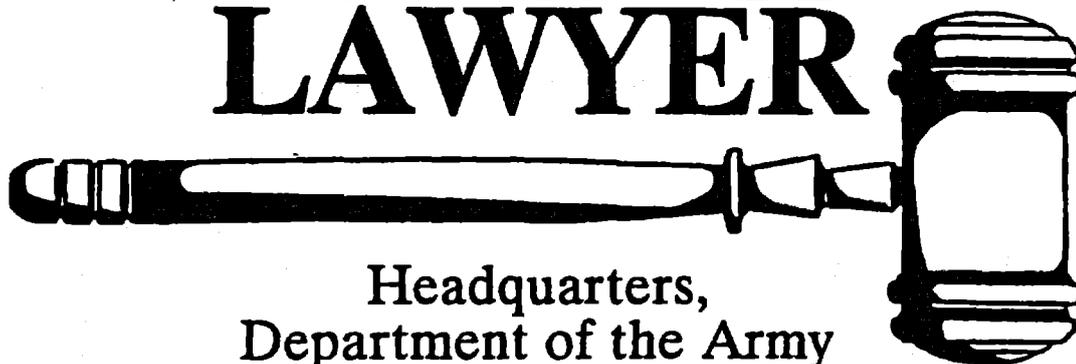


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Editors

Captain John B. Jones, Jr.
Captain John B. Wells

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Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff

Major Mark S. Martins
Deputy Director, Center for Law and Military Operations and
Professor of Law, TJAGSA

Introduction

The Army and the Judge Advocate General's Corps turned an important page in July of 1995 with the dedication of personnel and other resources to the Center for Law and Military Operations.¹ Although it has existed for almost seven years and during that time has played a significant role in the development of operational law,² the Center's newly acquired resources will now enable it to meet the new challenges that face military lawyers, the commanders and soldiers they support, and the nation they serve. The Center will assume the duties of the Secretariat for the Inter-Service Committee on International Legal Education, will collect, refine, and disseminate successful training approaches in operational law, and will contribute to the development of military doctrine for legal operations. This article provides an account of CLAMO's creation and evolution and briefly describes its focus and functions for the months ahead.

Creation and Evolution of CLAMO

In 1988, the Secretary of the Army directed The Judge Advocate General to establish a Center for Law and Military Operations, the principal purpose of which would be to conduct an

"ongoing examination of legal issues associated with the preparation for, deployment to, and conduct of military operations."³ Although he directed the establishment of the Center at The Judge Advocate General's School (TJAGSA) using existing personnel and funding, the Secretary instructed that "additional personnel and funding requirements will be identified as the Center develops."⁴ Accordingly, the Center found a home in the International Law Division⁵ at TJAGSA. The Chief of that Division acquired the additional title of Director of CLAMO.⁶

Despite lacking an independent staff, CLAMO made noteworthy contributions under this initial arrangement. It soon became the central repository within the Judge Advocate General's Corps for memoranda, lessons learned, and after-action materials pertaining to legal support for deployed forces.⁷ These materials became essential references for degree candidates researching topics involving military deployments,⁸ and they provided operational contexts for classroom treatment of diverse legal issues by teachers in every division of TJAGSA's faculty. The educational ferment generated by these materials eventually touched every segment of TJAGSA's student population, from lieutenants in officer basic courses to brigade commanders receiving senior officer legal orientations.

¹ Hereinafter referred to in text or notes as either "CLAMO" or "Center."

² This term often is shortened to "OPLAW," as in the title of this article.

³ Memorandum, Secretary of the Army to The Judge Advocate General, subject: Establishment of a Center for Law and Military Operations (21 Dec. 1988), *reprinted in* ARMY LAW., Apr. 1989, at 3.

⁴ *Id.*

⁵ In response to the same developments in operational law that have resulted in the staffing of CLAMO, the name of the Division was changed in 1994 to the "International and Operational Law Division." In 1995, "Department" replaced "Division" in the names of the four academic subfaculties. *See, e.g.,* DEP'T OF ARMY, THE JUDGE ADVOCATE GENERAL'S SCHOOL, TJAGSA CIRC. NO. 351-6, JUDGE ADVOCATE OFFICER MASTERS DEGREE IN LAW PROGRAM ORIENTATION, app. A (27 July 1995) (reflecting "International and Operational Law Department").

⁶ The Chief at the time was David Graham, then a Lieutenant Colonel. Subsequent Chiefs, and hence CLAMO Directors, have been Lieutenant Colonel H. Wayne Elliott and Lieutenant Colonel David Crane.

⁷ This archival function of CLAMO grew as TJAGs directed that items be deposited in the Center or as other senior judge advocates donated materials to it. *See, e.g.,* UNITED STATES ARMY LEGAL SERVICES AGENCY, DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY 1 (22 Apr. 1992) [hereinafter DSAT REPORT] (providing for the filing of "[w]orking papers and miscellaneous materials not included in the published report"); Memorandum, The Judge Advocate General of the Army, DAJA-ZA, to Chief, Desert Storm Assessment Team Report, subject: Desert Storm Assessment Team Report, para. 2 (22 Oct. 1992) (approving the report for implementation). This function has been formally established in more recent policy memoranda. *See* Memorandum, The Judge Advocate General of the Army, DAJA-IO, to Command and Staff Judge Advocates, subject: After Action Reporting Policy—Policy Memorandum 95-5, para. 3b(4) (3 Oct. 1994) (updating a similar memorandum issued on 13 April 1993 and preserving the requirement to "[m]aintain a file copy of approved After Action Reports at TJAGSA with CLAMO").

⁸ *See, e.g.,* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994); *see also* Major Brian Brady, Notice Provisions for United States Citizen Contractor Employees Serving with the United States Armed Forces in the Field: Time to Reflect Their Assimilated Status in Government Contracts? (manuscript on file at TJAGSA); Major Susan Gibson, Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem (manuscript on file at TJAGSA); Major Roy Abbott, Australian Army Legal Corps, Common Rules of Engagement for the Armies of the United States and Australia: A Proposal Stranded on the Moral High Ground (manuscript on file at TJAGSA).

Yet CLAMO has been more than an archive. It played an important role in the work of the Desert Storm Assessment Team⁹ and sponsored after-action conferences following Operations Just Cause,¹⁰ and Uphold Democracy.¹¹ It hosted a week-long working conference of judge advocates and line officers that produced the first draft of the new *Standing Rules of Engagement for United States Forces*.¹² It conducted and participated in symposia, such as the April 1990 investigation by Army, interservice, and inter-agency lawyers into differing perspectives on operational law,¹³ and the November 1994 inquiry by prominent scholars, policy-makers, and practitioners into deterrence of humanitarian law violations.¹⁴ Additionally, acting in conjunction with the International and Operational Law Division, CLAMO assisted in preparing the first two versions of the *Operational Law Handbook*.¹⁵

The Center was created to meet a need that—while present in some form since the Vietnam conflict¹⁶—clearly emerged during Operation Urgent Fury in 1983.¹⁷ On an educational and conceptual level, the continued development of operational law¹⁸ has addressed this same need, namely that of training judge advocates to identify and assist commanders in resolving the numerous legal issues associated with deploying United States forces. Partly as a result of CLAMO's establishment in 1988, operational law is today regarded as a distinct, yet overarching body of law within TJAGSA¹⁹ and throughout the Corps,²⁰ as well as in the wider Army,²¹ Department of Defense,²² civilian academic,²³ and international²⁴ communities. Although it is impossible to trace the evolution of operational law without acknowledging the contributions of several existing offices—particularly the International

⁹ This team was established by Major General John L. Fugh, then TJAG, on 6 September 1991 to collect after-action material, analyze lessons learned, resolve issues, propose doctrinal changes, recommend changes to training, and preserve historical records of the operations of the Corps in Desert Storm. See DSAT REPORT, *supra* note 7, at 3.

¹⁰ This conference took place in January of 1990 in Charlottesville, Virginia, at the direction of Major General William K. Suter, then Acting The Judge Advocate General. *Id.* at 14 (noting that, before DSAT, the proceedings of the Just Cause conference formed "virtually the only extant AAR on JA operations in combat").

¹¹ See *infra* note 44 and accompanying text.

¹² See International Law Note, "Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement, ARMY LAW., Dec. 1993, at 48 (recounting contributions of the conference, which was held between 11 and 15 October 1993). The basic organization, as well many specifics of this initial draft, were preserved throughout the entire staffing process. See SECRET CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) (including an unclassified portion, enclosure A, intended for wide distribution).

¹³ See Operational Law Note, *Proceedings of the First Center for Law and Military Operations Symposium*, ARMY LAW., Dec. 1990, at 47 [hereinafter *First Symposium*].

¹⁴ The major papers presented at this symposium will be published in a forthcoming issue of *The Duke Journal of Comparative and International Law*. See also International Law Note, *The Role of the Military in Emerging Democracies*, ARMY LAW., Dec. 1992 at 28 (describing a CLAMO symposium from 21 to 26 September 1992 on "The Role of the Military in a Democratic Society," which involved military and civilian participants from Lithuania, Latvia, Estonia, Poland, the Czech Republic, Hungary, Bulgaria, Romania, and Albania).

¹⁵ See, e.g., CENTER FOR L. AND MIL. OPERATIONS & INT'L AND OPERATIONAL L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, JA422, OPERATIONAL LAW HANDBOOK (2d ed. 1993). This handbook is now in its fourth edition. See INT'L AND OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, JA422, OPERATIONAL LAW HANDBOOK (4th ed. 1995) [hereinafter *OP. LAW HANDBOOK*].

¹⁶ See, e.g., MAJOR GENERAL GEORGE S. PRUGH, DEP'T OF ARMY, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 (1975); George S. Prugh, *United States European Command: A Giant Client*, 44 MIL. L. REV. 97, 111-13 (1969); William H. Parks, *The Law of War Adviser*, 31 JAG. J. 1 (1980); Steven Keeva, *Lawyers in the War Room*, A.B.A. J., Dec. 1991, at 52.

¹⁷ Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9. At about the same time, legal advisors for British forces were identifying a similar need as a result of operations in the Falkland Islands. See *First Symposium*, *supra* note 13, at 47.

¹⁸ Operational law is "that body of domestic, foreign, and international law that impacts specifically upon the activities of U.S. forces in war and operations other than war." See *OP. LAW HANDBOOK*, *supra* note 15, at 1-1.

¹⁹ See *id.* (stating that operational law "includes military justice, administrative and civil law, legal assistance, claims, procurement law, national security law, fiscal law, international law, and the law of war"); *id.* at cover page (listing among contributing authors members of all academic departments at TJAGSA).

²⁰ See, e.g., OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF ARMY, JAGC PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, app. at 23 (stating that all judge advocates will attend Combined Arms and Services Staff School (CAS³) and noting that CAS³ "is of particular benefit to officers who want to perform operational law duties").

²¹ See, e.g., LIEUTENANT COLONEL GEOFFREY B. DEMAREST, THE STRATEGIC IMPLICATIONS OF OPERATIONAL LAW (1995) (comprising a "Blue Cover Publication" of the Foreign Military Studies Office at Fort Leavenworth, Kansas).

²² See, e.g., Colonel Robert L. Bridge, United States Air Force, *Operations Law: An Overview*, 37 A.F. L. REV. 1, 3 (1994) (introducing a volume of 17 articles comprising "The Master Operations Lawyer's Edition" and stating that "[o]perations law crosses the lines of many subdisciplines within military law").

²³ See, e.g., Professor John Norton Moore, Remarks During Conference in Charlottesville, Virginia, on Deterring Humanitarian Law Violations (Nov. 4, 1994) (videotape on file with the Center for National Security Law, University of Virginia School of Law, Charlottesville, Virginia, and with CLAMO).

²⁴ See, e.g., AIR POWER STUDIES CENTRE, ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS at para. 5 (introduction) (1994) (stating that operations law "includes but is not limited to [law of armed conflict], air law, law of the sea, anti- and counter-terrorist activities, overseas procurement, discipline, pre-deployment preparation, deployment, status of forces agreements, operations against hostile forces, aid to the civil power and civil affairs operations").

and Operational Law Department at TJAGSA—and numerous individual officers, CLAMO also has undoubtedly facilitated the emergence of this unique legal discipline.

Changes in the world and in military doctrine that occurred after the Center's founding increasingly convinced leaders and thinkers in the Corps that some corresponding change was required in the development and delivery of operational law education and training. Of course, commendable individual initiatives already had begun to meet this need. Military lawyers provided crucial and innovative legal training in emerging democratic countries, furthering national strategic goals articulated by the President and mandated by legislation.²⁵ Claims judge advocates investigated, adjudicated, and paid claims during overseas deployments under arduous circumstances.²⁶ Contract law attorneys identified a host of methods to fulfill operational supply and service requirements.²⁷ Trial counsel, defense counsel, and military judges combined administrative versatility with an uncompromising commitment to due process as they pursued justice and encouraged discipline among deployed soldiers.²⁸ Task force lawyers developed situational training for soldiers that instilled the proper blend of initiative and restraint essential to mission accomplishment against unconventional threats.²⁹ Legal assistance attorneys developed thorough and efficient methods of enhanc-

ing soldier readiness to deploy.³⁰ These and many other operational lawyers—in both the active and reserve components—applied resourcefulness and intelligence to the challenges before them. What was needed, however, was a formal organizational change designed to capture and bring coherence to these admirable and diverse individual ideas and contributions.

