluski*.

Opinions of Other Jurisdictions

Story v. United States

The *Story* court did not clearly impose criminal liability for aiding and abetting a driver whose criminal negligence resulted in a death. In affirming Story's conviction of culpable-negligence involuntary manslaughter, the court failed to specify the theory on which it relied. Although the court claimed that Story could be found guilty of involuntary manslaughter for abetting the driver's criminal negligence, the court recognized that Story's own culpable negligence also could support his conviction. Indeed, ample evidence supported the latter conclusion. Story and a man named O'Connor were riding in Story's car. Story was driving, and both men were drinking. They found a man named Jarvis walking along the road and picked him up. Jarvis was already so drunk that he could hardly stand. Even so, he drank with Story and O'Connor as Story again guided his car on its unsteady course. Story eventually turned down a narrow lane and stopped the car. All three men got out. Jarvis fell into a ditch and Story pulled him out. Jarvis then started walking up the lane in the direction the car was headed. "Knowing that Jarvis was so intoxicated he hardly could walk, that the lane was narrow, and that even the most careful driver would have difficulty in passing Jarvis, Story [then] placed his car under the control of another drunken man [—O'Connor—], and, without protest, permitted him to attain a speed of from 20 to 25 miles an hour...."[48] The car struck Jarvis, injuring him fatally. Reviewing Story's subsequent manslaughter conviction, the appellate court concluded, "If a jury may not find criminal carelessness from such conduct, it is difficult to perceive what conduct would justify such a finding."[49] Accordingly, the court apparently concluded that Story was himself criminally negligent—an entirely reasonable conclusion under the circumstances.

State v. Whitaker

In *Whitaker*[50] the court's decision to uphold a non-driver's involuntary manslaughter conviction also may have derived from the non-driver's own criminal negligence. In this case, the owner of a vehicle turned over operation of his vehicle to a driver he knew had consumed at least two drinks of vodka and beer. A test administered on the driver more than an hour after he caused a fatal collision showed that he must have been appreciably under the influence of alcohol when Whitaker gave him the keys to the car. Appealing his subsequent conviction, Whitaker challenged the trial judge's instructions on aiding and abetting involuntary manslaughter. The appellate court, however, did not discuss abetment in its opinion; nor did it even set forth the instructions that Whitaker challenged. Instead, the court apparently upheld Whitaker's liability on the basis of Whitaker's own culpable negligence without looking to any assistance he might have provided the driver. The court simply ruled that

> when a death results from the operation of a motor vehicle by an intoxicated person not the owner of that vehicle, the owner who is present in the vehicle and who with his knowledge and consent permits the intoxicated driver to operate the vehicle, is as guilty as the intoxicated driver.[51]

This language strongly suggests that the court intended to treat the owner as a perpetrator and not merely as an abettor. The decisions the court cited as authority for its holding focused in a similar manner on the culpable negligence of owners who loaned automobiles to visibly intoxicated individuals. In *State v. Gibbs*,[52] for instance, the North Carolina Supreme Court had upheld an instruction that had advised the jury that an owner's guilt depended on whether he had "consciously permitted [the

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[47] *Id.* at 54.

[48] 16 F.2d 342, 344 (D.C. Cir. 1926), *cert. denied*, 274 U.S. 739 (1927).

[49] *Id.*

[50] 43 N.C. App. 600, 259 S.E.2d 316 (1979).

[51] *Id.* at 605, 259 S.E.2d at 319.

[52] 227 N.C. 677, 44 S.E.2d 201 (1947).

driver] to operate the vehicle on a highway, knowing at the time he, the driver, was under the influence of intoxicating liquor."[53] Likewise, in affirming an owner's conviction for drunk driving in *State v. Nall*,[54] the North Carolina Supreme Court had remarked expressly that the jury could have found that the owner actually had been the driver or that the owner knowingly had permitted a person he knew was intoxicated to operate his vehicle while the owner was a passenger. Finally, in *Story v. United States*—the third case the *Whitaker* court cited—the owner's own criminal negligence also played a substantial role in the appellate court's opinion, and arguably moved that court to uphold his conviction.[55]

Freeman v. State

In *Freeman*[56] the Supreme Court of Tennessee affirmed the accused's conviction for involuntary manslaughter. The *Freeman* court, however, did not even mention abetment as a possible basis of liability. Instead, the court ruled that Freeman himself was criminally negligent. Freeman had allowed a woman to drive his car although he knew that she was intoxicated and that his car's brakes were defective. According to the court, "[h]is permitting her to drive while intoxicated [was] the act that constituted criminal negligence on his part, especially when he knew the brakes on the car were defective."

Stacy v. State

In affirming the accused's involuntary manslaughter conviction, the *Stacy* court implied—but never specifically held—that an accused could be convicted as an accessory to an involuntary manslaughter. The court rejected the defense's contention that "the owner of a vehicle ... driven by another cannot be convicted as an accessory to manslaughter unless he [or she was] ... present in the vehicle [when] ... the offense [was] ... committed";[57] however, the court did not find expressly that the defendant was an accessory. Rather, the court focused on the defendant's own misconduct. The defendant, the manager of a logging company, had provided one of his employees with alcohol throughout the workday. Moreover, he was present at a log cutting site when this worker fell three times while operating a chain saw. At the end of the day, the defendant ordered his visibly intoxicated employee to drive a loaded logging truck, ignoring a sober employee's offer to take the drunken worker's place. The intoxicated employee drove off. Following immediately behind the truck, the defendant could see that the driver was driving fast on curves and would swerve occasionally onto the wrong side of the road. The owner also could see that a log protruded several feet from the left side of the truck. The drunk employee's erratic driving finally forced the driver of an approaching pick-up truck to veer onto the right shoulder of the road. The protruding log struck and destroyed the cab of the pick-up truck, killing the driver instantly.

The court found this evidence sufficient to uphold the defendant's conviction. Significantly, however, the defendant's own misconduct clearly exceeded mere abetment of the driver's negligent conduct. *Stacy*, therefore, cannot be considered compelling authority for the contention that an accused may be guilty of involuntary manslaughter for aiding and abetting a drunk driver.

The Unpersuasive Footnote

In a footnote in *Brown*, Judge Cox commented, "Several jurisdictions have accepted the proposition that one who engages with others in a common purpose or joint enterprise to carry on an activity in a reckless manner can be convicted of involuntary manslaughter as an aider and abettor."[58] Only one of the cases Judge Cox cites in this note, however, actually relied on the doctrine of abetment. In each case, moreover, the accused's criminal liability easily could have derived from the accused's own culpable negligence.[59] Finally, an accused's liability

[53] *Id.* at 679, 44 S.E.2d at 203.

[54] 239 N.C. 60, S.E.2d 354 (1953).

[55] *See Story*, 16 F.2d at 342; *see also supra* notes 48-49 and accompanying text.

[56] 211 Tenn. 27, 362 S.W.2d 251 (1962).

[57] 228 Ark. 260, 262, 306 S.W.2d 852, 854 (1957).

[58] *Brown*, 22 M.J. at 450 n.1.

[59] In Connecticut v. Dilorenzo, 138 Conn. 281, 83 A.2d 479 (1951), the defendant leased the basement and first floor of a wooden building. Two families occupied apartments on the second floor. The defendant and two other men had a still built in the basement; this crudely-constructed still had a firebox. One of the other men actually operated the still, while the defendant merely visited the basement occasionally and supplied ingredients for the mash. One night, while the defendant was not present, alcohol and vapors leaking from the still caught fire. The fire spread rapidly throughout the building and two young children burned to death in their beds on the second floor. The state charged the defendant under an information that he "did aid, assist and abet [two other men] in the unlawful installation and operation of a still ... which unlawful acts resulted in the burning of the building [in which the still was located], ... thereby causing the deaths of" the two victims. *Id.* The appellate court upheld the accused's conviction on appeal. The court, however, refused to predicate the defendant's criminal liability on a theory of abetment. It stated that it would "go no further than to hold that one who engages with others in a common purpose to carry on an activity in a reckless manner or with wanton disregard for the safety of others is guilty of involuntary manslaughter, if the death of another is caused thereby, even though he is not present when the homicide occurs." *Id.* at 481. Once again, the court focused specifically on the defendant's own misconduct, ruling that the defendant had engaged in

> a common enterprise requiring continuing unlawful acts. The still could be operated only at great danger to others. The defendant's absence from the building when it burned could not nullify *his* reckless purpose in making use of the dangerous instrumentality of the still under the conditions which he knew existed.

[Footnote continued next page.]

needs not be premised on abetment when the accused shares in a common purpose or joint enterprise to carry on an activity in a reckless manner because an accused who shares a purpose or enterprise, by implication, has an individual purpose. This purpose, standing alone, will sustain the accused's conviction as a perpetrator.

Extending Abetment Detracts from Basic Concepts of Criminal Liability

Judge Cox's proposed extension could extend criminal liability for drunk driving very broadly—at its fullest extension, almost anyone associated with a driver's misconduct could be prosecuted. As the Court of Military Appeals recognized in *Jacobs*, however, the law must "insur[e] that the standard of proof is not minimized to the point of permitting conviction upon a theory of guilt by association—a principle alien to American standards of justice."[60] When death results from the negligence—whether culpable or simple—of an intoxicated driver, guilt by abetment quickly approaches guilt by association. To give an extreme example, a neighbor's daughter or son who watches the driver's children so that the driver may attend a party at which the driver becomes intoxicated effectively "aids" the drunk driver. So does the service station attendant who pumps the gas when the driver stops to fill his or her gas tank enroute to the party. At the party, the host who serves the alcohol the driver consumes also "aids" the drunk driver. Fellow guests at the party further "aid" the driver, whether they provide the driver with drinks or merely contribute by their presence to an atmosphere conducive to drinking. A broad definition of aiding could reach even an associate of the driver who, weeks earlier, told him or her the time and location of the party. The suggested extension opens the door to an unjust, open-ended, and overreaching application of criminal liability.

The Extension is Unnecessary

Military criminal law already reaches individuals who actively aid drunk drivers. Liability for any resulting homicide may follow, as it did in *Brown*, if the accused was negligent or culpably negligent in his own conduct. A lawful general regulation, moreover, may proscribe permitting intoxicated individuals to operate a vehicle—indeed, in *Brown* the Court of Military Appeals expressly approved this sort of regulatory proscription.[61] Contributors to drunk driving, accordingly, remain responsible for the consequences of their own conduct, and this responsibility is sufficient to satisfy the interests of discipline and public safety.

Military administrative procedures and civilian criminal law, moreover, can encourage sobriety in many other ways. The armed forces' current emphasis on combatting alcohol abuse and the aggressive programs they have developed to fight that battle render an extension of criminal liability unnecessary.[62] Likewise, all fifty states have raised the minimum drinking age to twenty-one.[63] An increasing number of states also have enacted automatic license revocation laws, providing that drivers who fail or refuse to take an alcohol breath test automatically will lose their licenses. Approximately a dozen of the twenty-one states presently without these laws will consider enacting them in 1991 legislative sessions.[64] Further, recent Supreme Court cases upholding the use of sobriety

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[59] [Continued]

Id. at 481-82 (emphasis added). In Missouri v. Fennewald, 339 S.W.2d 769 (Mo. 1960), as in *DiLorenzo*, the court focused on the accused's own culpability, not on the accused's abetment of the criminal negligence of another. In *Fennewald*, the accused and another driver agreed to hold a drag race. During the race, the other driver's car struck and killed a third person. The court concluded that

> [Fennewald] could properly be found guilty of manslaughter by reason of entering into an agreement to conduct an automobile race on a city street and doing so in a reckless manner, with wanton disregard for the safety of others, from which the death of [the victim] resulted. Although [Fennewald] did not intend to take life, he did intend that the two automobiles should be raced on a city street which reasonably meant to drive them at the highest speed they could attain and far in excess of lawful speed. Doing so under these circumstances was negligence of such a character that criminal intention could be presumed.

Id. at 773.

In Commonwealth v. Atencio, 345 Mass. 627, 189 N.E.2d 223 (1963), three men played "Russian roulette." The first man examined the gun and saw that it contained only one cartridge. He spun the cylinder, pointed it at his head, and pulled the trigger. Nothing happened. He passed the gun to the defendant. The defendant spun the cylinder, pointed the gun at his head, and pulled the trigger. Again, nothing happened. The defendant then passed the gun to the third man. He spun the cylinder, put the gun to his head, and pulled the trigger. Luck was not with him. The gun fired, and he fell over dead. The court affirmed the defendant's involuntary manslaughter conviction. It found that the "concerted action and cooperation of the defendants in helping to bring about the deceased's foolish act" constituted the "wanton and reckless conduct" necessary to support the conviction. *Id.* Significantly, the defendant never was charged with abetting involuntary manslaughter, nor did the court even discuss this theory of liability.

In Michigan v. Turner, 125 Mich. App. 8, 336 N.W.2d 217 (Mich. Ct. App. 1983), the defendant was convicted as an abettor to involuntary manslaughter for furnishing loaded guns to two women and directing them to have a "trial by battle" to settle a dispute. Acting on his instructions, one woman aimed her gun—which had no safety device—at the other woman. The gun went off, killing the other woman. The court concluded explicitly that "one may be an aider and abettor of involuntary manslaughter where, as here, there exists a common and shared purpose to participate in the act which results in death—the pointing of a loaded firearm at another individual." *Id.* at 9, 336 N.W.2d at 218. As in the other cases, however, the defendant's own conduct was so reckless that he could have been convicted of the involuntary manslaughter as a perpetrator.

[60] *Jacobs*, 2 C.M.R. at 117.

[61] *Brown*, 22 M.J. at 451.

[62] *See supra* notes 4-10 and accompanying text.

[63] *See supra* note 3.

[64] *Id.*

checkpoints[65] and videotaped evidence[66] will strengthen enforcement of drunk driving laws. Finally, drunk driving fatalities, especially among younger drivers, are declining. Surveys show that many people are reducing their consumption of alcohol and that an increasing percentage of the population avoids driving after drinking.[67]

Conclusion

Although the yearly accumulation of drunk driving fatalities remains staggering, the doctrine of abetment should not be stretched to impose liability on individuals who unwittingly permit drunk drivers negligently to take the lives of others. To apply abetment in this manner would drive a gaping hole through four decades of sound, solid, sober decisions. When Judge Cox suggested this extension, he advanced no rationale for his suggestion, and cited no compelling cases to support it. Indeed, the need for rational standards and certainty in criminal law far outweighs the extension's dubious benefits. Finally, alternative theories of liability and alternative means to encourage safe driving make this extension unnecessary. These reasons, taken together, compel the rejection of this unprincipled extension of principal liability.

[65]Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990).

[66]Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990).

[67]Institute Report, *supra* note 3.

Security Assistance and Operations Law

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> We have no eternal allies—nor perpetual friends. We do have interests, both eternal and perpetual. And those it is our duty to follow.
>
> Henry, Lord Palmerston[1]

Security assistance plays an important role in our nation's foreign policy. It includes all programs by which the United States provides material and training to friendly foreign nations. In general, these programs are aimed at advancing American interests abroad by bolstering the economies and military readiness of allied nations. By providing materials and training, rather than stationing troops abroad, the United States enhances the defensive capabilities of its allies in the most cost effective manner possible.[2]

Although most defense-related security assistance programs are administered by the armed forces, few judge advocates possess even general familiarity with them. Judge advocates soon may have to increase their understandings of those programs, however, as the military arm of security assistance gains importance as an instrument of national foreign relations. Because the military services administer many security assistance programs, judge advocates will be called with ever increasing frequency to give advice on security assistance issues.[3]

Defining Security Assistance

Security assistance involves "the transfer of economic assistance through sale, grant, lease, or loan to friendly foreign governments."[4] The Foreign Assistance Act of 1961[5] and the Arms Export Control Act[6] provide both the authority for, and the principal limitations on, American security assistance. The five aspects of security assistance that are of primary concern to judge advocates are the Foreign Military Financing Program (FMFP), the Foreign Military Sales Program (FMS), peacekeeping operations, the International Military Education and Training Program (IMET), and the various programs drawing on the federal Economic Support Fund (ESF).

[1]Harold A. Hovey, United States Military Assistance: A Study of Policies and Practices, at v (1965).

[2]Defense Institute of Security Assistance Management, The Management of Security Assistance 1-7 (10th ed. 1990) (noting that "[u]nderlying much of the security assistance program is the belief that aiding foreign countries to defend themselves ... will be more cost-effective than using U.S. military personnel and equipment to the same end").

[3]One indication of the increased importance of security assistance to the judge advocate is shown by the Defense Institute of Security Assistance Management noting that it is negotiating with the Office of The Judge Advocate General for a judge advocate to serve on its faculty. *Defense Institute of Security Assistance Management Faculty Positions Available*, DISAM J., Spring 1990, at 133.

[4]Dep't of Defense Manual 5105.38-M, Security Assistance Management Manual, para. 10,103A (Oct. 1, 1988) [hereinafter SAMM].

[5]*See* Foreign Assistance Act of 1961 §§ 501-577, 75 Stat. 424, 424-42 (codified as amended 22 U.S.C. §§ 2301 to 2349aa-9 (1988)).

[6]22 U.S.C. §§ 2751-2796d (1988).

Foreign Military Financing Program

The Foreign Military Financing Program[7] consolidates three former security assistance programs: the Foreign Military Sales Financing Program (FMSF), the Foreign Military Sales Credits Program (FMSC), and the Military Assistance Program (MAP).[8] Under the Military Assistance Program, authorized by the Foreign Assistance Act of 1961, the federal government provided foreign nations with nonreimbursable grants of defense materials and services.[9] The Foreign Military Sales Financing and Foreign Military Sales Credit Programs were loan programs by which the United States either extended credit directly to foreign governments or guaranteed the loans they borrowed from American banks.[10]

The present program, FMFP, is both a grant and a loan program. Congress initially intended the FMFP to be a transitional program—effective only during the phase out of MAP, FMSF, and FMSC—that eventually would lead to a program built exclusively around cash sales.[11] This goal, however, never has been realized. The economies of many nations, moreover, only rarely can support the expenditures required for arms purchases. Consequently, FMFP expenditures have been dominated increasingly by grants. The Bush Administration's requested FMFP authorization for fiscal year (FY) 1991 consisted entirely of grants,[12] and of the $4.6 billion Congress ultimately appropriated for FMFP that year, all but $403,500,000 paid for grants.[13]

Foreign Military Sales

The FMS permits eligible foreign governments to purchase defense materials from existing government stocks[14] or from military contractors.[15] Because the federal government need not draw on appropriated funds to provide foreign governments with security assistance through foreign military sales, FMS has come to be the United States' most significant form of military security assistance in terms of the dollar value of annual materials transfers.

International Military Education and Training

The International Military Education and Training Program (IMET)[16] is purely a grant program. It allows foreign military personnel to attend United States' military schools and observe United States' military training. To date, more than 500,000 foreign nationals have received training through IMET or the programs that preceded it.[17]

Peacekeeping Operations

The Foreign Assistance Act of 1961 empowers the President to furnish aid to both friendly nations and to international organizations for peacekeeping operations.[18] In recent years, the United States has extended assistance under authority of the act to support peacekeeping efforts in Cyprus and in the Sinai.[19]

Economic Support Fund

The Foreign Assistance Act authorizes the President to furnish aid to foreign countries from annual appropriations for the ESF[20] when he or she determines this aid would "promote economic or political stability."[21] Although the ESF is managed not by the Department of Defense (DOD), but by the Agency for International Development, judge advocates still should be familiar with ESF components and functions because congressional limitations on use of ESF monies may affect military operations.[22]

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[7] *Id.* §§ 2763, 2764, 2771.

[8] *The FY 1991 Security Assistance Budget Request*, DISAM J., Spring 1990, at 48, 54 [hereinafter *1991 Budget Request*].

[9] Defense Institute of Security Assistance Management, The Management of Security Assistance, at B-15 (10th ed. 1990) [hereinafter Management of Security Assistance].

[10] Defense Institute of Security Assistance Management, The Management of Security Assistance 2-23 (3d ed. 1982).

[11] Management of Security Assistance, *supra* note 9, at 2-8.

[12] *1991 Budget Request*, *supra* note 8, at 55.

[13] Samelson, *Military Assistance Legislation for FY 1991: A Summary*, DISAM J., Winter 1990-1991, at 23, 24.

[14] 22 U.S.C. § 2761 (1988).

[15] *Id.* § 2762.

[16] *Id.* §§ 2347-2347d.

[17] *1991 Budget Request*, *supra* note 8, at 55; *see also* Manolas & Samelson, *The United States International Military Education and Training Program*, DISAM J., Spring 1990 at 1 (discussing the value of IMET as a means of advancing United States interests and promoting human rights in a cost effective manner).

[18] *See* 22 U.S.C. § 2348 (1988).

[19] *1991 Budget Request*, *supra* note 8, at 57.

[20] *See generally* 22 U.S.C. §§ 2346-2346d (1988).

[21] *See id.* § 2346(a).

[22] *See generally infra* notes 61-62 and accompanying text.

History and Purpose of Security Assistance

History

The advice Lord Palmerston offered to his countrymen applies equally well to the United States. America, too, has interests that "it is our duty to follow." The United States does not provide aid under security assistance programs solely out of a sense of altruism. It provides this aid primarily to promote American interests abroad.

Providing military equipment and training to one's allies is a practice of ancient origin. Early in our nation's history, the United States was the recipient, rather than the provider, of this assistance. During the Revolutionary War, for example, the United States received extensive military aid from France. In later years—even after America's position in the international community strengthened precipitously—the United States provided only marginal military assistance to other nations. Not until the outbreak of World War II did America emerge as a significant participant in the international security assistance community. American influence in security assistance affairs increased steadily, however, in the years following World War II. Only recently has it begun to be curtailed. This curtailment actually may be short-lived—the liberation of Kuwait well may herald a resurgence of United States' military assistance throughout the world.

Purpose of Security Assistance

Invariably, the principal purpose of security assistance has been to advance the interests of the United States. As noted above, the United States first recognized the importance of security assistance as a foreign policy tool during World War II. The lend-lease program, which began in 1940, marked America's first significant effort to provide security assistance to friendly foreign nations.[23] Even at this early stage, Congress permitted transfers of aid or equipment only if they clearly furthered United States' interests. In 1940, for example, Congress required the Chief of Naval Operations to certify that this transfer "would promote the national security of the United States" before it would permit President Franklin D. Roosevelt to transfer fifty destroyers to the United Kingdom.[24]

With the reconstruction of Europe and the advent of the "cold war" following World War II, security assistance became an even more important part of American foreign policy. That security assistance programs advanced national interests abroad was a basic presupposition in the post-World War II years.[25] During the late 1960's and early 1970's, however, these programs—much like the military in general—were subjected to critical scrutiny by both the Congress and certain special interest groups.[26] Many members of Congress believed that extensive military aid had contributed to escalation of the Vietnam war;[27] moreover, many saw military aid cut-backs as a convenient way to reduce budget and balance-of-payment deficits.[28] Congress eventually imposed controls over both the MAP and the FMS, placing particularly restrictive constraints on foreign military sales involving extensions of credit to allied nations.[29]

In the mid-1970's, mounting concern over alleged human rights violations within assisted countries led to even greater congressional involvement with security assistance. Congress eventually enacted legislation proscribing the grant of aid to countries that committed human rights violations. Concern about the harmful effects of security assistance became manifest in the executive branch as well upon the inauguration of President Jimmy Carter. On May 19, 1977, President Carter stated, "[t]he virtually unrestrained spread of conventional weaponry threatens stability in virtually every region of the world. Total arms sales in recent years have risen to over $20 billion and the United States accounts for more than one-half of this amount."[30] To curb what he perceived to be a threat to world peace, President Carter directed a sharp reduction in the dollar value of transfers of military material by the United States.[31] Although he acknowledged that United States' arms transfers would continue, President Carter declared that, henceforth, "the burden of persuasion would be on those who favor a particular arms sale rather than [on] those who oppose it."[32] During his term of office, President Carter also attempted repeatedly to reduce arms transfers by foreign nations. He initiated the "Conventional Arms Transfers Talks" with the Soviet Union, but was unable to conclude an agreement.

With the election of President Ronald Reagan, the basis for American security assistance returned to its his-

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[23] Paul Y. Hammond et al., The Reluctant Supplier: U.S. Decisionmaking for Arms Sales 3 (1983) [hereinafter The Reluctant Supplier].

[24] *Id.*

[25] Roger P. Labrie et al., U.S. Arms Sale Policy: Background and Issues 5 (1982).

[26] *Id.*; *see also* The Reluctant Supplier, *supra* note 23, at 47.

[27] Ernest Graves & Steven A. Hildreth, U.S. Security Assistance: The Political Process 64-65 (1985) [hereinafter U.S. Security Assistance].

[28] *Id.* at 62; *see also* The Reluctant Supplier, *supra* note 23, at 44.

[29] The Reluctant Supplier, *supra* note 23, at 47, 49-50; U.S. Security Assistance, *supra* note 27, at 24.

[30] James E. Carter, Policy on Transfer of Conventional Arms (May 19, 1977), *in* Dep't St. Bull., June 13, 1977, at 625.

[31] *Id.* at 626.

[32] *Id.* at 625.

torical focus. President Reagan declared "the transfer of conventional arms and other defense articles and services [to be] an essential element of [the United States'] global defense posture and an indispensable element of its foreign policy."[33] President Reagan averred that increased emphasis on security assistance would deter international aggression, enhance American and allied military readiness through combined exercises, and demonstrate to the world our long standing commitment to our allies. He also asserted that increased assistance would promote stability in the assisted nations and in the geographic regions surrounding them, and would improve the capacity and efficiency of America's industrial base.[34]

Security assistance clearly is not founded on philanthropy. Rather, it is grounded on the belief that aiding our allies will advance our national interests, either directly or indirectly. The unilateral reductions introduced by President Carter were well intentioned, but naive—in essence, they ignored real world actualities. Nations always will need arms for their defenses, and some nations always will be willing to supply them. In the Reagan view, if the United States would not provide its allies with military assistance, some other nation would do so in our stead to the detriment of American political influence in the aided nation. President Reagan plainly expressed this conclusion in his proclamation, remarking pragmatically that "[w]e will deal with the world as it is, rather than as we would like it to be."[35] President Bush, continuing President Reagan's policies on security assistance, has left this proclamation undisturbed.[36]

Current Posture of Security Assistance

Despite the executive branch's strong support for security assistance programs, Congress has cut the security assistance budget consistently. Congress reduced military programs from $5.7 billion in 1985 to $4.6 billion in 1990[37] and cut over $600 million from economic support fund appropriations in FY 1991.[38] The IMET appropriation also was reduced, dropping by $180,000 from the FY 1990 appropriation to a total allocation of $47,196,000.[39] Moreover, although federal law empowers the executive branch to administer the various security assistance programs, Congress repeatedly has restricted the executive's administrative flexibility by earmarking much of its appropriations for specific expenditures.[40] The 1991 FMFP appropriation, for example, not only imposed a one-percent cut from the 1990 appropriation, but also tied up nearly eighty-six percent of the total appropriation in earmarked accounts.[41]

Foreign military sales have dropped dramatically in recent years. Annual foreign military sales fell from $19.2 billion in 1982 to $7.1 billion in 1988.[42] Significant factors contributing to this decrease included increased competition from other nations, the financial instability of the purchasing nations, and congressional reluctance to supply arms to Middle East nations antagonistic to Israel.[43]

The future of security assistance appears more optimistic, however, following the recent liberation of Kuwait. The allied victory in the Persian Gulf enhanced executive and military prestige both with the public and with Congress. The Bush Administration may benefit from larger security assistance appropriations in days to come—appropriations for foreign military aid to America's allies in the Gulf are particularly likely to increase—and Congress even may allow the administration greater discretion in expending its annual appropriations. Our Gulf allies, moreover, will need to replace weapons systems that were damaged or destroyed during Operation Desert Storm—and doubtlessly will want to modernize their defense inventories as well. Congress likely will grant most of their requests for foreign military sales.

Congress already has demonstrated an increased willingness to yield to the administration's security assistance requests. In 1990, President Bush asked Congress to forgive Egypt's substantial security assistance

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[33] *Conventional Arms Transfer Policy*, Dep't St. Bull., Sept. 1981, at 61.

[34] *Id.*

[35] *Id.* at 62.

[36] *See generally* Management of Security Assistance, *supra* note 9, at 1-29.

[37] Foreign Appropriations, Export Financing, and Related Programs Appropriations Act of 1991, Pub. L. No. 101-513, title III, 1991 U.S.C.C.A.N. (104 Stat.) 1979, 1997-98 [hereinafter 1991 Appropriations Act]; *see also 1991 Budget Request*, *supra* note 8, at 50 (discussing the Bush administration's budget request for security assistance).

[38] 1991 Appropriations Act, title III, 1991 U.S.C.C.A.N. (104 Stat.) at 1990-1991; *1991 Budget Request*, *supra* note 8, at 50.

[39] Samelson, *supra* note 13, at 26.

[40] *1991 Budget Request*, *supra* note 8, at 50.

[41] Samelson, *supra* note 13, at 24.

[42] Management of Security Assistance, *supra* note 9, at 1-29.

[43] *Id.* Interestingly, in 1988, Congress appeared ready to disapprove the sale of F-18 attack fighters and Maverick missiles to Kuwait. Initially, the Senate actually did disapprove the Maverick sale. Secretary of State George M. Schultz responded somewhat prophetically, reminding the Chairman of the Committee on Foreign Affairs that "Kuwait must be able to provide a credible deterrent to its neighbors." *See Recent Arms Sales to Kuwait*, DISAM J., Fall 1988, at 25.

debt in consideration for Egypt's military support of Operation Desert Shield.[44] Congress did not accede completely to this request; however, it did agree to suspend Egypt's payment obligation and authorized the President to cancel Egypt's indebtedness if he determined this forgiveness to be "essential to the security interests of the United States."[45] Congress's willingness to cooperate with the Bush Administration's efforts to reward Egypt for participating in Operation Desert Shield is significant because it implies that Congress may be even more favorably disposed toward requests benefiting nations that contributed to the allied victory in Operation Desert Storm.