The augmentation and enhanced mission of CLAMO represent this formal organizational change. In March of 1995, The Assistant Judge Advocate General for Military Law and Operations proposed the Center's augmentation to improve the effectiveness and efficiency of international and operational law training and education.³¹ This proposal received enthusiastic concurrence—along with principled and well-reasoned recommendations—from a broad array of JAG Corps leaders and affected elements within the Corps.³² In June, The Judge Advocate General (TJAG) approved both the near-term recommendations and the broader strategy contained in the formal report generated by the proposal and by the subsequent staffing process.³³

Specifically, TJAG approved three near-term initiatives. First, he directed that an additional judge advocate captain be assigned to both the Joint Readiness Training Center (JRTC) at Fort Polk and the Battle Command Training Program (BCTP) at Fort

²⁵ See, e.g., Message, United States Embassy in Kiev, Ukraine, to Secretary of State, subject: Preparation of Code of Conduct for Ukrainian Military (170455Z Nov 94) (stating that a handbook prepared by United States military judge advocates containing information on the law of war, human rights, military justice, military ethics, and the training of these topics "will enhance Ukrainian Forces' usefulness in United Nations' Peacekeeping Operations, perhaps in situations also involving U.S. Forces" and "promote the rule of law and respect for democracy"); Major Jeffrey F. Addicott & Major Andrew M. Warner, *JAG Corps Poised for New Defense Missions: Human Rights Training in Peru*, *ARMY LAW.*, Feb. 1991, at 78 (describing innovative and effective human rights training in Peru); Captain Robert J. Kasper, Jr., USNR, *Expanded International Military Education and Training: Matching Military Means to Policy Ends*, *DISAM J.*, Summer 1994, at 77, 80-81 (describing the five-day, three-phase, executive training program of foreign military and civilian officials developed by the joint International Training Department of the Naval Justice School and participated in by judge advocates of all services).

²⁶ See, e.g., *DSAT REPORT*, *supra* note 7, at Claims-3 (favorably discussing the appointment of Army judge advocates as foreign claims commissions within an Air Force geographic jurisdiction to permit prompt processing of foreign claims).

²⁷ These ranged from using existing contracts to pursuing cross-servicing agreements with allied forces. See, e.g., *OP. LAW HANDBOOK*, *supra* note 15, at 11-8 to 11-9.

²⁸ See, e.g., *DSAT REPORT*, *supra* note 7, at Criminal Law-10 (quoting the Chief Circuit Judge supervising and trying cases in South West Asia, who opined that courts-martial in the theater of operations "were conducted in an extremely competent manner").

²⁹ See Memorandum, Brigade Judge Advocate, 194th Armored Brigade (Separate), AFVL-JA to Staff Judge Advocate, XVIII Airborne Corps, subject: After Action Report for Judge Advocate Participation in Uphold Democracy (19 Dec. 1994) (on file with CLAMO) (describing situational training of a battalion of Combined Caribbean soldiers in Camp Santiago, Puerto Rico prior to their deployment to Haiti). This training of allied soldiers, conducted by a resourceful army judge advocate, is a highly successful refinement of situational training conducted for United States troops by judge advocates in previous deployments. See, e.g., *Martins*, *supra* note 8, at 90 n.295 (lauding successful uses of situational training in Operations Restore Hope and Desert Storm).

³⁰ See, e.g., Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), Operation Uphold Democracy, Office of the Staff Judge Advocate, Multinational Force Haiti After-Action Report 29 July 1994—13 January 1995 at 15 (1995) (unpublished report on file with CLAMO) (reporting that only 12 soldiers required wills while the unit was in Haiti and attributing this small number to the success of regular soldier readiness checks in garrison).

³¹ See Memorandum, Assistant Judge Advocate General for Military Law & Operations, DAJA-ZC, to Judge Advocate General United States Army Europe and other addressees, subject: Improving JAGC Effectiveness and Efficiency in International and Operational Law Training and Education (1 Mar. 1995) (on file with CLAMO, along with enclosures and comments).

³² *Id.*

³³ See Memorandum, Chief, International and Operational Law Division, Office of The Judge Advocate General, DAJA-IO, to The Judge Advocate General, subject: Operational Law and International Military Legal Education Initiatives (20 June 1995).

Leavenworth.³⁴ Second, he directed that Colonel David Graham, Chief, International and Operational Law Division, Office of The Judge Advocate General (OTJAG), assume the position of Director of the Center and that one Army major and one Army captain be assigned, full time, to newly designated CLAMO offices on the second floor of the main building at TJAGSA. Third, he directed that these first two initiatives be formally announced through appropriate channels.³⁵ Further staffing and funding for the Center remained medium and long-term actions.

CLAMO Functions and Focus in the Months Ahead

The Deputy Director of CLAMO already has assumed full-time duties,³⁶ as has the judge advocate captain assigned to JRTC. Through the combined efforts of OTJAG and TJAGSA, furniture, sophisticated automated data processing equipment, and advanced communications gear are being purchased. A separate budget for the Center is being established. The judge advocate captains assigned to CLAMO and BCTP soon will be on station.

As a result of judge advocate captains being assigned to JRTC and BCTP, units and legal elements around the world being trained by these rigorous evaluation programs will begin to profit from a more thorough integration of legal issues in deployment scenarios.³⁷ The full-time duties of the judge advocate at JRTC will be to input realistic scenario data, to research and develop performance criteria for units confronted with these data, and to pro-

vide comprehensive assistance to judge advocates preparing to support their units at Fort Polk. The full-time duties of the judge advocate at BCTP will be to perform analogous functions, with differences as appropriate for the training of division and corps staffs and their supporting operational lawyers. Assets of CLAMO at TJAGSA will assist in this mission to support judge advocates in the field by creating a guide to successful operational law training at BCTP. This guide will distill important information and principles from Army training doctrine and will contain practical tips for the junior judge advocate who may be providing advice to staff officers before and during the evaluated exercise. This guide should be available in hard copy and downloadable via electronic bulletin board³⁸ by this autumn. The Center also will prepare a similar guide for training at JRTC within the next year.³⁹

The Center will immediately assume the duties of the Secretariat for the Inter-Service Committee on International Legal Education. This responsibility rotated to Army OTJAG in July 1995,⁴⁰ and CLAMO's augmentation, in part, is linked to these important duties. The Committee's charter is to eliminate duplication, overlap, or fragmentation in the provision of international legal training, to make efficient use of available resources, and to encourage consistency and quality in the training provided by lawyers in all the services.⁴¹ Congress, recognizing the profound contribution that can be made to national security through military-legal contacts with—and training of—foreign government personnel, authorizes and appropriates funds for such contacts

³⁴JRTC and BCTP are two important parts of the Army's combat training center (CTC) program, which is intended to create a realistic training environment for corps and subordinate units during peacetime. They seek to provide active and reserve forces

hands-on training in a stressful, near-combat environment. The training is designed to exercise all or portions of the unit's [mission essential task list (METL)]. The centers provide realistic integration and portrayal of joint and combined aspects of war; they train units in [doctrine] to [mission training plan (MTP)] standards. Further, CTCs focus on those soldier tasks and leadership skills that contribute directly to the success or failure of collective tasks and unit missions.

See DEP'T OF ARMY, FIELD MANUAL 25-101, BATTLE FOCUSED TRAINING (16 Apr. 1990). See also *infra* notes 37-39 and accompanying text.

³⁵ One of the appropriate channels includes publication of this article in *The Army Lawyer*.

³⁶ In this capacity, the author welcomes and solicits suggestions and contributions of relevant operational law materials from the field. Please call 934-7115, ext. 339 (DSN) or (804) 972-6339 (commercial); send electronic mail to martinsm@otjag.army.mil; post a message to the author on the Legal Automation Army-Wide Systems (LAAWS) electronic bulletin board service (BBS); or write Major Mark Martins, Center for Law and Military Operations, The Judge Advocate General's School, 600 Massie Road, Charlottesville, Virginia, 22903-1781.

³⁷ Since 1993, JRTC and the operations group within BCTP slated to receive dedicated support (Operations Group D) have placed greater emphasis on the training of units for operations other than war (OOTW), a development which reflects recent changes in Army and joint doctrine. See DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS ch. 13 (14 June 1993); JOINT CHIEFS OF STAFF PUBLICATION 3-0, DOCTRINE FOR JOINT OPERATIONS Ch. I (9 Sept. 1993). Another of the Army's combat training centers—Combat Maneuver Training Center (CMTC), Hohenfels, Germany—already profits from dedicated judge advocate support. See Interview with Major Gary A. Khalil, former Operations Group Judge Advocate, United States Army Europe & 7th Army, CMTC, Charlottesville, Virginia (Aug. 9, 1995).

³⁸ See *infra* p. 54, Current Materials of Interest, for instructions on downloading files from the LAAWS BBS.

³⁹ Eventually, CLAMO will seek to play a role in feeding the doctrinal, organizational, and equipment shortcomings discovered as operational lawyers train at BCTP and JRTC back into the process of force integration, see, e.g., DEP'T OF ARMY, FIELD MANUAL 100-11, FORCE INTEGRATION, ch. 5 (29 Sept. 1988), resulting in judge advocate elements that can better perform their mission. See DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS (3 Sept. 1991) (stating that the primary mission of the Judge Advocate General's Corps is "to support the commander on the [battlefield] by providing professional legal services as far forward as possible at all echelons of command throughout the operational continuum").

⁴⁰ See Memorandum of Understanding Between The Judge Advocate General of the Army and The Judge Advocate General of the Navy and The Judge Advocate General of the Air Force and The Staff Judge Advocate to The Commandant of the Marine Corps, art. IV, para C. (25 May 1993) (copy on file with CLAMO). Colonel David Graham, Chief, International and Operational Law Division, OTJAG and Director, CLAMO, serves as the Army's representative on the Inter-Service Committee and has rotated into the Chairmanship for the period that the Army has Secretariat duties.

⁴¹ See Memorandum, *supra* note 40, art. II.

and training in various laws.⁴² Accordingly, many executive branch agencies both inside and outside of the Department of Defense play large roles under these and other similar programs. Many leaders in the Corps who advocated the full-time staffing of CLAMO strongly believe that the efficient and thorough discharge of Secretariat responsibilities not only will fulfill Congress's intent, but also will infuse the operational law training of United States Army units and judge advocates with innovative ideas from a variety of sources: Navy, Air Force, and Marine Corps judge advocates; Reserve Army judge advocates; lawyers working in other United States governmental agencies; and the legal advisors to military services of other countries.⁴³

The Center soon will produce an after-action report on legal support provided during the course of Operation Uphold Democracy. Many judge advocates who provided this support already have contributed to this effort by attending a three-day session at TJAGSA this past May and depositing materials with the Center.⁴⁴ CLAMO's goal is to produce a relatively short, readable, well-indexed document that distills the most important lessons learned from this operation. Although in the process of producing and indexing this document, groundwork will be laid to build a computer database of operational law issues,⁴⁵ the emphasis will be on creating a written product of pamphlet size that will permit wide dissemination and encourage assimilation of these lessons into all subdisciplines of operational law. Along with the practical BCTP guide discussed above,⁴⁶ this report will be one of the first two tangible products of the newly augmented Center. The report will be distributed to field offices this autumn.⁴⁷

On 17 and 18 November 1995, TJAGSA and the Center will cosponsor a conference entitled "Nuremberg and the Rule of Law: A Fifty Year Verdict."⁴⁸ The Conference, will be held in the Decker Auditorium at TJAGSA on the fiftieth anniversary of Justice Robert Jackson's historic opening statement in the Trial of Major War Criminals before the International Military Tribunal at Nuremberg. Participants will include attorneys who appeared before the International Military Tribunals at Nuremberg and Tokyo, prosecutors who tried cases before the subsequent proceedings at Nuremberg, and numerous influential policy-makers and scholars involved in the current debate over whether and how international humanitarian laws can be enforced in the former Yugoslavia, in Rwanda, and elsewhere. Members of TJAGSA's faculty will participate in the conference as moderators and presenters, and members of the 44th Judge Advocate Officer Graduate Course will be invited to attend. Because general courts-martial and military commissions have broad jurisdiction to try offenses against the law of war committed by persons of any nationality or affiliation,⁴⁹ and because United States commanders must always be prepared to deploy their units to regions where atrocities are being committed, this conference will be particularly relevant to CLAMO's operational law training mission.

CLAMO personnel will have the specific duty to foster integration of lessons learned from deployments into the curriculum of all relevant TJAGSA courses, workshops, orientations, and seminars. This will involve exchanges with faculty members of the four academic departments to explore including examples from recent operations into lectures and deskbooks. The Deputy

⁴² See 22 U.S.C. §§ 2347-47d (authorizing the Expanded International Military Education and Training Program (EIMET)); 10 U.S.C. § 168 (authorizing military-to-military contacts); 10 U.S.C. § 166a (authorizing CINC Initiative Funds); 22 U.S.C. § 5901 (authorizing expanded military-to-military contacts between the United States and the independent states of the former Soviet Union); 10 U.S.C. § 1050 (authorizing the Secretary of the Army Latin American Cooperation Fund); 10 U.S.C. § 1051 (authorizing payment of travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with attendance at bilateral or regional conferences). Funds are made available to these programs in appropriations acts. See, e.g., Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-306, 108 Stat. 1608 (1994); Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, 108 Stat. 2599 (1994).

⁴³ See Memorandum, *supra* note 31. This notion of cross-fertilization was central to the original intent for CLAMO. See Memorandum, *supra* note 3 ("It is my belief that the development of a close professional working relationship between U.S. and allied attorneys in the area of operational law will prove to be valuable to the effective resolution of legal issues which arise in the overseas operational environment.").

⁴⁴ See Memorandum, Assistant Judge Advocate General for Military Law and Operations, DAJA-ZD, to Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg and other addressees, subject: After Action Report for Operation Uphold Democracy (2 Feb. 1995) (directing that the conference take place). The conference was held at Charlottesville between 8 and 10 May 1995 and was attended by many judge advocates who provided legal support during the operation.

⁴⁵ Eventually, the Center will load into this database legal issues from historical materials already in its files, to include the issues compiled by the Desert Storm Assessment Team, which created a database of 659 issues. See DSAT REPORT, *supra* note 26, at 11.

⁴⁶ See *supra* text accompanying note 38.

⁴⁷ The Uphold Democracy project also will provide CLAMO personnel the opportunity to explore organizational models for capturing and disseminating lessons learned and to adapt these models to the distinctive needs of operational lawyers. See, e.g., DEP'T OF ARMY, REG. 11-33, ARMY LESSONS LEARNED PROGRAM: SYSTEM DEVELOPMENT AND APPLICATION, para. 1-5a(1) (10 Oct. 1989) (describing the Center for Army Lessons Learned (CALL)); DEP'T OF DEFENSE, TRAINING AND PERFORMANCE DATA CENTER, JOINT UNIVERSAL LESSONS LEARNED SYSTEM (JULLS), VERSION 3.10 USER'S MANUAL 1 (describing joint efforts to capture lessons and benefit from previous experiences); DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 22 (8 Sept. 1994) (describing the United States Army Trial Counsel Assistance Program).