Another area of probable growth in the security assistance arena is in counternarcotics operations. The Bush Administration continues to place a high priority on the war on drugs, and the military's role in this battle continues to expand. The appropriation for FY 1991 allowed the executive branch to spend up to $59.9 million from economic support fund accounts to support counternarcotic operations in Bolivia, Ecuador, Jamaica, and Peru.[46] If these nations made "significant progress" in stemming the flow of drugs, the President could provide them with an additional $195 million from the ESF.[47] Congress, moreover, authorized the executive branch to extend as much as $118 million to these nations from the FMFP.[48] The FMFP appropriation, however, was more restrictive than the ESF appropriation. Federal law barred the Bush Administration from providing FMFP money to any nation that "engages in a consistent pattern of gross violations of internationally recognized human rights."[49]

Who Manages Security Assistance Activities?

Responsibility for security assistance activities belongs to the executive branch. Within the Executive, the Department of Defense and the Department of State are the principal managers of security assistance programs.[50] Each year, these departments submit a "congressional presentation document" to solicit the requisite budget appropriations.[51]

Within DOD, the agency bearing primary responsibility for security assistance activities is the Defense Security Assistance Agency (DSAA).[52] From the DSAA, responsibility flows through the service secretaries, the Joint Chiefs of Staff, and the commanders of the unified commands, to the local offices of the Security Assistance Organization (SAO).[53] An SAO office is located in each of the various foreign nations that benefit from security assistance. These offices usually will be a judge advocate's principal point of contact with security assistance planners. Each SAO office has in-country management responsibility for security assistance programs.[54] The local SAO chief is responsible to the United States ambassador, the commanding general of the appropriate unified command, and to the Director, DSAA.[55] Each SAO also forms part of the "country team"—a governmental unit serving under the ambassador that includes the embassy staff, as well as local officers of the Agency for International Development, the United States Information Agency, and other agencies.[56] Country teams develop proposals for security assistance to their respective host-nations, consistent with the advancement of United States' interests.[57]

Security Assistance Restrictions

In addition to reducing the security assistance budget and earmarking numerous accounts, Congress has imposed other restrictions on security assistance programs.[58] These restrictions flatly prohibit expenditures on behalf of certain countries[59] and impose a profusion of

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[44] Proposal to Forgive Egypt's FMS Debt, State Dep't Current Policy No. 1299, Oct. 1990.

[45] 1991 Appropriations Act § 592 (d)-(e), 1991 U.S.C.C.A.N. (104 Stat.) 2059-60.

[46] 1991 Appropriations Act § 559(a)(1), 1991 U.S.C.C.A.N. (104 Stat.) at 2024; *see also Department of Defense Guidance for Implementation of the President's National Drug Control Strategy*, DISAM J., Fall 1989, at 15.

[47] 1991 Appropriations Act § 559(a)(2), 1991 U.S.C.C.A.N. (104 Stat.) at 2024.

[48] *Id.* § 559(a)(4), 1991 U.S.C.C.A.N. (104 Stat.) at 2024.

[49] *Id.*, 1991 U.S.C.C.A.N. (104 Stat.) at 2024-2025. The 1991 Appropriations Act added a new restriction on the use of security assistance appropriations: "Funds appropriated by this Act may not be obligated or expended to provide assistance to any country for the purpose of aiding the efforts of the government of such country to repress the legitimate rights of the population of such country contrary to the Universal Declaration of Human Rights." *Id.* § 511, 1991 U.S.C.C.A.N. (104 Stat.) at 2003.

[50] SAMM, *supra* note 4, para. 30,001.A.

[51] Blandell, *Security Assistance: An Instrument of U.S. Foreign Policy*, DISAM J., Fall 1990, at 57, 58.

[52] SAMM, *supra* note 4, para. 30,002.C.6.

[53] *Id.*, paras. 30,002.C.8, 30,002.C.10-.C.12.

[54] *Id.*, para. 30,002.C.12.b.

[55] Management of Security Assistance, *supra* note 9, at 5-14.

[56] Center for Land Warfare, U.S. Army War College, Theater Planning and Operations for Low Intensity Conflict Environments 8a (Sept. 86) [hereinafter Theater Planning]; *see also* Management of Security Assistance, *supra* note 9, at 6-7.

[57] Theater Planning, *supra* note 56, at 9.

[58] *See generally* Carl J. Woods, *An Overview of the Military Aspects of Security Assistance*, 128 Mil. L. Rev. 71 (1990); Jeffrey F. Addicott, *Developing a Security Strategy for Indochina*, 128 Mil. L. Rev. 35, 53-54 (1990); Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 Yale J. Int'l L. 69 (1988).

[59] For example, the 1991 appropriation prohibits FMFP or IMET programs in Zaire, Sudan, Liberia, or Somalia. *See* 1991 Appropriations Act, title III, 1991 U.S.C.C.A.N. (104 Stat.) at 1996-1998. Certain other countries, though not banned completely from receiving assistance, are limited in the dollar amount they may receive. *Id.*

complicated reporting requirements.[60] Most of these restrictions are beyond the scope of this article; however, it will address briefly the restrictions that commonly affect judge advocates involved in operations law.

Limitations on Economic Support Fund

The executive branch may use ESF monies only in support of "economic programs."[61] These monies "may not be used for military or paramilitary purposes."[62] Thus, security assistance planners must take care to ensure that they do not draw on ESF accounts to fund activities arising under the FMFP or similar programs.

Prohibition on Police Training

As a general rule, the executive branch may not expend monies appropriated for any Foreign Assistance Act program to assist or train "police, prison, or other law enforcement forces ... or any program of internal intelligence or surveillance."[63] When the federal government has provided an allied nation with a training team for a lawful purpose, judge advocates must take particular care to ensure that the team is not diverted to an unlawful purpose, such as police training.

Restrictions on Training

The United States often provides training units to foreign countries. These units include mobile training teams (MTT),[64] field training services,[65] technical assistance teams (TAT) and technical assistance field teams (TAFT).[66] As is the case for all security assistance programs, requests for training teams must be submitted through channels and must be approved by appropriate authorities. Judge advocates must ensure that the federal government does not provide training teams unless appropriate authorization has been granted. This is particularly important if Congress has declared the country that has requested the teams to be ineligible for security assistance. The government, moreover, may not use IMET monies to fund training activities, without the express approval of the Defense Security Assistance Agency.[67]

Soldiers providing training may not engage in combat activities or provide any training that could involve them in combat.[68] While they may engage hostile forces in self-defense, training teams must withdraw as soon as possible and scrupulously should avoid any activity that is likely to result in combat. Training teams, moreover, must cease training activities—and withdraw if possible—if they learn that host nation personnel have engaged in activities violating common article three to the Geneva Conventions.[69] This article specifically prohibits "murder, mutilation, cruel treatment, torture, ... taking of hostages, ... humiliating and degrading treatment [of prisoners], ... and denial of judicial guarantees that are recognized as indispensable by civilized people."[70] Soldiers must report all common article three violations to federal authorities; these reports must be kept within military channels.[71] Judge advocates involved in operations law should be aware of these general prohibitions and reporting requirements and should be prepared to brief team members on their legal responsibilities prior to their deployments.[72]

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[60] *See* Samelson, *Legislative Constraints on U.S Arms Transfers*, DISAM J., Fall 1989, at 34 (commenting on the myriad reporting requirements).

[61] 22 U.S.C. § 2346(e) (1988). Note that the current appropriation contains detailed guidance to which judge advocates invariably should refer. For example, despite the general restriction limiting expenditure of ESF monies to "economic programs," Congress specifically directed that Israel receive $200,000 from the FY 1991 ESF appropriation for use during Operation Desert Shield. 1991 Appropriations Act, title III, 1991 U.S.C.C.A.N. (104 Stat.) at 1990.

[62] 22 U.S.C. § 2346(e) (1988).

[63] *Id.* § 2420(a). *But see id.* § 2420(b)(1) (permitting the Drug Enforcement Agency and the Federal Bureau of Investigation to train foreign police agencies to combat crimes that are unlawful under the laws of the United States); *id.* § 2420(b)(3) (permitting the federal government to provide agents of foreign nations with maritime law enforcement training); *id.* § 2420(b)(2) (authorizing the continuation of training contracts extent before December 30, 1974, including contracts entered before that date that subsequently were renewed or extended); *id.* § 2420(c) (permitting the federal government to provide law enforcement training to any nation that has a "long standing democratic tradition, does not have a standing armed force, and does not engage in a consistent pattern of gross violations of internationally recognized human rights"). The government has used the exception set forth in section 2420(c) to justify training law enforcement agents in Costa Rica. *See* Woods, *supra* note 58, at 102 n. 225.

[64] Army Reg. 12-15, Joint Security Assistance Training (JSAT) Regulation, para. 13-7 (28 Feb. 1990) [hereinafter AR 12-15]. Mobile Training Teams provide a wide range of training services. *See id.*

[65] *Id.*, para. 13-5. Field training services include "extended training service specialists" and "contract field services." Both provide training on specific military equipment. *Id.*

[66] *Id.*, para. 13-6. TATs deploy on temporary duty status only, while TAFTs deploy in a permanent change of station status. *Id.* Technical assistance field teams normally will not be used when MTT, TAT, FTS, or commercial contract teams can perform the required task. *See* Army Reg. 12-7, Technical Assistance Field Teams (TAFT) and Technical Assistance Teams (TAT), para. 2-2 (15 Mar. 1979) [hereinafter AR 12-7].

Both TATs and TAFTs install equipment incident to purchase. Any training they may provide is considered incident to installation. Consequently, these teams are not considered to be "providing training" within the meaning of the regulation. AR 12-15, para. 13-6. Nevertheless, the prohibitions discussed in this section do apply to TATs and TAFTs.

[67] AR 12-15, para. 13-2b.

[68] 22 U.S.C. § 2761(c)(1) (1988).

[69] AR 12-15, para. 13-3.

[70] *Id.*

[71] *Id.*, para. 13-3(c); *see also* 22 U.S.C. § 2761(c) (1988) (requiring the President to notify Congress within forty-eight hours of actual combat or a significant change in the circumstances surrounding the deployment).

[72] *See* AR 12-15, para. 13-3 (requiring that team members receive operational law briefing prior to deployment).

Classified Information

Judge advocates also must be prepared to discuss the rules governing release of classified information to foreign nationals. Here, the regulations provide a bright line rule—any proposed release of classified information must be approved by the appropriate authority prior to deployment.[73] Absent prior approval, release is prohibited. Within the host-nation, the SAO must ensure that foreign citizens possess the appropriate level clearance to receive classified information.[74]

Practical Considerations

Four other areas that may prove significant to the operations law judge advocate are status of personnel, claims, standards of conduct, and release of security assistance data.

Status of Personnel

American access to foreign commissaries or post exchanges normally will be governed by host nation agreements.[75] Another issue, of greater concern to American soldiers, is the amenability of security assistance personnel to foreign criminal and civil process. Personnel assigned to an SAO typically enjoy diplomatic status,[76] and thus are immune to host nation criminal prosecution and to most local civil sanctions. Personnel assigned to training teams usually receive identical protection.[77] In NATO countries, and in countries that are parties to agreements similar to the NATO status of forces agreement (SOFA),[78] the applicable SOFA will govern the status of personnel. By interpreting these agreements, judge advocates can help SAO personnel determine their amenabilities to host nation laws.[79] In the absence of any express agreement with the host nation, American personnel are subject to all host nation laws and judicial procedures.

Claims

The United States normally conducts foreign military sales in accordance with the terms and conditions of "letters of offer and acceptance" (LOA).[80] General condition C of the military's standard LOA requires the host nation to "indemnify" and "hold harmless," the United States and its personnel for any claims arising "in connection with this offer and acceptance."[81] Obviously, whenever this provision applies, the United States will owe no obligation to pay claims arising from transactions conducted pursuant to the LOA. If the United States already has made payment, government agents should seek immediate indemnification from the host nation.

If an activity giving rise to a claim falls outside the scope of the LOA, judge advocates first should look to host nation stationing arrangements—such as the NATO SOFA[82]—to determine whether the claim is payable. If a stationing agreement exists, its claims procedures must be followed. If no host nation agreement exists, the judge advocate should review the Foreign Claims Act to determine whether the claim is cognizable.[83]

Standards of Conduct

SAO personnel and training teams remain subject to standards of conduct regulations and must be reminded of their responsibilities semiannually.[84] SAO personnel wield considerable influence in security assistance planning. Judge advocates, accordingly, must take special care to remind them of the general prohibition against accepting gifts from contractors and other individuals or organizations seeking to do business with the United States.[85] Similarly, judge advocates must advise security

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[73] *Id.*, para. 13-18; AR 12-7, para. 3-17.

[74] AR 12-15, para 13-18; AR 12-7, para. 3-17.

[75] Army Reg. 1-75, Administrative and Logistical Support for Oversea Security Assistance Organizations (SAOs), paras. 3-1, 3-4 (1 Oct. 1989) [hereinafter AR 1-75].

[76] Management of Security Assistance, *supra* note 9, at 11-19, 11-20.

[77] Addicott, *supra* note 58, at 52. For a description of the types of diplomatic immunity and the protection extended by each, see Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[78] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

[79] The Department of Defense normally provides training pursuant to a letter of offer and acceptance (LOA). The LOA often defines the status of training teams; therefore the SAO should have a copy for reference. *See generally* SAMM *supra* note 4, at table 701-7 (discussing supplementary information to be covered by the LOA).

[80] Dep't of Defense Form 1513, United States Department of Defense Offer and Acceptance (Mar. 1979) [hereinafter DD Form 1513]. *See generally* SAMM, *supra* note 4, ch. 7; Army Reg. 12-8, Foreign Military Sales Operations/Procedures, ch. 5 (1 Jan. 82).

[81] DD Form 1513, annex A, general condition C.

[82] North Atlantic Treaty, *supra* note 78.

[83] *See generally* AR 1-75, ch. 6; Army Reg. 27-20, Legal Services: Claims, ch. 10 (28 Feb. 1990).

[84] Army Reg. 600-50, Standards of Conduct, para. 1-6b (28 Jan. 1988) [hereinafter AR 600-50].

[85] *Id.*, para. 2-2.

assistance personnel to refuse gifts from a foreign government whenever possible.[86] SAO personnel may not accept cash payments under any circumstances.[87] Nor may American personnel act as conduits for gifts from contractors to individuals in the host nation.[88] Equivalent prohibitions apply to other DOD personnel performing security assistance duties.[89]

As an exception to the general rule, DOD personnel may accept gifts of minimal value—currently defined as no more than $200—from a foreign government.[90] If the gift is of more than minimal value, it must be refused unless the offeree concludes that refusal would embarrass the offeror or adversely would affect America's relations with the offeror.[91] Whenever an offeree does accept a gift of more than minimal value, this gift becomes the property not of the donee, but of the United States.[92]

Release of Information

Release to the Host Nation

Personnel participating in security assistance operations may release unclassified information—which includes any security assistance information that has not been classified by an appropriate authority[93]—to representatives of any country or international organization that possesses a legitimate need to know it.[94] Classified information on "tentative plans and programs [likewise] may be released to concerned countries and international organizations to the extent necessary for [their] effective participation."[95] "Classified dollar levels of tentative country or organizational programs [however] may be released only with the specific permission of DSAA (Defense Security Assistance Agency) with the concurrence of the Department of State."[96]

Release to Third Parties

The rules governing release of security assistance data to third parties are less straightforward than the rules governing release to the host nation. This is particularly true when a third party submits a request for information under the provisions of the Freedom of Information Act (FOIA).[97] Two principal FOIA exemptions may serve as grounds for denying FOIA requests for security assistance information. The first is the classified information exemption and the second is the trade secrets exemption.

Information that has been classified properly need not be released pursuant to a FOIA request.[98] If the government determines that the requested data should be classified, but is not, the government may classify the information and deny the request.[99] If security assistance personnel wish to deny a FOIA request for classified or classifiable data, they must forward the request to the initial denial authority (IDA) for action,[100] and also should provide the requester with an interim response acknowledging receipt of the request and informing the requestor that the request has been forwarded for action.

Whenever the requested datum contains information from contractors that is marked confidential or proprietary—or whenever this information apparently should have been so marked—judge advocates must ensure that security assistance personnel take certain steps before permitting the data to be released. When government officials receive a FOIA request for confidential or proprietary data, they must notify the contractor who provided the data of the request and must allow the contractor thirty days to object or consent to release.[101] While awaiting the contractor's response, officials should provide the requestor with an interim response.[102] If the contractor objects to release, the servicing judge advocate should assess the validity of the objection. If he or she determines that release of the data will impair the government's ability to obtain similar data in the future or that it will cause substantial harm to the contractor, he or she should advise the IDA to deny the

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[86] AR 1-75, para. 2-7a.

[87] *Id.*

[88] AR 600-50, para. 2-3c.

[89] *See* Army Reg. 672-5-1, Military Awards, para. 7-3a (1 Oct. 1990).

[90] *Id.*, paras. 7-4d and 7-13.

[91] *Id.*, para. 7-13b.

[92] *Id.*

[93] SAMM, *supra* note 4, para. 50,202A.1.

[94] *Id.*, para. 40,002b.2.a.

[95] *Id.*, para. 40,002b.2.b.

[96] *Id.*

[97] Freedom of Information Act 5 U.S.C. § 552 (1988) [hereinafter FOIA]. In addition to the two exemptions discussed in this article, all remaining FOIA exemptions should be considered. The fifth enumerated exemption, which pertains to internal advice and recommendations, may be particularly applicable to security assistance files. *See id.* § 552(b)(5).

[98] *Id.* § 552(b)(1)(A).

[99] *See* Army Reg. 25-55, The Department of the Army Freedom of Information Program, para. 5-100c (9 Feb. 1990) [hereinafter AR 25-55]; Exec. Order No. 12,356, para. 1-6(d), 3 C.F.R. 166 (1982) (limiting the authority of Army officials to classify data after receipt of a FOIA request to the Secretary of the Army, the Deputy Secretary of the Army, senior agency officials designated in accordance with paragraph 5-3(a) of Executive Order No. 12,356, and officials with top secret classification authority); *see also* SAMM, *supra* note 4, para. 40,002 (providing guidance on classifying security assistance data).

[100] *See* AR 25-55, paras. 5-104, 5-200 (outlining procedures for forwarding requests to the initial denial authority).

[101] Exec. Order No. 12,600, 3 C.F.R. 235 (1987); AR 25-55, para. 5-207.

[102] Exec. Order No. 12,600, *supra* note 101, § 5.

request.[103] If, however, the government decides to release the information over the contractor's objection, government officials must inform the contractor of the government's intent and should allow the contractor a reasonable time for response before releasing the data.[104] Only the IDA, or a person with equivalent authority, may release data that a contractor claims to be exempt from release.[105]

Conclusion

Judge advocates may expect the role of security assistance as an instrument of national foreign policy to increase. Because the military bears administrative responsibility for so many security assistance programs, judge advocates involved with operations law must obtain a basic understanding of security assistance programs and of the statutory and regulatory restrictions that govern them.

Operational law judge advocates must be particularly cognizant of the restrictions on the use of training teams and should be prepared to brief team members on their responsibilities under federal law. On a practical level, a basic understanding of the rules governing release of information, standards of conduct, claims, and status of personnel is also essential. Judge advocates may expect commanders to look to them for advice on these matters with ever increasing frequency.

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[103] *See* National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also* 5 U.S.C. § 552(b)(4) (1988).

[104] AR 25-55, para. 5-207.

[105] *Id.*

Torncello and the Changed Circumstances Rule: "A Sheep in Wolf's Clothing"

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Introduction

The government's right to terminate federal procurement contracts for its own convenience dates back to the Civil War. In *Torncello v. United States*,[1] the United States Court of Claims addressed the extent to which the government may invoke the termination for convenience clause that appears in most federal contracts. A plurality of the court announced that the government no longer would be allowed to "walk away" from its contractual obligations "with impunity."[2]

The *Torncello* plurality, asserting that it was "tossing out" traditional notions about when the government could terminate for convenience, averred that the government henceforth would be held to a more demanding standard of conduct. According to the plurality, government officials could terminate a contract for convenience properly only in the event of "some kind of change from the circumstances of the bargain or in the expectations of the parties."[3]

In the nine years following the *Torncello* decision, the courts and federal contracts boards have struggled, to varying degrees, with this changed circumstances rule. Although commentators originally hailed *Torncello* as a decision of potentially far-reaching proportions,[4] no substantial changes in the allocation of the risks associated with convenience terminations actually have occurred. To the contrary, the changed circumstances rule has provided no results that could not have been achieved through a proper application of the traditional bad faith and abuse of discretion analysis. This article analyzes the *Torncello* decision and its impact on the government's ability to invoke termination for convenience clauses.

Termination for Convenience

Legal commentators date the government's first assertion of its right to terminate contracts for its own convenience to the Civil War.[5] Historically, this termination authority provided the government a vehicle by which it could settle massive, war-related procurement contracts that became obsolete as the needs of the conflict changed and as the war drew to a close.[6] Rule 1179 of the Army Regulations of 1863 empowered the Commissary General not only to enter into subsistence contracts for the War

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[1] 681 F.2d 756 (Ct. Cl. 1982)

[2] *Id.* at 772.

[3] *Id.*

[4] *See* Note, *Limiting The Government's Ability To Terminate for Its Convenience Following* Torncello, 52 Geo. Wash. L. Rev. 892, 906-07 (1984).

[5] *See* Ralph C. Nash, Jr. & John Cibinic, Jr., Administration of Government Contracts 818 (2d ed. 1986).

[6] *See id.* at 817-18.

Department, but also to terminate them "at such time as ... [he] may direct...."[7] The Supreme Court recognized the Commissary General's regulatory termination authority in *Speed v. United States*, but also ruled expressly that this authority was not without limitations.[8]

The federal government's authority to terminate contracts for its own convenience expanded in the years following the Civil War. In *United States v. Corliss Steam Engine Co.*[9] the Supreme Court recognized the inherent authority of government officials to suspend contracts in the "public interest." Later, in World War I, Congress passed the Urgent Deficiency Appropriation Act of 1917, which authorized the President to "modify, suspend, [or] cancel" contracts for goods and services pursuant to wartime procurement requirements.[10] The Contract Settlement Act of 1944[11] likewise entitled the executive branch to enter and terminate wartime procurement contracts. The Persian Gulf War provided the most recent examples of the government's discretionary authority to invoke the termination for convenience clause.[12]

The government's authority to terminate for convenience presently applies to all federal procurements, in peace as well as in war. For more than twenty years, federal procurement contracts have incorporated some form of standardized termination for convenience clause.[13] The Federal Acquisition Regulation currently provides a draft clause for use in all fixed-price contracts. This clause states, in pertinent part, "The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that termination is in the Government's interest."[14]

The most significant aspect of termination for convenience clauses is the manner in which they minimize government liability. Properly invoked, a termination for convenience clause limits a contractor's recovery to costs of work performed prior to termination, profits on any work the contractor actually performed, and the costs of settlement. Thus, a contractor is deprived of anticipatory profits whenever the government—in essence—breaches by terminating a contract for its convenience.

Although termination for convenience clauses may enhance the government's authority to cancel procurement contracts, they also carry a certain amount of judicial baggage. Both the courts and the federal contracts boards use what now is referred to as the "traditional bad faith and abuse of discretion analysis" to evaluate the government's use of termination for convenience clauses. Simply put, if a contractor can show that government officials invoked a termination for convenience clause arbitrarily and capriciously or in bad faith, the finder of fact will deny the government the protection of the clause. In *Kalvar Corp. v. United States*[15] the Court of Claims discussed the proof required to show bad faith by the government. To argue a claim of bad faith successfully, the contractor must present "well-nigh irrefragable proof."[16] The courts have construed this high burden of proof to require "evidence of some *specific intent to injure the contractor.*"[17] In *United States Fidelity & Guaranty Co. v. United States*,[18] the Court of Claims cited four principles to consider in determining whether the contracting officer acted arbitrarily or capriciously:

(1) Evidence of subjective bad faith by the government ("often equated with conduct motivated by bad faith");

(2) Absence of a "reasonable basis" for the decision;

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[7] Army Regulations of 1863.

[8] 75 U.S. (8 Wall.) 77 (1868). The Supreme Court characterized *Speed* as "one of those particular and urgent cases where the Secretary of War directed that rations should be procured by purchasing hogs and slaughtering and packing them." The contractor had "agreed at a fixed price, to slaughter and pack for the government fifty thousand hogs at Louisville.... The government furnished 17,132 hogs, which were killed and packed and this service paid for; and failed to furnish any more." Because the contract did not contain a clause allowing the Commissary General to terminate the order at his discretion, the Court awarded the contractor breach damages.

[9] 91 U.S. 321 (1875).

[10] Ch. 29, § 2(b), 40 Stat. 182 (1917).

[11] Contract Settlement Act of 1944, ch. 358, 58 Stat. 649 (1944) (current version at 41 U.S.C. §§ 101-125 (1988)).

[12] Indeed, one newspaper reported,

> The Defense Budget Project, a Washington group that analyzes the effects of defense spending, estimates that 70 percent to 80 percent of the billions of dollars spent on the Persian Gulf war have been for wages and consumable items such as food, clothes and medical supplies. Companies that supply these products are also the most vulnerable, because the government is more likely to cancel contracts for things it won't be able to use....

No Peace Dividend For Firms That Geared Up For The War, The Washington Times, at A1, col. 4, Mar. 4, 1991.

[13] *See* Nash & Cibinic, *supra* note 5, at 818.

[14] Fed. Acquisition Reg. 52.249-2 (1 Apr. 1984).

[15] Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976).

[16] *Id.* at 1301.

[17] *Id.* at 1302 (emphasis added).

[18] United States Fidelity & Guar. Co. v. United States, 676 F.2d 622 (Ct. Cl. 1982); *see also* Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990); Air-Flo Cleaning Sys., 90-3 B.C.A. (CCH) ¶ 23,071 (June 22, 1990).

(3) The degree of proof necessary to show a lack of reasonableness is directly related to the amount of discretion given the government—hence, the greater the discretion given the contracting officer, the more difficult is the task of showing his or her decision to be an abuse of discretion; or

(4) Violation of a statute or regulation.

As one may surmise, the traditional analysis has proven to be a rather amorphous standard for gauging the government's use of discretion in convenience terminations. Exactly how far the "discretionary scope" of the government's termination authority extends under this traditional framework remains a hotly debated issue in litigation to this day.

The latitude afforded the government to revoke contracts pursuant to termination for convenience clauses reached its greatest breadth in *Colonial Metals Co. v. United States*.[19] The facts of this case provide a good point of reference for analyzing the government's use of termination for convenience clauses. At issue was a fixed-price, definite quantities contract with the Navy for 900,000 pounds of copper ingot. Colonial Metals Company (Colonial), the only bidder for this contract, offered to supply the copper to the Navy at about seventy-eight cents per pound. The contracting officer awarded the contract to Colonial. Within a month of award, however, the Navy terminated the contract for the convenience of the government. Evidently, when the Navy awarded the contract, the market price for copper ingot was actually about fifty-six cents per pound. The Navy, accordingly, found it could save over $200,000 if, rather than dealing with Colonial, it contracted with a "primary source" offering the market price. On review, the Court of Claims intimated that the contracting officer was unaware of the price disparity at the time of contract award, remarking that,

> [i]t ... also [was] not explained in the record why the contracting officer did not withhold the award to plaintiff and do immediately what he eventually did—negotiate rated contracts with the primary sources, at their prevailing low prices. Quotations of the price of copper from primary sources, to be found in the *Wall Street Journal* and trade papers, are common knowledge. It may be that the contracting officer did not share in the common knowledge of the price of copper futures.[20]

The Court of Claims, in a broadly worded opinion, then upheld the Navy's use of the convenience termination clause to obtain the better price. Noting that contracting officers have the "fullest discretion to end work,"[21] the court ruled that, "[a]bsent bad faith ... or some other wrong to the plaintiff ... such as does not here appear, the government alone is the judge of its best interest in terminating a contract for convenience."[22]

The deferential language that the Court of Claims used in assessing the government's authority to invoke the termination for convenience clause caused a mild uproar within the legal community. Many legal pundits argued that, after *Colonial Metals*, "virtually no limitations [restricted] the government's right to terminate for convenience."[23]

Colonial Metals' seemingly simple and authoritative standard for judging convenience termination decisions, however, was short-lived. Just eight years after it decided *Colonial Metals*, the Court of Claims redefined the scope of the government's power to terminate contracts for convenience in *Torncello v. United States*.[24]

The Changed Circumstances Rule

In *Torncello*, the Court of Claims, sitting en banc, expressly overruled *Colonial Metals* by majority decision.[25] A plurality of the court also announced the changed circumstances rule, which many legal commentators then believed would restrict radically the government's authority to terminate for convenience. The *Torncello* plurality based its decision on a fundamental principle—all binding contracts must be supported by consideration.[26] The plurality claimed that the discretion given the government to terminate contracts under the traditional analysis amounted to "a route of complete escape ... [vitiating] any other consideration furnished."[27] The *Torncello* plurality then looked to the specific facts of the case to determine what—if any—consideration the government had rendered to Torncello.

Torncello involved a simple set of facts. In June 1973, the United States Navy awarded Torncello a requirements contract to provide grounds maintenance and refuse

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[19] 494 F.2d 1355 (Ct. Cl. 1974)

[20] *Id.* at 1360.

[21] *Id.* at 1361.