⁴⁸ The other cosponsors will be the Center for National Security Law at the University of Virginia School of Law and the Center on Law, Ethics, and National Security at Duke University School of Law.

⁴⁹ See generally Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 510-15 (maintaining that American military commanders have the authority under articles 18 and 21 of the Uniform Code of Military Justice to prosecute alleged criminals such as Saddam Hussein or General Aided).

Director of CLAMO, in his capacity as a full member of TJAGSA's law faculty, also will update and tailor a "CLAMO Watch" class of between one and two hours.⁵⁰ This class will directly incorporate lessons and training techniques collected by the Center into the TJAGSA curriculum, and it will serve to further disseminate innovations by judge advocates around the world.

Conclusion

In an earlier time, under admittedly different circumstances, Thomas Jefferson uttered the words displayed at the entrance to TJAGSA:

Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times.⁵¹

Mr. Jefferson was arguably among the first of a long line of distinguished American operational lawyers. In many ways that can become evident only with the passage of time. The enhanced operational law mission of CLAMO affirms this Jeffersonian principle.

⁵⁰ Additionally, the Deputy Director of CLAMO periodically will produce a "CLAMO Update" to appear in future issues of *The Army Lawyer*.

⁵¹ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in 10 THE WRITINGS OF THOMAS JEFFERSON 37, 42-43 (Paul L. Ford ed. 1899).

Exploring the Limits of Westfall Act Immunity

Major Christopher J. O'Brien
Regimental Judge Advocate
160th Special Operations Aviation Regiment
Fort Campbell, Kentucky

Introduction

Federal employees, particularly those in supervisory or management positions, often make difficult decisions. Government is more effective if supervisors and managers can make difficult decisions without fear of being sued. To this end, a series of judicial decisions issued over the years created the idea of absolute official immunity for federal employees. These decisions recognized that immunity is necessary to shield federal employees, particularly supervisors and managers, from lawsuits, which might discourage the vigorous exercise of their duties.

Generally, federal employees are faithful and hardworking civil servants. To a significant degree, the present quality of the work force is due to the passage of the Civil Service Reform Act of 1978.¹ The Civil Service Reform Act regulates the employee-management relationship in federal government. Among other things, the Civil Service Reform Act helps ensure that supervisors and managers make legitimate merit based personnel decisions.

Despite the improvement in the quality of the federal work force, less than stellar performers remain. Frequently, the difficult decisions that supervisors and managers must make are personnel-related—such as, decisions regarding promotions, job assignments, discipline, and awards. Some employees win and some lose. Some losers become disgruntled. Disgruntled employees can breed inefficiency and discontent. Such conduct can adversely affect management of an office. Disgruntled employees may be prone to sue. A system that protects supervisors and managers from distracting lawsuits makes a more productive Government.

In this context, this article addresses the scope of immunity available under the Federal Employees Liability Reform and Tort Compensation Act of 1988.² Congress passed the legislation, commonly called the Westfall Act, in response to the Supreme Court's decision in *Westfall v. Erwin*,³ which restricted the scope of immunity available to federal employees. In short, the Westfall Act confers immunity to federal employees for common law torts committed "within the scope of employment."⁴

¹ The Civil Service Reform Act of 1978 is codified in scattered sections of Title 5 of the United States Code.

² See 28 U.S.C. § 2679 (1988).

³ 484 U.S. 292, 108 S.Ct. 589 (1988).

⁴ 28 U.S.C. § 2679(d).

Since its passage, the Westfall Act has proven to be an effective shield for federal employees accused of committing wrongs that stem from the federal employee-management relationship. In recent years however, a few courts have attempted to narrow the scope of immunity available under the Westfall Act. Most recently, in *Wood v. United States*, the First Circuit ruled that Westfall immunity is not available where the defense is that the alleged injury-causing action never occurred.⁵ If *Wood* were to become the prevailing view, it would hinder effective government. This article explores the decision in *Wood*, subsequent decisions by other courts of appeals, and the policies underlying the Westfall Act.

History of the Westfall Act

Enactment of the Westfall Act came on the heels of the Supreme Court's opinion in *Westfall v. Erwin*.⁶ The *Westfall* case involved an Army civilian employee injured by exposure to toxic ash improperly stored on the installation allegedly due to his supervisors' negligence. The Supreme Court had to resolve a conflict in the courts of appeals regarding the reach of absolute official immunity. In resolving the conflict, the Court ruled that the conduct must be both within the scope of employment and discretionary in nature before the employee is absolutely immune from state-law tort liability.⁷ The key issue in *Westfall* was whether the supervisors exercised sufficient discretion concerning the storage of the chemicals to warrant protection of official immunity.

In supporting its opinion, the Court acknowledged the purpose underlying the doctrine of official immunity.

The purpose of . . . official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly

timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits.⁸

Thus, the Court recognized that official immunity facilitated effective government. However, the Court reasoned that effective government would not be promoted if immunity shielded an employee from tort liability for nondiscretionary acts. The Court opined that immunity should extend only where the challenged conduct was discretionary—that is, the product of “independent judgment.”⁹

At least from the federal employees' perspective, the *Westfall* opinion appeared to represent a retreat from prior Supreme Court decisions defining the scope of official immunity.¹⁰ Prior to *Westfall*, the “discretionary” nature of the act was not an issue. Instead, the focus was simply whether the challenged conduct was within the scope of employment.

An appreciation of the previous standard is critical. In passing the Westfall Act, Congress intended to return federal employees to the status they held before *Westfall v. Erwin*.¹¹ The seminal case of *Barr v. Matteo* enunciated the pre-*Westfall* standard.¹² *Barr* represented the Supreme Court's first definitive analysis of official immunity in this century.¹³ In *Barr*, the Court extended the official immunity cloak to all levels of the executive branch for actions taken “within the outer perimeter” of their duties.¹⁴ The Court's analysis of the justification for official immunity is significant:

The reasons for the recognition of the privilege have been often stated. It is important that officials of government exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those

⁵ 995 F.2d 1122 (1st Cir. 1993) (en banc).

⁶ 484 U.S. 292 (1988).

⁷ *Id.* at 295.

⁸ *Id.*

⁹ *Id.* at 296.

¹⁰ In fairness, one could persuasively argue that the decision in *Westfall* merely represented a refinement of prior precedent defining the scope of official immunity. *Westfall v. Erwin*, 484 U.S. 292, 298 n. 4 (1988) (“A close reading of *Barr* . . . shows that the discretionary nature of the act challenged . . . was central to Justice Harlan's opinion.”).

¹¹ See H.R. Rep. No. 100-700, reprinted in 1988 U.S.C.C.A.N. 5945, 5947.

¹² 360 U.S. 575 (1959).

¹³ Application of the official immunity doctrine to the executive branch has its roots in *Spalding v. Vilas*, 161 U.S. 483 (1896), which held the Postmaster General immune in a defamation action.

¹⁴ 360 U.S. at 575.

duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.¹⁵

Thus, as expressed by the Supreme Court in *Barr* (and similar to the Court's pronouncement in *Westfall*), effective government is at the core of official immunity.

Of course, the Supreme Court recognized that facilitating effective government by conferring official immunity involves a significant tradeoff between promotion of effective government and the rights of individuals allegedly wronged by government officials. The net result is a balancing test. In discussing this issue in *Barr*, the Supreme Court relied upon an oft-quoted opinion of Judge Learned Hand:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who tried to do their duty to the constant dread of retaliation.¹⁶

The delicate balance referenced by Judge Hand clearly favors the attachment of immunity. As discussed later, this balance, tipped

in favor of the federal employee defendant, is just as relevant when applying the statutory provisions of the Westfall Act.

In issuing the opinion in *Westfall*, the Supreme Court also struggled with the balance discussed in *Barr*:

[C]ourts should be careful to . . . consider whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens. Courts must not lose sight of the purposes of the official immunity doctrine when resolving individual claims of immunity or formulating general guidelines. We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful.¹⁷

Thus, although the Court in *Westfall* took a restrictive view of absolute immunity, the Court left the door open for Congress to provide more complete guidance.

The *Westfall* opinion sparked a flurry of legislative activity. In testimony before the House Subcommittee on Administrative Law and Government Relations, a Department of Justice official ominously declared:

The [*Westfall*] decision may be expected to undermine materially the ability of many Federal agencies to perform their programmatic responsibilities adequately. The prospect of routinely compelling Federal employees to subject their personal resources to the lottery of a jury trial will leave them uncertain and intimidated in the performance of any official duties that might expose them to potentially ruinous personal liability.¹⁸

It is a fitting tribute to those in the federal government lobbying for reform legislation that Congress passed the Westfall Act before the year ended.¹⁹

¹⁵ 360 U.S. at 571. The Court also echoed the finding in *Spalding v. Vilas*, that subjecting executive officials to the threat of suit would "seriously cripple the proper and effective administration of public affairs." *Id.* at 570, quoting, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

¹⁶ *Barr v. Matteo*, 360 U.S. at 571-72, quoting, *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

¹⁷ *Westfall v. Erwin*, 484 U.S. 292, 299-300 (1988).

¹⁸ See H.R. Rep. No. 100-700, reprinted in 1988 U.S.C.C.A.N. 5945, 5947 (Testimony of Deputy Assistant Attorney General Robert L. Wilmore before House Subcommittee on Administrative Law and Governmental Relations, April 14, 1988).

¹⁹ On the other hand, perhaps the train left the station too fast. The Westfall Act has spawned a number of legal disputes, not the least of which is the subject of this article. One of the more significant issues left open by the Act was whether the Attorney General's scope of employment certification under 28 U.S.C. § 2679(d) was subject to judicial review. A split among the circuits was recently resolved by the Supreme Court's holding that certification for substitution purposes is subject to judicial review. *Gutierrez De Martinez v. Lamagno*, 115 S.Ct. 2227 (1995).

The Westfall Act

In short, the Westfall Act eliminated the requirement (imposed by the *Westfall* decision) that the challenged conduct must involve a discretionary act before invoking absolute immunity. In doing so, the Westfall Act returned federal employees to their status before the *Westfall* decision.²⁰ Congress accomplished this by amending the Federal Tort Claims Act.²¹

Through the Westfall Act, Congress declared that all state-law tort claims "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" may only be asserted against the United States.²² The statute mandates that this is the exclusive remedy for any civil action or proceeding and that the United States will take the place of the federal employee named as a defendant in the lawsuit.

Section 679(d)(1) of Title 28 provides:

Upon certification by the Attorney General that the defendant employee was acting *within the scope of his office or employment at the time of the incident out of which the claim arose*, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. (emphasis added)

If the action against the federal employee commenced in state court, the Attorney General's certification will have the effect of substituting the United States as defendant and removing the action to federal court.²³ If a plaintiff disagrees with the certification and

substitution, the plaintiff may challenge the scope of employment determination before the district court.²⁴ The district court's review of the scope of employment issue is de novo.²⁵

Finally, if the Attorney General refuses to certify that a particular employee was acting in the scope of employment, the Act gives the employee the right to petition the district court to make a similar finding and certification. If the court makes such a finding, the United States is substituted as the defendant (and if applicable, the case is removed to federal court).²⁶

The Wood Dispute

At first blush, the Westfall Act appears to provide bright line rules regarding the scope of official immunity. In the vast majority of cases, the Westfall Act contains sufficient guidance to resolve suits against federal employees. Frequently, determining whether a suit warrants certification of scope of employment requires no more than reading the judicial complaint.

Consider the following hypothetical scenario: A supervisor has just issued notice to her subordinate, a probationary employee, that he is being removed from federal service before completion of his probationary period. The notice describes the subordinate's performance as substandard. Incensed over his removal, the subordinate files a state-law tort suit against the supervisor alleging libel and both intentional and negligent infliction of emotional distress. The complaint cites the removal action as the basis for the suit.²⁷

In this scenario, few would question whether the supervisor was acting within the scope of her employment "at the time of the incident out of which the claim arose."²⁸ Likewise, few would question that the supervisor should not have to defend her actions during a trial on the merits. To require her to defend her actions and risk personal pecuniary loss would encourage the evil that the doctrine of official immunity seeks to avoid—inhibiting the

²⁰ See e.g., *Aliota v. Graham*, 984 F.2d 1350, 1355 (3d Cir. 1993).

²¹ 28 U.S.C. § 1346, 2671 *et seq.*

²² See 28 U.S.C. § 2679(b)(1) and § 1346(b).

²³ 28 U.S.C. § 2679(d)(2).

²⁴ *Gutierrez De Martinez v. Lamagno*, 115 S.Ct. 2227 (1995).

²⁵ The Attorney General's scope of employment certification is generally regarded as *prima facie* evidence that the defendant was acting within the scope of employment. See e.g., *Schrob v. Catterson*, 967 F.2d 929, 936 (3rd Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991).

²⁶ 28 U.S.C. § 2679(d)(3); see also *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994) (involving an unsuccessful attempt to petition the court to make such a finding).

²⁷ Of course, this type of suit would give rise to at least one other defense not relevant here, *i.e.*, the tort claims are barred by the Civil Service Reform Act of 1978, see note 1, *supra*; see also *United States v. Fausto*, 484 U.S. 439 (1988); *Petrini v. Howard*, 918 F.2d 1482, 1485 (10th Cir. 1990) (Civil Service Reform Act is the exclusive procedure for challenging federal personnel decisions).

²⁸ 28 U.S.C. § 2679(d)(2).

"fearless, vigorous, and effective administration of policies of government."²⁹

Instead of requiring the supervisor to defend herself in state court, the government would invoke the provisions of the Westfall Act.³⁰ The Attorney General's designee would certify that the supervisor was acting within the scope of her employment.³¹ The suit would be removed to federal district court and the United States would be substituted as the defendant.³²

The above scenario represents a typical application of the Westfall Act. Unfortunately, life is not always so easy. Suppose that, in addition to the facts and allegations discussed above, the employee alleges the supervisor sexually harassed him during the probationary period, causing him severe emotional distress. The supervisor denies that any sexual harassment took place. After conducting an inquiry, the supervisor's superiors conclude the sexual harassment charge is baseless. Should the supervisor have to endure a trial on the merits as to the sexual harassment allegation? Put another way, is Westfall Act immunity available where the only defense is that the allegedly tortious events never occurred?