[22] *Id.*

[23] *Torncello*, 681 F.2d at 767.

[24] *See* Note, *supra* note 4, at 906-07.

[25] *Torncello*, 681 F.2d at 773. Interestingly, the three judges who decided *Colonial Metals*—Judges Davis, Nichols, and Bennett—also were part of the *Torncello* panel. Judge Bennett, moreover, wrote the *Torncello* plurality opinion.

[26] *Id.* at 768.

[27] *Id.* at 769.

removal for six Navy housing projects in the San Diego area.[28] Part of the contract required Torncello to provide rodent control services for each housing project. Torncello's bid specified a charge of $500 per call for rodent removal—a price considerably higher than the fees quoted by other bidders.[29] The Navy apparently awarded the contract to Torncello knowing of this disparity in prices. Even so, when Navy officials eventually realized they actually would need an exterminator to kill rats in the projects, they immediately hired another contractor to do so. Torncello challenged this diversion of work. Contending that the Navy had breached its contract, he claimed breach damages, including anticipatory profits. The Armed Services Board of Contract Appeals (ASBCA) denied Torncello's appeal, citing "the overriding availability to the government of constructive termination for convenience."[30]

The Court of Claims, however, found for Torncello. The court rejected the proposition that the government could invoke the termination for convenience clause "to take advantage of a price that ... [it] had known about at the award date...."[31] The plurality expressed its specific concern that the protection of traditional analysis used to evaluate government termination decisions failed to provide contractors with adequate consideration to form a binding contract. The *Torncello* plurality concluded that to apply traditional analysis would deprive the Navy contract of essential consideration.[32]

The plurality correctly pointed out that, under the traditional analysis, the government is presumed to act in good faith. As the plurality noted, "mere allegations" could not rebut this good-faith presumption. To prevail, the contractor had to show "specific [governmental] intent to injure the plaintiff."[33] The plurality dismissed the notion that good faith alone amounted to adequate consideration, asserting, "It does not seem enough to support the government's claim for otherwise unlimited convenience termination for the government only to promise not to use it specifically to damage the contractor."[34]

The *Torncello* plurality then turned its attention to the second prong of the traditional analysis, that the government's decision to terminate may not be arbitrary or capricious. Applying rather circuitous logic, the plurality concluded that "the government's obligation to avoid clear abuses of discretion is only an illusion."[35] The plurality, consequently, felt compelled to reallocate the risks associated with convenience terminations. To remedy what it perceived to be an "absence of consideration," the *Torncello* plurality ruled that the invocation of a termination for convenience clause "requires [as justification] some kind of change from the circumstances of the bargain or in the expectations of the parties."[36]

The plurality, however, failed to establish the parameters of the "new rule" it sought to create. It tried to define the changed circumstances rule by citing past examples of permissible government termination actions.[37] In these cases, government officials had terminated contracts for convenience because of bid irregularities,[38] misinterpretation of the contract terms,[39] and deficient contract specifications.[40] Each of these decisions, however, was the product of the traditional bad faith and abuse of discretion analysis. Although the plurality carefully highlighted these cases as demonstrating conduct acceptable under the changed circumstances rule, it failed to explain why the traditional approach would not work as well in future administrative and judicial reviews of terminations for convenience. The *Torncello* opinion, therefore, left the legal community uncertain what new ground the plurality actually believed it had broken.

Significantly, three judges on the *Torncello* court concurred in the result, but refused to adopt the changed circumstances rule. Each interpreted *Torncello* to stand for the simple proposition that the federal government may

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[28] *Id.* at 758. Ronald A. Torncello was the president of Soledad Enterprises, Inc., a corporation that collapsed into bankruptcy before the court rendered its decision.

[29] *Id.* Torncello ultimately offered to perform rodent control services for $35 per call, once he realized that the Navy had found his original charges excessive. He rescinded this offer, however, when the Navy ordered its own Public Works Department to perform the services.

[30] *Id.*

[31] *Id.* at 760.

[32] *Id.* at 770-71.

[33] *Id.* at 770. Echoing the sentiments of other courts, the *Torncello* plurality acknowledged that a claimant seeking to show bad faith on the part of the government must present "'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing." *Id.*

[34] *Id.* at 771.

[35] *Id.* The plurality found that the government's discretion to termination a contract for convenience was essentially unlimited. *See id.*

[36] *Id.* at 772.

[37] *Id.* at 766.

[38] *See, e.g.*, John Reiner & Co. v. United States, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964); Brown & Son Elec. Co. v. United States, 325 F.2d 446 (1963); Warren Bros. Roads Co. v. United States, 355 F.2d 612 (1965); G.C. Casebolt Co. v. United States, 421 F.2d 710 (1970).

[39] Nesbitt v. United States, 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966)

[40] Nolan Bros. v. United States, 405 F.2d 1250 (Ct. Cl. 1969).

not invoke a termination for convenience clause for reasons that it had considered before entering into the contract.[41] Judge Friedman argued that the court should deem the government's use of a termination for convenience clause improper only if it found the government actually *intended* to terminate the contract at time of award.[42] Judge Davis specifically rejected the plurality's suggestion that the traditional "abuse of discretion" analysis "is an inadequate or unsatisfactory general standard for gauging the contracting officer's use of the termination clause."[43] Judge Nichols, complaining that "the court takes a needlessly circuitous route to a destination we all agree on," likewise concluded that the traditional analysis provided adequate consideration.[44]

Perhaps the most controversial aspect of the *Torncello* opinion was its suggestion that the government might not be able to take advantage of postcontract price changes.[45] The plurality implicitly rejected any attempt by the government to use termination to obtain lower prices, when it declared that this practice "put[s] contractors 'in the untenable position of being subject to termination and loss of the benefit of the sale when the market falls but being saddled with a loss when the reverse occurs.'"[46] In his concurring opinion, Judge Davis attacked this proposition vigorously, arguing that it was "wrong and a mistake to intimate, even provisionally or gratuitously, that the convenience termination clause cannot be utilized when a better price appears *after* the contract is made."[47] Judge Davis further noted that, even using the changed circumstances rule proffered by the plurality, a "better price ... appears to be ... a change in significant conditions."[48] Indeed, two noted legal commentators later remarked that "it would be difficult to ascertain a more valid instance for the contracting officer to issue a termination for convenience 'in the government's interest.'"[49]

The Changed Circumstances Rule Fails to Gain Acceptance

The *Torncello* plurality clearly believed that it was pioneering a new area in federal procurement contracting. Although the changed circumstances rule was supposed to replace the traditional analysis, the plurality failed to flesh out the actual scope of its new doctrine. Satisfied with eliminating the traditional standard for gauging government termination decisions, the plurality judges left the task of further defining their new rule to courts in future cases. Rather than accepting this invitation to adopt the "more demanding" changed circumstances rule, however, courts and federal contracts boards responded nearly unanimously by limiting the scope of *Torncello*. Arguably, although many courts and boards paid lip-service to *Torncello*, not one yet has reached a result that would differ even slightly from the results of traditional discretionary analysis.[50] Clearly, the boards and the courts have applied the changed circumstances rule restrictively—insofar as they have not ignored it altogether.

The Boards

For the most part, the federal contracts appeals boards have rejected an expansive reading of *Torncello*'s changed circumstances rule. Whenever a contractor attempted to invoke *Torncello* to challenge a government convenience termination, each board normally began its analysis by carefully examining the specific facts of the case before it. If it could distinguish the case from *Torncello* on the facts, the board would ignore the changed circumstances rule and would apply the traditional bad faith and abuse of discretion analysis instead.

The federal boards most commonly have avoided the changed circumstances rule by distinguishing the contracts in the cases at hand from the contract in *Torncello*. In *Morgan Management Systems, Inc.*, for instance, the ASBCA refused to apply *Torncello* because the case before it did not involve a requirements contract.[51] It likewise eschewed the changed circumstances rule in C.F.S. *Air Cargo, Inc.* because that case involved a fixed-price, definite quantities contract—"not a requirements contract as in *Torncello*."[52]

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[41] *Torncello*, 681 F.2d at 773-74.

[42] *Id.*

[43] *Id.* at 773.

[44] *Id.* at 774. Judge Nichols also characterized the plurality's opinion as "toss[ing] ... off needlessly sweeping dicta."

[45] *Id.* at 767.

[46] *Id.*

[47] *Id.* at 774.

[48] *Id.*

[49] W. Noel Keyes, Government Contracts Under the Federal Acquisition Regulation § 49.32 (1986)

[50] Ralph C. Nash, Jr. & John Cibinic, Jr., *Termination for Convenience: Searching for The Changed Circumstances Rule*, The Nash & Cibinic Rep., Sept. 1990, at 55.

[51] 83-2 B.C.A. (CCH) ¶ 16,728 (July 27, 1983).

[52] ASBCA No. 30,113, Nov. 28, 1990, 1990 LEXIS 452; *see also* Adams Mfg. Co., 82-1 B.C.A. (CCH) ¶ 15,740 (Mar. 29, 1982), *aff'd*, 1 Fed. Ct. Procurement Decisions (Fed. Publications, Inc.) ¶ 125 (Fed. Cir. 1983). In *Fiesta Leasing & Sales, Inc.*, the ASBCA applied an identical rationale to a case in which the contracting officer mistakenly had contracted to lease buses that already had been provided under a different contract. *See* Fiesta Leasing & Sales, Inc., 86-3 B.C.A. (CCH) ¶ 19,045 (Apr. 28, 1986).

The boards also have refused to apply *Torncello* because of variations in the forms of termination clauses contained in the contracts at issue. In *Viktoria Transport GmbH & Co.* the ASBCA refused to apply the changed circumstances rule because "[u]nlike the situations in *Torncello* ... where the short-form termination for convenience clause left the contractors without a remedy, the contract in this case contained the long-form convenience termination clause."[53] The boards commonly have concluded the element of "consideration" the Court of Claims found missing in the *Torncello* requirements contract existed if, upon awarding the contract, the government committed itself to a definite quantity or conditioned its termination action in accordance with the limitations contained in the long-form clause.

The boards also have placed great emphasis on the manner in which the government invoked termination clauses. In *Special Waste, Inc.*, the ASBCA distinguished the case before it from *Torncello*, in part because in *Special Waste* "the government terminated the entire contract not just the unfavorable contract line item."[54] The board also stressed that, in *Special Waste*, the government discovered its error and terminated the contract before the contractor commenced work.[55]

In other cases, the boards have declared that a "change in circumstances" occurred but nonetheless have ignored *Torncello* in favor of the traditional discretionary analysis. In *Vec-Tor, Inc.*,[56] the ASBCA announced that it "will follow the bad faith/abuse of discretion rule regarding convenience termination until the 'change of circumstances' rule is adopted by a clear majority of the court."[57] The *Vector* contract involved the construction of an air terminal in Egypt. After awarding the contract to Vector, the federal government learned that "the Egyptians did not need or want [this] work."[58] The ASBCA viewed this as "a sufficient change in circumstances" to warrant a termination for convenience.[59] The ASBCA, moreover, regularly has condoned the government's use of convenience terminations to obtain better prices from third parties. In *East Bay Auto Supply, Inc.*,[60] for instance, the ASBCA upheld a partial contract termination for convenience that arose when the government discovered that some of the contracted items were "available through other commercial sources at greatly lower prices."[61] In reaching this decision, the ASBCA noted expressly that the "'abuse of discretion/bad faith' rule is the one followed by this Board."[62]

The Courts

Both the United States Claims Court and the United States Court of Appeals for the Federal Circuit have wavered on the issue of whether the changed circumstances rule is an effective vehicle for evaluating terminations for convenience. The courts' vacillations reflect their uncertainties about the proper scope of the changed circumstances rule. Like the boards, however, the courts have tended to read *Torncello* narrowly rather than expansively. Not one decision by either court has objected to the boards' refusals to adopt the changed circumstances rule. Indeed, the courts themselves often have appeared to pay mere "lip service" to *Torncello* before applying the traditional analysis.

The early decisions of both the Claims Court and the Federal Circuit immediately after *Torncello* revealed their reluctances to embrace the changed circumstances rule. The Federal Circuit first addressed "*Torncello* issues" in two unpublished decisions. In *Adams Manufacturing Co.*[63] Chief Judge Davis—author of one of the concurring opinions in *Torncello*—availed himself of a second opportunity to comment on the changed circumstances rule. He stated that *Torncello* decided only that "the government cannot employ the convenience-termination article when it ends a requirements contract solely to obtain a better price from a different source, of which the United States already had knowledge when it entered the contract." Although *Adams* was an unpublished opinion, and, therefore, lacked any precedential value, Judge Davis's opinion fired an interesting first shot in the

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[53] 88-3 B.C.A. (CCH) ¶ 20,921 (May 26, 1988); *see also Drain-A-Way Sys.*, 84-1 B.C.A. (CCH) ¶ 16,929 (Nov. 16, 1983).

[54] 90-2 B.C.A. (CCH) ¶ 22,935 (Apr. 25, 1990).

[55] *Id.*

[56] 85-1 B.C.A. (CCH) ¶ 17,755 (Nov. 5, 1984), *aff'd*, 4 Fed. Ct. Procurement Decisions (Fed. Publications, Inc.) ¶ 61 (Fed. Cir. 1985).

[57] *Id.*

[58] *Id.*

[59] *Id.* For additional cases in which the boards have found a "change in circumstances" using the traditional bad faith and abuse of discretion analysis, see generally Special Waste, Inc., 90-2 B.C.A. (CCH) ¶ 22,935 (Apr. 25, 1990) (deficient government work estimate); Aden Music Co., 87-3 B.C.A. (CCH) ¶ 20,113 (Aug. 26, 1987) (contracting officer not satisfied with management of Navy band by tour director); Executive Airlines, Inc., 87-1 B.C.A. (CCH) ¶ 19,594 (Feb. 24, 1987) (holding new mail route to be a change in circumstances).

[60] 89-2 B.C.A. (CCH) ¶ 21,634 (Feb. 3, 1989).

[61] *Id.*

[62] *Id.*

[63] 1 Fed. Ct. Procurement Decisions (Fed. Publications, Inc.) ¶ 125 (Fed. Cir. 1983).

debate that rapidly surrounded the changed circumstances rule. The second case in which the court considered the *Torncello* rule was *Vector v. United States*, an appeal from the ASBCA decision described above.[64] Notably, both Judge Davis and Judge Nichols—another member of the *Torncello* court—heard the case. The most notable feature of this opinion, which was written by Judge Nichols, was the court's complete indifference to the ASBCA's overt refusal to adopt the changed circumstances rule. These two unpublished decisions strongly support the boards' apparent beliefs that the courts, like the boards, will not read *Torncello* as expansively as the *Torncello* plurality would have wanted.[65]

In subsequent cases, both the Claims Court and the Federal Circuit struggled to determine what weight they should give to the changed circumstances rule. Apparently abandoning the plurality's lead in *Torncello*, they methodically adjusted the changed circumstances rule to conform it to the traditional bad faith and abuse of discretion analysis. Indeed, over the years the courts have invoked *Torncello* primarily to ascertain the proper "mens rea" by which to evaluate the actions of government officials.[66]

In any event, *Torncello* clearly has failed to take the world by storm. In *Government Systems Advisors, Inc. v. United States*,[67] a case decided more than eight years after *Torncello*, the Claims Court pointedly remarked on the "dearth of law defining the phrases 'change in the circumstance of the bargain' and 'expectations of the parties.'"[68]

Virtually all of the decisions of the Claims Court and the Federal Circuit follow the boards' reasoning and read *Torncello* restrictively. Not surprisingly, however, some opinions have placed somewhat more emphasis upon the changed circumstances rule than have others—or, at least, they have claimed to do so. In *Municipal Leasing Corp. v. United States*[69] the Claims Court parroted the *Torncello* plurality decision almost word-for-word, holding that "the termination for convenience clause appropriately can be invoked *only* in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties."[70] How its holding would differ from the holding obtained through use of traditional analysis, however, the court left unsaid. Other cases attached less importance to the changed circumstances rule. In *Salsbury Industries v. United States*,[71] the Federal Circuit observed that *Torncello* "stands [only] for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause."[72]

No matter how one interprets *Torncello*, however, the application of the changed circumstances rule has yet to result in an outcome different from that which would result from the use of the traditional analysis.[73]

Over the years, the courts apparently have spiced the traditional rule with just a touch of "*Torncello* seasoning." Both the Claims Court and the Federal Circuit have adopted a two-stage analysis to evaluate convenience terminations. In the first stage, the courts determine what change in circumstances—if any—induced the government to invoke the termination for convenience clause. Significantly, in some cases, the changes in circumstances arose from conditions completely independent of precontract government activity or knowledge. In *B & H Supply Co. v. United States*,[74] for example, the government used a convenience clause to terminate a work contract for the repair and maintenance of a housing development because of the low economic viability of the housing units. The contractor challenged the termination. On appeal the court specifically rejected the contractor's argument that the government had assumed the risks associated with changed economic conditions.[75]

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[64] 4 Fed. Ct. Procurement Decisions (Fed. Publications, Inc.) ¶ 61 (Fed. Cir. 1985).

[65] See Drain-A-Way Sys., 84-1 B.C.A. (CCH) ¶ 16,928 (Nov. 16, 1983), in which the General Services Board of Contract Appeals (GSBCA) acknowledged the limited precedential value of *Adams* but noted, "nonetheless ... we do not consider that the court's rule precludes us from citing such unpublished opinions from the circuit that we consider significant, even though the circuit may not."

[66] *See generally infra*, notes 76-77 and accompanying text.

[67] 21 Cl. Ct. 400 (1990)

[68] *Id.* at 410.

[69] 7 Cl. Ct. 43 (1984).

[70] *Id.* at 47 (emphasis added).

[71] 905 F.2d 1518 (Fed. Cir 1990).

[72] *Id.* at 1521.

[73] Nash & Cibinic, *supra* note 50.

[74] 17 Cl. Ct. 544 (1989).

[75] *Id.* at 547; *see also* Embrey v. United States, 17 Cl. Ct. 617 (1989). In *Embrey* Judge Rader applied the four abuse of discretion principles and couched his findings in terms of changed circumstances. Ruling in favor of the government termination for convenience action, Judge Rader concluded that ruined business relations between the contractor and the contracting officer constituted a valid "change in circumstances." *Embrey*, 17 Ct. Cl. at 625-27.

The second prong of the courts' analyses focuses on the knowledge or intent of government officials when they entered into the contracts. This aspect of the courts' analyses causes the most discussion and, not surprisingly, the most confusion.

Torncello's clearest message has been that the government may not enter into a contractual agreement with a contemporaneous intent subsequently to invoke the termination for convenience clause. The courts, however, remain divided on whether *Torncello* should apply to cases in which the government has based its convenience termination actions on information of which it was aware before it entered into the agreements in question. In *Biener GmbH v. United States* Judge Rader—following the lead set by Judge Friedman's concurring opinion in *Torncello*—ruled that a contractor must demonstrate that the government possessed not only precontract knowledge, but also contemporaneous intent to breach, to prove a claim of governmental breach of contract.[76] On the other hand, in *Erwin v. United States*, the Claims Court took a more expansive view of *Torncello*. It held expressly that the government may not invoke the termination for convenience clause based "on knowledge acquired before the contract award."[77]

The most recent example of the courts' struggles with the changed circumstances rule appears in *Salsbury Industries v. United States*.[78] *Salsbury* involved a Postal Service construction contract for the manufacture and installation of aluminum post office lockboxes. To correct a bid irregularity, a federal district court ordered the Postal Service to terminate the contract with Salsbury and award it to another bidder. The Postal Service, accordingly, terminated the Salsbury contract for the convenience of the government. Salsbury challenged the convenience termination, claiming that the Postal Service had known of the facts that ultimately gave rise to the district court's order when it awarded Salsbury the contract.[79]

In finding for the government, the Claims Court focused on *Torncello* and the changed circumstances rule. After engaging in a extensive analysis about the application of the changed circumstances rule, the court concluded that *Torncello* did not require a "reasonable foreseeability test" and that the district court order represented a valid change in circumstances.[80] On appeal, the Federal Circuit affirmed the lower court's decision, but gave short shrift to the Claims Court analysis, flatly declaring that "*Torncello* has nothing to do with this case."[81] The Federal Circuit instead applied the bad faith and abuse of discretion standard to rule that the district court order "was an unanticipated change in circumstances, not merely justifying but compelling termination of the contract."[82]

Despite the Federal Circuit's strong disavowal of *Torncello* in *Salsbury*, at least one member of the Claims Court judiciary still chooses to read *Salsbury* in accordance with *Torncello*. In *Government Systems Advisors, Inc. v. United States*[83] the Claims Court again opted to evaluate a government termination for convenience in the context of the changed circumstances rule. Although it acknowledged the Federal Circuit's rejection of *Torncello* in *Salsbury*, the Claims Court nevertheless persisted in viewing its earlier opinion in *Salsbury* as providing "guidance" into the scope of the changed circumstances rule.[84]

Perhaps the best evaluation of the deference the courts should give to the changed circumstances rule appears in *SMS Data Products Group, Inc. v. United States*.[85] In *SMS Data Products* Judge Rader asserted that "*Torncello* did not change the traditional understanding of when the government could terminate for convenience."[86] Rather than viewing the *Torncello* decision as the source of a new doctrine for the evaluation of convenience terminations, Judge Rader interpreted the changed circumstances rule to be but a part of the analytical process that the courts always have used when applying the traditional rule.[87] The government, Judge Rader stated, always must have a rational basis for invoking a termination for convenience clause, and—more often than not—that basis will be a "change in circumstances."

Allocation of Risks and the Public Interest

The past nine years have shown that the courts and boards are not willing to embrace fully the changed circumstances rule. Nevertheless, at least three judges on

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[76] 17 Cl. Ct. 802 (1989).

[77] 19 Cl. Ct. 47, 53 (1989)

[78] 17 Cl. Ct. 47 (1989), *aff'd*, 905 F.2d 1518 (Fed. Cir. 1990).

[79] *See Salsbury Indus.*, 905 F.2d at 1520.

[80] *Salsbury Indus.*, 17 Cl. Ct. at 58-59.

[81] *Salsbury Indus.*, 905 F.2d at 1551.

[82] *Id.* at 1552.

[83] 21 Cl. Ct. 400 (1990).

[84] *Id.* at 410.

[85] 19 Cl. Ct. 621 (1990).

[86] *Id.* at 620.

[87] *Id.* at 620-21.

the *Torncello* court perceived a need to reallocate the risks of liability for convenience terminations to reduce the burdens they impose on contractors. The *Torncello* plurality insisted that the traditional analysis did not protect contractors adequately against the financial costs associated with terminations for convenience. It suggested that a postcontract drop in prices may not always serve as a valid basis for the government to invoke the termination for convenience clause. The plurality's opinion clearly questions the justice of depriving a contractor of its anticipated profits when the contractor itself has not defaulted.

Federal courts and boards, however, consistently have avoided—or even rejected—the idea of shifting the costs associated with a termination for convenience past the limits set by the traditional analysis. Even the decisions that purported to follow *Torncello*'s changed circumstances philosophy easily could have reached the same results under the traditional analysis. Most significantly, the courts and boards have shied away from the most controversial aspect of the *Torncello* decision—the contention that the government may not invoke termination for convenience clauses solely to obtain better prices from a third party. This part of the plurality's decision reveals the changed circumstances rule as it truly should be construed—that is, as a judicial device intended to shift the costs of a termination for convenience away from the contractor. Unfortunately, the *Torncello* plurality failed to establish cogent parameters for this new doctrine. Consequently, no one can be quite sure when the burden of the costs of termination actually should remain on the contractor.

A marked hesitancy to venture beyond the limits prescribed by the traditional rule is evident even in the *Torncello* opinion. The supporters of the changed circumstances rule failed to obtain a clear majority in support of the changed circumstances rule. Even with the entire court sitting en banc, only three of the six judges adopted the changed circumstances rule. Furthermore, the plurality—even as they criticized the traditional rule—were themselves unable to identify which attributes of the changed circumstances rule amounted to consideration sufficient to bind the government. Significantly, the few decisions the plurality cited to support its changed circumstances rule derived from the traditional rule. None of these decisions shifted the risk of liability away from the contractor. Rather, each afforded the government great latitude to terminate contracts for its own convenience. Indeed, many permitted the government to terminate a contract for convenience even when the termination arose from the *government's* own precontract errors, such as bid irregularities and defective specifications. The opinions, therefore, offered the legal community little insight on how to distinguish the changed circumstances rule from the traditional good faith and abuse of discretion analysis. Indeed, they actually seem to argue *against* the plurality's underlying premise that the government should bear an increased share of the costs of summary contract terminations.

The right to exercise a termination for convenience clause arises from the government's obligation to protect the public "purse strings." This is perhaps the strongest argument countering an expansive reading of the changed circumstances rule. The evident concern of the courts and boards with protecting the public interest explains their reluctance to extend *Torncello* beyond the parameters established by the traditional bad faith and abuse of discretion analysis. As Judge Davis, who concurred in the *Torncello* opinion, noted in *Nolan Brothers*,

> [t]he mere existence of a default by the Government would not bar convenience-termination.... Among the 'host of variable and unspecified situations' calling for closing of the work under a still existing contract... it is entirely reasonable to include a post-contract recognition that the job is impossible or too difficult to perform or too costly for the Government if pushed through to its conclusion.... Certainly the Government would not be compelled to see the contract work through to the bitter end, no matter what the cost or the trouble or the waste in resources.[88]

When considering equity and allocation of risks in federal contracting, one should remember that contractors participate in the highly regulated field of government procurement voluntarily. All are acutely aware that in negotiating with the United States Government, they are dealing with the "deepest pocket" known to mankind. Any contractor who bargains with the government must be aware not only of the potential costs of its actions, but also of the potential economic benefits it may reap. If a contractor objects to the tolerant standards of review that federal factfinders apply to government terminations for convenience, it is free to forego these potential benefits and refrain from dealing with the government.

Conclusion

Although legal commentators initially hailed *Torncello* as a revolutionary rule that offered contractors a better shot at the government's "deep pockets," the changed circumstances rule has received a much more restrained welcome from the courts and boards. Nine years after its debut, the *Torncello* changed circumstances rule has done little more than underscore the proposition that the government may not "use the standard termination for convenience clause to dishonor, with impunity, its contractual obligations."[89]

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[88] *Nolan Bros.*, 405 F.2d at 1253.

[89] *Torncello*, 681 F.2d at 772.

The fallout from *Colonial Metals* moved the *Torncello* plurality to attempt to replace the traditional bad faith and abuse of discretion analysis with the changed circumstances rule. The plurality, however, failed to flesh out this new doctrine. The three judges instead appeared content to present the legal community with but the skeletal framework of a rule in the hope that future cases would "put some meat on its bones." The rule, however, remains a skeleton—with rather fewer bones than it had in 1982.

One commentator opined shortly after the *Torncello* decision that the changed circumstances rule advanced three crucial propositions.[90] First, convenience terminations based on precontract knowledge are "improper *per se*."[91] Second, the government must pay breach damages if the termination for convenience arises through the negligence of government contracting officials.[92] Finally, if postcontract events cause the termination, the courts must determine whether these occurrences "truly [were] beyond the expectations or control" of the government.[93]

Over the past nine years, however, the courts and boards have opted to restrict the changed circumstances rule, rather than to expand it. Consequently, of the three propositions cited above, they have examined seriously only the most conservative position—that is, the issue of precontractual knowledge—and on even that issue, they are wavering. Although legal commentators still advocate the merits of the changed circumstances rule,[94] the courts and boards continue to view convenience terminations in the context of traditional discretionary doctrine.

Of the three fora most likely to address the scope of *Torncello*'s changed circumstances rule, the Claims Court currently offers contractors the most sympathetic ear. Several Claims Court judges appear willing to extend the changed circumstances rule beyond an "intent" threshold and apply it to cases involving precontractual knowledge. Whether this "more demanding" standard will grow in importance remains to be seen. Absent a specific disavowal by the Federal Circuit, however, the knowledge element of proof probably will gather a greater following with time.

Whatever action the Federal Circuit takes, the courts clearly will not extend the scope of the changed circumstances rule far beyond a precontractual knowledge standard. Significantly, the *Salsbury* court flatly rejected the adoption of any sort of reasonable foreseeability standard. Even so, the next issue the court logically should address is whether government officials may terminate a contract for convenience of the government when they "should have known" of the facts that compel them to use the termination for convenience clause. Interestingly, *Colonial Metals* centered on just this question. The current ambivalence the Claims Court presently displays about the significance of precontract knowledge well may afford contractors their best chances of prevailing in cases involving facts similar to those in *Colonial Metals*.[95]

The courts and boards, for the most part, have declined the *Torncello* plurality's invitation to flesh out the changed circumstances rule. In case after case, these fora instead have continued to address the government's termination for convenience decisions in terms of traditional analysis. Accordingly, the changed circumstances rule, at most, has provided some definition to the somewhat amorphous qualities of the bad faith and abuse of discretion standard. *Torncello*'s key role, thus, may have been to highlight a lesson left vague in *Colonial*

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[90] Note, *supra* note 4, at 906-07.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See* Nash & Cibinic, *supra* note 50. Acknowledging the less than enthusiastic welcome the changed circumstances rule has received, professors Nash and Cibinic note:

> We believe that the plurality opinion in *Torncello* deserves a better fate than to be relegated to the scrap heap of judicial opinions.... [I]t is based on a fair allocation of risks....
>
> ....
>
> ... [W]here changed circumstances do not exist, the only 'harm' suffered by the government is payment of anticipated profits—and who ever said profits was a dirty word?
>
> *Id.*

[95] The courts have not addressed this issue specifically since *Torncello*; however, in light of *Nolan Brothers*, the changed circumstances rule might not offer contractors much relief even under these circumstances.

Metals—the government may not award a contract with the intent to terminate it at a later date.[96]

When a contractor enters the field of federal procurements, government attorneys should expect it to use every available weapon at its disposal to safeguard its financial interests.[97] Civilian attorneys retained by contractors invariably will attempt to breathe new life into the changed circumstances rule because this rule represents a potential gold mine to their clients. Nevertheless, despite its flashy introduction, the nine years since *Torncello* have shown the changed circumstances rule to be no more demanding than the traditional analysis that preceded it. What once appeared to be a substantial threat to the government's ability to terminate for convenience has proved to be "a sheep in wolf's clothing."

[96] *Torncello* also may have provided civilian attorneys with a better basis to challenge the government's use of the termination for convenience clauses. For example, in *Maxima v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), the Federal Circuit relied on the reasoning of *Torncello* to reject the government's "assertion of a constructive termination for convenience." *Id.* The *Maxima* case involved a one-year indefinite quantity contract for typing and printing services. The government also agreed to provide Maxima with a minimum quantity of work. As the one-year base term approached its end, Maxima discovered that the government would not supply it with even the minimum agreed quantity of work. Indeed, the government could not provide this minimum quantity of work even after Maxima voluntarily extended the one year period. More than one year *after* the contracting officer paid Maxima for the services it had provided—including the unused portion of the minimum quantity—the government informed Maxima that the contract was constructively terminated for convenience. *Id. See generally* Note, *A Change in Circumstance*, The Army Lawyer, Feb. 1989, at 36 (referring to the government's argument as "exploring the boundaries of the 'straight-face' test").

The ASBCA recently interpreted *Maxima* to leave "open the question whether the termination for convenience clause could be invoked ... to remedy an anticipated failure to meet the guaranteed minimum." Rather than replacing the traditional framework, the *Torncello* changed circumstances rule appears to have carved for itself a niche in the traditional discretionary standard—a niche from which an aggressive civilian attorney more successfully may challenge the government's attempts to terminate contracts for its own for convenience. *See* PHP Healthcare Corp., 91-1 B.C.A. (CCH) ¶ 23,647 (Dec. 28, 1990).

[97] For an example of the ASBCA's appreciation of a contractor's challenge to government convenience terminations, see *Vec-Tor, Inc.*, 85-1 B.C.A. (CCH) ¶ 17,755, in which the Board dismissed the contractor's claim as "a melange of legal theories—estoppel, 'urgency', bad faith, express oral contract, implied contract and breach of contract—which allegedly entitle it to compensation ... and ... lost profits." *Id.* at 88,676.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Don't Leave the Back Door Open

In *almost* every case, trial defense counsel profitably may present witnesses in extenuation and mitigation to testify that the accused is a good soldier. Defense attorneys, however, should not present "good soldier" evidence purely as a matter of routine. In each case, the trial defense counsel must consider carefully whether mitigation evidence will cause more harm than good. This dilemma recently was highlighted by the opinion of the Army Court of Military Review in *United States v. White*.[1]

In *White*, a special court-martial panel composed entirely of officer members convicted the accused of one specification of wrongful use of cocaine. During the presentencing hearing, the defense counsel presented one of the accused's military supervisors, who had known the accused for two years, as a witness in extenuation and mitigation. On direct examination, the defense counsel elicited testimony from the witness that the accused, a psychiatric technician, was "clinically very proficient ... as far as his duty performance" was concerned.[2] Before conducting cross-examination, the trial counsel requested an article 39a session, during which she announced her intention to test the witness's knowledge by posing a question concerning a specific instance of uncharged misconduct. The defense counsel objected, arguing that he had not opened the door for this type of cross-examination. The military judge, however, permitted trial counsel to ask the question in the article 39a session and again before the members. In this manner, trial counsel was able to present before the sentencing panel a "do you know" question that implicated the accused in a separate incident of misconduct—that is, that accused had tested positive for cocaine in a urinalysis conducted after the charged offense was preferred.[3] On appeal, the Army

[1] 33 M.J. 555 (A.C.M.R. 1991).

[2] *Id.* at 556.

[3] *Id.* at 557.

Court of Military Review ruled that the military judge had not abused his discretion by permitting trial counsel to ask the traditional "do you know" question, stating that the defense had opened the door for the question by presenting "good soldier" character evidence.[4]

The defense's problems were compounded when the trial counsel referred to the uncharged cocaine use during closing argument, asserting that the accused should be punished for multiple uses of cocaine rather than just the one use of which he had been convicted.[5] The Army court acknowledged that the military judge erred by permitting the trial counsel to argue facts not in evidence[6] and by failing to interrupt the argument, sua sponte, to give a limiting instruction.[7] It ruled, however, that this error was harmless.[8]

Appellate defense counsel often are confronted with the *White* scenario, but usually find themselves stuck with the results because questions asked by trial counsel are not evidence.[9] Thus, although a single question based on uncharged misconduct can be very damaging to the defense, the accused is foreclosed on appeal from challenging "do you know" questions as admissions of improper evidence. Furthermore, even if the trial counsel has capitalized on the error in argument and the military judge has failed to limit the question to its proper scope, to prove on appeal that the accused was unduly prejudiced is virtually impossible—as the Army court's decision in *White* amply demonstrates.

Defense counsel can prevent these problems only by keeping the door closed on uncharged misconduct. Trial defense counsel who are aware of uncharged misconduct or similar evidence that is inadmissible in the government's case-in-chief in aggravation should scrutinize the potential consequences of presenting "good soldier" evidence. The damage that could result were the trial counsel to reveal even a single incident of uncharged misconduct may far outweigh the benefits of favorable testimony by a superior.

If a defense counsel inadvertently does open the door for the Government's uncharged misconduct questions, he or she must attempt to minimize the damage done. Although, at this point, damage control may seem like the proverbial closing of the barn door after the horses have escaped, trial defense counsel *must* make a motion in limine prior to closing arguments to prevent the Government from referring to uncharged misconduct in its closing argument. Moreover, if the individual circumstances of the case permit, trial defense counsel should request an instruction from the military judge limiting the panel's consideration of the trial counsel's question solely as a test of the witness's basis of knowledge. Captain Norris.

Tough Cases Make Bad Law: An Implied Finding of Necessity Satisfies the Sixth Amendment

The Court of Military Appeals recently took a big step back from the Sixth Amendment protection established in *Coy v. Iowa*[10] and *Maryland v. Craig*.[11] In *United States v. Romey*,[12] the court held that an implied finding of necessity was sufficient to deny an accused his right to confront the principal witness against him.

Private First Class (PFC) Romey was accused of sodomy and indecent acts with his natural daughter, *S*. When Romey's case went to trial *S* was almost nine years old. She was the Government's only witness regarding the substance of the charged offenses. During the Government's case on the merits the Government called *S* to testify. *S* answered the trial counsel's general questions about matters that were unrelated to the charged offenses, but she became unresponsive when asked about her father's conduct toward her. The child then responded affirmatively when the trial counsel asked if she would like to whisper her answers in her mother's ear.[13]

The child did not respond when the military judge asked her if she thought she could answer any questions without her mother. When she refused to answer any

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[4] *Id.* On cross-examination, trial counsel may inquire into specific incidents of misconduct when the defense attorney has presented reputation or opinion testimony concerning the character of the accused in extenuation and mitigation. Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 405(a) [hereinafter Mil. R. Evid.]; *see, e.g.*, Michelson v. United States, 335 U.S. 469 (1948); United States v. Hallum, 31 M.J. 254 (C.M.A. 1990); United States v. Pearce, 27 M.J. 121 (C.M.A. 1988); United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982); United States v. Childress, 33 M.J. 602 (A.C.M.R. 1991); United States v. Peterson, 26 M.J. 906 (A.C.M.R. 1988). *But see* United States v. Kitching, 23 M.J. 601 (A.F.C.M.R. 1986), *petition for review denied*, 24 M.J. 441 (C.M.A. 1987) (error to allow cross-examination of defense character witness on basis of uncharged misconduct of accused, when witness did not offer opinion on accused's character generally, but testified only on the narrow basis of the accused's performance in the job-related environment).

[5] *White*, 33 M.J. at 557-58.

[6] *Id.* at 558; *see also* United States v. Rutherford, 29 M.J. 1030 (A.C.M.R. 1990); United States v. Falcon, 16 M.J. 528 (A.C.M.R. 1983), *petition for review denied*, 17 M.J. 314 (C.M.A. 1984).

[7] *White*, 33 M.J. at 558; *see also* United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).

[8] The court reviewed the merits of the issue concerning improper argument, even though trial defense counsel did not object to the argument. Normally, however, a defense counsel's failure to object at trial, either during or after a trial counsel's improper argument, will constitute waiver. *See, e.g.*, United States v. Sherman, 32 M.J. 449 (C.M.A. 1991); United States v. Childress, 33 M.J. at 602.

[9] *See* United States v. Hubert, 6 M.J. 887 (A.C.M.R. 1979).

[10] 487 U.S. 1012 (1988).

[11] 110 S. Ct. 3157 (1990).

[12] 32 M.J. 180 (C.M.A. 1991).

[13] *Id.* at 182.

questions about the substance of the charges, the military judge had the mother brought into the courtroom. Over defense objection, Mrs. Romey was seated immediately to her daughter's right. Mrs. Romey then was sworn in as an interpreter and instructed to repeat what her daughter said. The questioning continued with *S* answering by whispering her responses to her mother, which her mother then repeated aloud. The military judge did not offer the members any explanation for this method of testimony, nor did he provide them with any cautionary instruction concerning it.[14]

The parties had anticipated this situation and actually had discussed it at an article 39(a)[15] session. The trial counsel had indicated then that *S* was reluctant to talk about the alleged offenses and that, in the past, she had communicated by whispering her answers or drawing pictures. The trial counsel also had stated that he believed *S* would not answer questions directly except as to peripheral matters.[16] The defense counsel had objected to alternate methods of testimony, asserting that to permit *S* to testify in this manner would violate PFC Romey's Sixth Amendment right to confrontation. As noted, however, the judge ultimately overruled the defense counsel's objection. Significantly, he made no detailed inquiry of the child, heard no testimony, and made no specific findings of fact that the alternate procedure was necessary before he allowed her to testify through her mother.[17]

The Court of Military Appeals found no Sixth Amendment violation in PFC Romey's case. Recognizing that the right to confrontation is not absolute, the court stated that an accused's rights may be satisfied if the Government makes an adequate showing of necessity for an alternate method of testimonial presentation and if the reliability of this testimony is otherwise assured.[18] The court held that the military judge implicitly had made the requisite finding of necessity in PFC Romey's case. The military judge, according to the court, had based this finding on the trial counsel's uncontroverted representations about *S*'s responses at the article 32[19] hearing and his prior discussions with the child. The military judge, moreover, had observed personally the child's refusal to answer questions in PFC Romey's presence at the article 39(a) session. The court concluded that the record established the necessity of an alternative mode of testimony and that the "third-party-whisper procedure," therefore, did not violate PFC Romey's right to personal confrontation.[20]

In affirming PFC Romey's conviction, the court purportedly measured the "third-party whisper procedure" and the military judge's implied finding of necessity against the standards established in *Craig*.[21] A closer look at the requirements established by the Supreme Court in *Craig*, however, reveals the flaws in the *Romey* decision.

Craig and *Coy* recognized that the right to face-to-face confrontation is not absolute. It may give way to alternative forms of testimony if the use of these forms of testimony is necessary to further an important public policy and if the reliability of the testimony is otherwise assured.[22] The Government, however, *must* make an adequate showing of necessity before it may use special procedures that permit a child witness to testify against an accused in the absence of face-to-face confrontation with the accused.[23]

Craig held that each finding of necessity must be case specific and must follow three basic guidelines:

> 1) alternate procedures must be necessary to protect the welfare of the particular child witness who seeks to testify;
>
> 2) the trial court must find that the child would be traumatized by the presence of the defendant, and not merely by the courtroom in general; and
>
> 3) the trial court must find that the emotional distress that the child witness would suffer in the presence of the defendant would be more than mere nervousness, excitement or a reluctance to testify.[24]

The Court of Military Appeals' holding that an *implied* finding of necessity is sufficient clashes with *Craig*. *Romey* is a classic example of a tough case making bad

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[14] *Id.*

[15] Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839(a) (1988) [hereinafter UCMJ].

[16] *Romey*, 32 M.J. at 182.

[17] *Id.* at 183.

[18] *Id.*

[19] UCMJ art. 32.

[20] *Romey*, 32 M.J. at 183.

[21] *Id.*

[22] *Craig*, 110 S. Ct. at 3166; *Coy*, 487 U.S. at 1021.

[23] *Craig*, 110 S. Ct. at 3169.

[24] *See id.*

law. The number of prosecutions for sexual offenses against children has increased dramatically in the last several years. The military justice system, like its civilian counterparts, struggles to address adequately the unique issues these cases present. The natural tendency to protect allegedly abused children sometimes results in situations like that in *Romey*. Defense counsel must do everything in their powers to protect their clients' rights in these cases. They must not rely on the Government's assertions that a child is reluctant to testify or may be traumatized, but should challenge the Government to prove everything it says. Moreover, a defense counsel should consider asking the military judge to make the requisite specific finding of necessity. This may force the Government to put on expert testimony to prove the "trauma" that physical confrontation would inflict on the child. Finally, the defense should rely on the protection established by *Craig*, rather than on those taken away in *Romey*.

Criminal law practitioners should watch this area of the law closely for future developments. *Romey* itself may be short-lived—Romey's appellate counsel have petitioned the Supreme Court for writ of certiorari. Captain Swope.

Residual Hearsay Under Military Rule of Evidence 803(24)—The Focus of Analysis Defined

In its recent decision in *United States v. Stivers*[25] the Army Court of Military Review addressed the admissibility of a hearsay statement under the residual hearsay exception[26] in light of the Supreme Court's guidance in *Idaho v. Wright*.[27] The Army court's decision followed closely on the heels of a contrary decision by the Navy Court of Military Review in *United States v. Harjak*.[28]

Both *Stivers* and *Harjak* were child sexual abuse cases. Ironically, although the Army court and the Navy court reached divergent results, the analyses the two courts employed were basically identical.

At issue in *Stivers* was a statement the seven-year-old victim made to a state social worker. At trial, the Government called the victim, established her competence to testify, and elicited testimony that the accused had given her a "bad touch" on more than one occasion. The victim, however, could not, or would not, explain the nature and circumstances of the acts. The Government, therefore, called the social worker to testify about prior statements the victim had made to her regarding a neighbor's allegations that Stivers had abused the victim sexually. Over defense objection, the military judge allowed the social worker's testimony under the residual hearsay exception.[29]

In *Harjak* the Navy court considered the admissibility of hearsay statements the ten-year-old victim made to a Naval Investigative Services (NIS) agent. The victim made these statements, which essentially described her relationship with the accused, during an interview at the victim's foster home. At trial, the Government argued that the victim was unavailable and sought the admission of a transcript of the interview under the residual hearsay exception.[30] As in *Stivers*, the military judge admitted the statement over a strident defense objection.

Both appellate courts derived their analyses of the issue from the Supreme Court's opinion in *Wright*. In *Wright*, the prosecution had argued that, in determining the admissibility of a hearsay statement under this exception, the trial court should base the requisite finding of "particularized guarantees of trustworthiness" not only on a consideration of the totality of the circumstances that surrounded the making of the statement, but also on other evidence at trial that corroborated the truth of the statement.[31] The Supreme Court, however, did not agree completely with this argument. It conceded that particularized guarantees of trustworthiness may be shown from the totality of the circumstances. It emphasized, however, that the relevant circumstances include only the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.[32]

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[25] 33 M.J. 715 (A.C.M.R. 1991).

[26] Mil. R. Evid. 803(24). Military Rule of Evidence 803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ....
>
> .... [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that ... the statement is offered as evidence of a material fact; ... the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and ... the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Mil R. Evid. 803(24).

[27] 110 S. Ct. 3139 (1990).

[28] 33 M.J. 577 (N.M.C.M.R. 1991).

[29] *Stivers*, 33 M.J. at 717.

[30] In *Harjak*, the Government originally argued that the victim was unavailable as defined by Military Rule of Evidence 804(a)(4) and claimed as two bases for admissibility Military Rules of Evidence 803(24) and 804(b)(5). Before the Navy court, however, the appellant asserted—and the Government conceded—that the evidence had failed to establish that the victim actually had been unavailable. Accordingly, the court analyzed the admission of the victim's hearsay statements to the NIS special agent under Military Rule of Evidence 803(24).

[31] 110 S. Ct. at 3148.

[32] *Id.*

The common rationale for all hearsay exceptions forms the basis of the Supreme Court's decision in *Wright*. If the circumstances surrounding the making of a statement clearly show that the offered statement is sufficiently free from the risks of inaccuracy and untruth that the test of cross-examination would be of only marginal value, then the hearsay rule should not bar the admission of the statement at trial.[33] These circumstantial guarantees of trustworthiness, however, may include only those guarantees that existed when the declarant made the statement, and may not include factors that the trial court later might add through hindsight—that is, for example, independent evidence that corroborates the hearsay statement.[34]

In affirming the military judge's decision in *Stivers*, the Army court determined that he had focused his analysis solely on the circumstances surrounding the making of the statement. The Army court upheld as sufficient indicia of reliability the military judge's findings that (1) the child's testimony in court had revealed no animosity towards the accused and no motive to lie; (2) the Government probably had not coached the child before the interview; (3) the social worker had stressed to the child that she was there to help and had reminded her of the importance of telling the truth; (4) the social worker's questioning had not been suggestive or leading; and, (5) the child had not recanted her accusations when offered the opportunity to do so during the interview.[35]

In *Harjak*, the Navy court likewise examined the focus of the military judge's analysis. Reviewing the military judge's justifications for admitting the hearsay statement, the court found that he had considered factors that had not existed when the declarant made the statement, had been added through hindsight, or had arisen from subsequent corroboration of the criminal act.[36] The court concluded that the consideration of these extraneous factors had had a substantial effect on the judge's ruling, and that his admission of the statements had amounted to an abuse of discretion.

Despite their obvious inconsistencies, *Stivers* and *Harjak* provide advocates with good examples of the application of *Wright* to courts-martial. Both opinions provide trial defense counsel with a solid argument to use against the admission of hearsay under the residual hearsay exception when, after the military judge has applied a "totality of the circumstances" analysis *exclusively* to the circumstances surrounding the making of the statement, questions remain about a declarant's truthfulness.

Trial defense counsel should ensure that the Government does not use factors other than the circumstances that actually surrounded the making of the hearsay statement to prove that statement's reliability. Defense counsel should force the Government to prove that the declarant is worthy of belief and that cross-examination would be of only marginal value. Situations certainly will arise in which the Government simply will not have the facts it needs to prevail. Furthermore, the rules of evidence require a military judge to make specific judicial findings of "equivalent circumstantial guarantees of trustworthiness" before admitting hearsay statements under the residual hearsay exception.[37] Defense advocates, by making appropriate objections, should strive to prevent military judges from having the facts before them to find and articulate these required guarantees of trustworthiness, and to ensure that the judges' focuses are as limited as *Wright* dictates they should be. Captain Toole.

Mere Flight Does Not Constitute Resisting Apprehension

A soldier vandalized the automobile of his former girlfriend. He hurriedly left the scene and drove down a one-way street in the wrong direction. In doing so, he passed two military police on a routine patrol. The military police turned their vehicle around and pursued the fleeing soldier with siren and emergency lights ablaze. After a chase, the soldier eventually stopped. The military police approached his vehicle. They told him several times to step out of the car, but the soldier remained in the vehicle, asking "what was wrong." When one of the police officers started to reach in through the open window of the soldier's car, the soldier "jerked back" in his seat. Finally, the military police removed the soldier from the car and placed him in handcuffs. At his subsequent court-martial, the soldier was found guilty of a number of offenses, among them, resisting apprehension.[38]

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[33] *Id.* at 3149.

[34] *Id.*

[35] *Stivers*, 33 M.J. at 721.

[36] *Harjak*, 33 M.J. at 582. The court stated that the military judge erred by considering the following factors: (1) the victim had no reputation or motive for lying; (2) the victim never refused to testify concerning the charged offenses; (3) the victim never retracted her statements; (4) the victim's statements were mutually consistent; (5) the victim's first statement to the social worker had been an excited utterance; (6) the victim had reported the alleged offense to a social worker, rather than to a policeman; (7) when the victim had reported the offense, her panties had been stained with semen; and (8) appellant had confessed to the offenses twice. *Id.*

[37] *See Stivers*, 33 M.J. at 720 (quoting United States v. Hines, 23 M.J. 125, 134 (C.M.A. 1986)); *see also* United States v. LeMere, 22 M.J 61 (C.M.A. 1986).

[38] *See* UCMJ art. 95.

The facts discussed above occurred in *United States v. Bell.*[39] In *Bell* the Army Court of Military Review considered once again the issue of whether "flight" from the military police constitutes resisting apprehension. The Army court may be said to have "revisited" this issue because the Court of Military Appeals previously had answered this question in the negative when it had reversed the Army court in *United States v. Harris.*[40]

In *Harris* the Court of Military Appeals held specifically that mere flight from apprehension—even at speeds of seventy-five miles per hour—does not constitute resisting apprehension. To reach this conclusion, the court focused on the nature of the conduct constituting the alleged resistance. The court found a critical difference between evading apprehension and actively resisting it. The determinative question, it held, was whether the accused had engaged in active or even violent resistance, directed toward the apprehending police officer, or merely had attempted to flee or elude capture. The Court of Military Appeals concluded unequivocally that, "[s]ince Congress gave no indication that it intended for the Article 95 violation to encompass flight from apprehension, we shall not torture the language of the Uniform Code to expand criminal liability in this area."[41]

In *Bell* the Army Court of Military Review, relying heavily on *Harris* and cases cited therein, readily dismissed the charge and specification alleging that Bell had resisted apprehension. The court noted that the military judge, using a sample instruction from the Military Judges' Benchbook,[42] erroneously had advised the panel of officers that "[t]he resistance can be accomplished by *flight* or assault or striking the person attempting to apprehend."[43] The court pointedly remarked that a change in the Benchbook would appear to be in order.[44] Despite the instruction in the Benchbook or even the language in the Manual for Courts-Martial,[45] the law is clear that mere flight is insufficient to constitute resisting apprehension.

The Court of Military Appeals also "revisited" the "mere flight" issue shortly after the Army court decided *Bell.* In *United States v. Burgess*[46] the appeals court held once again that mere flight from an arresting officer is insufficient to constitute resisting apprehension under article 95. The court noted, however, that mere flight *may* be charged as failure to obey the lawful order of one not a superior under article 92(2).[47]

When defending a soldier charged with resisting apprehension, a defense counsel vigilantly must ensure that the military judge adheres closely to the law as it is clearly enunciated in *United States v. Harris* and its progeny, rather than to the language of the Manual for Courts-Martial or the Military Judges' Benchbook. An accused should not be charged with—much less convicted of—resisting apprehension, absent some form of physical resistance in *addition* to flight. Major Train.

Clerk of Court Notes

Court-Martial Processing Times, FY 1991

We last published court-martial processing times in the March 1991 issue of *The Army Lawyer*, presenting information for the four quarters of fiscal year (FY) 1990. In this issue, we present figures for the first three quarters of FY 1991 and include statistics for FY 1990 for comparison.

Although the figures shown below represent only the records that the Clerk actually received and, thus, do not necessarily reveal all the cases that were tried in each quarter, one can see clearly the effects of deployments to Operation Desert Shield and Operation Desert Storm and of the redeployment that followed—fewer trials, especially special courts-martial, and somewhat longer posttrial processing times.

Speaking of longer processing times, the Clerk of Court will mount his pulpit yet again—sensitive to implications of dilatory case-processing, chiefs of military justice sections customarily want to deduct time for every aberrational circumstance that may occur after a trial and before the convening authority's action. Army Regulation 27-10, Legal Services: Military Justice, para. 5-31*a*.1 (22 Dec. 1989), however, limits these deductions

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[39] CM 9001258 (A.C.M.R. 7 June 1991).

[40] 29 M.J. 169 (C.M.A. 1989) *rev'g* 25 M.J. 909 (A.C.M.R. 1988); *see also* United States v. Nocifore, 31 M.J. 769 (A.C.M.R. 1990).

[41] 29 M.J. at 173.

[42] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-36 (15 Feb. 1985).

[43] *Bell*, CM 9001258, slip op. at 2.

[44] *Id.*

[45] Manual for Courts-Martial, United States, 1984, Part IV, para. 19c(1) provides, in pertinent part, that "[r]esistance must be active, such as assaulting the person attempting to apprehend or flight ...."

[46] 32 M.J. 446 (C.M.A. 1991).

[47] *Id.* at 448. Additionally, the court noted that general regulations could be promulgated to make flight an offence subject to prosecution under article 92. Furthermore, applicable state statutes can be assimilated under the Assimilative Crimes Act, 18 U.S.C. § 13 (1988). *Burgess*, 32 M.J. at 448.

to authorized defense-requested delays for submission of posttrial matters and to certain other documented delays requested by the accused.

If military justice sections were permitted to deduct all of the unusual delays that stemmed from deployment or combat, their reports would not reveal to the Judge Advocate General's Corps' managers and planners how much longer posttrial processing takes when forces are committed in a full-scale deployment. The purpose of the reports would be defeated. If your jurisdiction's processing times increased between August 1990 and August 1991, this does not mean you were slow. It shows you were there!

General Courts-Martial

	FY 90	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	1558	275	275	309
Days from charging or restraint to sentence	43	42	47	46
Days from sentence to action	52	54	62	63
Days from action to dispatch	6	6	7	6
Days from dispatch to receipt by the Clerk	9	10	11	11

BCD Special Courts-Martial

	FY 90	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	458	91	66	99
Days from charging or restraint to sentence	30	33	32	31
Days from sentence to action	45	45	56	53
Days from action to dispatch	5	4	5	7
Days from dispatch to receipt by Clerk	9	9	9	10

Non-BCD Special Courts-Martial

	FY 90*	1st Qtr	2d Qtr	3d Qtr
Records reviewed by SJA	293	56	33	42
Days from charging or restraint to sentence	34	36	39	34
Days from sentence to action	33	45	43	41

Summary Courts-Martial

	FY 90*	1st Qtr	2d Qtr	3d Qtr
Records reviewed by SJA	1130	222	215	258
Days from charging or restraint to sentence	14	11	11	13
Days from sentence to action	8	8	8	7

*Last Three Quarters Only

Court-Martial and Nonjudicial Punishment Rates, FY 1991

The rates of courts-martial and nonjudicial punishment per 1000 soldiers for the first three quarters of FY 1991 appear below. In parentheses, the quarterly rates appear annualized for comparison with the accompanying FY 1990 rates.

As the court-martial processing times shown above indicate, the number of trials by courts-martial declined during Operation Desert Shield and Operation Desert Storm. Significantly, the rate of special courts-martial empowered to adjudge a bad-conduct discharge (BCDSPCM) declined less than did the general court-martial rate. That result occurred—at least in part—because convening authorities in the area of operations used special courts-martial far more frequently than did their counterparts in garrison. Special courts-martial in the Persian Gulf ultimately constituted more than one-half of the special court-martial cases tried.

Historically, the number of trials always declines in the third and fourth quarters of a fiscal year. Therefore, the third quarter upswing suggests that court-martial rates are returning to their prewar levels. Nonjudicial punishment rates, however, continued their slight decline.

Court-Martial and Nonjudicial Punishment Rates Army-Wide, FY 1991

	FY 90	1st Qtr 91		2d Qtr 91		3d Qtr 91	
GCM	1.94	0.42	(1.69)	0.36	(1.43)	0.41	(1.63)
BCDSPCM	1.03	0.21	(0.83)	0.18	(0.71)	0.22	(0.87)
SPCM	0.20	0.04	(0.15)	0.02	(0.08)	0.04	(0.14)
SCM	1.50	0.31	(1.25)	0.30	(1.18)	0.36	(1.44)
NJP	101.87	20.64	(82.54)	19.63	(78.53)	19.51	(78.04)

Note: Based on average strength of 747,537 (FY 90); 735,517 (1Q); 739,918 (2Q); 737,180 (3Q)

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Sentencing Instructions: Tailor—Not Marshal—the Evidence

Military judges owe a duty to give appropriate instructions to court members.[1] They should tailor these instructions to reflect the circumstances and the evidence admitted in the case.[2] Early in its history, the United States Court of Military Appeals stated,

> The [military judge] must provide the court members with appropriate instructions on the law which applies to all matters to be decided by them.... [Moreover, the judge's] responsibility in that regard does not end with the findings.... Until the trial ends the [military judge] must supply the court members with adequate legal assistance.[3]

The court also has indicated that military judges should provide "general guides [sic] governing the matters to be considered in determining the appropriateness of the particular sentence."[4] Indeed, the thrust of early Court of Military Appeals opinions on sentencing instructions was "to require the [judge] to delineate the matters which the court-martial should consider in its deliberations."[5] Even today, Rule for Courts-Martial (R.C.M.) 1005(e)(4) requires military judges to instruct court members that they should consider all matters in extenuation, mitigation, and aggravation. The discussion to the rule reflects the belief that tailored instructions on sentencing should bring attention to the accused's service record and other pertinent information. A military judge, however, must be mindful of his or her obligation to remain impartial and to dispose of cases in a manner that does not bring the judiciary into disrepute.[6] In giving instructions, the military judge must avoid using any language that gives an appearance of judicial bias.