Wood v. United States

In *Wood v. United States*, the First Circuit answered the latter question in the negative, ruling that the Attorney General may not issue a scope of employment certification that "simply denies that any injury-causing action occurred."³³ In the above scenario, the *Wood* decision would lead to an anomalous result. As to the tort allegations stemming from the removal action, the United States would be substituted as defendant. As to these charges, the parties would agree that an "injury-causing action" occurred; that is, the removal action.

However, the sexual harassment charge is an entirely different matter. The defendant contends (and the government believes) the charge is groundless. Yet, *Wood* prohibits a scope certification that essentially denies the "injury-causing action" (the sexual harassment) occurred. Consequently, the supervisor would re-

main a named defendant to the tort charge stemming from the sexual harassment claim.³⁴

A discussion of the facts in *Wood* is instructive. The case arose out of Fort Devens, Massachusetts. The plaintiff (*Wood*) sued her former supervisor, an Army Major, for alleged violations of the Massachusetts Civil Rights Act and assault and battery. Specifically, *Wood* alleged that over a five-month period the officer told her he wanted to go to a hotel with her; that the officer called her into his office, grabbed her arm, pulled lint from her blouse, and told her that he wanted to be intimate with her; that later the officer told her he wanted to have a sexual relationship with her; and that eventually the officer told her she would have to leave because she was not right for the job.³⁵

The officer signed an affidavit denying the allegations. Pursuant to the Westfall Act, the United States Attorney certified that the officer was acting within the scope of his employment at all times referenced in the complaint. The United States was substituted as a defendant. In response to *Wood's* challenge, the district court vacated the certification and reinstated the officer as a defendant. A panel of the First Circuit affirmed the district court.³⁶ The government subsequently sought and obtained rehearing en banc.

The Quagmire—When The Scope of Employment Question and The Merits Overlap

The peculiar facts of the *Wood* case raised some interesting issues. If *Wood's* allegations were true, the supervisor was not acting within the scope of his employment. In other words, if the supervisor did as *Wood* alleged, he would be liable in tort. Thus, the scope of employment question and the merits overlapped. Resolution of both issues turned on an identical factual determination—did the tortious activity occur?

The First Circuit wrestled with this dilemma and split the vote four to three. Writing for the majority, then Chief Judge Stephen Breyer concluded that Westfall Act immunity is not available where the defendant denies that the "incident" alleged in the com-

²⁹ *Barr v. Matteo*, 360 U.S. at 575.

³⁰ The supervisor would likely request representation by the Department of Justice pursuant to 28 C.F.R. § 50.15.

³¹ The Attorney General has delegated the authority to make Westfall Act scope of employment certifications to the United States Attorneys. See 28 C.F.R. § 15.3.

³² 28 U.S.C. § 2679(d)(2).

³³ 995 F.2d 1122, 1123 (1st Cir. 1993) (en banc).

³⁴ Although not relevant here, in this scenario the supervisor would argue that the sexual harassment claim is not actionable as a tort. Instead, the claim is preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. See *Brown v. General Service Admin.*, 425 U.S. 820, 829-32 (1976); *Hampton v. Internal Revenue Service*, 913 F.2d 180, 183 (5th Cir. 1990) (a plaintiff cannot circumvent Title VII's remedial scheme by suing supervisor in tort).

³⁵ *Wood*, 995 F.2d at 1123.

³⁶ *Wood v. United States*, 991 F.2d 915 (1st Cir. 1992), opinion later withdrawn and, following rehearing en banc, superseded by 995 F.2d 1122 (1st Cir. 1993) (en banc).

plaint occurred.³⁷ The majority believed a natural reading of section 2679 ("at the time of the incident out of which the claim arose") required an assumption that "some kind of 'incident' occurred."³⁸ The majority reasoned that the scope question should turn not on whether the incident took place, but the characterization of the "incident."³⁹

The majority also examined the statutory scheme of the Westfall Act, concluding that Congress intended to limit Westfall immunity to cases that involve potential respondeat superior liability.⁴⁰ Thus, if the allegations in *Wood* were true, the defendant's conduct would be outside the scope of employment, and consequently, beyond the reach of respondeat superior liability.

Finally, in further support for its holding, the majority cited the decision in *McHugh v. University of Vermont*.⁴¹ There, the Second Circuit also concluded that the government cannot certify conduct within the scope of employment "by denying the acts occurred."⁴²

The Implications of Wood

Wood was wrongly decided. Among other things, the court misread the statute. In doing so, the court significantly eroded Westfall Act immunity. Moreover, the result in *Wood* is inconsistent with the purpose of the official immunity doctrine—promoting effective government. Because of the decision, the defendant in *Wood* must first endure the rigors of discovery and then face the "lottery of a jury trial"⁴³ to show that he conducted himself appropriately as a federal employee over the five-month period encompassing *Wood*'s complaint. If *Wood* becomes the prevailing view, federal employees would be required to defend against even the most frivolous of suits.

Despite the majority's attempts to explain away the problem,⁴⁴ the decision places federal employees at the mercy of clever pleading plaintiffs. Moreover, as discussed below, the majority's focus on "job-related"⁴⁵ lawsuits (*i.e.*, the "incident" should be linked or related to a particular duty of the employee) ignores reality. The only constraint will be the plaintiff's imagination. The net effect is that the *Wood* decision tips the balance in favor of the plaintiff. This result is inconsistent with *Barr v. Matteo, supra*, which, in the balancing test, clearly favors the extension of official immunity.

Putting The Act in Perspective

The dissenting opinion exposes the fallacy of the majority opinion in *Wood* and had the better argument and interpretation of the statute. Contrary to the majority's contention, a "natural" reading of the statute *does* permit a scope certification where the defendant (and the Attorney General) contend the "incident," as alleged by the plaintiff, did not occur.⁴⁶ Such a reading is consistent with the policies supporting the doctrine of absolute immunity. The dissent also puts the Westfall Act in proper perspective. The Westfall Act does not deny a plaintiff his day in court. The Act merely affords the individual defendant a federal forum (non-jury) to resolve the scope of employment issue.

The Plain Reading of The Statute

Where a statute is clear on its face, its plain meaning should be given effect.⁴⁷ The plain language of section 2679 does not require, as the *Wood* majority concluded, that the parties concede some "incident" took place. As the *Wood* dissent recognized, the plain language of the statute does not prevent the Attorney General from issuing a scope certification where the "'incident'

³⁷ *Wood*, 995 F.2d at 1123, 1129.

³⁸ *Id.* at 1124.

³⁹ *Id.* In other words, a defendant is free to dispute how a complaint characterizes conduct. For example, a complaint may allege that a defendant caused an accident intentionally. The scope certification may assert that the accident was caused negligently. Each party agrees an accident occurred. The dispute is over the characterization of the incident (the accident).

⁴⁰ *Id.* at 1124.

⁴¹ 966 F.2d 67 (2nd Cir. 1992).

⁴² *Id.* at 74. The *Wood* majority believed *McHugh* was directly on point. *Wood*, 995 F.2d at 1128. While the court in *McHugh* would not permit the defendant to deny that the acts occurred, the court did allow the defendant to challenge the "context of the alleged acts." *McHugh*, 966 F.2d at 74.

⁴³ See note 18, *supra*.

⁴⁴ The majority asserted that the scope certification could still dispute "characterizations of the incident and subsidiary immunity-related facts." *Wood*, 995 F.2d at 1129.

⁴⁵ *Wood*, 995 F.2d at 1129.

⁴⁶ *Wood*, 995 F.2d at 1134 (Coffin, Selya, and Boudin, JJ., dissenting).

⁴⁷ *United States v. James*, 478 U.S. 597, 606 (1986).

charged in the complaint did not occur and the defendant engaged only in proper behavior occurring wholly within the scope of his office or employment."⁴⁸ Indeed, "[i]ncident, . . . must encompass the possibility that something did not happen as well as the possibility that it did."⁴⁹

The majority's limited reading of the statute has been ignored. At least two circuits have adopted the *Wood* dissent's rejection of the majority's limitation on Westfall immunity. In *Melo v. Hafer*, the Third Circuit held that:

The Attorney General may file a certification under 2679(d)(1) whenever he or she concludes that an employee defendant was acting within the scope of his or her employment at the relevant time or times. This may include cases in which the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur.⁵⁰

Similarly, in *Kimbrow v. Velten*, the District of Columbia Circuit concluded that "the statutory language describing certification does not preclude a disavowal through certification that the harm-causing event actually occurred."⁵¹

Both the Third and the District of Columbia Circuits chided the *Wood* majority's ambiguous distinction between disputed facts that pertain to the incident, and those that "describe" or "characterize" the incident. The *Melo* court stated:

We find nothing in the text or legislative history of the Act suggesting that Congress intended to restrict district courts to the facts alleged in the plaintiff's complaint when deciding substitution motions. *A fortiori*, we find nothing

there suggesting that district courts be limited to the "core" facts alleged but not the "descriptive" ones.⁵²

The *Kimbrow* court was equally unimpressed with the *Wood* majority opinion. "The dissenters thought, we think correctly, that it would be impossible . . . to draw a distinction between a characterization of an incident and whether or not it actually occurred."⁵³ The court cited the following excerpt from the *Wood* dissent:

[S]uppose *Wood* said she had been offensively touched but *Owens* said he touched her accidentally as he was handing her a stack of correspondence. If the Attorney General granted a certificate, there would be an "incident" and a clear scope of employment issue. Presumably the certificate could not be set aside without a district court factual finding. Why this case should follow a different procedural course is hard to understand.⁵⁴

The facts in *Kimbrow* help illustrate the "hair splitting distinctions and anomalous results"⁵⁵ that the *Wood* dissent predicted would flow from the majority opinion. The plaintiff in *Kimbrow* filed suit in small claims court against a fellow Veteran Affairs employee. The complaint alleged that the defendant "without provocation and without the consent of [the plaintiff], viciously struck the plaintiff on the right arm."⁵⁶ After the United States Attorney filed a scope certification for the defendant, the case was removed to district court and the United States was substituted as defendant.

The plaintiff challenged the scope of employment certification. The defendant filed an affidavit that she did not recall touch-

⁴⁸ *Wood*, 995 F.2d at 1134 (Coffin, Selya, and Boudin, JJ., dissenting).

⁴⁹ *Id.* at 1134. Nonetheless, the dissent noted that

it is not difficult to find here a set of "incidents" or occurrences conceded by everyone: *Owens* did have a supervisory relationship with *Wood*, met and talked with her on various occasions and danced with her at an official function. What is disputed is precisely what was said and done on these occasions, much as a government driver and a private plaintiff might give two quite different versions of an accident. *Id.*

⁵⁰ *Melo v. Hafer*, 13 F.3d 736, 747 (3rd Cir. 1994).

⁵¹ *Kimbrow v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1994), petition for cert. filed, (Nov. 1, 1994) (No. 94-6703).

⁵² *Melo*, 13 F.3d at 746.

⁵³ *Kimbrow*, 30 F.3d at 1507.

⁵⁴ *Id.*, quoting *Wood v. United States*, *supra*, 995 F.2d at 1136 n. 7 (Coffin, Selya, and Boudin, JJ., dissenting) (emphasis added by court in *Kimbrow*).

⁵⁵ *Wood*, 995 F.2d at 1136 (Coffin, Selya, and Boudin, JJ., dissenting). The dissent believed the majority's approach would lead to difficulty determining which facts should be decided by the judge and which should go to the jury.

⁵⁶ *Kimbrow*, 30 F.3d at 1502.

ing the plaintiff and that at the time of the alleged incident she was performing her official duty. The defendant's supervisor filed an affidavit that it was within the defendant's scope of employment to traverse the hallway where the alleged tort took place. The plaintiff replied with an affidavit that the defendant struck her on the arm while she was attempting to make a copy of the defendant's time card.⁵⁷ The government appealed the district court's order resubstituting the individual defendant and remanding the case to State court.

Applying the rationale of the majority in *Wood*, was there an "incident?" Some would argue "no" because there was a dispute over whether an assault and battery took place. Taking their cue from the *Wood* dissent, others might argue that there were a set of "incidents"—the plaintiff and defendant were co-workers; the defendant was working at the time of the alleged assault; it was within the defendant's scope of employment to be in the hallway where the alleged assault took place. Is this enough? Suppose the defendant's affidavit stated that she recalled passing the plaintiff in the hallway that day but that no contact occurred. What is the result?

Fortunately, as the *Wood* dissent, *Melo v. Hafer*, and *Kimbrow v. Velten*, persuasively show, these semantical gyrations are pointless and unnecessary. The statute does not bind the defendant, the government, and the district court to the plaintiff's unilateral accounting (be it real, imagined or embellished) of an alleged harm-causing event. As the *Kimbrow* court explained:

[S]uch an approach puts a premium on skillful pleading and is quite unfair to the employee defendant. More important, it allows a plaintiff to nullify a government employee's immunity claim. In the last analysis, a defendant who was indeed acting within the scope of his office or employment would suffer the very injury Congress wished to protect him from. He would have to go through a complete jury trial on the merits only after which would it be known that he was actually always immune from that which he had endured.⁵⁸

The Purpose of Immunity

The purpose of official immunity, *i.e.*, "to insulate the decisionmaking process from the harassment of prospective litigation,"⁵⁹ and thus, promote effective government (discussed *supra*), is served by a system that shields employees from frivolous litigation. The result reached in *Melo v. Hafer* and *Kimbrow v. Velten* furthers the purpose of official immunity. The *Wood* ma-

majority also believed its decision furthered the purpose of official immunity.