A recent Court of Military Appeals opinion provides an example of an impermissible comment. In *United States v. Kirkpatrick*[7] the court members convicted the accused—a senior noncommissioned officer—of failure to obey an order and of wrongful use of marijuana. The latter conviction derived from a positive urinalysis result. The evidence included copious testimony describing the accountability of urine samples, the testing procedures used in the urinalysis program, and many samples tested at the laboratory where the accused's specimen was analyzed.[8]

When the military judge in *Kirkpatrick* gave his sentencing instructions, he included the following charge:

> Consider the nature of the offense, particularly the fact that one of the offenses involves marijuana, and consider all the time and money and expense that the Army consumes each year to combat marijuana, and here we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Though [sic] shalt not.[9]

The court faulted the military judge for injecting Army policy into the members' deliberations. Indeed, the court concluded that the instruction was so egregious that the judge committed plain error by delivering it to the members[10] and that the lack of a defense objection to the instruction, consequently, did not waive the issue on appeal.[11] Judges and counsel would be wise to follow the court's admonition that they should not interject command policies into the members' deliberations, either by way of argument or through instructions.

One aspect of the *Kirkpatrick* case that the court failed to address was the military judge's departure from impartiality when he instructed the members in the language quoted above. One readily can imagine the tone of voice the judge used when giving this instruction. Even on its face, the language appears biased and oriented to favor the prosecution. Apparently, the judge deduced from the

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[1] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 920(a), 1005(a) [hereinafter R.C.M.].

[2] R.C.M. 920(a), 1005(a) discussion.

[3] United States v. Linder, 20 C.M.R. 385, 391 (C.M.A. 1956) (citations omitted).

[4] United States v. Mamaluy, 27 C.M.R. 176, 180 (C.M.A. 1959).

[5] United States v. Wheeler, 38 C.M.R. 72, 75 (C.M.A. 1967).

[6] Model Code of Judicial Conduct Canon 3 (1990).

[7] 33 M.J. 132 (C.M.A. 1991).

[8] United States v. Kirkpatrick, CM 8901682, slip. op. at 2 (A.C.M.R. 7 Sep. 1990) (unpub).

[9] 33 M.J. at 133.

[10] *Id.* at 134.

[11] *Id.*

evidence relating the large number of specimens processed by the drug testing laboratory that the Army consumes much "time and money and expense" to combat marijuana each year. This may have been a fair inference; however, it was an inference that the military judge should have allowed the court members to adduce for themselves. When tailoring instructions to the evidence, a judge should summarize the evidence by stating the testimony and evidence as it was adduced at trial, rather than by stating his or her own conclusions about the evidence. A judge should reflect on what the Court of Military Appeals stated early in its history: "There is no real value in reciting generalities to courts-martial. They should operate on facts, and instructions should be tailored to fit the particular record."[12] Lieutenant Colonel Holland.

Suicide and Confidentiality

As a defense counsel or legal assistance attorney representing a distraught client, what may you do ethically if the client reveals to you during the course of the representation that he or she intends to commit suicide? May you reveal this information to appropriate authorities, hopefully to prevent the client's death, or does the ethical rule of confidentiality[13] prohibit the disclosure? The Arizona State Bar recently answered an attorney's inquiry on this question.[14] The Arizona Bar decided that a lawyer whose client has indicated an intention to commit suicide must disclose the communication to the extent the lawyer reasonably believes necessary to prevent the suicide if—and only if—attempted suicide constitutes a crime under the law of the applicable jurisdiction.

How does the Arizona opinion apply to Army legal practice? The applicable rule of confidentiality is the same. As a general rule, "[a] lawyer shall not reveal information relating to the representation of a client...."[15] however, "[a] lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm...."[16] Significantly, the rule does not require death or substantial bodily harm to be directed toward someone other than the client. It does specify, however, that the act likely to result in death or substantial bodily harm must be a crime.

The Army attorney first should determine whether the information about the suicide relates to his or her representation of the client. If, for example, the client has consulted the attorney to execute a will and has related the intended suicide as the reason for the will, then the information certainly relates to the representation. If, however, the information does not relate to the representation, no duty of nondisclosure should exist.[17] If the client is an accused pending trial by court-martial and the defense counsel learns that the client intends to commit suicide, does that information relate to the representation of the client? Because one of the purposes behind the confidentiality rule is to promote free and frank discussion between the attorney and client,[18] bar associations normally construe broadly what constitutes information relating to the representation. Their analyses may differ, however, in situations involving potential suicides. Public concern for the sanctity of human life is so predominant that one state bar has noted that the attorney's duty to preserve client confidences does *not* prevent an attorney from disclosing that a client may be considering suicide, even if the client has not expressed that intention definitively.[19]

The second inquiry the Army attorney must make is whether attempted suicide constitutes a crime. In military law the answer is uncertain. The Court of Military Appeals, however, has stated that an attempted suicide may be prosecuted as malingering under Uniform Code of Military Justice (UCMJ) article 115[20] if the person sought to commit suicide to avoid duty—which apparently could include the duty of facing prosecution by a court-martial.[21] Although suicide itself may be noncriminal, at least two states that have addressed this issue have held that the overriding social concern for the preservation of human life permits the lawyer to disclose the information.[22]

An Army attorney faced with a client intent upon committing suicide should remember that other ethical rules

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[12] *Mamaluy*, 27 C.M.R. at 180-81.

[13] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 1.6 (31 Dec. 1987) [hereinafter Army Rule].

[14] Ariz. State Bar Comm. on Rules of Professional Conduct, Op. 91-18 (1991) [hereinafter Opinion 91-18].

[15] Army Rule 1.6(a).

[16] Army Rule 1.6(b).

[17] *See* Va. State Bar Standing Comm. on Legal Ethics, Op. 560 (1984); Army Rule 1.6a.

[18] Army Rule 1.6, comment.

[19] State Disciplinary Bd., State Bar of Ga., Op. 42 (1984).

[20] Uniform Code of Military Justice art. 115, 10 U.S.C. § 915 (1988) [hereinafter UCMJ].

[21] United States v. Johnson, 26 M.J. 415 (C.M.A. 1988). Depending upon applicable state law and the jurisdictional nature of the situs of the intended suicide, the Assimilative Crimes Act, 18 U.S.C. § 13 (1988), also may enable the military attorney to conclude that attempted suicide constitutes a crime.

[22] Comm. of Professional Ethics, N.Y. State Bar Ass'n, Op. 468 (1978); Comm. on Professional Ethics, Mass. Bar Ass'n, Op. 79-61 (1979); *cf.* Opinion 91-18, *supra*, note 14 ("It cannot, however, be said that for all individuals under all circumstances suicide is a fundamentally wrong and improper act that must be prevented at all costs").

besides the rule of confidentiality may apply. The ethical rules permit the attorney to "seek the appointment of a guardian or *to take other protective action* with respect to a client, [if] ... the lawyer reasonably believes that the client cannot adequately act in the client's own interests."[23] The rule does not indicate what constitutes a disability, but the intent to commit suicide, arguably, may so undermine the client's ability to act in his or her best interest that the attorney should take protective action—that is, for example, disclosing the client's intent to commit suicide to appropriate authorities—to prevent the suicide.[24] Another ethical rule that the attorney may use states, "A subordinate lawyer does not violate [ethical rules] if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[25] The ethical uncertainties of a suicide scenario should allow a subordinate attorney to rely upon a supervisory lawyer's judgment. Army attorneys must remember that they do not operate in an ethical vacuum. Supervisory attorneys bear the responsibility of ensuring that subordinate attorneys are trained in their ethical responsibilities and that subordinates comply with the ethical rules.[26] Accordingly, Army attorneys not only should be aware of potential ethical issues, but also should seek help, if necessary, when choosing a correct (and ethical) course of action. Lieutenant Colonel Holland.

Mistake of Fact in Bad Check Cases Revisited

Kudos to Major Boots Bakauskas, United States Marine Corps, who pointed out an error in a recent TJAGSA Practice Note.[27] The note, which discussed how the mistake of fact defense[28] applies to the three bad check offenses recognized under military law,[29] incorrectly reversed the specific intents for two UCMJ article 123a offenses.

As Major Bakauskas correctly noted, the offense of intentionally writing a bad check to obtain a thing of value requires a specific intent to defraud, rather than an intent to deceive. On the other hand, writing a bad check to pay off a past debt requires a specific intent to deceive, not to defraud.

This error does not affect the discussion in the remainder of the note about applying the mistake of fact defense to these bad check offenses. Major Hunter.

Contract Law Note

Default Termination Final Decisions Lose Finality

Previously, we highlighted *Overall Roofing and Construction, Inc. v. United States*,[30] in which the Court of Appeals for the Federal Circuit held that only the various boards of contract appeals have jurisdiction over "naked appeals"[31] from terminations for default.[32] In that practice note we advised contracting officers to modify the appeal rights notification in termination notices and final decisions to clarify that, in the absence of a monetary claim, the default termination decision may be appealed only to the applicable board of contract appeals.[33] Recent decisions of the Armed Services Board of Contract Appeals (ASBCA or Board) and the United States Claims Court verify the need to clarify a contractor's right to appeal a contracting officer's final decision to terminate a contract for default.[34] The Claims Court and the ASBCA agree that a final decision terminating a contract for default is defective if it advises a contractor that it can appeal to the United States Claims Court. Although the two fora appear to differ on when this defect renders a final decision invalid for jurisdictional purposes, inescapably, one must conclude that the language currently prescribed by regulation is erroneous and should not be used.[35]

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[23] Army Rule 1.14(b) (emphasis added); *see also* Opinion 91-18, *supra* note 14.

[24] *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 83-1500 (1983).

[25] Army Rule 5.2(b).

[26] Army Rule 5.1.

[27] TJAGSA Practice Note, *Mistake of Fact in Bad Check Cases*, The Army Lawyer, June 1991, at 26.

[28] R.C.M. 916(j).

[29] *See* UCMJ art. 123a (intentionally writing a bad check to obtain a thing of value and intentionally writing a bad check to pay off a past debt); *id.* art. 134 (writing a check for which the accused dishonorably failed to maintain sufficient funds in his or her account).

[30] 20 Cl. Ct. 181 (1990), *aff'd*, 929 F.2d 687 (Fed. Cir. 1991).

[31] A "naked appeal" is an appeal that involves only the termination decision—that is, the decision encompasses no monetary claims encompassed from either the contractor or the government.

[32] *Id.* at 184; *see also General Elec. Co.*, 91-2 B.C.A. (CCH) ¶ 23,958 (ASBCA Apr. 23, 1991) (in which the Armed Services Board of Contract Appeals further defined its jurisdiction over non-monetary claims). Although the Board did not address this issue specifically in *General Elec. Co.*, the final decision issued in that case by the contracting officer likewise advised the contractor that it could appeal to the Claims Court. *See id.*

[33] *See* TJAGSA Practice Note, *Default Terminations and Claims Court Jurisdiction*, The Army Lawyer, Aug. 1991, at 39.

[34] This modification is necessary for default termination final decisions that give rise to no monetary claims. Contracting personnel also should be aware of a similar appeal rights problem in final decisions concerning nonmonetary claims. *See* TJAGSA Practice Note, *Armed Services Board of Contract Appeals Expands Jurisdiction Over Nonmonetary Claims*, The Army Lawyer, Aug. 1991, at 41.

[35] At present, contracting officers' final decisions must contain the following language: "Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court ... within 12 months of the date you receive this decision." Fed. Acquisition Reg. 33.211(a)(4)(v) (1 Apr. 1984) [hereinafter FAR].

The Claims Court was the first forum to address the effect of *Overall Roofing and Construction* on default termination final decisions. In *The Finney Co. v. United States*,[36] the contractor received its default termination final decision from the Navy on 14 May 1990. The final decision complied with Federal Acquisition Regulation (FAR) 33.211,[37] informing the contractor that it could appeal the decision to the ASBCA or to "the U.S. Claims Court within twelve months of the date [that it] ... receive[d the] ... decision."[38] The contractor did not appeal to the ASBCA, instead filing its appeal in the Claims Court within the twelve-month period described in the decision. Pursuant to *Overall Roofing and Construction*, the Government moved to dismiss the contractor's appeal for lack of jurisdiction. The contractor opposed the motion and sought to have the appeal transferred to the ASBCA.[39]

The Claims Court found that the final decision did not comply with the Contract Disputes Act (CDA)[40] because it erroneously advised the contractor that it could "bring action directly in the U.S. Claims Court within twelve months of the date [it] receive[d the] ... decision."[41] *Overall Roofing and Construction* clearly demonstrates that the ASBCA is the only tribunal with jurisdiction. The Claims Court noted, however, that failure to comply with the CDA, standing alone, does not render a final decision invalid. As the court stated:

> [T]o deny viability to a default decision, a contractor must demonstrate that it has been harmed by the [government's] failure to comply with [the Contract Disputes Act], such as by not appealing to the Armed Services Board of Contract Appeals within 90 days, but by filing a Claims Court action within 12 months, as the decision incorrectly stated was the contractor's right.[42]

Because the contractor in *The Finney Co.* apparently had relied on the erroneous language in the Navy's final decision in filing its appeal, the court found the final decision invalid.[43] The remedy, according to the Claims Court, was to obtain a decision by the contracting officer notifying the contractor of the right to appeal only to a board, which decision then timely may be appealed.[44]

The ASBCA, however, has taken a different approach. The ASBCA does *not* require a contractor to show detrimental reliance on the government's defective appeal rights notification. Instead, *any* decision that erroneously advises a contractor that it can appeal to the Claims Court lacks finality because it does not trigger the time limit for filing an appeal to the Board. The Board stated this position most clearly in two recent decisions. In *Power Ten, Inc.*,[45] the Navy had moved to dismiss as untimely an appeal from termination that the contractor had filed with the Board one day after the ninety-day time period ended.[46] Noting that the termination did not involve a monetary claim and that the final decision had advised the contractor falsely that an appeal could be taken to the Claims Court, the Board found the final decision to be "ineffective" to trigger the ninety-day period and denied the Navy's motion.[47] The Navy asked the Board to reconsider the decision, asserting that the contractor must show that it relied upon the erroneous advice to its detriment. The Board, however, reaffirmed its decision, stating, "Detrimental reliance need not be shown. All that is required is a finding that the Government gave erroneous information as to taking a Board appeal or bringing a court action."[48]

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[36] No. 91-1141C (Cl. Ct. filed July 1, 1991) (unpub.), *reconsid. denied* (Cl. Ct. filed July 19, 1991) (unpub.).

[37] FAR 33.211(a)(4)(v).

[38] *The Finney Co.*, No. 91-1141C, slip op. at 2 (Cl. Ct. filed July 1, 1991).

[39] An appellant may transfer an appeal from the Claims Court to the ASBCA only if the appellant has filed a claim under the same contract in both forums. 41 U.S.C. § 609(d) (1988).

[40] *The Finney Co.*, No. 91-1141C, slip op. at 3 (Cl. Ct. filed July 1, 1991) (unpub.) (citing Contract Dispute Act §6(a), 41 U.S.C. § 605(a) (1988)).

[41] *Id.*

[42] *The Finney Co.*, No. 91-1141C, slip op. at 3 (Cl. Ct. filed July 19, 1991) (unpub.) (denying motion for reconsideration).

[43] *Id.*, slip op. at 4 (remarking "the concept that a contracting officer's decision lacks viability if it does not adequately set forth appeal rights, as required by regulation or statute, and the contractor is so harmed, is long-standing and is not new or troubling"); *see also, Philadelphia Regent Builders, Inc. v. United States*, 225 Ct. Cl. 234 (1981) (holding failure of default termination notice to comply with procurement regulations (41 C.F.R. §§ 1-1.318-1(a), 1-18.803-4 to .803-5 (1979)) not "fatal" because the contractor was not harmed by the defects); *accord Bostwick-Batterson Co, v. United States*, 151 Ct. Cl. 560 (1960) (upholding appeals board decision overturning the dismissal of an untimely appeal when the final decision failed to give the contractor sufficient notice that it had to appeal within 30 days, noting that the contractor's reliance on the faulty decision justified reversal).

[44] *The Finney Co.*, No. 91-1141C, slip op. at 3-4 (Cl. Ct. filed July 1, 1991) (unpub.).

[45] *Power Ten, Inc.*, ASBCA No. 43,026, 1991 ASBCA LEXIS 323 (Aug. 7, 1991), *aff'd on reconsid.*, 1991 ASBCA LEXIS 389, (Sept. 17, 1991).

[46] The government asserted that the contractor had received the final decision on 6 March 1991 and the contractor had filed notice of appeal on 7 June 1991. The Board made no findings concerning this point because it was irrelevant to the decision. *See generally Power Ten, Inc.*, ASBCA No. 43,026, 1991 ASBCA LEXIS 323 (Aug. 7, 1991); *Power Ten, Inc.*, ASBCA No. 43,026, 1991 ASBCA LEXIS 389 (Sept. 17, 1991).

[47] The Board did not treat the final decision as a nullity. Instead, the Board found only that the ninety day appeal period had not been "triggered" and ruled that the appeal had been timely filed. This approach may create practical difficulties for the federal government because it effectively may reopen contract files that the government previously had considered closed because the contractors involved failed to appeal default termination final decisions within the required 90 day period. *See Power Ten, Inc.*, ASBCA No. 43,026, 1991 ASBCA LEXIS 323 (Aug. 7, 1991)

[48] 1991 ASBCA LEXIS 389, at *2.

The Board rendered a similar decision in an Army case a few days later. In *Short Electronics, Inc.*,[49] the Board, on reconsideration, affirmed its denial of a government motion to dismiss an untimely appeal. The Board restated its ruling in *Power Ten* that a contractor need not show detrimental reliance on the erroneous information.[50] It also rejected the Government's argument that it should uphold all final decisions issued prior to *Overall Roofing and Construction*.[51]

The decisions described above demonstrate that the language currently being used in final decisions must be changed—at least for default terminations that do not involve a monetary claim. Both the Claims Court and the ASBCA assert that a contractor's only appeal right is to the proper board of contract appeals and that final decisions should reflect this. The Department of Defense recently decided to address the problem by adding the following "Note" to *all* final decisions immediately after the language required by FAR 33.211(a)(4)(v):

> "(Note: The U.S. Court of Appeals for the Federal Circuit has issued a decision that you should consider in evaluating your choice of a potential forum for any appeal from this final decision. See *Overall Roofing & Construction, Inc. v. U.S.*, 929 F.2d 687 (Fed. Cir. 1991))."[52]

Contracting officers and their legal advisors should monitor future decisions closely to see whether the prescribed language above puts finality back into default termination final decisions. Major Melvin.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Note

Automobile Broker's Liability Under Federal Law[53]

Consumers seeking to avoid automobile loan or lease installment payments may turn to automobile "brokers" who will sell or lease the cars to third parties. The brokers often complete these transfers without the knowledge or consent of the secured creditors, lessors, or lienholders—that is, the banks that financed the loans for the original purchases or the owner-dealers who leased the cars to the original consumers.

To curtail automobile broker fraud, eight states have enacted civil or criminal statutes proscribing unethical auto brokerage practices.[54] Moreover, the Federal Consumer Leasing Act[55] permits an aggrieved third party who has subleased a car to recover up to $1000 in statutory damages, plus actual damages and attorney's fees, for *any* failure by an automobile broker to disclose in the lease agreement certain terms mandated by the Act.[56]

The Federal Consumer Leasing Act provides that each lessor,[57] before the consummation of any lease,[58] must give the lessee[59] a dated written statement on which both the lessor and the lessee are identified. This statement

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[49] *Short Elec., Inc.*, ASBCA No. 41,707, 1991 ASBCA LEXIS 314 (Aug. 7, 1991), *aff'd on reconsid.*, ASBCA LEXIS 400 (Sept. 19, 1991).

[50] *Short Elec. Inc.*, ASBCA No. 41,707, 1991 ASBCA LEXIS 400 (Sept. 19, 1991).

[51] *Id.* (noting that the *Overall Roofing and Construction* decision merely confirmed a long-standing position of the Claims Court).

[52] The Department of Defense implemented this language by adding new section 233.211 to the Defense Federal Acquisition Regulation Supplement (DFARS), effective 4 October 1991. *See* Memorandum, Dep't of Defense, Director of Defense Procurement, Subject: Contracting Officer's Final Decisions (Oct. 4, 1991).

[53] A casenote by Captain William A. Wilcox, Jr., which discussed problems of auto broker fraud and possible remedies for various parties, provided the author with the idea for this note. *See generally* TJAGSA Practice Note, *Victims of Fly-by-Night Auto Leasing Agencies*, The Army Lawyer, Oct. 1991, at 43.

[54] Cal. Civ. Code § 3343.5 (1987); Ill. Rev. Stat. ch. 95½, para. 6-305.1 (1990); Ind. Code § 24-5-16 (1990); Md. Crim. Law Code Ann. art. 27, § 208 (1990); N.C. Gen. Stat. § 20-106.2 (1990); Tex. Penal Code Ann. § 32.36 (West 1989); Va. Code Ann. § 18.2-115.1 (1990); Wash. S. 6167 (1990 Regular Sess.); *see also* 9 Nat'l Consumer L. Center Rep., Deceptive Practices and Warranties Edition, at 15 (Jan.—Feb. 1991); TJAGSA Practice Note, *supra* note 53, at 43.

[55] Consumer Leasing Act of 1976, 15 U.S.C. §§ 1601(b), 1640, 1667-1667e (1988).

[56] *Id.* § 1640.

[57] The term "lessor" means a person who regularly engages in leasing, offering to lease, or arranging to lease under a consumer lease. *Id.* § 1667(3).

[58] Lease, as used here, refers only to a "consumer lease"—that is, a contract, in the form of lease or bailment, for the use of personal property by a natural person for a period of more than four months and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, regardless of whether the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease. *Id.* § 1667(1). It does not include a lease that meets the definition of a credit sale under Regulation Z, 12 C.F.R. § 226.2(a)(1) (1990).

[59] The term "lessee" means a natural person who leases or is offered a consumer lease. 15 U.S.C. § 1667(2).

also must set out the following information with respect to the lease in a clear and conspicuous manner:

(1) a brief description or identification of the leased property;

(2) the amount of any payment the lessor may require of the lessee at the inception of the lease;

(3) the amounts paid or payable by the lessee for official fees, registration, certificate of title, or license fees or taxes;

(4) the amounts of any other charges payable by the lessee that are not included in the periodic payments, together with a description of those charges and, if applicable, notice that the lessee shall be liable for any difference between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease;

(5) a statement describing the amount, or the method for determining the amount, of any liabilities the lease will impose upon the lessee upon the termination of the leasehold and stating whether the lessee then may purchase the leased property, as well as the price and time constraints relevant to this purchase;

(6) a statement that (a) sets forth any express warranties or guarantees the manufacturer or lessor have made concerning the leased property, (b) identifies the party responsible for maintaining or servicing the leased property, and (c) describes the scope of this person's responsibilities;

(7) a brief description of insurance provided or paid for by the lessor or that the lessor shall require of the lessee, including the types and amounts of coverage and their costs;

(8) a description of any security interest that the lessor will hold or retain in connection with the lease that clearly identifies the property to which the security interest attaches;[60]

(9) the number, amount, and due dates of payments under the lease and the total amount of these periodic payments;

(10) a statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount of, or the method of determining, any penalty or other charge for delinquency, default, late payments, or early termination.

(11) if the lease provides that the lessee shall be liable for the anticipated fair market value of the property on expiration of the lease, the fair market value of the property at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them.[61]

Regulation M, which implements the Federal Consumer Leasing Act, provides additional disclosure requirements.[62] Actions under the Act must be brought within one year of the termination of the lease agreement.[63] Legal assistance attorneys may find an excellent explanation of the Act and its applicability to automobile broker fraud in *Truth in Lending*, a publication produced by the National Consumer Law Center as part of its *Consumer Credit and Sales Legal Practice Series*.[64] Major Hostetter.

Family Law Note

Applying State Child Support Guidelines to Military Compensation

During the 1980's, Congress required states to enact child support guidelines.[65] Moreover, federal law requires state courts and agencies charged with determining child support obligations to treat these guidelines as rebuttable presumptions of adequate levels of support.[66] Any deviations from these guidelines must be made a matter of record.[67]

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[60] *Cf. supra* note 54 (citing state statutes requiring auto brokers to notify secured creditors, lessors, or lienholders and to obtain their written permission to transfer cars).

[61] 15 U.S.C. § 1667a (1988).

[62] *See* 12 C.F.R. § 213 (1990) (providing detailed definitions and additional disclosure requirements).

[63] 15 U.S.C. § 1667d(c) (1988); *see also* National Consumer Law Center, Truth in Lending 358-59 (2d ed. 1989 & Supp. 1990) (discussing statutory defenses under the Act and state statutory remedies) [hereinafter Truth in Lending].

[64] *See generally* Truth in Lending, *supra* note 63. Legal assistance attorneys may order this publication by calling the National Consumer Law Center at (617) 523-8010 or by writing to the following address:

Publications
National Consumer Law Center
11 Beacon Street
Boston, MA 02108

[65] *See* 42 U.S.C. § 667(a) to (b) (1988).

[66] *Id.* § 667(b).

[67] *Id.*

Courts, administrative agencies, and family law practitioners representing custodial parents frequently are unacquainted with the components of military compensation. Consequently, legal assistance attorneys must be prepared to assist custodial parents to ensure that courts or agencies consider the incomes of noncustodial soldiers when calculating support obligations. The following fact pattern, involving two hypothetical staff sergeants, illustrates the importance of this assistance.

Both sergeants have nine years of service for pay purposes. One sergeant lives onpost and eats in the installation dining facility. The other is authorized to live offpost. Cash income of the two sergeants is computed as follows:

	Onpost	Offpost
Base pay	$ 1448.70	$ 1448.70
BAS[68]	$ 0	$ 184.50
BAQ[69]	$ 0	$ 418.50
Total:	$ 1448.70	$ 2051.70

If the state's child support guidelines specify that factfinders may consider only an obligor's cash income when calculating his or her support obligation, then the sergeant living onpost likely[70] will pay substantially less child support than his or her offpost counterpart. This seems unfair, because both sergeants are situated similarly with respect to their ability to pay child support.

Many states, however, recognize that "in-kind" income must be quantified and counted as income when a court or agency applies support guidelines. In those states, the finder of fact would have to assign a cash value to the meals and lodging that the Army provides to the sergeant living onpost. One common approach equates the value of the meals and lodging the sergeant actually receives with the BAS and BAQ the sergeant would have received in lieu of these benefits had he or she chosen to live offpost. Using this rationale, the finder of fact would find the "true income" of the sergeant living onpost to equal the cash income of the sergeant living offpost.

Another issue may arise when state law requires factfinders to apply child support guidelines against an obligor's gross pay. Laws of this type implicitly assume that all obligors bear income tax burdens commensurate with their incomes. A substantial portion of military compensation, however, is tax-free. In our hypothesis, for example, the sergeant living offpost collects BAQ and BAS, which both are untaxed. If the sergeant resides in an area with a high cost of living, his or her monthly pay also may include a tax-free variable housing allowance (VHA) or cost of living allowance.[71] Assuming that he or she receives a monthly payment of $150 for VHA, the sergeant has a total cash income of $2201.70, of which $753 is not subject to federal income tax. At a fifteen percent marginal tax rate, a civilian would have to earn an additional $132.88 per month to enjoy the same take-home income as the sergeant.[72]

Advocates may attempt to claim other adjustments, depending on the explicit provisions or legislative histories of their states' guidelines. A state legislature, for example, may have assumed when it enacted the guidelines that obligors would have to pay state and local income taxes as well as federal taxes. The tax-free components of military pay escape these tax burdens. Moreover, some states waive their rights to impose taxes against even the taxable portion of military pay. For example, domiciliaries[73] of Missouri and California who are stationed outside those states need not pay state income taxes on their military compensations. Factfinders arguably should permit an income adjustment when assessing the support obligations of service members domiciled in states such as these to account for the absence of state tax obligations.

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[68] Basic Allowance for Subsistence and Separate Rations.

[69] Basic Allowance for Quarters.

[70] In most jurisdictions, courts and agencies comply closely with child support guidelines unless the custodial parent or support obligor can demonstrate "extraordinary expenses or circumstances." *See, e.g.*, Ky. Rev. Stat. Ann. § 403.210 (Baldwin Supp. 1990).

[71] Variable housing allowance (VHA) and cost of living allowance (COLA) rates can differ dramatically, depending on where a soldier is assigned. Consequently, attorneys representing soldiers who receive VHA should advise their clients to seek downward adjustments in support obligations if the clients ever are transferred to areas with substantially lower VHA or COLA rates.

[72] Calculated as follows:

$$\text{Equivalent civilian income} = \text{Military taxable income} + \frac{\text{Military tax-free income}}{\text{(1.00 -(member's marginal tax income rate expressed as a decimal))}}$$

[73] Domicile is not the same as residence. The critical factor is whether or not the subject intended to make a particular place "his [or her] house for the time at least." Restatement (Second) of Conflict of Laws § 18 (1971). An individual normally expresses an intent to establish domicile by: (1) paying local and state income taxes; (2) paying state or local personal property taxes; (3) registering to vote in the state; or (4) obtaining state driver and vehicle licenses. *Id.*

The employee's portion of the social security tax (Federal Insurance Contributions Act, or "FICA") perhaps could be considered as well.[74] The federal government assesses FICA tax at a rate of 7.65% of a taxpayer's annual taxable income—up to an income ceiling of $50,400.[75] Military pay that is not subject to federal income tax, however, is exempt from the FICA tax. If the law-making body that adopted state support guidelines assumed that all obligors would pay FICA tax, then one could argue that a soldier's income should be adjusted upwards to reflect that a portion of military pay is not subject to FICA.

One arguably could combine all these adjustments to calculate a "civilian equivalent" income for soldiers. Applying these adjustments to our hypothetical staff sergeants would add $259.78 in constructive income to each soldier's monthly gross pay.[76] Assuming that state guidelines call for twenty percent of an individual's gross pay to be paid as child support,[77] each sergeant's monthly support obligation would increase from $440.34 to $492.30.