In a perfect world, free of frivolous or vexatious suits, the *Wood* majority's analysis might make some sense. In describing the relationship between its decision and the purpose of official immunity, the court stated:

[Official] immunity reflects a balancing of judgments, on the one hand, about the likelihood that potential tort liability will adversely affect job performance and, on the other, about potential harm such immunity might cause potential tort plaintiffs. That balance may differ as between cases inside, and outside, the scope of employment. After all, one might believe that employees often can change their job performance to avoid, even unfounded, suits based on, say, negligent performance of that job, but that they lack a comparable ability to avoid, in a similar way, false charges of an egregious tort (e.g., murder or assault). And, the possible effect of such non-duty-related suits on job performance might seem too uncertain, or too weak, a justification for depriving a plaintiff of her right to a jury trial in cases involving non-duty-related egregious torts.⁶⁰

The court's rationale has some surface appeal. No employee should enjoy immunity from an egregious tort committed outside the scope of employment. Unfortunately, the issue is not so simple. The line between a "job related" and "non-duty-related" tort is not easy to draw. For instance, an innocent tap on the shoulder may become a "violent, vicious assault" on a co-worker in a plaintiff's pleading. The *Wood* decision is flawed because it allows the plaintiff to define the duty-related nature of the conduct.

Plaintiffs (especially vindictive plaintiffs) can be quite creative. Supervisors are particularly susceptible to frivolous suits by disgruntled subordinates. In the hypothetical above involving the dismissal of the probationary employee, the *Wood* majority would find the tort related to the removal action "job-related," but would find the baseless sexual harassment charge a "non-duty-related egregious tort." However, the latter charges are just as disruptive to government as the former.

Again, *Wood* strikes the balance in favor of the plaintiff, facilitating potentially harassing litigation, and does not promote effective government.

⁵⁷ *Id.*

⁵⁸ *Kimbrow*, 30 F.3d at 1509.

⁵⁹ *Westfall v. Erwin*, *supra*, 484 U.S. at 295.

⁶⁰ *Wood*, 995 F.2d at 1126.

Adding Perspective

Following the results in *Kimbro* and *Melo* will not deny litigants their day in court. Rather, the decisions merely guarantee early resolution of scope of employment issues early and in a federal forum. As the *Wood* dissent urged:

[B]y its express terms and its underlying policy, the [Westfall Act] meant to lift the case into a federal forum and relieve the employee from the cost and effort of defending the case if the Attorney General issues the certificate . . . [T]he Supreme Court has . . . spoken recently and emphatically about the procedures for resolving immunity questions. The single thread that runs through these recent decisions is that immunity-related issues should be decided by the judge and at the earliest opportunity.⁶¹

Moreover, the potential effect on a plaintiff's Seventh Amendment jury trial right should be limited. As the District of Columbia Circuit observed in *Kimbro*:

On our reading of the statute, the plaintiff . . . loses his jury trial on the merits only if the scope issue and merits coincide. If the court determines that the defendant was indeed acting within the scope of his employment, then the plaintiff was *a fortiori* not entitled to a jury, and if the court decides otherwise, the plaintiff is hardly prejudiced; he will have

entirely prevailed and presumably would be entitled to a jury trial as to damages.⁶²

In short, permitting scope certifications where the defendant denies the harm-causing incident alleged in the complaint will have little impact on plaintiffs. Furthermore, it is not likely that the government will exercise its right to issue scope certifications arbitrarily. After all, issuing the scope certification exposes the government to potential liability.

Conclusion

In passing the Westfall Act, Congress gave the Attorney General the authority to certify that a defendant was acting in the scope of his employment. Contrary to the majority's finding in *Wood v. United States*, Congress did not limit the Attorney General's authority to make this determination when the government believes the harm-causing incident, as alleged by the plaintiff, did not occur.

The outcomes reached in *Kimbro v. Velten*, *Melo v. Hafer*, and the analysis urged by the *Wood* dissent, support the purpose of absolute immunity. These decisions strike the proper balance between the interests of the government and the rights of those harmed by government actors. We live in a litigious society. Federal employees must have some mechanism to protect themselves from baseless allegations. Government is more effective if federal employees can carry out their duties without fear of harassing and often frivolous litigation. Allowing scope certifications where the government believes no harm-causing event occurred serves this end.

⁶¹ *Wood*, 995 F.2d at 1135 (Coffin, Selya, and Boudin, JJ., dissenting). Among other Supreme Court cases, the dissent cited *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

⁶² *Kimbro*, 30 F.3d at 1509.

A Practical Guide to Contingency Contracting

Major Rafael Lara, Jr.
Chief, Contract Law
Third U.S. Army/USARCENT

Introduction

Although not a traditional "Battlefield Operating System,"¹ contracting plays a significant role on the modern battlefield.

Effective contracting in the contingency environment is a force multiplier. In light of force reductions in combat support and combat service support units, contingency contracting will play an increasingly important and more visible role in future Army

¹ See DEP'T OF ARMY, FIELD MANUAL, 100-5 OPERATIONS, v Glossary-1 (14 June 1993) [hereinafter FM 100-5]. Battlefield operating systems are the major functions performed by the force on the battlefield to successfully execute Army operations (battles and engagements) to accomplish military objectives directed by the operational commander; they include maneuver, fire support, air defense, command and control, intelligence, mobility, and survivability, and combat service support.

participation in contingency operations.² This article attempts to prepare deploying judge advocates (JAs) with an analytical and practical foundation for deployments in the contracting environment. Although written in an Army context, similar procedures should apply to all services.

Types of Deployments

From a contracting point of view, two types of deployments exist. The first type is a deployment into a "mature" contracting environment, an area in which the deploying JA finds sufficient infrastructure to fully support the logistical requirements of a modern military force. For example, a sophisticated distribution system that can respond to rapidly changing contract requirements already is in place and sufficient vendors who can satisfy the competition requirements of the *Federal Acquisition Regulation*³ (FAR) are present. Local vendors have prior experience contracting with the United States government. In a best case situation, a contracting office already is in the theater. Examples of current "mature" contracting environments are Kuwait; Saudi Arabia; Korea; and the National Training Center at Fort Irwin, California. Even though deploying into a "mature" contracting environment often will be short fused and stressful, deploying JAs should not need, or be required, to set up an entire legal office operation and carry all of their personal needs with them. With luck, when deploying into a "mature" environment, the JA will supplement or "fall in" on an already established legal and contracting offices. A fully stocked office will await the JA and, while spartan, its creature comforts will meet minimum needs. In the "mature" environment, lodging and mess considerations will not be a major personal problem for the JA.⁴

On the other hand, the "immature" contracting environment is an area with little or no built-up infrastructure, few vendors, and no local suppliers with prior contracting experience with the Army. Examples of "immature" contracting environments are Somalia, Haiti, and Rwanda. Not only do deploying JAs need to be concerned with austere personal conditions, they must also ensure that they take sufficient office supplies to establish a contract law office where contracting officers (KOs) can receive legal advice. Today's deployed legal office requires more than just paper clips and legal pads. Judge advocates must realize that a properly stocked deployed legal office includes, at a minimum:

- (1) World-wide telephonic communications, to include secure facsimile machine.
- (2) World-wide written message capability.
- (3) Legal research capabilities, such as Lexis/WestLaw and CD-ROM capability, which permit researching both home station and local legal issues.

In the "immature" environment, satisfying personal lodging and messing requirements will take up more of the JA's time and effort.⁵

Judge advocates must be aware that whether deployed into a "mature" or "immature" environment, certain contracting requirements remain the same. *Federal Acquisition Regulation* requirements continue to apply,⁶ even when legal opinions are being issued in the field by JAs wearing kevlar and flak jackets with

² 10 U.S.C. § 101(a)(13) defines a contingency operation as follows:

The term "contingency operation" means a military operation that—

- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
- (B) results in the call or order to, or retention on, active duty of members of the uniform services under section 672(a), 673, 673b, 673c, 688, 3500, or 8500 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

This is separate and distinct from the requirement for the Secretary of Defense to declare a National Contingency Operation under provisions of 10 U.S.C. § 127a(a) or Presidential Declarations of National Emergencies issued in accordance with 50 U.S.C. § 1601.

DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. MAN. NO. 2, at 1-1, (Dec. 1993) [hereinafter AFARS MANUAL No. 2] defines contingency and contingency contracting as:

- b. *Contingency*. A situation involving the deployment of military forces in response to natural disasters, terrorist or subversive activities, collapse of law and order, political instability, contingencies require plans, rapid response and special procedures to ensure the safety and readiness of personnel, installations and equipment.
- c. *Contingency Contracting*. The provision of those essential supplies and services needed to sustain the mission. It includes emergency contracting in continental United States (CONUS) or outside continental United States (OCONUS) for those actions necessary for the mobilization and deployment of units.

³ GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 2.101 (Apr. 1, 1984) [hereinafter FAR].

⁴ A major concern of the JA, however, will be reviewing the contracts necessary to ensure that the thousands of soldiers involved in a deployment are properly lodged and fed.

⁵ All Army judge advocates should ensure that, at a minimum, they are familiar with DEP'T OF ARMY, MANUAL STP 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS SKILL LEVEL 1 (Oct. 1994).

⁶ 10 U.S.C. § 2304 requires that the government seek competition for its requirements. There is no automatic exception for contracting operations during deployments.

units demanding that their requirements⁷ be filled immediately for mission success. These are times when JAs must realize that they provide a "sanity check" for the contracting process in either type of environment. Judge advocates will be under intense pressure to "bless" actions that do not conform with FAR requirements. In particular, JAs often will be faced with situations in which people attempt to avoid the FAR's competition requirements.⁸

Exceptions from the requirement for full and open competition are listed in 10 U.S.C. § 2304(c) and described in part six of the FAR. "Unusual and compelling urgency"⁹ is the most common exception used to justify avoiding the competition requirements of the FAR during contingency operations. The KO is permitted to limit competition to only those vendors who can meet the requirements of the contract in the time available. More importantly, the required "Justification and Approval"¹⁰ (J&A) can be prepared after the contract award.¹¹ "National security"¹² is another basis for limiting competition. This exception applies if the deployment, or part of the deployment, is classified. However, just because an operation is classified is not sufficient reason to limit competition.¹³

Two other exceptions can assist deployed JAs. The first exception applies if there is only one responsible source and no other that can provide supplies or services which satisfy agency requirements.¹⁴ The second exception applies if international agreements mandate.¹⁵ Examples of these services are: port services; utility services; and "unique supplies or services available from only one or a limited number of sources or from only one or a limited number of suppliers with unique capabilities."¹⁶ Host nation support and service in kind agreements are examples of instruments that allow for acquisition of goods and services without competition. Host nation support and service in kind agreements will only be found in the "mature" environment or when the presence of United States troops has been requested.

Less useful is the "public interest"¹⁷ exception; only the head of the agency can authorize this exception and the authority is nondelegable.¹⁸ This is but one example of why a long distance communication capability, both voice and data, is critical to a deployed legal office.

Exceptions from full and open competition that are not especially useful to deploying JAs are: the exceptions related to

⁷ All Army JAs working in the contract environment should become familiar with Dep't of Army, (DA) Form 3953, Purchase Request and Commitment (1 Aug. 1976). The DA Form 3953 is the document which usually begins the procurement process. A requestor fills out the form when a good or service cannot be filled by normal supply channels.

A supply officer validates that supply channels cannot fill the request. Then, the commanding officer approves the request. Next, the form is sent to the comptroller who ensures that there are sufficient funds of the correct "type" to make the purchase and the signs the fund certification. Finally, the requirement is sent to the KO who initiates the actual purchase. Other services should have similar service specific procedures.

⁸ See FAR, *supra* note 3, pt. 6.

⁹ *Id.* 6.302-2(a)(2). When the agency's need for the supplies or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.

¹⁰ *Id.* 6.303-1 states, in part:

- (a) A contracting officer shall not commence negotiations for a sole source contract, commence negotiations for a contract resulting from an unsolicited proposal, or award any other contract without providing for full and open competition unless the contracting officer—
 - (1) Justifies, if required in 6.302, the use of such actions in writing;
 - (2) Certifies the accuracy and completeness of the justification; and
 - (3) Obtains the approval required by 6.304

Because the justification required by 6.303-1 is usually combined with the approval required by 6.304, the document is referred to as the "Justification and Approval" or simply the J&A.

¹¹ *Id.* 6.302-2(c)(1).

¹² *Id.* 6.302-6. The authority to avoid full and open competition for national security reasons applies when disclosing the agency's needs would violate security requirements.

¹³ *Id.*

¹⁴ *Id.* 6.302-1.

¹⁵ *Id.*

¹⁶ *Id.* 6.302-1(1).

¹⁷ *Id.* 6.302-7. Full and open competition need not be provided when the agency head determines that it is not in the public interest in the particular acquisition concerned.

¹⁸ *Id.* 6.302-7(c). Either the Secretary of Defense or Secretary of the Army must make a determination to use the public interest exemption to avoid requirements for full and open competition. Further, Congress must be notified thirty days prior to award of a contract when competition has been limited based on this exemption. For this reason alone the "public interest" exception is of little use during the opening stages of any contingency operation.

maintaining an industrial mobilization base; engineering, development, or research capability,¹⁹ and the exception for procuring from sources authorized or required by statute.²⁰

Once a KO, in consultation with a judge advocate, (JA) determines that no exception to the competition requirement exists, the KO and JA must select the method of acquisition. For larger acquisitions, the KO can use two methods of acquisition. The first is sealed bidding.²¹ Under this method of acquisition, award is based solely on price; the lowest responsible, responsive bidder. To use sealed bidding, requirements must be clear, sufficient lead time to use formal procedures must exist, there must be a reasonable expectation that more than one bid will be received and there must be no expectation that discussions will be necessary.²² Sealed bidding also requires lead times that, in the contingency setting, generally are too long and usually will be unacceptable to the "war fighters." In both the "mature" and "immature" environments, the use of sealed bidding is not favored overseas.²³ Further, in "immature" environments and in some "mature" theaters, there is a cultural bias against written contracts and sealed bidding procedures, which makes it nearly impossible to conduct sealed bidding procurements. In these cultures, drinking tea and handshakes to conclude an agreement are more the norm.

A second type of procedure for handling larger acquisitions is negotiations. Negotiated procurements are used when sealed bidding procedures are not appropriate.²⁴ Negotiated procurements allow for greater flexibility in source selection and permit the requiring activity to evaluate factors other than price before making award. Negotiated procurement provide a faster means to satisfy requirements²⁵ and may be more acceptable in some of the theaters in which JAs will operate.