Legal assistance attorneys also can assist noncustodial parents to *reduce* their support obligations. Noncustodial parents often have compelling grounds to seek deviations from support guidelines. The most effective rationales for support modifications are the emancipation, death, marriage, or enlistment in the armed forces of the children to be supported. Some states also consider whether a child is employed on a regular and sustained basis.

When the applicable guidelines and the factual situation allow, an attorney may argue that a remarried soldier's obligation to support a second family justifies a reduction of the support the soldier must pay his or her first family. The obligor's need to support all of his or her children equally has an innately logical appeal. Some courts, however, still hold that a "support obligor must favor an established obligation over a subsequently-assumed one."[78]

Attorneys representing support obligors also should be alert to the possibility that income can be imputed to a nonworking custodial parent, thereby effectively reducing the amount the obligor must pay for support. Not surprisingly, guidelines allowing for imputation of income vary widely from state to state. One constant, however, is the requirement for a judicial finding that the nonworking parent voluntarily has reduced his or her income or ability to earn income.[79] Imputation arguments are most likely to succeed when the supported child is attending school and the custodial parent has sufficient education and prior work experience to justify a finding that his or her lack of income derives not from an inability to earn sufficient income, but from his or her aversion to work.

Finally, attorneys representing support obligors should consider obtaining deductions from the obligor's income before the finder of fact applies the guideline formulas. State guidelines often permit support obligors to deduct from their gross income the cost of any premiums on insurance that benefit the supported children—including Civilian Health and Medical Program for the Uniformed Services (CHAMPUS) supplemental coverage, DELTA Dental protection, and Servicemen's Group Life Insurance (SGLI). In some states, obligors even can deduct depreciation deductions associated with rental property from their income, as long as the "property was retained for legitimate income producing purposes ... [and] is not held primarily for the purpose of shielding income."[80]

Although child support guidelines may simplify the task of advising custodial parents and support obligors regarding the potential extent of support obligations, they leave many issues unanswered. When appropriate, legal

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[74] The federal government deducts Federal Insurance Contributions Act (FICA) tax monthly from military pay.

[75] I.R.C. §§ 3101, 3111, 3121 (West Supp. 1991).

[76] To calculate these adjustments, assign each tax burden a decimal value—for example, the soldier's marginal federal tax rate might be .15 (*i.e.*, 15%), state taxes might be .03 (3%), and FICA taxes are .0765 (7.65%). Add these decimals together (*e.g.*, .15 + .03 + .0765 = .2565), and then use the following formula:

$$\text{Equivalent civilian income} = \text{Military taxable income} + \frac{\text{Military tax-free income}}{\text{1.00 minus the sum of the decimals}}$$

Using the offpost staff sergeant's situation as an example, the calculation would look like this:

$$\text{Equivalent civilian income} = \$\ 1448.70 + \frac{\$753.00}{.7435}$$

or

$$\text{Equivalent civilian income} = \$\ 1448.70 + 1012.77 = \$\ 2461.48$$

Adjustment of the onpost staff sergeant's income yields the same result if one also adjusts his or her base pay to reflect receipt of pay "in-kind." *See supra* text accompanying notes 68-70.

[77] This is a realistic assumption. In Wisconsin, for example, child support guidelines require support obligors to pay 17% of their gross income for support of one child, 25% for two children, 29% for three children, 31% for four children, and 34% for five or more children. Wis. Admin. Code §§ HSS 80.01-80.05 (1990); *id.*, app. A.

[78] *See, e.g.*, Hayes/Carrizales v. Hayes, 17 Fam. L. Rep. (BNA) 1529 (Minn. Ct. App. Aug. 6, 1991).

[79] *See, e.g.*, *Michigan Child Support Guideline Manual* (Jan. 1990).

[80] Preusner v. Timmer, 414 N.W.2d 577, 579 (Minn. Ct. App. 1987).

assistance attorneys should use their advocacy skills and their understandings of military compensation to argue for modifications of these guidelines. Major Connor.

Tax Notes

Early Tax Refund on 1991 Income Taxes?

The Internal Revenue Service (IRS) recently estimated that as many as 14 million families will qualify for earned income credit (EIC) this year.[81] Those who will qualify for EIC[82] could choose to receive as much as $1192 of the credit as they earn their monthly pays instead of waiting until they file their annual federal income tax returns.[83] Legal assistance attorneys should find this note helpful in disseminating this information to the military communities they serve.

EIC is a refundable income tax credit available to certain low-income taxpayers with children. To qualify for advance EIC, the taxpayer must:

have some earned income[84] (for example, wages, salaries, or tips),

have earned income and adjusted gross income less than $21,245 for 1991,

file as married, filing jointly[85], as head of household, or as a qualifying widow or widower, and

have a qualifying child[86] living with him or her in the United States[87] for more than half the year—or all year for a qualifying widow or widower.

Legal assistance attorneys should advise military taxpayers with expected 1991 adjusted gross incomes below $21,250 who have one or more children living with them that they may obtain their EICs in advance. Soldiers should request advanced EICs on IRS Form W-5, Earned Income Credit Advance Payment Certificate,[88] which they can obtain from their servicing finance offices. After processing, soldiers will receive their advance credits in their pays.

Each soldier's Form W-2, Wage and Tax Statement, will reflect the amount of the advance EIC that he or she receives in block 8, "Advance EIC payment". The soldier must report any advance EIC he or she has received when filing his or her IRS Form 1040 or 1040A.[89] Moreover, each taxpayer must repay advance EIC payment in excess of the authorized credit when the taxpayer files his or her annual federal income tax return. Major Hancock.

IRS International Tax Forum

Legal assistance attorneys stationed overseas should arrange to receive the *International Tax Forum*, a newsletter published quarterly by the Office of the Assistant IRS Commissioner, International.[90] Legal assistance attorneys can add their offices to the mailing list by writing to the following address:

Internal Revenue Service
Assistant Commissioner, International, IN:P
950 L'Enfant Plaza SW, Room 4435
Washington, DC 20024.

This brief newsletter includes tax information suitable for further dissemination to the military community that is of special interest to overseas tax practitioners. For example, the Summer 1991 edition contained advice for taxpayers with alien spouses and dependents. Taxpayers who have alien spouses or dependents without social

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[81] I.R.S. Announcement 91-128, 1991-35 I.R.B. 23.

[82] I.R.C. § 32(c) (Maxwell Macmillan 1991). See generally TJAGSA Practice Note, *Entitlement to the Earned Income Credit*, The Army Lawyer, Mar. 1989, at 40, for an excellent explanation of EIC.

[83] The maximum EIC for 1991 actually can be as much as $2020—up from $953 last year—if the taxpayer has more than one qualifying child, has a qualifying child born in 1991, or pays health insurance premiums on a qualifying child. I.R.S. Announcement 91-128, 1991-35, I.R.B. at 24.

[84] Earned income does not include interest, dividends, welfare benefits, veterans' benefits, pensions or annuities, alimony, social security payments, worker's compensation, or unemployment compensation. Treas. Reg. § 1.43-2(c)(2) (Maxwell Macmillan 1991).

[85] Married taxpayers filing separately are not eligible for EIC. *See* I.R.C. § 32 (Maxwell Macmillan 1991); Treas. Reg. § 1.43-2(b)(2) (Maxwell Macmillan 1991).

[86] For EIC purposes, the term "qualifying child" includes a taxpayer's son, daughter, adopted child—including a child legally adopted or placed with the taxpayer by an authorized placement agency for adoption—or descendant, or a stepchild or foster child—that is, a child for whom the taxpayer cared for as his or her own for the entire year. Each "child" claimed, moreover, must be under 19, a full-time student under age 24 at the end of the tax year, or permanently and totally disabled. I.R.C. § 32(c)(3) (Maxwell Macmillan 1991).

[87] Under Treasury Regulation section 1.43-2(c)(1)(iii), a soldier stationed temporarily outside the United States because of military service remains eligible for EIC if he or she maintains a home in the United States for his or her spouse and child or children for the tax year. A soldier's temporary absence can be for as long as a full tour of duty. *See generally* TJAGSA Practice Note, *supra* note 82, at 40.

[88] Soldiers can obtain Form W-5 at most legal assistance offices and at many local IRS offices. They also may order it by calling (800) 829-3676.

[89] Soldiers should record their advance earned income credits on line 52 of IRS Form 1040 or on line 26 of IRS Form 1040A.

[90] Special thanks to Mr. Thomas E. Shealy, Office of the Staff Judge Advocate, 21st TAACOM Legal Service Center, The Netherlands, for sharing this newsletter. The Legal Assistance Branch at TJAGSA welcomes such information and urges readers to share their practical knowledge with other legal assistance attorneys via this section of *The Army Lawyer*.

security numbers (SSN) should leave the social security number (taxpayer identification number (TIN)) block blank when filing federal income tax returns.[91] Taxpayers who have applied for, but have not yet received, SSNs for their alien spouses or dependents should write "SSN applied for" in the TIN block.[92]

The IRS indicated, however, that a taxpayer filing a *joint* return with an alien spouse who has not obtained a SSN should enter "NRA"[93] in the space for the spouse's number. If that notation does not appear, the IRS service center automatically will generate a notice CP58 (Spouse's SSN Missing), which requires no action by the taxpayer.[94]

A taxpayer with alien dependents who has applied for SSNs by submitting a Form SS5 to the appropriate Social Security Administration Office, but who does not receive the numbers for his or her dependents before filing federal tax returns, should write "APPLIED FOR" on the federal form in the column for the dependent's SSN.[95] The IRS will credit the taxpayer with the exemptions claimed even without the dependents' SSNs, though it later will contact the taxpayer to obtain the missing SSNs.[96] Major Hancock.

Administrative and Civil Law Notes

Digest of Opinion of The Judge Advocate General: Government Printing Plant Support for Private Organizations

Printing and copying support for private organizations (POs) operating on military installations has been an issue for years. Army Regulation (AR) 210-1[97], as recently revised, addresses this issue, stating that POs "may obtain printing or copying services from Government printing plants on a reimbursable basis" in accordance with Army Regulation 37-60.[98] This guidance, however, conflicts with law and government printing regulations. Consequently, the Office of The Judge Advocate General (OTJAG), Headquarters, Department of the Army, recently clarified the issue.[99]

OTJAG stated that two statutes, 44 U.S.C. § 1102 (1988) and 44 U.S.C. § 1118 (1988), control the operation of government printing plants.[100] These statutes allow the use of government funds and facilities for printing materials that are authorized by law and are required for official business.[101] They provide no exception whatsoever for printing unofficial material on a reimbursable basis;[102] therefore, the Army cannot print material for a PO, even if the PO reimburses the cost of the printing.[103] OTJAG added that the Army may print material that incidentally benefits a PO, but noted that the Army may do so only when it can justify this activity as official Army business.[104] Major McCallum.

Routine Use Exception Under The Privacy Act of 1974 And The Requirement of Compatibility

Introduction

The Privacy Act of 1974, enacted by the 93rd Congress on December 31, 1974,[105] became effective on September 27, 1975.[106] By this act, Congress intended "to promote governmental respect for the privacy of citizens by requiring all departments of the executive branch and their employees to observe certain constitutional rules in the ... collection, management, use, and disclosure of personal information...."[107] The Privacy Act accomplishes this purpose in several ways. First, the Act requires each executive agency to inform the public about any system of records which it creates or maintains that contains information about private individuals.[108] Furthermore, when an agency collects personal information about an individual, it must tell him or her the basis of its authority to solicit the requested information, why it is

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[91] IRS International Tax Forum, Summer 1991, at 4.

[92] *Id.*

[93] NRA stands for nonresident alien.

[94] IRS International Tax Forum, Summer 1991, at 4.

[95] *Id.* at 4-5.

[96] *Id.*

[97] Army Reg. 210-1, Installations: Private Organizations of Department of the Army Installations and Official Participation in Private Organizations (14 Sept. 1990).

[98] *Id.*, para. 4-11 (citing Army Reg. 37-60, Financial Administration: Pricing for Materiel and Services, ch. 9 (3 Apr. 1989)).

[99] *See* DAJA-AL 1991/2391, 4 Sept. 1991.

[100] *See* DAJA-AL 1991/2391, 4 Sept. 1991.

[101] *See* 44 U.S.C. § 1102(a) (1988); *id.* § 1108.

[102] *See generally id.* §§ 1102(a), 1108.

[103] DAJA-AL 1991/2391, 4 Sept. 1991.

[104] *Id.*

[105] The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1986 (1974) (codified as amended at 5 U.S.C. § 552a (1988)).

[106] Pub. L. No. 94-183, 89 Stat. 1057 (1975).

[107] S. Rep. No. 1183, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6916.

[108] 5 U.S.C. § 552a(e)(4) (1988).

collecting it, and what routine uses the agency may make of it.[109] Most importantly, the Act restricts the authority of an agency to release information from its system of records. An agency may not release personal information about an individual without that individual's written consent unless the Act expressly provides otherwise.[110]

The Privacy Act contains twelve exceptions under which an agency may disclose private information to third parties without seeking the subject's consent.[111] This note will address only "routine use" disclosures—that is, releases of information under the third enumerated exception to the Privacy Act.[112] This third exception permits an agency to disclose a record, without the prior, written consent of the subject of the record, pursuant to a "routine use as defined in ... [5 U.S.C. § 552a] (a)(7)...."[113] Subsection (a)(7) explains that "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected."[114]

A routine use can be either general or specific. A general routine use applies to all of an agency's systems of records.[115] A specific routine use applies only to the specific type of record for which it is listed.[116]

When an executive agency establishes or revises a system of records, it must publish a notice in the Federal Register describing all the routine uses to which it may put the records it has collected.[117] This notice also must list the categories of users and explain the purpose for each use.[118] Thus, in essence, Congress imposed two requirements for release of records under exception three—namely, the procedural requirement of "notice" and the substantive requirement of "compatibility."

Legislative History

The legislative history of the Privacy Act[119] poorly illustrates Congress's intended definition of routine use. The Act's convoluted evolution is largely to blame for this obscurity. The original Senate bill did not provide for a routine use exception at all,[120] while the House bill proposed that routine use be defined as "a routine purpose for which the records are used or intended to be used."[121] Senate Bill 3418, which Congress eventually enacted as the Privacy Act, adopted exception three in its current form as a compromise between those two divergent proposals.[122]

The report on Senate Bill 3418 advises agencies to disclose information under exception three in such a way as "to protect the individual and the public interest by assuring that the uses for which the agency or user states that it wishes the data are consistent with those for which formal notice has been given by either the transferring agency or the receiving agency or user."[123] Proper use of this "notice" requirement is important "to assure ... that one government agency does not use the personal information given by the individual or by third parties to another agency to make what might be a detrimental decision ... without [the individual's] consent, thereby [denying the individual] an opportunity to challenge ... the accuracy and reliability" of the information.[124]

Nowhere does the report refer to a "compatibility requirement" as such. It does state, however, that the routine use disclosure requirement "prevents an agency from merely citing a notice of intended 'use' as a routine and easy means of justifying transfer or release of information."[125] The comments of two influential legislators provide additional insight on how Congress may have viewed the routine use exception. After Congress passed Senate Bill 3148, Senator Sam J. Ervin and Congressman William S. Moorehead declared in identical statements that "[t]he compromise definition [on routine use] should serve as a caution to agencies to think out in advance

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[109] *Id.* § 552a(e)(3).

[110] *Id.* § 552a(b).

[111] *Id.*

[112] *Id.* § 552a(b)(3).

[113] *Id.* § 552a(b)(3).

[114] *Id.* § 552a(a)(7).

[115] *See* Army Reg. 340-21, Office Management: The Army Privacy Program, para. 3-2 (5 July 1985).

[116] *See id.*

[117] 5 U.S.C. § 552a(e)(4) (1988).

[118] *Id.*

[119] *See* Staffs of Senate and House Comms. on Gov't Operations, 94th Cong., 2d Sess., Legislative History of the Privacy Act of 1974, S. 3418 (Pub. L. 97-579): Source Book on Privacy (Joint Comm. Print 1976) (setting forth the complete legislative history of the Privacy Act) [hereinafter Source Book].

[120] *See* 120 Cong. Rec. 37,067 (1974).

[121] *See* H.R. 16,373, 93d Cong., 2d Sess. (1974).

[122] Staffs of Senate and House Comms. on Gov't Operations, 94th Cong., 2d Sess., *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, *in* Source Book, *supra* note 119, at 859.

[123] S. Rep. No. 1183, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6916, 6983.

[124] *Id.*, 1974 U.S.C.C.A.N. at 6984.

[125] *Id.*

what uses it will make of information."[126] Their language implies that Congress intended to require "compatibility" under exception three.

Office of Management and Budget Guidance

The Privacy Act required the Office of Management and the Budget (OMB) to develop guidelines and regulations for use by all agencies in implementing the Act.[127] The OMB also must assist and oversee agencies' implementations of the Act.[128] Accordingly, the OMB published extensive written guidelines in OMB Circular A-108.[129] Ironically, these guidelines are not binding on any agency or on the courts, even though they were mandated by Congress.[130] Agencies normally are well advised to follow the OMB's guidance, however, whenever they seek to interpret the Act.[131]

The clarity of the OMB's guidelines concerning the "compatibility" requirement of exception three contrasts sharply with the ambiguity of the Privacy Act's legislative history. The guidelines state unmistakably that any routine use must meet the Act's substantive requirement of "compatibility." In discussing exception three, the OMB declared that "one of the [Act's] primary objectives ... is to restrict the use of information to the purposes for which it was collected."[132] In the OMB's interpretation of the Act, to justify disclosure "a 'routine use' must be not only compatible with, but [also] related to, the purpose for which the record is maintained...."[133]

Early Decisions—The First Ten Years

Harper v. United States[134] was one of the first reported cases to address the routine use issue. The *Harper* court cited both the legislative history of the Privacy Act and the OMB's definition of routine use, but issued its decision without actually discussing the "compatibility" requirement of the Act.[135]

In *Harper*, the Internal Revenue Service (IRS) had investigated the plaintiff and two other individuals for tax evasion. Because the investigations of the three were closely related, the IRS routinely had captioned the administrative file with only the plaintiff's name. During the investigations, the IRS notified the two other individuals of the investigations, using the case caption with plaintiff's name. Plaintiff responded by suing the IRS for damages under the Privacy Act.

The IRS claimed the release was authorized under exception three as a routine use. The court agreed. It ruled that the IRS had given proper notice pursuant to 5 U.S.C. § 552a(e)(4)(D) when it had published in the Federal Register a notice reading, "Disclosure may be made to other parties when necessary in the administration and enforcement of law as authorized by 26 U.S.C. [§§] 7801 and 7802."[136] The court added that "[a]ny disclosure resulting from the letters ... [was] a consequence of ... [the IRS's] ordinary and necessary business, ... [was] entirely compatible with this purpose, and ... [was] well within the authorized routine uses set forth" in the published notice.[137]

The court made no further effort to discuss the disclosure's compatibility with the IRS's purposes for records collection. Significantly, a close inspection of the court's decision reveals that the court also erroneously compared the purpose of the disclosure with the purported routine use that the IRS had published in the Federal Register, rather than "with the purpose for which it [actually had been] ... collected," as the Act requires.[138]

Approximately eighteen months after *Harper*, the Federal District Court for the Middle District of Tennessee considered another routine use disclosure in *Burley v. Drug Enforcement Administration.*[139] The district court held the agency's release of an investigative file on a pharmacist to a state licensing board to be a proper disclosure in accordance with exception three. The agency previously had published notice that, as a routine use, it would release investigative files "to federal and [to] state regulatory agencies responsible for the licensing or certification of individuals in the fields of pharmacy and medicine."[140] Like the *Harper* court, the *Burley* court

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[126] Staffs of Senate and House Comms. on Gov't Operations, 94th Cong., 2d Sess., *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, *in* Source Book, *supra* note 119, at 859, 987.

[127] S. Rep. No. 1183, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6916, 6983.

[128] *Id.*

[129] Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. 28,949 *amended by* 40 Fed. Reg. 56,741 (1975) [hereinafter OMB Guidelines].

[130] Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979).

[131] OMB Guidelines, *supra* note 129, 40 Fed. Reg. at 28,949.

[132] *Id.*, 40 Fed. Reg. at 28,953.

[133] *Id.*

[134] 423 F. Supp. 192 (D.S.C. 1976).

[135] *See id.*

[136] *Id.* at 198.

[137] *Id.* at 199.

[138] *See* 5 U.S.C. § 552a(a)(7) (1988).

[139] 443 F. Supp. 619 (M.D. Tenn. 1977).

[140] *Id.* at 624.

was satisfied that the agency had disclosed the file in accordance with a routine use that the agency had published earlier in the Federal Register. Also like the *Harper* court, the *Burley* court failed to discuss whether this routine use was compatible with the purpose for which the agency originally had compiled the record.

Between 1975 and 1984, courts in several jurisdictions[141] summarily disposed of routine use issues in similar fashions. In each case, the court would uphold an agency's disclosure if the agency showed that it had released the information pursuant to a routine use that it had published previously. Not one appellate court addressed the "compatibility" requirement of 5 U.S.C. § 552a(a)(7) in reaching its decision.

The first reported decision to address "compatibility" was *Ash v. United States*.[142] In *Ash* the Fifth Circuit determined whether the Navy could publish the results of a nonjudicial punishment proceeding conducted pursuant to article 15 of the Uniform Code of Military Justice[143] as a routine use disclosure under exception three. The court found that the Navy's purpose for disclosing the results of its article 15 proceedings was "plainly rational and germane to the maintenance of discipline,"[144] and, hence, was "a purpose compatible with conducting and recording [the proceedings]."[145] Significantly, the court upheld the Navy's disclosure even though the Navy actually never had published a routine use for this disclosure in the Federal Register.[146] The Fifth Circuit later withdrew this portion of its opinion at the government's request, but the court also stated that it remained convinced that its original decision had been correct.[147]

Five years later, the Federal District Court for the Eastern District of Missouri reflected on the Fifth Circuit's recognition of the "compatibility" requirement when it decided *Howard v. Marsh*.[148] In *Howard*, the plaintiff filed a sexual discrimination complaint under Army equal opportunity (EEO) regulations after she was demoted and denied a within-grade salary increase. An Army investigator confirmed the plaintiff's allegations and recommended in his report of investigation (ROI) that she be restored to her prior position. The ROI then was referred for action to plaintiff's commander. The commander responded that the ROI was incomplete. He also ordered his legal office and civilian personnel office to compile a rebuttal to the ROI. This rebuttal, when completed, contained disclosures from plaintiff's personnel files. Plaintiff filed suit, alleging these disclosures violated her rights under the Privacy Act. The government, in turn, claimed the disclosures were authorized as a routine use under exception three of the Act.[149]

The *Howard* court found that the disclosure of plaintiff's personnel files in a rebuttal to an EEO investigation that she herself had initiated "was not a use which was compatible with the purpose for which the documents were collected."[150] The court emphasized that the Army had not collected the documents in plaintiff's EEO and personnel files "to enable [the commander] to conduct an independent investigation of matters raised in plaintiff's discrimination complaint."[151]

"Compatibility" Requirement Ignored (1985 to 1986)

In 1985, the District Court for the Northern District of Illinois returned to the pre-*Ash* position of ignoring the "compatibility" requirement of exception three. In two separate opinions[152] the court held that governmental disclosures fell within the purview of exception three without addressing the issue of "compatibility." In each

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[141] *See, e.g.*, United States v. Collins, 596 F.2d 166 (6th Cir. 1979) (disclosure by Department of Health, Education, and Welfare to the Department of Justice of plaintiff's Medicaid cost reports for use in criminal case); Parks v. United States Internal Revenue Serv., 618 F.2d 677 (10th Cir. 1980) (use of records to pinpoint government employees who had not pledged to purchase savings bonds was not a routine use because this use was not designated by the IRS as a routine use in accordance with section 552a(e)); United States v. Miller, 643 F.2d 713 (10th Cir. 1981) (disclosure by parole officer to the Department of Justice of records submitted by plaintiff for use in criminal case).

[142] 608 F.2d 178 (5th Cir. 1979).

[143] Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1988).

[144] *Ash*, 608 F.2d at 179 (5th Cir. 1979).

[145] *Id.*

[146] *Id.*

[147] *Id.* at 180.

[148] 596 F. Supp. 1107 (E.D. Mo. 1984).

[149] *Id.* at 1109.

[150] *Id.* at 1111.

[151] *Id.*

[152] Kimberlin v. United States Dep't of Justice, 605 F. Supp. 79 (N.D. Ill. 1985), *aff'd*, 788 F.2d 434 (7th Cir. 1986) (holding that disclosure by plaintiff's case manager of information concerning plaintiff's commissary account to inmate's probation officer so that these monies could be attached in settlement of civil judgment was routine use under Privacy Act); Ely v. Department of Justice, 610 F. Supp. 942 (N.D. Ill. 1985) (holding that assistant United States attorney's disclosure of information to plaintiff's court appointed attorney while representing defendants in civil action brought by plaintiff fell within Privacy Act's routine use exception).

case, the court's inquiry focused only on whether the agency had published a routine use and whether the release was consistent with this published notice. The Seventh Circuit, affirming both decisions,[153] likewise ignored the "compatibility" requirement.

Courts in several other jurisdictions rendered similar decisions. In the District of Columbia, the Court of Appeals often overlooked "compatibility" requirements entirely, rendering several decisions strictly on exception three's "notice" requirement.[154] The Eleventh Circuit, in *Doe v. Naval Air Station, Pensacola, Florida.*,[155] likewise passed over the "compatibility" language in section 552a(a)(7). That court, moreover, demonstrated a misunderstanding of the Privacy Act's terminology by mistakenly denoting exception three of the Act as "exemption three."[156]

The Federal Labor Relations Authority (FLRA) also tended towards a permissive interpretation of exception three. In *Farmers Home Administration Finance Office, St. Louis, Missouri*[157] the FLRA ruled that an agency's disclosure to a federal employees' union of the names and home addresses of bargaining unit employees was a proper routine use. Like the federal courts, the FLRA did not address the "compatibility" requirement in its decision.

Strict Construction of Exception Three (1987-Present)

Not until 1987 did the courts again consider the compatibility requirement of routine use. In *Covert v. Harrington*[158] the Federal District Court for the Western District of Washington criticized the lack of consideration afforded the compatibility issue in *Burley*[159] and in *United States v. Miller.*[160] The district court noted with disapproval that neither *Burley* nor *Miller* "discuss the 'routine use' requirement under [section] 552a(a)(7) that [a] disclosure must be compatible with the purpose for which a record was collected."[161] This requirement, it intimated, should not be ignored. Accordingly, the court considered whether the Department of Energy's (DOE) disclosure of records to the Department of Justice (DOJ) was "compatible" with the purpose for which the DOE had collected them.[162] It concluded that it was not. The court noted that the DOE originally had collected the records solely "to determine an individual's eligibility for a DOE personnel security clearance or access authorization."[163] It held that releasing the records to the DOJ for use in a criminal prosecution clearly did not comport with this purpose.[164]

Since *Covert*, the District of Columbia Court of Appeals,[165] the Third Circuit,[166] and the Ninth Circuit[167] each have interpreted the compatibility requirement under exception three strictly as defined in section 552a(a)(7).

In *Doe v. Stevens*,[168] the Veterans' Administration had published notice of a routine use under exception three that allowed it to disclose medical records to a federal grand jury to comply with federal subpoenas.[169] The Court of Appeals for the District of Columbia, however, ruled that exception three did not allow the Veterans' Administration to disclose a patient's medical record

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[153] Kimberlin v. United States Dep't of Justice, 788 F.2d 434 (7th Cir. 1986).

[154] *See, e.g.*, Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987).

[155] 768 F.2d 1229 (11th Cir. 1985).

[156] *Id.* at 1231. Exemptions under the Privacy Act excuse managers of systems of records from compliance with most of the provisions of the Act, including disclosure to the individual of his or her own record. *See* 5 U.S.C. § 552a(j)-(k) (1988). Exceptions merely allow an agency to disclose to third parties information contained in systems of records without consent of the individual. *See generally id.* § 552a(b).

[157] 23 F.L.R.A. 788 (1986), *aff'd in substantial part and remanded sub. nom.* Department of Agric. v. Federal Labor Relations Auth., 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025 (1989). The Supreme Court vacated the judgement and remanded the case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of routine uses the agency published after the court of appeals rendered its decision. *See* Department of Agric. v. Federal Labor Relations Auth., 488 U.S. 1025 (1989).

[158] 667 F. Supp. 730 (W.D. Wash. 1987), *aff'd*, 876 F.2d 751 (9th Cir. 1989).

[159] Burley v. Drug Enforcement Admin., 443 F. Supp. 619 (M.D. Tenn. 1977).

[160] United States v. Miller, 643 F.2d 713 (10th Cir. 1981); *see supra* note 141.

[161] *Covert*, 667 F. Supp. at 738.

[162] *Id.* at 739.

[163] *Id.*

[164] *Id.*

[165] *E.g.*, Doe v. Stevens, 851 F.2d 1457 (D.C. Cir. 1988); Federal Labor Relations Auth. v. Department of Treasury, Fin. Management Serv., 884 F.2d 1446, *cert. denied*, 110 S. Ct. 863 (1990).

[166] Britt v. Naval Investigative Serv., 886 F.2d 544 (3rd Cir. 1989).

[167] Swenson v. United States Postal Serv., 890 F.2d 1075 (9th Cir. 1989).

[168] 851 F.2d 1457 (D.C. Cir. 1988).

[169] *See id.* at 1466.

pursuant to this routine use because the purpose of the release was not compatible with the Administration's original reasons for collecting the information in the record.[170] The court noted that, in reaching this decision, it was complying with a "well-established [rule] that agencies covered by the Privacy Act may not utilize the 'routine use' exception to circumvent the mandates of the Privacy Act."[171] The court concluded that "based on a combination of congressional purpose and the structural integrity of the Privacy Act, it is inconceivable that the agency could circumvent it merely by taking the 'routine use' route."[172]

In *Federal Labor Relations Authority v. Department of Treasury, Financial Management Service*,[173] the same court overturned the precedent that the FLRA had established in *Farmers Home Administration Finance Office, St. Louis, Mo.*.[174] The court rejected the FLRA's interpretation of the Act, stating that the disclosure to a union of the addresses of bargaining unit employees was not a routine use because the agency involved had published no notices announcing this type of release.[175] Although the court did not rule explicitly on the compatibility requirement, it did note that even if the Treasury Department had published a routine notice, this notice still would have to be "compatible with the purpose for which [the information] was collected" before exception three would justify disclosure.[176]

The Third Circuit, in *Britt v. Naval Investigative Service*, also declared that the Privacy Act requires routine use disclosures under exception three to be compatible with the purpose for which the information was collected.[177] Britt, a special agent for the Immigration and Naturalization Service (INS), was also a major in the Marine Corps Reserve. The Naval Investigative Service (NIS), having completed a criminal investigation of Britt's activities in the Marine Corps Reserve, provided the INS with a complete copy of its criminal investigation. Notably, the NIS investigation had been inconclusive. The Marine Corps never brought any charges against Britt, nor did Britt's superiors ever initiate any disciplinary actions against him. Indeed, shortly after the NIS completed the investigation, Britt was promoted to the rank of lieutenant colonel.

Britt sued the NIS, alleging that the NIS had violated his rights under the Privacy Act by releasing the record of the investigation. The NIS responded that its "disclosure to the INS was 'consistent with any of the ... routine uses [it had published in the Federal Register], ... particularly those [uses] that relate to the integrity of investigations or the status of an investigative agent.'"[178]

The Third Circuit noted that the NIS did not deny "that the investigation was for a specific instance of possible wrongdoing rather than for a general inquiry into Britt's background."[179] The court added that although the disclosure may have been relevant to a government activity, "relevance ... is not the standard Congress placed in section 552a(a)(7).... There must be a more concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure."[180] The court found no such relationship in NIS's disclosure to Britt's employer, even though his employer was a government agency. The court concluded that "an agency cannot, by the mere publication of broad routine use purposes, evade the statutory requirement that disclosure must be compatible with the purpose for which the material was collected."[181]

The most recent court to address the issue—the Ninth Circuit—also strictly construed the language in section 552a(a)(7). In *Swenson v. United States Postal Service*,[182] the plaintiff had written to two congressmen, alleging that her postmaster was falsifying reports. Both congressmen had contacted the Postal Service to inquire into these allegations. The Postal Service had responded to each inquiry with a letter that disclosed that plaintiff had filed a complaint with the Equal Employment Opportunity Commission (EEOC) in which she had accused her

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[170] *Id.* at 1467.

[171] *Id.* at 1466. The Privacy Act's exception eleven allows an agency to disclose information "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11) (1988). The Court of Appeals for the District of Columbia, however, has held that grand jury subpoenas do not satisfy exception eleven unless they are "specifically approved by a court." *See* Doe v. DiGenova, 779 F.2d 74, 85 (D.C. Cir. 1985).

[172] Doe v. Stevens, 851 F.2d. at 1467.

[173] 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990).

[174] 23 F.L.R.A. at 788 (1986), *aff'd in substantial part and remanded sub. nom.* Department of Agric. v. Federal Labor Relations Auth., 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025.

[175] 884 F.2d 1446, 1456. The court also held that the release of names and home addresses of government employees to federal employees' labor unions was not permissible under exception two of the Privacy Act, 5 U.S.C. § 552a(b)(2) (1988), which allows disclosure if required by the Freedom of Information Act, 5 U.S.C § 552 (1988). Relying on the Supreme Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the court ruled that exemption six of the Freedom of Information Act prohibited this type of disclosure. Exemption six specifically exempts agencies from the duty to disclose information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(6) (1988).

[176] Federal Labor Relations Auth. v. Department of Treasury, Fin. Management Serv., 884 F.2d at 1454.

[177] 886 F.2d 544 (3rd Cir. 1989).

[178] *Id.* at 549.

[179] *Id.*

[180] *Id.* at 549-50.

[181] *Id.* at 550.

[182] 890 F.2d 1075 (9th Cir. 1989).

postmaster of sexual discrimination, and that she also had filed two grievances in response to warnings from her supervisor.

Plaintiff filed suit, claiming that the Postal Service had violated her rights under the Privacy Act. The Postal Service responded that it had revealed the information under a routine use that allowed disclosure "to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual."[183]

The court noted, however, that the Postal Service had stated earlier "that its purpose in collecting data on EEOC charges ... [was] 'to adjudicate complaints of alleged discrimination and to evaluate the effectiveness of the EEO Program.'"[184] Accordingly, the Postal Service's release of information was in no way compatible with the stated purpose of its collection and, thus, was not sanctioned by the Privacy Act.[185]

Conclusion

After hesitating more than fifteen years, the federal judiciary finally appears willing to accept OMB guidance.[186] Many courts now require strict compliance not only with the procedural requirement of "notice," but also with the substantive requirement of "compatibility." Federal agencies must consider carefully the purposes for collecting data under the Privacy Act and ensure that their disclosures of this type of information are "compatible with the purpose for which the information was collected."[187] In addition, each agency should review the notices of routine use it previously has published to ensure that they also meet the compatibility test. Major Lassus.

Use of Government Rental Cars

Guidance on the use of government rental cars on official temporary duty status (TDY) travel appears in Army Regulation 37-106, Financial Administration: Finance and Accounting for Installations Travel and Transportation Allowances, para. 1-47 (31 Dec. 1991) and Army Regulation 55-355, Transportation and Travel: Defense Traffic Management Regulation, ch. 58 (31 July 1986). The Deputy Chief of Staff for Logistics, Transportation Management Division, recently added to this guidance in a message discussing the use of rental cars by military and civilian personnel while they are on TDY. *See* Message, HQ, Dep't of Army, DALO-TP, 091520Z May 91, subject: Use of Government Rental Cars. This message applies only to rental cars authorized in travel orders; it does *not* apply to motor vehicles leased or rented by an activity to fill or to augment established allowances for administrative use vehicles.

Rental cars must be authorized by the order issuing authority. A statement to this effect must be included on the travel orders. The commercial travel office, the installation travel office, or the traveler will select the lowest cost rental service that meets mission requirements. First consideration should be given to companies that have agreements with the Military Traffic Management Command (MTMC) because these companies generally provide superior service and include collision damage waivers and unlimited mileage in their rates.

The message authorizes travelers to use rental cars for both official and nonofficial purposes. Official uses include transportation to, from, and within the TDY area pursuant to official business; transportation between business locations, lodging locations, eating establishments, drugstores, barber and beauty shops, places of worship, and cleaning establishments; and transportation to similar places that provide for the sustenance, comfort, or health of the TDY traveler. If a traveler uses a rental car for nonofficial purposes, he or she must bear any excess cost resulting from nonofficial use. In addition, travelers should understand that the government's assumption of liability and the inclusive collision damage waiver included in the rates of companies with MTMC agreements apply only to official uses.

Commanders and judge advocates should ensure that all Army TDY travelers are aware of this policy. Major McCallum.

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[183] *Id.* at 1078.

[184] *Id.*

[185] *Id.*

[186] *See generally* OMB Guidelines, *supra* note 129, 40 Fed. Reg. at 28,953.

[187] 5 U.S.C. § 552a(a)(7) (1988).

Claims Report

United States Army Claims Service

Household Goods Recovery Note

Envelopes Not Required for Unearned Freight Packets Forwarded to USARCS

Army Regulation 27-20 and Department of the Army Pamphlet 27-162 require field claims offices to include unearned freight packets—when appropriate—in files forwarded to USARCS for centralized recovery. *See* Army Reg. 27-20, Legal Services: Claims, para. 11-36*a* (28 Feb. 1990); Dep't of Army, Pam. 27-162, Claims, para. 3-27 (15 Dec. 1989). Many field claims offices are preparing envelopes for the unearned freight packets they forward to USARCS.

Because USARCS sends unearned freight packets to the Defense Finance and Accounting Service (DFAS, formerly USAFAC) in mass mailings, field offices do *not* need to prepare envelopes for unearned freight packets. Field offices, however, must prepare envelopes for the actual demands on carriers and warehouse firms. They should ensure that these envelopes are not franked—that is, that the envelopes do not have the postage prepaid stamp on the right side. They also should ensure that the envelopes have "Department of the Army" preprinted in the upper left-hand corner, along with the changed address recently published for USARCS. *See generally* Claims Management Note, *Mailing Address for United States Army Claims Service*, The Army Lawyer, July 1991 at 47. Mr. Frezza.

Management Note

Crediting Success in Carrier Recovery

USARCS recognizes carrier recovery performance through annual awards for effectiveness. It bases its assessment of carrier recovery effectiveness on the percentage recovered—both centralized and local—of amounts paid on household goods and baggage claims and on the annual carrier recovery survey, which recognizes timeliness in pursuing recovery by identifying CONUS offices with little or no carrier recovery backlog.

Some field offices mistakenly assume that recovery success depends solely on the efforts of carrier recovery clerks. Successful carrier recovery, however, is actually a team effort and claims offices should recognize the work of every contributor.

A good adjudicator aids in the prompt dispatch of demands by completing the "Exceptions" and "Carrier Liability" columns on Department of Defense (DD) Form 1844 as he or she adjudicates each claim. Good reception clerks can aid timeliness even more by requesting needed government bills of lading and riders whenever a claim is received—or even before then.

"Well-documented" adjudication is the most important single factor in recovery of a high percentage of an amount paid. The adjudicator's role in pursuing recovery is not limited to identifying lost potential carrier recovery. Recovery personnel at USARCS and in field offices ultimately must compromise significant amounts of money on files because the documentation and the notes on chronology sheets do not substantiate the amount paid on items. Effective recovery, particularly on files forwarded for centralized recovery, largely depends on how well the adjudicator has documented or explained the basis for payment in the file.

An adjudicator, however, should not try to obtain an estimate or some other piece of paper from a claimant to prove the value of every twenty dollar item in every claim. Careful investigations of questionable documentation, such as exaggerated repair estimates or solemn certifications that items have been "irreparably damaged" that have been provided by companies that customarily replace property rather than repair it, are far better uses of an adjudicator's time. An adjudicator can influence the recovery process most effectively by recording reasons on the chronology sheet to substantiate his or her recommendations to pay on questionable items.

In many files, hand-written notes in the chronology sheets make the difference between a large recovery, which USARCS can defend before the General Accounting Office, and a poor recovery. For example, notes indicating that a particular repair firm never includes repair of preexisting damage in its estimates, explaining why reupholstering a sofa was more appropriate than awarding a loss of value, or reporting the reasons offered by an electronic repair firm to support its assertion that internal damage was due to rough handling, can be invaluable. Offices that pay inadequately substantiated claims and that fail to document their reasons never will pursue carrier recovery effectively, no matter how good their recovery clerk may be.

In subtle ways, the reception clerk's efforts also are important to effective recovery. Screening DD Forms 1840 and 1840R to ensure that the claimant has listed inventory numbers and recorded damage that in some way reflects the damage he or she will claim is an effective way for the reception clerk to maximize carrier recovery. Additionally, the counselling a reception clerk initially gives the claimant on how to substantiate loss and damage is crucial to later adjudication.

In giving credit for timely and effective carrier recovery, USARCS recognizes claims offices rather than individuals. Conscientious effort from the carrier recovery clerk is absolutely essential to good carrier recovery, but so is the work of other individuals in the claims office. Mr. Frezza.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Office of the Staff Judge Advocate, and TJAGSA Administrative and Civil Law Division

Civilian Personnel Law

Indefinite Suspensions Pending Security Clearance Adjudications

The Merit Systems Protection Board (MSPB or Board) recently held that an agency may suspend an employee indefinitely without pay after suspending the employee's security access, pending the agency's adjudication of the employee's qualification for the security clearance.[1] The agency may suspend an employee indefinitely when it believes that the employee's retention on duty would be

[1] Jones V. Department of the Navy, 48 M.S.P.R. 680, 689 (1991).

detrimental to the government's interests.[2] The agency must afford the employee the procedural protections contained in 5 U.S.C. § 7513. The employee, moreover, may appeal the indefinite suspension to the MSPB.

The United States Supreme Court limited review of indefinite suspensions based on suspensions of security accesses in *Department of the Navy v. Egan*.[3] The Board may not review the merits of an agency's suspension of the employee's security access. Rather, it must limit its inquiry to three issues: (1) whether the employee's position required a security clearance; (2) whether the agency suspended the employee's security access pending a security clearance adjudication; and (3) whether the agency afforded the employee minimal due process when it suspended his or her access.[4]

Army labor counselors must be particularly careful when advising agencies about the due process element. To satisfy minimal due process in suspending an employee's security access, an agency not only must inform the employee of the suspension of access and of the basis for the suspension, but also must afford the employee an opportunity to respond.[5] The Army's personnel security regulation, however, *does not* require commanders to permit employees to reply before suspending the employees' accesses to classified information pending final adjudications.[6] Significantly, a majority of the Board recently declared that it will not sustain an indefinite suspension when the agency has failed to give an employee the opportunity to respond to the notice of suspension of access, *even if* the agency's regulations do not require the agency to provide such an opportunity.[7] Permitting the employee to respond to advance notice of indefinite suspension, which is required by 5 U.S.C. § 7513(b)(2), *will not* satisfy the requirement that the employee be allowed to respond to the proposed suspension of security access.[8] A same-day, preaction investigative interview will satisfy the requirement, however, if, during this interview, the employee may reply orally to the allegations that form the basis for the suspension of access.[9]

Before initiating indefinite suspensions based on the suspension of security access, labor counselors should review the Board's recent decisions carefully. They also should ensure that the proposed action complies with all the traditional requirements for an indefinite suspension, including identification of a condition subsequent which will terminate the indefinite suspension.[10] If the agency properly suspends an employee pending final security adjudication, it will not have to carry the employee in an extended paid administrative leave status or assign the employee nonsensitive "make-work" tasks pending final clearance adjudication.

Labor counselors should watch for future developments in this area, including a decision on the Office of Personnel Management's request that the Board reconsider its requirement that an employee be afforded due process not mandated by agency security regulations. Major Hatch.

Theft Justifies Removal

In *Jiggetts v. Department of the Treasury*[11] the MSPB recently sustained the Internal Revenue Service's (IRS) removal of an employee for theft of public money. The agency had determined that the appellant, a supervisory tax examining assistant, intentionally failed to repay an emergency salary payment after receiving a full regular paycheck, and thus had kept $479.31 to which she had not been entitled. The administrative judge (AJ) had reduced the penalty to a suspension and a demotion, reasoning that the deciding official had failed to consider any *Douglas* factors[12] other than the seriousness of the offense. The Board disagreed, noting that the deciding official actually had considered other factors, such as the appellant's long and successful career and her supervisor's recommendation that she receive only a demotion. The Board distinguished *Goode v. Defense Logistics Agency*,[13] in which the MSPB had mitigated the removal of a GS-3 employee who wrongfully had retained $100 by keeping duplicate salary checks. The Board noted that Goode, unlike Jiggetts, had not been in a position of trust

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[2] *Id.*

[3] 484 U.S. 518 (1988).

[4] *Jones*, 48 M.S.P.R. at 690.

[5] *Id.* at 691.

[6] *See* Army Reg. 380-67, Security: Personnel Security, para. 8-102 (9 Sept. 1988).

[7] Alston v. Department of the Navy, 48 M.S.P.R. 694, 698-99 (1991).

[8] *See id.* at 698.

[9] *See Jones*, 48 M.S.P.R. at 691.

[10] *See id.* at 686.

[11] 48 M.S.P.R. 252 (1991).

[12] *See* Douglas v. Veterans' Admin., 5 M.S.P.R. 280, 306 (1981) (establishing twelve factors that are "relevant in determining the appropriateness of a penalty").

[13] 31 M.S.P.R. 446 (1986)

when he kept the duplicate checks.[14] It also noted that, in *Goode*, the agency had waited five months after learning of Goode's misconduct before initiating removal proceedings.[15] The IRS, on the other hand, removed the appellant only two months after discovering her misconduct.[16] The Board concluded that, given appellant's supervisory status and the seriousness of the offense, removal was appropriate.[17]

Coerced Settlement Agreements

In *Lee v. United States Postal Service*[18] the Board set forth its procedures for evaluating allegations that an AJ coerced a settlement agreement or was biased in adjudicating the merits of an appeal. The Board stated that it will set aside a settlement agreement if a party makes a sufficient showing of bias or coercion.[19] It articulated two models, the first a test for coercion allegations and the second, for bias.[20]

Coercion

If a party alleges that an AJ "put so much pressure on a party as to vitiate the party's consent," the Board will require the moving party to present evidence that "he [or she] involuntarily accepted the terms of another, that the circumstances permitted no other alternative, and that the circumstances resulted from the administrative judge's coercive acts."[21] Applying this coercion model, the Board concluded that the appellant had presented no evidence to substantiate his claim that the AJ had coerced him.[22]

Bias

The Board will analyze an AJ's decision for bias whenever (1) an appellant's allegations concern the AJ's "rulings on legal questions or [his or her] comments on the strength of the [appellant's] case,"[23] or (2) the appellant has "refuse[d] to settle a case and subsequently argues that this refusal affected the administrative judge's adjudication of the merits of the case.[24] To disqualify an AJ, however, the appellant must make a substantial showing of personal bias to overcome the presumption of honesty and integrity that accompanies a hearing officer.[25] The AJ's alleged bias, moreover, must have arisen in "extrajudicial conduct," rather than conduct arising in a "trial setting."[26] In the present case, the appellant's mere assertion that the AJ had told him in court that he could not win his case failed to substantiate his claim of bias.[27]

The Board also announced that a party attempting to disqualify an AJ must follow disqualification procedures similar to the procedures established by the Administrative Procedure Act[28]—that is, the party must file with the Board an affidavit setting forth the grounds for his or her assertion "as soon as practicable" after the party has reasonable cause to suspect bias.[29] The Board then will assign an another AJ if it determines that resolution of the disqualification motion requires further fact finding.[30]

A Reorganization by Any Other Name ...

In *Hasler v. Department of the Air Force*[31] the Board stressed the importance of determining the underlying cause of a potential reduction in force (RIF). *Hasler* has special significance for Army practitioners because of the impending military "build-down."

After the loss of the space shuttle Challenger, the Department of Defense (DOD) decided to return to the use of expendable launch vehicles (ELV) to deliver its primary space payloads. It therefore reduced its space shuttle workforce at Johnson Space Center (JSC) in

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[14] *Jiggetts*, 48 M.S.P.R. at 256.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] 48 M.S.P.R. 274 (1991).

[19] *Id.* at 279.

[20] *Id.* at 280-81.

[21] *Id.* at 280.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 280-81.

[26] *Id.* at 281 (citing *In re* Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1314 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989); *In re* International Business Mach. Corp., 618 F.2d 923, 929 (2d Cir. 1980)).

[27] *Id.* at 280.

[28] 5 U.S.C. §§ 551-559 (1988).

[29] *Lee*, 48 M.S.P.R. at 281.

[30] *Id.* at 282.

[31] 48 M.S.P.R. 207 (1991),

Houston, Texas, and attempted to reassign various employees to its ELV center in Los Angeles. Hasler, a GS-301-13 shuttle payload operations manager in Texas, was separated after he refused to accept a transfer to a newly created GS-301-12 payload integration specialist's position in Los Angeles. He appealed.

The DOD asserted that it had eliminated Hasler properly as part of a RIF, claiming that it had transferred his function to Los Angeles.[32] The Board noted, however, that DOD employees had performed ELV operations in Los Angeles both before and after the alleged transfer of function.[33] The DOD, moreover, also had continued its shuttle payload program in Houston, albeit with fewer employees.[34] The Board held that the DOD's reassignment of JSC personnel to California actually was not a transfer of function, but a reorganization.[35] The Board noted, however, that a reorganization is also a valid reason for a RIF.[36] Remarking that RIF notices need not state an agency's specific reasons for reducing its workforce, the Board concluded that it properly could look beyond the text of the notice to determine whether proper grounds existed for the agency to conduct a RIF.[37] The Board then remanded the case to determine whether the DOD properly notified the appellant that his assignment rights under a reduction in force were to be placed in issue and that they would be adjudicated as a matter separate from the purported transfer of function.[38]

Grievances Do Not Constitute Whistleblowing

The Board recently revisited its ruling in *Williams v. Department of Defense*[39] that the filing of Equal Employment Opportunity (EEO) complaints does not constitute "whistleblowing" as defined by the Whistleblower Protection Act.[40] In *Fisher v. Department of Defense*[41] the employee filed not only an EEO complaint, but also an agency grievance. Nevertheless, the Board found *Williams* directly applicable. Noting that 5 U.S.C. § 2302(b)(9) already protects individuals who have filed grievances from reprisals by their employers, the Board concluded that neither the filing of an EEO complaint nor the filing of an internal agency grievance entitled an employee to file an individual right of action (IRA) appeal under the Act.[42] The Board found that it lacked subject matter jurisdiction over Fisher's complaint and, accordingly, dismissed Fisher's appeal.[43]

Practice Pointer: Lack of Interim Relief Is a Bar to Petitions for Review

In *Wallace v. United States Postal Service*[44] the Postal Service filed a petition for review (PFR) of an initial decision reversing the removal of an employee. The Board dismissed the PFR on procedural grounds, holding that the Postal Service had not stated in its PFR that it had complied with the AJ's interim relief order in accordance with 5 C.F.R. section 1201.115(b)(4).[45] MSPB Chairman Daniel R. Levinson later announced that *Wallace* clearly indicates the rule the Board will follow in the future.[46]

Practice before the MSPB has been dynamic in the last two years. To this day, the Board's regulations remain in a state of flux. As *Wallace* demonstrates, labor counsellors must review current MSPB regulations carefully whenever they face a case.

Labor Law

Appropriate Arrangements For Equitable Work Assignments

The Federal Labor Relations Authority (FLRA or Authority) continues to reverse or distinguish past decisions in which it had held impermissible various union proposals that had infringed directly on management's

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[32] A transfer of function is the movement of work from one competitive area to another. *See* 5 C.F.R. § 351.301 (1990); Cavines v. Department of the Army, 39 M.S.P.R. 548, 553 (1989). Transfer of function is one of several valid reasons to institute a reduction in force. *See* 5 C.F.R. § 351.1.201(a)(2) (1990).

[33] *Hasler*, 48 M.S.P.R. at 211.

[34] *Id.*

[35] *Id.* at 213.

[36] *Id.* (citing 5 C.F.R. § 351.201(a)(2) (1990)).

[37] *Id.*

[38] *Id.* at 214.

[39] 46 M.S.P.R. 549 (1991).

[40] Whistleblower Protection Act of 1989 § 4(a), 5 U.S.C.A. § 2302(b)(8) (West Supp. 1991).

[41] 47 M.S.P.R. 585 (1991).

[42] *Id.* at 587-88.

[43] *Id.* at 588.

[44] 48 M.S.P.R. 270 (1991).

[45] *Id.* at 272.

[46] Chairman Daniel R. Levinson, Address at the Merit Systems Protection Board Practitioners Forum 1991 (Sept. 12, 1991).

right to assign employees and work. In one recent decision,[47] the FLRA considered a union proposal that management make maximum use of employees' skills and distribute work equitably within employees' job classifications.[48] The FLRA acknowledged that proposals that establish general criteria restricting the exercise of a management right interfere directly with management's exercise of that right.[49] The Authority determined, however, that although the union's proposal thus would interfere directly with the management's right to assign work, it would not curtail that right to an impermissible degree.[50] The FLRA declared that "the agency's interest in being able to assign work in a manner that would either improperly favor or disproportionately burden its employees is negligible. The burden on management of providing for the equitable distribution of work and for the utilization of employee skills ... is virtually nonexistent."[51] Because the proposal would not interfere excessively with the agency's management prerogatives, the FLRA held it to be properly negotiable.[52]

Discipline of Drug Users

The FLRA found yet another restriction on management's rights to be a negotiable appropriate arrangement in *American Federation of Government Employees Local 1692*.[53] It considered a provision of a union proposal that suggested that the management immunize from discipline for drug use any employee who: (1) voluntarily admitted engaging in drug abuse without first being identified by other means; (2) sought counselling and rehabilitation at a designated clinic; (3) agreed to drug testing during rehabilitation; (4) consented to release of rehabilitation records to appropriate officials; and (5) thereafter remained free from drugs.[54] Noting that the provision limited management's disciplinary authority only slightly, the Authority found that the provision's benefits to employees who would admit drug abuse and successfully undergo treatment greatly outweighed its minimal burden on management's right to discipline.[55]

Home Addresses—the Debate Goes On

The FLRA long has been a staunch believer in the right of a union to know the home addresses of bargaining unit members.[56] The federal courts, however, do not necessarily agree. The First Circuit recently ruled that federal employee unions could not use the Freedom of Information Act[57] to compel government agencies to disclose the home addresses of bargaining unit members because the Privacy Act[58] barred the government from releasing this information.[59] The First Circuit, following a 1989 decision of the Court of Appeals for the District of Columbia,[60] rejected the Authority's position that the FOIA exception or the "routine use" exception permitted the agency to disclose this information. The court accepted the Office of Management and Budget's interpretation that routine use allows release only if alternative means of communication are not available, noting that in this case, the union failed to prove the nonexistence of adequate alternative means to communicate with employees.

More important is a case decided by the Third Circuit one month after the First Circuit's decision. Before this decision, the Third Circuit had followed several other federal courts in upholding Authority orders to release home addresses.[61] The Third Circuit broke with past precedent, however, in *Department of the Navy v. Federal Labor Relations Authority*[62] and now agrees with the First Circuit and the Court of Appeals for the District of Columbia. We will keep you apprised of further developments. In the meantime, labor counselors who face a

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[47] National Ass'n of Gov't Employees, 40 F.L.R.A. 657 (1991).

[48] *Id.* at 682.

[49] *Id.* at 683.

[50] *Id.*

[51] *Id.* at 686.

[52] *Id.* at 687.

[53] 40 F.L.R.A. 868 (1991).

[54] *Id.* at 869.

[55] *Id.* at 874. Significantly, the union's proposal, if adopted, would immunize only employees who engage in self-referral. The management still could punish employees whose drug abuse it discovered through other means. Similarly, the provision would not prevent management from punishing employees for drug-related offenses other than drug abuse or for drug abuse following rehabilitation. *See id.* at 869, 874.

[56] *See* Labor and Employment Law Note, *Home Addresses*, The Army Lawyer, Jan. 1991 at 63.

[57] 5 U.S.C. § 552 (1988).

[58] The Privacy Act of 1974, 5 U.S.C. § 552a (1988).

[59] Federal Labor Relations Auth. v. Department of the Navy, No. 90-1948 (1st Cir. Aug. 13, 1991).

[60] Federal Labor Relations Auth. v. Department of Treasury, Fin. Management Serv., 884 F.2d 1446 (D.C. Cir. 1989).

[61] *See, e.g.*, Department of the Navy v. Federal Labor Relations Auth., 840 F.2d 1131 (3rd Cir.) *cert. dismissed* 488 U.S. 881 (1988); Department of the Air Force v. Federal Labor Relations Auth., 838 F.2d 229 (7th Cir.) *cert. dismissed*, 488 U.S. 880 (1988); Department of Health and Human Serv. v. Federal Labor Relations Auth., 833 F.2d 1129 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988).

[62] Department of the Navy v. Federal Labor Relations Auth., No. 90-3690, (3d Cir. Sep. 13, 1991).

request for release of home addresses from their local unions should contact their major command labor counselors and the OTJAG Labor and Employment Law Office immediately.

A Fond Farewell

The OTJAG Labor and Employment Law Office and The Judge Advocate General's School would like to thank publicly the Forces Command Labor Counselor, Mr. Chris Thurner, for his efforts on behalf of the Army Labor Counselor Program and especially for his contributions to the Labor and Employment Law Notes. It is not an overstatement to say that Chris has been the major contributor to the Notes since their inception. We wish him well in his new position with the Defense Logistics Agency.

Criminal Law Division Note

Criminal Law Division, OTJAG

Treating the Incompetent Accused: *Short v. Chambers*

> [T]he real question presented is what does the military service do with the incompetent accused? Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial offers a solution.[1]

Trial counsel who have attempted to prosecute an incompetent accused will recognize this statement by Judge Cox as a paramount truth. Until recently, the armed forces' abilities to deal with the incompetent accused were at best limited, and at worst, wholly unsatisfactory. The discussion to Rule for Courts-Martial (R.C.M.) 909c(2) suggests that a commander may initiate administrative action to discharge an incompetent accused from the service on grounds of mental disability.[2] For most of us, releasing into society a person who should be in a padded room is less than a satisfactory resolution of the case. With the Court of Military Appeals's recent decision in *Short v. Chambers*, however, circumstances well may have changed for the better.

History of the Case

In March 1988 Dutch authorities charged Charles Short, an Air Force staff sergeant stationed in the Netherlands, with murdering his wife. The murder had been particularly gruesome, culminating in the dismemberment of the corpse. Because the Dutch Government feared that the Air Force might refer the case capital, it tried Short in its own criminal court, ultimately finding him guilty of manslaughter.[3] On appeal, the Dutch *Hoge Raad* (High Court) overturned Short's conviction after determining that he suffered from a severe mental defect. The Dutch subsequently released Short to the Air Force. The Air Force reassigned Short to the United States, where court-martial charges were preferred against him.