In garrison, the preceding analytical framework and analysis is the one that KOs and contracting attorneys must use to determine what type of contract procedures to use for larger contracts. Normally, however, smaller procurements do not receive legal review from the contracting attorney.²⁶

The vast majority of contracting actions during a contingency operation can be executed using simplified acquisition procedures.²⁷ Full and open competition requirements do not apply to small purchases. The present small purchase limit for an approved contingency operation is \$200,000.²⁸ Consequently the use of sealed bidding or negotiated contracting procedures will be the exception, rather than the norm, during a contingency operation.

Small Purchase and Simplified Contracting Procedures

During contingency operations, most requirements can be satisfied by using small purchase and simplified contracting procedures. Examples of such procedures are the imprest fund, purchase orders made using Standard Form (SF) 44 (Purchase Order-Invoice-Voucher) or Department of Defense (DD) Form 1155 (Purchase and Delivery Order), blanket purchase agreements (BPAs), and credit card purchases.²⁹

An imprest fund is a cash fund established prior to actual deployment from home station. A duly appointed cashier may make immediate cash payments of small amounts for authorized supplies and nonpersonal services. The normal dollar ceilings per transaction are \$500, but the ceiling is raised to \$2500 for overseas purchases in support of a contingency operation. The imprest fund is established when the requiring activity submits a request to start a fund. All brigade-sized units should start and maintain

¹⁹ *Id.* 6.302-3.

²⁰ *Id.* 6.302-5.

²¹ *Id.* 14.101.

²² 10 U.S.C. § 2304(a)(2)(A); *Racal Filter Technologies*, B- 240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD, para. 453.

²³ See FAR, *supra* note 3, 6.401(b)(2).

²⁴ 10 U.S.C. § 2304(a)(2)(B).

²⁵ See FAR, *supra* note 3, 15.402 (oral solicitations); 16.603 (letter contracts).

²⁶ DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. (June 1992) 1.602-2(e)(1)(b) [hereinafter AFARS]. Legal reviews are only required for contract actions exceeding \$100,000.

²⁷ Ninety-five percent of the contracting activity conducted in a deployment will be small purchases. INTERNATIONAL & OP. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, K-4 (1994).

²⁸ Assistant Secretary of the Army, Research, Development and Acquisition (SARDA) Acquisition Letter (AL) 94-9 (31 Oct. 94). The AL provides that the simplified acquisition threshold for any contract "to be awarded and performed outside the U.S. in support of a contingency operation as defined in 10 U.S.C. § 101(A)(13)" has been increased to \$200,000, effective 13 October 1994.

²⁹ See FAR, *supra* note 3, pt. 13.

an imprest fund. After receiving notice of immediate deployment, the fund can be fully resourced. On arrival at the deployment site the appointed cashier and a unit representative³⁰ immediately can begin purchasing needed supplies and non-personal services.³¹

The imprest fund cashier is responsible for the money, and accountable to the finance and accounting officer. The cashier also is responsible to the KO for the administrative operation of the fund. When presented with an authorized document and the necessary certification of receipt for supplies or services, the cashier pays the supplier and obtains the certification of cash payment.

The fund cashier must, on at least a monthly basis, ensure that the fund is reimbursed using SF 1129, Reimbursement Voucher, documented by the cashier's subvouchers. At the end of the fiscal year, the fund cashier submits a reimbursement voucher covering all outstanding subvouchers, before closing the allotment accounts for the year.³²

In summary, the use of the imprest fund can be an expeditious method to secure low-cost items for deployed units. At the brigade level, and based on the cost of items obtained using imprest funds, the deploying JA normally will not become involved in reviewing imprest purchases, but should be prepared to advise if asked.

The SF 44, Purchase Order-Invoice-Voucher,³³ is a simple purchase order form used for one-time, one-stop purchases of supplies and nonpersonal services. The SF 44 is a versatile form that functions as a purchase order, receiving report, invoice, and public voucher.

The SF 44 is so versatile that it contains no written terms and conditions. Consequently, ordering officers and KOs should use

SF 44s when no other contracting method is more economical or efficient. Further, all of the conditions listed below must be met:

- (1) The supplies or services are immediately available.
- (2) Only one delivery and one payment will be made.
- (3) The purchase is not in excess of the contingency small purchase threshold. When using the SF 44 for overseas transactions by warranted contracting officers in support of contingencies declared by the Secretary of Defense, the small purchase threshold increases from \$25,000 limit to \$200,000.³⁴

Ordering officers may only use SF 44s after they have received written authorization from the KO and have been trained by the KO in the proper use of the form. The user of an SF 44 is responsible for ensuring that funds are available, the form is filled out properly, and that only authorized items are purchased.

Another simple method that KOs use to obtain goods or services during a contingency operation is the DD Form 1155, Order for Supplies or Services. Department of Defense 1155s are self-contained, one-time contracts that usually result in a contract requiring one delivery and one payment. The DD Form 1155 is authorized for purchases not to exceed the small purchase monetary threshold.³⁵ The DD Form 1155 can be used as a bilateral contract when there is sufficient lead time available, when the contract is more complex than that created by a SF 44, if more contract administration is needed, or if the KO perceives that certain contract clauses (*e.g.*, Termination for Default) should be included in the contract.

³⁰ See AFARS, *supra* note 26, 13.403. The fund cashier is bared from personally spending money from the fund.

³¹ The actual procedure involved in using the imprest fund is as follows:

(1) The purchasing information is annotated on a purchase request document and signed by the KO. A purchase requisition, SF 1165 (Receipt for the Cash-Subvoucher), and the vendor's sales document may be used to support the purchase.

(2) The requisition document must itemize the supplies or nonpersonal services to be purchased and indicate the estimated cost. Competition is required anytime the KO does not think that the price is fair and reasonable. Rotating suppliers in the same manner as any other small purchase method should be used to the maximum extent possible.

(3) Material purchases will be delivered to a designated point and the receiver will examine and accept the supplies on either the vendor's invoice or the SF 1165. When the vendor cannot deliver, an authorized person may be designated to pick up the supplies. In this case, an advance of funds will be drawn from the cashier, annotated on an SF 1165, and paid to the vendor. The receipt from the vendor will be returned to the imprest fund cashier with the SF 1165 signed by the vendor as having received a cash payment [FAR, *supra* note 3, pt. 13.4].

AFARS MANUAL No. 2, *supra* note 2, at 8-2.

³² *Id.* at 8-3.

³³ FAR, *supra* note 3, 13.505-3.

³⁴ AFARS MANUAL No. 2, *supra* note 2, at 8-3.

³⁵ FAR, *supra* note 3, 13.501.

A more complicated method of procurement in the contingency environment is the blanket purchasing agreement (BPA). The BPA is a method of filling anticipated repetitive needs for supplies or services by establishing a "charge account" with qualified sources of supply.³⁶ The BPA is not a contract, but an agreement on price for orders to be placed in the future. A KO prepares a BPA, which is issued on DD Form 1155 and must contain certain terms and conditions.³⁷ A KO may authorize ordering officers to place orders under BPAs.³⁸

Blanket purchase agreements can only work in the "mature" contingency environment. Infrastructure and stability are needed to have a potential pool of offerers who are willing to maintain set prices for goods and services that may or may not be ordered. Inherent in the BPA is the concept that the opening stages of the contingency operation have ceased and long-term sustainment of the operation has commenced.

Finally, government credit cards always are mentioned when discussing small purchases and simplified contracting during contingency operations.³⁹ However, because of the lack of sophisticated banking facilities necessary for a credit purchase, credit cards may be of no use in most "immature" environments.⁴⁰ Further, because of funding limitations, training requirements, and the requirement that all provisions of *Army Federal Acquisition Regulation Supplement Manual* part 13 be complied with, credit cards may be of limited use OCONUS even in the "mature" environment.⁴¹ Credit cards are an excellent device for properly trained

members of the command to make small purchases in the CONUS post, camp, and station environment; for OCONUS contingency deployments, do not rely exclusively on them.

Items That Deploying JAs Need to Know Which Are Not Necessarily Legal

The reality of contingency contracting is that mastery of the FAR and contract types does not ensure that the client receives proper advice. Deploying JAs must not only understand their role in the procurement process, but also the larger role that they play in the entire deployment.⁴² Depending on the size of the deployment, the JA may be the sole source of legal advice or be one of many in a large SJA office. Further, the JA must understand the competing forces at work during a major deployment.

Whether large or small, the majority of future deployments are going to be made in the joint environment.⁴³ One of the principles of war recognized by the United States Army is, "unity of command."⁴⁴ Despite this principle, the logistical function has a separate chain of command from the operational function in the joint environment.⁴⁵ In some cases, the logistical and organizational functions will come from a different service. In Somalia, for example, the base operation contract was an Army contract that for a time had a Navy administrative KO while the JTF commander was a Marine. This split between the warfighter and the warfighter's supplier occasionally can lead to misunderstandings and conflicts that are not conducive to successful mission accomplishment.

³⁶ *Id.* 13.203-1.

³⁷ Under FAR 13.203-1(j), orders placed under BPAs must contain: a description of the agreement; a statement that the government is obligated only to the extent of authorized purchases actually made under the BPA; a statement that the prices to the government shall be as low or lower than those charged the supplier's most favored customer for comparable quantities under similar terms and conditions, in addition to any discounts for prompt payment; a statement that specifies the dollar limitation for each individual purchase under the BPA; notice of individuals authorized to purchase under the BPA and dollar limitations by title of position or name; a requirement for delivery tickets; and a requirement for invoices.

³⁸ AFARS, *supra* note 26, 13.203-1(a)(S-92).

³⁹ *Id.* subpt. 13.90.

⁴⁰ During Operation Restore Democracy a Haitian store owner in Port-a-Prince merely laughed when asked if he would accept a credit card by a KO (author's personal observation). Similar reactions have been anecdotally reported to the author from KOs who served in Somalia and Rwanda. However, credit cards were well received when used in neighboring countries such as Kenya. Furthermore, credit cards were accepted in Turkey for purchases in support of Provide Comfort.

⁴¹ AFARS MANUAL No. 2, *supra* note 2, at 8-9.

⁴² For an excellent article on the role of the judge advocate during field operations, see Swann, *The Role of the Judge Advocate Under the New Field Manual 100-5, Operations*, ARMY LAW., Dec. 1994, at 25.

⁴³ FM 100-5, *supra* note 1, at 2-0, 2-2, 4-1. Joint operations are the integrated activities of two or more service components of the United States military.

⁴⁴ *Id.* at 2-5. For every objective, seek unity of command and unity of effort. Unity of command means that all forces are under one responsible commander.

⁴⁵ *Id.* at 4-1, 4-2.

Much like the parent who demands to know what the child has used the credit card for, one of the most severe rifts that can occur because of the split between the warfighter and supplier is the matter of funding.⁴⁶ The supplier must "foot the bill" for the warfighter's requests and tell the warfighter that funds are not available for particular procurement or that contingency thresholds have not been raised for a particular operation.⁴⁷ Finally, the supplier solely determines whether there is money available to be spent on the goods or services requested.⁴⁸ Unfortunately it is usually the JA that must carry the supplier's message to the Commander, couched in terms of legal restraints.

As a practical matter, the Comptroller must deploy with the KO. Without the Comptroller present to certify funds and provide fund cites, the KO cannot perform his or her mission. The

KO, Comptroller, and JA make up the procurement team. Without all members present, the team cannot function.

Another, often forgotten, member of the procurement team is the Contracting Officer's Representative (COR).⁴⁹ In garrison, the COR receives extensive training and instruction on the limitations and responsibilities of the position. However, during contingency operations exceptions to this general rule develop. For example, because of exigent circumstances, a Sergeant First Class from the S-4 shop may suddenly be the COR for the trash collection contract. The training that the COR receives in this type of situation is often "quick and dirty." Subsequently, the COR may order the contractor to perform acts that either are outside the scope of the contract or require the contractor to perform in a manner that increases contract cost. Because the COR normally

⁴⁶ The following is a heavily edited journal entry from a G-4 log maintained by a unit recently deployed to the Caribbean. This entry illustrates the conflict between requirements generated by warfighters and the attempts by logisticians to pay for those requirements.

Operation: [deleted]
User: G4LOC in group G4 - LOG
Classification: UNCLASSIFIED
DTG: Oct 17 1994 06:48AM
Subject: REEFER VANS

Journal:

[deleted] J4 MSG 141131Z OCT IS DEMANDING [deleted] SOURCE & PROVIDE 42 EA REEFER VANS BECAUSE [deleted] REEFER VANS WON'T BE IN THEATER UNTIL 14 NOV. REEFER VANS IN THEA (sic) BELONG TO [deleted], WHO WANTS TO TAKE THEM OUT OF THEA (sic) WHEN CLASS 1 UNIT LEAVES. RELUCTANT TO LEAVE THEM BEHIND.

RAN THIS TO GROUND WITH [deleted], WHO SAID THERE WERE NO MORE REEFER VANS IN THE ARMY INVENTORY. WE'D HAVE TO CONTRACT FOR THEM—SPECIFICALLY, TELL 18 CORPS TO CONTRACT FOR THEM. BY THE TIME THAT WAS DONE AND THE REEFERS WERE ON THE WAY (BY SEA), IT'LL BE CLOSE TO THE 14 NOV DATE ANYWAY. AND WE'RE ALREADY PAYING ONCE FOR CONTRACTED REEFERS THRU [deleted]—WHY SHOULD WE HAVE TO PAY TWICE. (sic)

Action Taken:

RECOMMEND [deleted] BITE THE BULLET AND LEAVE VANS THERE UNDER SUPERVISION UNTIL [deleted] REEFERS ARRIVE. RECOMMEND THE [deleted] POSN (sic) BE STATED AT LOG VTC WITH [deleted] SATURDAY MORNING.

⁴⁷ By message dated 142030Z SEP 94, during Operation Restore Democracy, the Forces Command Principle Assistant Responsible for Contracting had to request that the small purchase threshold be raised to \$100,000.

⁴⁸ A complete discussion on the fiscal law limitations that apply to contingencies is beyond the scope of this article. Generally speaking, appropriations only can be spent for the purpose appropriated, within the timeframe of the appropriation, and within the amount appropriated. See 31 U.S.C. § 1341(a)(1).