During a preliminary session of the court-martial, the military judge ruled that Sergeant Short was incompetent and therefore suspended the trial. The Air Force then sought and received permission from the United States Bureau of Prisons (BOP) to transfer Short to a federal correctional institution (FCI) for inpatient psychiatric treatment. Short promptly filed a petition for extraordinary writ with the United States Court of Military Appeals, asking the court to direct his release from the FCI at Butner, North Carolina, and to return him to military control.

Opinion of the Court

In his petition, Sergeant Short argued the following: (1) the military judge had no power to make a judicial determination of incompetence; (2) the convening authority could not order that a service member be held in a BOP facility during pretrial confinement; and (3) the military judge's conduct of the competency proceeding had denied him due process of law.[4] The court rejected the first argument out of hand, holding that Uniform Code of Military Justice (UCMJ) articles 26 and 39a empower a military judge to determine whether an accused is competent to stand trial. Addressing the second issue, the court noted that a convening authority, pursuant to UCMJ article 13, may order an accused into pretrial detention for the purpose of evaluating the accused's competence to stand trial. That the detention facility is civilian rather than military is of no moment, provided that the conditions are no more harsh than are

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[1] Short v. Chambers, 33 M.J. 49, 52 (C.M.A. 1991).

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 909c(2) [hereinafter R.C.M.]; *see also* Army Reg. 40-3, Medical Services: Medical, Dental and Veterinary Care, para. 6-11 (15 Feb. 1985).

[3] John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats From Recent European Human Rights Developments*, 129 Mil. L. Rev. 41, 59 & n.95 (1990). Dutch law abhors the death penalty and Dutch courts must, whenever possible, avoid judicial resolutions that place an accused at risk of capital punishment. *Id.* The United States refused to guarantee that Short, if convicted, would not be executed; the Dutch, accordingly, refused to release Short to American custody. *Id.* at 59-60.

[4] *Short*, 33 M.J. at 50.

necessary to ensure the accused's presence at trial and the facility is capable of rendering competence evaluations and providing care and treatment for the service member.[5] Finally, the court determined that the military judge had afforded the accused the requisite due process.[6] Consequently, the court denied Short's petition for extraordinary relief.

Analysis and Conclusion

Short permits the military to obtain long-term inpatient psychiatric treatment for the incompetent accused. While *Short* is good news for the military departments, it raises other issues yet to be resolved. For example, what happens if an accused never becomes competent? When and how would that determination be made? Should convening authorities dismiss charges against these accused, or discharge them medically, or turn them over to state authorities? Until the Department of Defense addresses these issues, staff judge advocates and commanders may look to *Short* as an alternative to what otherwise may be an unacceptable solution—medically discharging an incompetent and potentially dangerous accused.[7] Major Schmidli.

[5] *Id.* at 52.

[6] *Id.* at 53; Vitek v. Jones, 445 U.S. 480 (1980).

[7] *See* Message, HQ, Dep't of Army, DAJA-CL, 251900Z Sep 91, subject: Pretrial Detention/Treatment of the Incompetent Accused. Interestingly, since 1987, the military departments have transferred many sentenced prisoners who were in need of inpatient psychiatric care to BOP custody. Before it will accept a prisoner for psychiatric care, however, the BOP requires military authorities to comply with federal statutes incorporating the due process requirements of *Vitek v. Jones*. *See generally Vitek*, 445 U.S. at 480; 18 U.S.C. § 4241-4242, 4244-4245 (1988). The Department of Defense also requires military authorities to comply with *Vitek*. *See* Dep't of Defense Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correction Facilities (May 19, 1988).

Procurement Fraud Division Note

Procurement Fraud Division, OTJAG

Does it Really Pay to Offer a Bribe? (It May Cost More Than You Think)

Practitioners fighting fraud in government contracting may find the recent United States Claims Court decision in *Brown Construction Trades, Inc. v. United States*[1] instructive. In *Brown Construction* the court discussed three issues that affect the remedies available to the government when a contract has been tainted by fraud. First, the court examined the public policy considerations against enforcing contracts that are "tainted by bribery, kickbacks or conflicts of interest"[2]. Second, the court interpreted 28 U.S.C. § 2514. Section 2514 permits the Government to enter a special plea in fraud demanding the forfeiture of the claim of any plaintiff who "corruptly practices or attempts to practice ... [a] fraud against the United States in the proof, statement, establishment, or allowance thereof."[3] Finally, the court outlined the limitations of the United States Supreme Court's decision in *United States v. Halper*[4].

Background

Brown Construction Trades (BCT or Brown Construction) filed suit to recover from the federal government the reasonable cost of painting and repair work that the Brown Construction had completed on housing units at an Air Force base before a default termination.[5] In response, the Government moved for a stay of proceedings pending the outcome of a grand jury investigation that was inquiring into corruption allegations against BCT.[6] Brown Construction subsequently pleaded guilty to one count of conspiracy to commit bribery.[7] The parties stipulated that Cecil Brown, a vice president of BCT, had given a $2000 check to a government project inspector to induce the inspector to approve modifications to certain line items of BCT's government contract.[8] Significantly, the parties also agreed that this modification did *not* result in any financial loss to the federal government.[9]

[1] 23 Cl. Ct. 214 (1991).

[2] *See id.* at 215.

[3] *See* 28 U.S.C. § 2514 (1988); *see also* O'Brien Gear & Mach. Co. v. United States, 591 F. 2d 666 (Ct. Cl. 1975).

[4] United States v. Halper, 490 U.S. 435 (1989).

[5] *Brown Constr. Trades*, 23 Cl. Ct. at 214-15.

[6] *See id.* at 215.

[7] Plea agreement at 1, United States v. Brown Constr. Trades, Inc. (No. 89-235-Cr-Orl-19) (M.D. Fla. Dec. 6, 1989).

[8] *Id.* at 4.

[9] *Id.*

The court imposed a fine of $5000, along with the cost of prosecution, upon Brown Construction. It fined Cecil Brown an additional $2000 and sentenced him to three years of imprisonment, four years of probation, and 300 hours of community service. The court, however, ultimately suspended all but three months of Brown's imprisonment.[10]

Following these convictions, the Government moved for summary judgment in the civil action, contending that Brown Construction's claim was unenforceable on grounds of public policy and also subject to forfeiture under 28 U.S.C. § 2514. The court found both arguments compelling and granted summary judgment.

Public Policy Arguments

Citing *United States v. Mississippi Valley Generating Co.*,[11] the court declared that "case law uniformly states that public policy considerations, in particular a concern for the integrity of the government procurement process, preclude the enforcement of contracts tainted by bribery, kickbacks or conflicts of interest."[12] In *Mississippi Valley Generating* the federal government had refused to honor a contract arising from negotiations unlawfully conducted by a government agent who had profited personally from the contract.[13] The Supreme Court ruled that the offeror's improper participation in these negotiations had tainted the entire contract and held the contract unenforceable. The Court acknowledged that this remedy might "seem harsh," but stated that nonenforcement was necessary "to extend to the public the full protection which Congress [had] decreed...."[14]

Applying *Mississippi Valley Generating*, the claims court concluded that BCT's fraud mandated nonenforcement of the entire contract. This conclusion, perhaps, is open to debate. The contract modification that BCT bribed the inspector to approve amounted to only seven percent of the damages Brown Construction sought to recover in its suit.[15] Moreover, the Air Force could show no injury whatsoever resulting from BCT's unlawful modification of the contract.[16] Nevertheless, the court applied the principles of *Mississippi Valley Generating* against BCT and refused to enforce BCT's claim. Comparing *Brown Construction Trades* with *Mississippi Valley Generating*, the claims court remarked that BCT's conduct was "perhaps different in degree, but certainly not in kind."[17] In both cases, the court asserted, the contractors' violations of criminal statutes had threatened the integrity of the government contracting process. The monetary insignificance of BCT's fraud on the government should not deny the government the remedy of nonenforcement, nor should this remedy be affected by the absence of fraud in the BCT's subsequent performance of the contract. The court stated, "Only through the remedy of nonenforcement can the procurement system free itself of the suspicion of frauds gone undetected."[18] It concluded, "[That] the remed[y] we endorse here entail[s] a potential denial of payment to the contractor for work done does not change ... [its] remedial character."[19]

Special Plea in Fraud

Under 28 U.S.C. § 2514, a claim against the United States is forfeited if the claimant corruptly practices or attempts to practice any fraud against the United States to prove or assert that claim.[20] When the Government proves, pursuant to a special plea of fraud, that a claimant has committed any of these acts of misconduct, the United States Claims Court must find this fraud or attempt specifically and must render judgment of forfeiture.[21]

In determining whether the government was entitled to relief under section 2514, the claims court looked to *Kamen Soap Products Co. v. United States*[22] for guidance. It noted that, in *Kamen Soap Products*, the former

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[10] *Brown Constr. Trades*, 23 Cl. Ct. at 215.

[11] United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

[12] *Brown Constr. Trades*, 23 Cl. Ct. at 215.

[13] *See Mississippi Valley Generating*, 364 U.S. at 548-62 (applying 18 U.S.C. § 434 (repealed 1962) which forbade officers or employees of the executive branch of the federal government to participate in evaluation of contract submissions when they have pecuniary interests in the outcomes of the evaluations). 18 U.S.C. § 208 corresponds to former section 434.

[14] *See Mississippi Valley Generating*, 364 U.S. at 566.

[15] *Brown Constr. Trades*, 23 Cl. Ct. at 215.

[16] Plea agreement, *supra* note 7, at 4.

[17] *Brown Constr. Trades*, 23 Cl. Ct. at 215.

[18] *Id.* at 216.

[19] *Id.* at 217.

[20] 28 U.S.C. § 2514 (1988).

[21] *Id.*

[22] Kamen Soap Prods. Co. v. United States, 124 F. Supp. 608 (Ct. Cl. 1954).

United States Court of Claims had held "[t]his statute ... to require the forfeiture of any claim affected by fraud, whether intrinsic to the claim or in the presentment of the claim."[23] The court added that "[w]here ... fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it."[24] The court concluded, therefore, that "[t]he practice of a fraud on part of a contract [must] condemn[] the whole."[25]

Limitations of United States v. Halper

BCT argued that the claims court's refusal to enforce the contract, following as it did the criminal penalties imposed on both Cecil Brown and Brown Construction, amounted to a cumulative sanction. Nonenforcement, BCT claimed, was therefore inconsistent with the Supreme Court's decision in *United States v. Halper*.[26]

In *Halper*, a trial court imposed a $130,000 civil penalty on the defendant, Irwin Halper, who already had been imprisoned and fined for presenting $585 in false claims. The Supreme Court held that "civil sanctions, separately imposed on the basis of conduct earlier punished as criminal, violate the constitutional prohibition against double jeopardy when those penalties are unreasonably disproportionate to the actual damages suffered by the government because of the wrongdoing."[27] The Court explained that

> where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[28]

The Court of Claims, however, ruled that BCT had suffered no second punishment. The court stated,

> Neither the nonenforceability of plaintiff's contract claim nor the forfeiture of that claim can be viewed as a second punishment carried out in the guise of a civil sanction. Rather, these remedies represent a rational means of overcoming the harm done to the integrity of the procurement process. Social betterment and not punishment are their aims.[29]

BCT suggested that, by emphasizing the need for a "rational connection between the civil penalty imposed and the damages suffered by the Government,"[30] the Supreme Court actually intended to condemn the disproportionate ratio of penalties ($130,000) to actual damages ($585) at issue in *Halper*.[31] If interpreted in this way, *Halper* would require the dollar amount that a court imposes as a penalty to be rationally related to the dollar amount of damages. The Claims Court, however, interpreted "rationally related to the damages" to mean a "rational means of overcoming the harm done to the integrity of the procurement process."[32] The court apparently concluded that civil penalties need not be proportionate to the dollar amount of damages to the government to satisfy *Halper*.

Conclusion

In *Brown Construction Trades*, the Claims Court firmly endorsed nonenforcement of contract as a remedy for the government when a contract has been tainted by bribery. Nonenforceability can be based on either of two theories: (1) preservation of the integrity of the contracting process as a matter of public policy; or (2) forfeiture pursuant to 28 U.S.C. § 2514 of all claims on the contract. The court concluded,

> a lesser sanction—one that would leave plaintiff free to enforce that part of the contract which is claimed to be free of fraud—would surely undermine the integrity of the procurement system. Enforcement of the contract would compel the Government to honor the work of one whose conduct involved a proven violation of public trust, deny the Government a remedy for abuses to the contract administrative process, and require the Government to ignore a breach of the obligation of good faith and fair dealing that lies at the heart of all contractual relationships.[33]

Ms. Hanlon, Legal Intern.

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[23] *Brown Constr. Trades*, 23 Cl. Ct. at 216 (citing *Kamen Soap Prods.*, 124 F. Supp. at 608).

[24] *Id.* (quoting Little v. United States, 152 F. Supp. 84, 87-88 (Ct. Cl. 1957)).

[25] *Id.*

[26] *Id. See generally Halper*, 490 U.S. at 435.

[27] *Brown Constr. Trades*, 23 Cl. Ct. at 216 (citing *Halper*, 490 U.S. at 441, 449-50).

[28] *Halper*, 490 U.S. at 449.

[29] *Brown Constr. Trades*, 23 Cl. Ct. at 216.

[30] *See id.*

[31] *Halper*, 490 U.S. at 439.

[32] *Brown Constr. Trades*, 23 Cl. Ct. at 216.

[33] *See id.*

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1992 Academic Year On-Site Schedule

The following information updates the 1992 Academic Year Continuing Legal Education (On-Site) Training Schedule in the October 1991 edition of *The Army Lawyer*.

There has been a change in action officers. Major William A. Reddington will replace Captain Kent N. Simmons at Columbus, Ohio. The address and phone number, however, remain the same.

Major Dolan D. Self, the Jackson, Mississippi, On-Site action officer, has a new address. It is 307 Clarksdell Road, Canton, MS 39046. His phone numbers remain the same.

One officer has been promoted—Colonel Fred K. Morrison was promoted to Brigadier General on 8 October 1991.

The location of the Salt Lake City On-Site has been changed to Headquarters, Utah National Guard, 12953 South Minuteman Drive, Draper, Utah 84020.

The training site for Washington, D.C. has been finalized. We will be meeting at Fort Lesley J. McNair. In addition, we have a new action officer for this On-Site—Captain Jordan E. Tannenbaum. He may be reached at 2686 Centennial Court, Alexandria, VA 22311. Phone: (703) 578-3419.

USAR Tenured JAGC Positions

Senior Judge Advocate General's Corps (JAGC) positions in United States Army Reserve (USAR) Troop Program units are tenured for a period of three years. These positions include military law center (MLC) commanders; senior staff judge advocates (SJA) of Army Reserve commands (ARCOM), general officer commands (GOCOM), or other major commands; military judges; and team directors. The Judge Advocate General must approve assignments to any of these positions. *See* Army Reg. 140-10, Army Reserve: Assignments, Attachments, Details, and Transfers, sec. VI (1 July 1990).

To fill these positions, units must act at least nine months prior to the end of the tenure of their current incumbents. A unit should begin by advertising the impending vacancy in unit bulletins or command newspapers and by ensuring that qualified Individual Ready Reserve members in the area know that they may apply for the position. The unit also may obtain a list of eligible officers by initiating a request for unit vacancy fill, using Department of the Army (DA) Form 4935-R. It then may send the DA Form 4935-R to its major United States Army Reserve command (MUSARC), to adjacent MUSARCs, and to the Army Reserve Personnel Center (ATTN: DARP-MOB-C).

The unit should nominate at least three candidates. The nomination packet should contain a list of all officers considered and a description of the unit's efforts to publicize the vacancy. The unit also must submit the following information for each officer nominated:

a. Personal data: Full name (including preferred name if other than first name), grade, date of rank, mandatory release date, age, address, telephone number (business and home), and a full-length official photograph.

b. Military experience: Chronological list of Reserve and active duty assignments and copies of officer evaluation reports for the past five years, including senior rater profile.

c. Awards and decorations: Copies of all awards and decorations as well as significant letters of commendation.

d. Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded.

Units must forward nominations for MLC commanders, and for SJAs of ARCOMs, GOCOMs, and other major commands, through their chains of command—and also through command selection boards when nominating MLC commanders—to arrive at TJAGSA, ATTN: JAGS-GRA, Charlottesville, VA 22903-1781, at least six months before current incumbents' tenures expire.

Officers selected for these positions are expected to serve a full tour of three years. No extensions of the tenure period will be granted unless no other qualified officers are available or the removal of the incumbent will have an adverse impact on the mission of the unit. An officer in the appropriate grade for the assignment has priority for selection. A lieutenant colonel, for instance, will not be selected for a position authorized a colonel if a qualified colonel is available. Officers usually will serve only one tour in a particular tenured position. Continual rotation is not permitted, except when no other qualified officers are available.

Nominations for military judges must be forwarded through the channels listed above, to the Chief Trial Judge.

Nominations for Judge Advocate General Service Organization team directors and JAGC section leaders will be forwarded through the CONUSA SJA, to the United States Army Reserve Command SJA, at least six months prior to the tenure expiration date.

SENIOR RESERVE JUDGE ADVOCATE POSITIONS

U. S. ARMY RESERVE COMMANDS

First Army

ARCOM		SJA	Vacancy Due
77	Fort Totten, NY	COL R.A. Salvatore	1 Jul 92
79	Willow Grove, PA	COL W.S. Little	15 Jan 93
94	Hanscom AFB, PA	COL G.D. D'Avolio	15 Mar 92
97	Fort Meade, MD	COL J.F. DePue	1 Sep 94
99	Oakdale, PA	COL W.J. Ivill	1 Apr 93

Second Army

ARCOM		SJA	Vacancy Due
81	East Point, GA	COL K.A. Nagle	15 Apr 91
120	Fort Jackson, SC	COL H.B. Campbell	20 Jun 92
121	Birmingham, AL	COL M.D. Barber	1 Jun 94
125	Nashville, TN	COL R.E. Harrison	15 Aug 94

Fourth Army

ARCOM		SJA	Vacancy Due
83	Columbus, OH	COL D.A. Schulze	2 Sep 91
86	Forest Park, IL	COL M.R. Kos	15 Feb 92
88	Fort Snelling, MN	COL M.F. Hanson	15 Jul 94
123	Indianapolis, IN	COL W.S. Gardiner	19 Sep 91

Fifth Army

ARCOM		SJA	Vacancy Due
89	Wichita, KS	COL L. Taylor	15 Dec 91
90	San Antonio, TX	COL J.D. Farris	1 Apr 93
102	St. Louis, MO	COL D.E. Johnson	30 Jun 93
122	Little Rock, AR	COL J.S. Arthurs	1 May 92

Sixth Army

ARCOM		SJA	Vacancy Due
63	Los Angeles, CA	COL J.C. Spence, III	10 Jul 93
96	Fort Douglas, UT	COL M.J. Pezely	1 Sep 92
124	Fort Lawton, WA	COL S.R. Black	30 Jun 93

MILITARY LAW CENTERS

First Army

MLC		Commander	Vacancy Due
3	Boston, MA	COL P.L. Cummings	15 Nov 92
4	Bronx, NY	COL J.P. Cullen	1 Sep 92
10	Washington, DC	COL B. Miller	1 Sep 94
42	Pittsburgh, PA	COL A.B. Bowden	1 Sep 92
153	Willow Grove, PA	COL D.E. Prewitt	1 Nov 92

Second Army

MLC		Commander	Vacancy Due
11	Jackson, MS	COL J.F. Wood	15 Aug 91
12	Columbia, SC	COL C.M. Pleicones	15 Sep 93
139	Louisville, KY	COL M.K. Gordon	15 Jun 94
174	Miami, FL	COL J.W. Hart	1 Jul 92
213	Chamblee, GA	COL R.A. Bartlett	15 Sep 93

Fourth Army

MLC		Commander	Vacancy Due
7	Chicago, IL	COL S.J. Connolly	2 Feb 94
9	Columbus, OH	COL M.C. Matuska	1 May 92
214	Ft Snelling, MN	COL R.M. Frazee	1 Mar 94

Fifth Army

MLC		Commander	Vacancy Due
1	San Antonio, TX	COL G.M. Brown	31 May 92
2	New Orleans, LA	COL M.J. Thibodeaux	1 Jul 92
8	Independence, MO	COL T.S. Reavely	30 Jan 94
113	Wichita, KS	COL W. Dillon, Jr.	28 Feb 92
114	Dallas, TX	COL G.M. Cook	15 Sep 91

Sixth Army

MLC		Commander	Vacancy Due
5	Presidio of SF, CA	COL J.A. Lassart	3 Apr 92
6	Seattle, WA	COL B.G. Porter	28 Aug 92
78	Los Alamitos, CA	COL J.D. Kirby	1 Jul 93
87	Ft Douglas, UT	COL R.H. Nixon	1 Sep 92

TRAINING DIVISIONS

First Army

TNG DIV		SJA	Vacancy Due
76	West Hartford, CT	LTC H.R. Cummings	15 Sep 90
78	Edison, NJ	LTC K.J. Hanko	15 Jan 93
80	Richmond, VA	LTC C.T. Mustian	Sep 91
98	Rochester, NY	LTC M.P. LaHaye	15 Aug 94

Second Army

TNG DIV		SJA	Vacancy Due
100	Louisville, KY	LTC J.F. Gordon, Jr.	1 Apr 93
108	Charlotte, NC	LTC L.N. Ellis	15 Sep 94

Fourth Army

TNG DIV		SJA	Vacancy Due
70	Livonia, MI	LTC J.P. Warren	3 Oct 94
84	Milwaukee, WI	LTC T.G. Van de Grift	1 Nov 92
85	Chicago, IL	LTC T.J. Benshoof	31 Aug 91

Fifth Army

TNG DIV		SJA	Vacancy Due
95	Oklahoma City, OK	COL G.A. Glass	1 Oct 92

Sixth Army

TNG DIV		SJA	Vacancy Due
91	Sausalito, CA	LTC J.M. Reidenbach	1 Nov 92
104	Vancouver Barracks, WA	LTC B.C. Shedahl	1 Apr 93

GENERAL OFFICER COMMANDS

First Army

GOCOMS	SJA	Vacancy Due
8 MED BDE Brooklyn, NY	LTC J.E. Brown	1 Nov 92
157 INF BDE (SEP) Horsham, PA	LTC E.D. Barry	1 Jul 92
220 MP BDE Gaithersburg, MD	MAJ M.G. Gallagher	1 Feb 94
300 SPT GP (AREA) Ft Lee, VA	—	Feb 90
310 TAACOM FT Belvoir, VA	COL F.X. Gindhart	1 Oct 94
352 CA CMD Riverdale, MD	COL R.E Geyer	Jul 91
353 CA CMD Bronx, NY	COL C.T. Grasso	1 Dec 92
411 ENGR BDE Brooklyn, NY	LTC W.C. Jaekel	15 Apr 92
800 MP BDE Hempstead, NY	MAJ A.P. Moncayo	Apr 90
804 HOSP CTR Bedford, MA	MAJ G.T. O'Brien	1 Aug 92

Second Army

GOCOMS	SJA	Vacancy Due
3 TRANS BDE Anniston, AL	LTC W.C. Tucker, Jr.	1 Mar 93
87 MAN AREA CMD Birmingham, AL	LTC E.E. Stoker	2 Jul 94
143 TRANS CMD Orlando, FL	COL F.J. Pyle, Jr.	1 Apr 93
332 MED BDE Nashville, TN	MAJ B. Story	31 Aug 93
335 SIG CMD East Point, GA	COL O.D. Peters, Jr.	5 May 92
412 ENGR BDE Vicksburg, MS	COL D.M. Magee	1 Oct 94
415 CHEM BDE Greenville, SC	LTC D.K. Warner	
818 HOSP CTR Forest Park, GA	MAJ K.S. Byers	15 Feb 92
USAR Forces San Juan, PR	LTC C. Fitzwilliams	1 Jun 94

Fourth Army

GOCOMS	SJA	Vacancy Due
6 INF DIV Ft Snelling, MN	MAJ D.T. Peterson	1 Oct 94
21 SPT CMD Indianapolis, IN	LTC C.H. Criss	1 Apr 91
30 HOSP CTR Ft Sheridan, IL	LTC R.R. Steele	22 Nov 91
103 COSCOM Des Moines, IA	COL R.M. Kayser	15 May 94
300 MP CMD Inkster, MI	COL P.A. Kirchner	15 Aug 92
416 ENGR CMD (TDA AUG) Chicago, IL	COL T.A. Morris	1 Dec 92
416 ENGR CMD Chicago, IL	COL J.R. Osgood	1 Jun 93
425 TRANS BDE Ft Sheridan, IL	LTC T.J. Hyland	1 Jun 92

Fifth Army

GOCOMS	SJA	Vacancy Due
75 MAN AREA CMD Houston, TX	COL W.H. Sullivan	1 Aug 92
156 SPT GP Albuquerque, NM	LTC R.G. Walker	1 Apr 93
321 CA GP San Antonio, TX	LTC R.M. Kunctz	1 Jul 92
326 SPT GP Kansas City, KS	LTC M. Walker	14 Sep 93
377 TAACOM New Orleans, LA	LTC R. Goddard	27 Sep 94
420 ENGR BDE Bryan, TX	LTC J.W. Hely, Jr.	30 Nov 93
807 MED BDE Seagoville, TX	LTC A.C. Olivo	1 Sep 92

Sixth Army

GOCOMS		SJA
Vacancy Due		
2 HOSP CTR Novato, CA	MAJ L.P. Warchot	1 Sep 93
221 MP BDE San Jose, CA	LTC J.H. Hancock	2 Apr 89
311 COSCOM Los Angeles, CA	LTC G.J. Gliaudys	15 May 92
319 TRANS BDE Oakland, CA	LTC W.E. Saul	15 Jul 93
351 CA CMD Mountain View, CA	LTC S.R. Hooper	15 Aug 93

SPECIAL OPERATIONS COMMAND

GOCOMS	SJA	Vacancy Due
Reserve Special Operations Command (ABN), Fort Bragg, NC	LTC R.C. Barnes	2 Jan 93

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit Reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

2-6 December: 11th Operational Law Seminar (5F-F47).

9-13 December: 40th Federal Labor Relations Course (5F-F22).

1992

6-10 January: 109th Senior Officers Legal Orientation (5F-F1).

13-17 January: 1992 Government Contract Law Symposium (5F-F11).

21 January-27 March: 127th Basic Course (5-27-C20).

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

February 1992

5-6: GWU, Procurement Law Research Workshop, Washington, D.C.

10-14: GWU, Administration of Government Contracts, Washington, D.C.

10-14: ESI, The Winning Proposal, Vienna, VA.

18-21: ESI, Third Party Contracting for UMTA Grantees, Washington, D.C.

25-28: ESI, Competitive Proposals Contracting, San Diego, CA.

25-28: ESI, Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1991 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Requirement
Alabama	31 January annually
Arizona	15 July annually
Arkansas	30 June annually
California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually
Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina	28 February of succeeding year
North Dakota	31 July annually
Ohio	Every two years by 31 January
Oklahoma	15 February annually
Oregon	Date of birth—new admittees and reinstated members report an initial one-year period, thereafter, once every three years
South Carolina	15 January annually
Tennessee	1 March annually
Texas	Last day of birthmonth annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the July 1991 issue of *The Army Lawyer.*

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A229148 Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).

AD A229149 Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

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

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135492 Legal Assistance Consumer Law Guide/ JAGS-ADA-89-3 (609 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD A226159 Model Tax Assistance Program/ JA-275-90 (101 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

AD A230991 Legal Assistance Guide: Wills/ JA-262-90 (488 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel & Defense Counsel Handbook/JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

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

The following CID publication is also available through DTIC:

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

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

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

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

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

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

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

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

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 725-50	Requisition and Issue of Supplies and Equipment, Interim Change 101	24 May 91
Cir 350-91-1	Army Individual Training Evaluation Program (ITEP) for (FY) 1992	11 Jul 91

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering

the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in **bold** print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, May 1991
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, May 1991
506.ZIP	TJAGSA Fiscal Law Deskbook, May 1991
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6

JA301.ZIP	**Unauthorized Absence—Programed Instruction, TJAGSA Criminal Law Division**
JA310.ZIP	**Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division**
JA320.ZIP	**Senior Officers' Legal Orientation Criminal Law Text**
JA330.ZIP	**Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division**
JA337.ZIP	**Crimes and Defenses Deskbook (DOWNLOAD ON HARD DRIVE ONLY.)**
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. 1. Due to the announced drawdown the following materials will be available for transfer immediately from the 3rd Armored Division, Butzbach Branch, APO AE 09077:

Anderson's UCC 2d & 3d
Bailey & Rothblatt, Crimes of Violence, Homicide, and Assault
Bailey & Rothblatt, Handling Narcotic Cases
Criminal Law Reporter
Family Law Reporter
Federal Rules of Evidence News Service
Federal Tax Guide
Hunter, Federal Trial Handbook 2d
LaFave, Search & Seizure 2d
Martindale-Hubbell Law Directory
Military Justice Citations
Red Book Official Used Car Guide — Region A
Tennehouse, Attorneys Medical Deskbook
US Law Week
Military Justice Reporters

2. The following materials will be available for transfer from the 3rd Armored Division, Frankfurt, APO AE 09039:

Criminal Law Reporter
Family Law Reporter
Federal Citations
Federal Practice Manual
LaFave, Search & Seizure 2d
Military Justice Citations
Red Book Official Used Car Guide
US Citations Cases — Cases & Statutes
Corpus Juris Secundum, vols. 1 — 101A
Federal Supplement, vols. 1 — 492

Please contact the agency directly with your requests for any of these materials.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Distribution: Special

Official:

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Administrative Assistant to the
Secretary of the Army
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The Judge Advocate General's School
US Army
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Charlottesville, VA 22903–1781

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