⁴⁹ DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 1-103, sec. 201.602-2 (1 Feb. 1994), states as follows:

Contracting officers may designate qualified personnel as their authorized representatives to assist in the technical monitoring or administration of a contract. A contracting officer's representative (COR)—

- (1) Must be a Government employee, unless otherwise authorized in agency regulations.
- (2) Must be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with department/agency guidelines.
- (3) May not be delegated responsibility to perform functions at a contractor's location that have been delegated under FAR 42.202(a) to a contract administration office.
- (4) May not be delegated authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract.
- (5) Must be designated in writing, and a copy furnished the contractor and the contract administration office,—
 - (i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;
 - (ii) Identifying the limitations on the COR's authority;
 - (iii) Specifying the period covered by the designation;
 - (iv) Stating the authority is not redelegable; and
 - (v) Stating that the COR may be personally liable for unauthorized acts.
- (6) Must maintain a file for each contract assigned. This file must include, as a minimum—
 - (i) A copy of the contracting officer's letter of designation and other documentation describing the COR's duties and responsibilities; and
 - (ii) Documentation of actions taken in accordance with the delegation of authority.

works directly for the requestor of the services and only works under the general supervision of the KO, the COR is under extreme pressure to satisfy the demands of the requestor at the expense of meeting the legal requirements of the contract. The JA should work hard to ensure that CORs are properly trained and aware of their responsibilities.

Teams also cannot function without trust. Furthermore, teamwork and trust are essential for successful mission accomplishment. During a deployment, when people from different units and services are put together in ad hoc units, trust sometimes takes time to build between people.⁵⁰ The JA is in an excellent position to reduce the amount of time needed for trust to develop between people. The JA cannot sit passively in his or her office and wait for people to come in with their legal problems. The JA must be actively involved in all aspects of the procurement process. The JA must ensure that the requestor's requirements are clearly stated and understandable, that proper monies are available, that the correct contract type is selected; and after award, that the contract is correctly administered. Consequently, the JA is the one person that all members of the procurement team must work with. Teamwork is built on mutual trust, understanding and reliance on individual members.⁵¹ The JA is in the most advantageous position to ensure that the team shares common understanding and trust. An active and concerned JA is the catalyst around which an effective procurement team can grow.

The JA must act as the "honest broker" between the competing interests in the contingency environment and the requirements of the law. In the midst of a hectic, chaotic, and tense environment, the JA occasionally must mediate the differences between all in the procurement community and remind everyone that all should share in the same "unity of effort."⁵²

Because the majority of procurements made during a contingency operation in an "immature" environment will be of the "cash and carry" variety, the likelihood of any claim being filed based on such a transaction is remote. However, the more "mature" an area of operation becomes, the greater the likelihood is that a disgruntled contractor will file a contract claim.

Because of the costs associated with litigating claims, the policy is to attempt to resolve all contractual disputes by mutual

agreement at the KO's level.⁵³ This is a perfect opportunity for the JA to exercise negotiating and investigating skills to formulate settlements which will satisfy all parties to the contract. Further, ensuring that limited time and resources are not expended on claims that can be easily settled by the KO improves the efficiency of the procurement team.

However, when settlement attempts fail, the JA must ensure that testimonial and physical evidence concerning the contract and claim is preserved. A contingency operation is a confused time. The best time to preserve evidence relating to a contract claim is while all parties who have knowledge of the claim are still in the area and their memories fresh. Because personnel return to their home station once the contingency operation is completed, JAs must get addresses and phone numbers of witnesses that will allow litigation attorneys to contact witnesses in the future. To prevent a loss of evidence, the JA must direct that the contract and all relevant files be collected and stored in one location.⁵⁴

The JA also needs to be aware of the impact that the media has during contingency operations.⁵⁵ Under current practice the JA must realize that, despite televised statements by the President from the White House and news announcements from CNN that a contingency operation has begun, there is no declared contingency under the provisions of section 127a(a), Title 10 of the United States Code until the Secretary of Defense so designates an operation.⁵⁶ Consequently, the higher purchase thresholds applied to small purchase procedures during contingency operations are not implemented until official notification is transmitted to the KO. This has the practical effect of the JA and KO being in country, in the middle of a contingency operation (and being reported as a contingency operation) and not being able to implement higher contracting thresholds.

Although not automatically consulted concerning this decision, JAs should advise Commanders and Principal Assistants Responsible for Contracting that only one principal contracting office be established in any theater. There is no better way to destroy trust and create misunderstandings than to have two or more contracting offices competing for scarce resources and supplies in one area of operation. At a minimum, such competition

⁵⁰ See FM 100-5, *supra* note 1, at 5-2, 5-3.

⁵¹ *Id.*

⁵² *Id.* at 2-5.

⁵³ FAR, *supra* note 3, 33.204.

⁵⁴ See PAMPHLET, PREPARING THE RULE 4 FILE AND THE TRIAL ATTORNEY'S LITIGATION FILE, OFFICE OF THE CHIEF TRIAL ATTORNEY, (Dep't of the Army, Sept. 1994).

⁵⁵ See FM 100-5, *supra* note 1, Media Impact, at 3-7.

⁵⁶ During a staff meeting attended by the author during Operation Vigilant Warrior, a General Officer referred to having to respond to instantaneous news reports as "FRAGO CNN." FRAGO is an abbreviation for "fragmentary order." Fragmentary orders usually are published by higher headquarters to alert subordinate units of impending orders.

drives up prices our client (the Army and ultimately taxpayers) must pay for goods and services.

Conclusion

"No notice" deployments will be the rule rather than the exception in the near future. Because of force reductions, contracting in the contingency environment will play an important part of any contingency action. Judge advocates must have the knowledge and the skills necessary to ensure that they can provide correct legal advice to the command in mature and immature

contracting environments. More importantly, JAs should prepare the contracting battlefield before deployment by pushing commands to establish imprest funds, by: collaborating with the Director of Contracting to teach simplified purchasing procedures to unit S-4s; by speaking up about unity of contracting effort soon and often in the contingency planning process; and by generating requests for increased contracting authority as soon as possible. Planning and training for contingency contracting while at home station ensures a smooth transition for the deploying JA from garrison to either mature or immature contracting environments.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

COURT-MARTIAL PROCESSING AND NONJUDICIAL PUNISHMENT RATES

Court-martial rates for the first two quarters of fiscal year 1995 are shown below. The second quarter rates reflect an increase in general and BCD special rates over the previous quarter and the second quarter of fiscal year 1994.

**COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES
RATES PER THOUSAND**

First Quarter Fiscal Year 1995; October-December 1994

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.28 (1.12)	0.26 (1.04)	0.54 (2.18)	0.44 (1.76)	0.16 (0.63)
BCDSPCM	0.14 (0.56)	0.12 (0.49)	0.34 (1.36)	0.18 (0.72)	0.47 (1.90)
SPCM	0.00 (0.01)	0.00 (0.01)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.14 (0.55)	0.14 (0.56)	0.36 (1.45)	0.06 (0.24)	0.00 (0.00)
NJP	16.54 (66.14)	16.75 (67.01)	26.84 (107.35)	19.53 (78.10)	17.07 (68.27)

Note: Based on average strength of 533,626

Figures in parenthesis are the annualized rates per thousand

**COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES
RATES PER THOUSAND**

Second Quarter Fiscal Year 1995; January-March 1995

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.41 (1.63)	0.39 (1.54)	0.55 (2.19)	0.58 (2.33)	0.49 (1.97)
BCDSPCM	0.16 (0.65)	0.16 (0.62)	0.24 (0.97)	0.15 (0.58)	0.49 (1.97)
SPCM	0.02 (0.07)	0.02 (0.07)	0.03 (0.13)	0.00 (0.00)	0.00 (0.00)
SCM	0.11 (0.44)	0.13 (0.51)	0.10 (0.39)	0.04 (0.17)	0.00 (0.00)
NJP	19.12 (76.47)	20.17 (80.68)	20.02 (80.08)	18.26 (73.05)	12.83 (51.31)

Note: Based on average strength of 528,748

Figures in parenthesis are the annualized rates per thousand

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board Systems, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issues (volume 2, number 9) is reproduced below:

Clean Water Act Reauthorization

On 16 May 1995, by a vote of 240 to 185 the United States House of Representatives approved House Resolution (H.R.) 961, a sweeping rewrite of the Clean Water Act (CWA). President Clinton has indicated that he will veto any CWA Reauthorization similar to H.R. 961.

Among other things, H.R. 961 replaces the current storm water permitting program with a management program modeled after the current nonpoint source provisions of the CWA. The bill also eases federal regulation of wetlands.

Perhaps more important for the Army, however, H.R. 961 amends § 313 of the existing statute, further waiving sovereign immunity. Specifically, the Army would be subject to civil and administrative penalties and fines—regardless of whether such penalties or fines were punitive or coercive in nature or were imposed for isolated, intermittent, or continuing violations. The Army also would be subject to reasonable service charges—to include fees associated with the inspection and monitoring of Army facilities, and all other nondiscriminatory charges assessed in connection with a federal, state, interstate, or local water pollution regulatory program.

Individual employees of the Army would not be personally liable for civil damages for violations of water pollution laws with respect to an act or omission within the official scope of their duties. They would, however, be subject to criminal sanctions.

The Environmental Protection Agency (EPA) would be required to initiate an administrative enforcement action against the Army in the same manner and under the same circumstances as an action that would be initiated against any other person. The amendment to § 313 would take effect on the date of enactment and would only apply to violations occurring after such date.

The Senate Environment and Public Works Committee is expected to start work on its version of a CWA reauthorization bill after completing work on the Safe Drinking Water Act in June or

July. Senator Chafee, the committee chairman, indicated that he expects the Senate version of a CWA reauthorization to be narrower in scope than H.R. 961. Major Saye.

Storm Water Phase II Rule

On 7 April 1995, the EPA issued a direct final rule for the second phase of the storm water permitting program. Phase I, promulgated in November 1990 and amended in 1992, includes discharges associated with industrial activity, discharges from municipal separate storm water sewer systems serving 100,000 people or more, construction projects disturbing more than five acres, and dischargers issued a permit before February 1987.

A phase II storm water discharge includes all discharges composed entirely of storm water, except those specifically classified as phase I discharges. The phase II rule¹ establishes a sequential application process for all phase II storm water discharges. If the permitting authority determines that the discharge is contributing to water quality impairment, or is a significant contributor of pollutants, the facility will be required to apply for a permit within 180 days of receipt of notice, unless permission for a later date is granted. All other phase II facilities shall apply to the permitting authority no later than six years from the effective date of the regulation.

The rule is the first step of the EPA's approach to develop a comprehensive phase II program and does not contain a set of performance standards, guidelines, guidance, management practices, or treatment requirements. These conditions will be established by the permitting authority on a case-by-case basis. The EPA may, however, define certain conditions as it revises the phase II program regulations.

The rule will take effect on 2 August 1995, unless the EPA receives significant adverse or critical comment. However, the scheme for managing storm water discharges could change under a revised CWA. The House Resolution 961's reauthorization of the CWA would eliminate the storm water permitting program and replace it with a management program based on the polluted runoff control provisions of the existing CWA. Major Saye.

Overview of the Title V Operating Permit Application Process—The Emissions Inventory and Compliance Assessment

(This is the second note in a series intended to assist environmental law specialists (ELs) in fulfilling their role in the Title V Operating Permit Application Process.)²

The Emissions Inventory

Completing a thorough and accurate emissions inventory for an installation is essential to planning for, and submitting, the Title V application. The inventory should include a thorough installation-wide inspection, not just a review of documentation. Facility operators should actively participate in the inventory to ensure that all emissions sources are included.

The inventory must include both the actual emissions and the potential to emit values for each source. The EPA defines "potential to emit" to be the "maximum capacity of a stationary source to emit any air pollutant under its physical and operational design."³ The applicability of Title V is based on an installation's potential to emit, as opposed to its actual emissions. In most cases, the potential to emit will be significantly greater than the actual emissions. Consequently, even installations with small actual emissions still may have to meet Title V requirements. Installations with small actual emissions—but with a potential to emit in excess of the major source threshold—may be prime candidates for synthetic minor status to avoid the Title V requirements. Installations can attain synthetic minor status by creating federally enforceable limits on the installation's potential to emit; for example, through an EPA-approved state operating permit program for minor sources.⁴

Installations must calculate and consider the potential emissions from all activities, including those considered insignificant, in determining whether an installation is a major source. States, however, may exempt various insignificant activities from Title V reporting, monitoring, and recordkeeping requirements. Insignificant units, like space heaters, that the state categorically exempts, do not have to be separately listed in the permit application. Units exempt based on the quantity of emissions or production rate must be listed in the application.⁵

The emissions inventory should include all the supporting data needed to calculate the emissions estimates. An inventory without supporting documentation is difficult to verify and has limited future utility. Installations should retain inventory records indefinitely.

The Compliance Assessment

As part of the Title V application process, each installation must thoroughly assess its Clean Air Act (CAA) compliance status and identify any noncompliance with applicable federal, state, or local air pollution control requirements. Ideally, an installa-

¹ 60 Fed. Reg. 17,950 (1995).

² See Environmental Law Division Notes, Overview of the Title V Operating Permit Application Process, ARMY LAW., Jul. 1995, at 46-47.

³ 40 C.F.R. § 70.2 (1995).

⁴ See Environmental Law Division Notes, Clean Air Act (CAA), ARMY LAW., Apr. 1995, at 57.

⁵ 40 C.F.R. § 70.5(c) (1995).

tion should satisfactorily resolve compliance problems well in advance of the Title V application deadline. The voluntary self identification and prompt correction of violations will be positive factors in resolving any resulting enforcement action.⁶

If an installation is unable to resolve identified compliance problems prior to submitting a Title V application, the application must include a compliance plan and schedule. *Failure to identify and report existing noncompliance with applicable CAA requirements in the Title V application will place the responsible official, normally the installation commander, at risk of criminal, and possibly, civil sanctions for false certification.* Additionally, a failure to report will be an adverse factor in any subsequent enforcement action.

As part of its compliance assessment, an installation should ensure that it has met all applicable federal and state preconstruction and operating permit requirements. Since the 1977 CAA amendments, the construction of new, or significant modification of, existing major sources of air pollutants has been subject to rigorous federally mandated preconstruction review and permit requirements called the New Source Review (NSR) in areas of nonattainment of National Ambient Air Quality Standards (NAAQS)⁷ and Prevention of Significant Deterioration (PSD) in areas in attainment of NAAQS.⁸ Additionally, states have preconstruction permit programs covering minor sources that vary greatly from state to state.

In the past, some installations may have modified facilities resulting in an increase in air pollutant emissions without realizing the need for a preconstruction review and a permit. In particular, installations that considered only newly constructed or modified facilities on the installation to be the regulated sources—for example, the new boiler or paint shop—in determining the applicability of preconstruction permit requirements likely inadvertently avoided major sources NSR or PSD requirements. Both the NSR and the PSD apply to significant modifications of all major sources. Under both programs, major source status is determined based on the potential to emit from all collocated stationary sources, under common control, and part of a single industrial grouping.⁹ Generally, in determining the applicability of the NSR and the PSD, installations must calculate the potential emissions from many stationary sources on the installation, not just from the single source or facility being constructed or modified. Consequently, the failure to include collocated sources, under common control, and part of the same industrial grouping, may have resulted in the erroneous conclusion that the modified

source was minor and not subject to the PSD or the NSR. Various states or the EPA may now require installations in this situation to meet PSD and NSR requirements, including installing emission control technology applicable to the construction or modification of major sources.

Application of the "major source" definition to military installations has been inconsistent. Currently, some EPA regions and state regulators view all of the stationary sources on an installation as part of a single source in determining the applicability of permitting requirements. In the past, many regulators took a more flexible approach. The Department of Defense (DOD) currently is attempting to obtain formal guidance from the EPA to allow division of military installations into multiple sources based on the lack of common control over certain tenant activities or different major industrial groupings.¹⁰ Consequently, in conducting compliance assessments, ELSs should coordinate closely with their Major Army Command ELS and Environmental Law Division in addressing the applicability of the NSR and the PSD to past modifications. Major Teller.

Government-Owned Contractor-Operated Environmental Compliance

Citizens' groups may have been handed another weapon to compel compliance by government contractors. In *United States ex rel Fallon*,¹¹ the United States District Court for the Western District of Wisconsin held that the Atlantic States Legal Foundation could pursue an action under the False Claims Act (FCA) against Accudyne Corporation, for making false claims for contract payments. Accudyne had various DoD contracts, and, according to plaintiffs, knowingly presented false representations of costs related to environmental compliance. After being awarded the contracts, Accudyne, again according to plaintiffs, knowingly failed to comply with environmental requirements while performing the contracts. The district court held that there was no preemption of the FCA by the environmental laws stating that "Defendants' characterization of the claim as an attempt to sue for violations of environmental laws misses the point—it is not the violation of environmental laws that gives rise to an FCA claim but the false representations to the government that there has been compliance." Mr. Nixon.

"Devolvement" of the Defense Environmental Restoration Account to the Services

The former Deputy Defense Secretary, John Deutch, has issued guidance to the services for implementing the DOD's recent

⁶ See EPA's Draft Policy, Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement (proposed April 3, 1995). 60 Fed. Reg. 16,875 (1995).

⁷ 40 C.F.R. § 51.165, 52.24 (1995).

⁸ *Id.* § 51.166, 52.21.

⁹ See *Id.* § 70.1 ("major source" definition).

¹⁰ See Environmental Law Division Notes, *Clean Air Act Definition of "Major Source" Under the Title V Operating Permit Program*, ARMY LAW., Aug. 1995, at 50-51.

¹¹ No. 93-C-801-S (W.D. Wis. Mar. 10, 1995).

decision to "devolve" the Defense Environmental Restoration Account (DERA) to the individual services for management beginning Fiscal Year (FY) 1997.¹² The guidance states that the DOD intends to seek congressional authority to implement the redistribution of funds, because the account was established by statute.¹³ The DOD is proposing that the Army remain the Executive Agent for the execution of the Agency for Toxic Substances and Disease Registry, the Defense State Memorandum of Agreement, and the formerly used defense sites (FUDS) activities, and that the Deputy Under Secretary of Defense (Environmental Security) will program for the FUDS. Mr. Deutch's guidance directs each service to evaluate the relative risk to human health and the environment for all sites, as well as the cost to complete clean-up. Each service will continue to be required to ensure protection of human health and environment at their sites, and to comply with all legally enforceable agreements. Ms. Fedel.

New Cuts to the Defense Environmental Restoration Account Proposed

On 24 May 1995, the full committee of the National Security Committee sustained markup for a reduction to the FY1996 DERA budget. The proposed reduction of \$200 million adds to the \$300 million rescission for the FY1995 budget. Moreover, the markup proposes to repeal 10 U.S.C. § 2703(c), which provides limitations to the actions for which DERA funds can be used. The DOD is expected to oppose this proposed repeal. The repeal would enable the services—in conjunction with the proposed devolvement of the account to the individual services—to transfer DERA funds to other accounts to be used for purposes other than remediation. If the funds are available for other purposes, the DOD is expected to argue that it has no defense to claims of citizens, states, or federal regulators that other defense funds must be used to meet environmental legal obligations. Ms. Fedel.

Rocky Mountain Arsenal: Agreement for Conceptual Clean-up Remedy Reached

On 13 June 1995, the Army, the EPA, the United States Fish & Wildlife Service, the State of Colorado, and the Shell Oil Com-

pany reached an agreement on a conceptual clean-up remedy the Rocky Mountain Arsenal (RMA). The remedy includes an assortment of proven technologies, including the continuation of boundary groundwater treatment systems, and the excavation, landfilling, capping, solidifying, and consolidation of contaminated soil. As an added layer of protection, 4000 acre feet of water will be provided to a local water district, and existing well owners north of the RMA will be connected to a local water distribution system. For the next six months, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, the Army will prepare a Detailed Analysis of Alternatives (DAA). The conceptual remedy will be presented as the preferred alternative in the DAA and be placed in the Proposed Plan. While the DAA is being drafted, a Resource Conservation and Recovery Act Draft Closure Plan for former Basin F and the Basin F wastepile will be prepared using applicable portions of the conceptual remedy in accordance with Colorado's Hazardous Waste Management Act. Both documents will be issued simultaneously, and the thirty day public comment period will run concurrently. After any modifications based on public comment, a Final Record of Decision and Final Closure Plan will be issued. Both documents will be completed sometime in 1996. The estimated cost of the cleanup is approximately \$2 billion. This cost includes all money spent to date on clean-up efforts. The cleanup will take about ten years. As a result of legislation designating the RMA's twenty-seven square miles as a wildlife refuge, the RMA will be turned over to the Department of Interior for management as a National Wildlife Refuge once cleanup has been completed. Captain Cook.

National Priorities List Delisting

Proving that there is a first time for everything, the first Army National Priorities List site has been delisted. On May 22, 1995, the EPA announced the deletion of the Fort Lewis Landfill No. 5 from the National Priorities List.¹⁴ Mr. Nixon.

¹² Memorandum, Deputy Secretary of Defense, Pentagon, to Secretaries of the Military Departments, SUBJECT: Environmental Restoration Defense Account (3 May 1995).

¹³ 10 U.S.C. §§ 2701, 2708 (1986).

¹⁴ 60 Fed. Reg. 27,041 (1995).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Army and Air Force Courts of Criminal Appeals Split on the Constitutionality of Military Rule of Evidence 707 and Practitioners Await Resolution by the Court of Appeals for the Armed Forces

In *United States v. Scheffer*,¹ the Air Force Court of Criminal Appeals (AFCCA) upheld the constitutionality of Military Rule of Evidence (MRE) 707's categorical ban on the admissibility of polygraph evidence.² Specifically, the AFCCA held that the ban does not impermissibly infringe on an accused's Fifth Amendment right to due process and Sixth Amendment right to present a defense. In reaching its conclusion, the AFCCA specifically rejected the decision of the Army Court of Military Review (ACMR)³ in *United States v. Williams*,⁴ which held that MRE 707 was unconstitutional.⁵

In *Scheffer*, the accused was charged, among other things, with wrongful use of methamphetamine based on a positive urinalysis test result.⁶ The accused took a polygraph examination during which he denied having used illegal drugs. The polygrapher opined that the accused's polygraph charts "indicated no decep-

tion" to the test questions.⁷ At trial, the accused moved to admit the results of the polygraph, but based on MRE 707(a), the military judge denied the accused's motion and refused to allow him to lay a foundation for admission of the polygraph test results.⁸

The AFCCA began its analysis by noting that the issue to be resolved was not whether polygraph examinations should be admissible in trials by courts-martial, but whether the President may constitutionally prohibit their admission by promulgating MRE 707.⁹ The AFCCA further explained that it would not declare MRE 707 unconstitutional unless clearly shown that the President exceeded his discretionary powers conferred by Article 36(a) of the Uniformed Code of Military Justice (UCMJ).¹⁰

In view of an accused's right to due process under the Fifth Amendment and right to compulsory process under the Sixth Amendment, the AFCCA explained that the President exceeds his rule-making authority if he promulgates a rule that prohibits an accused from introducing "constitutionally required" evidence; that is, evidence that is "relevant, material, and favorable to the defense."¹¹ Mindful of this constitutional limit on presidential rule-making authority, the AFCCA established a general framework for examining constitutional challenges to rules of evidence,

¹ 41 M.J. 683 (A.F. Ct. Crim. App. 1995).

² MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 707 (1994 ed.) [hereinafter MCM] provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

³ On October 5, 1994, the United States Army Court of Military Review was renamed the United States Army Court of Criminal Appeals and the United States Court of Military Appeals was renamed the United States Court of Criminal Appeals for the Armed Forces. The name of the court at the time of the decision is the name used in referring to that decision. See *United States v. Sanders*, 41 M.J. 485 n.1 (1995).

⁴ 39 M.J. 555 (A.C.M.R. 1994), *certificate for review filed*, 39 M.J. 408 (C.M.A. Feb. 25, 1994).

⁵ *Id.* at 558. *Williams* held that the accused's Fifth Amendment right to a fair trial, combined with his Sixth Amendment right to produce favorable witnesses "afford[ed] him the opportunity to be heard . . . , and allow[ed] for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of [MRE] 707."

⁶ *United States v. Scheffer*, 41 M.J. 683, 686 (A.F. Ct. Crim. App. 1995).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 687.

¹⁰ *Id.* at 686; Article 36(a) of the Uniform Code of Military Justice provides, in pertinent part:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Uniform Code of Military Justice art. 36(a), 10 U.S.C.A. § 836(a) (1988).

¹¹ *Id.* at 687 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

like MRE 707(a), that prohibit an accused from presenting evidence. First, the testimony must be relevant under MRE 401 and 402 and vital to the defense when evaluated in the context of the entire record. If the evidence is either irrelevant or not vital to the defense, there is no constitutional right to present it. Second, the rule of evidence may not *arbitrarily* limit the accused's ability to present reliable evidence. Third, if the rule permits admission of the evidence for some purpose, but not for others, it may not *arbitrarily* limit admission by the defense to a greater degree than by the prosecution. Finally, the rule of evidence must not *arbitrarily* infringe on the right of the accused to testify in his or her own behalf.¹²

Applying these principles to MRE 707(a), the AFCCA stated that, although it assumed the accused's credibility was relevant and vital to his defense, presentation of polygraph evidence was not "vital to the court member's assessment of the accused's credibility."¹³ The AFCCA next ruled that "[MRE] 707 does not arbitrarily limit the accused's ability to present reliable evidence" as the rule is based "on sound reasoning."¹⁴

The AFCCA identified several factors supporting this conclusion. First, the AFCCA considered the drafters' policy reasons adopted by the President, exercising his Article 36(a), UCMJ, authority, in promulgating MRE 707.¹⁵ The drafters were concerned that courts-martial could degenerate into a battle of poly-

graph examinations and experts that would impose a burden on the administration of military justice and would outweigh the probative value of the evidence.¹⁶ Second, the AFCCA noted that the United States Court of Military Appeals (COMA) had raised "valid concerns about the soundness of the underlying principles of the technique and the reliability of any particular polygraph evidence."¹⁷ Third, MRE 707 applies a rule of evidence generally recognized by the federal courts: "While not a part of the Federal Rules of Evidence, most of the federal circuit courts of appeal still hold that polygraph evidence cannot be introduced into evidence to establish the truth of statements made during the polygraph examination."¹⁸ Finally, the AFCCA found persuasive that there is no federal court of appeals decision—either before or after promulgation of the Federal Rules of Evidence—which suggests that this federal rule, or any similar state rule, unconstitutionally interferes with an accused's rights to due process or to present a defense.¹⁹ In completing the analysis, the AFCCA summarily found that the MRE 707(a) prohibition against admission of polygraph evidence is comprehensive and equally applicable to both the prosecution and the defense and does not infringe on the right of an accused to testify in his or her own behalf.²⁰

The AFCCA expressly declined to follow the ACMR's holding in *United States v. Williams*.²¹ In *Williams*, based on MRE 707(a), the ACMR reversed a trial court's decision not to admit

¹² *Id.* at 690-91.

¹³ *Id.* at 691.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* According to the drafter's analysis, MRE 707 is based on the following policy grounds:

(1) the "danger that court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility'" [*United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975)];

(2) "[t]o the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted'" [*Alexander*, 526 F.2d at 168-69];

(3) the danger of confusion of the issues which "could result in the court-martial degenerating into a trial of the polygraph machine" [*State v. Grier*, 300 S.E.2d 351 (N.C. 1983)];

(4) presentation of polygraph evidence "can result in a substantial waste of time when collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case" [*People v. Kegler*, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987)]; and

(5) "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system." [*Kegler*, 242 Cal. Rptr. at 897];

MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-46. See generally John J. Canham, Jr., *Military Rule of Evidence 707: A Bright-Line Rule That Needs to Be Dimmed*, 140 MIL. L. REV. 65, 72-75 (1993).

¹⁷ *Scheffer*, 41 M.J. at 691 (citing *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987)). In *Gipson*, the COMA characterized the polygraph as "evidence for which the principles can neither be accepted nor rejected out of hand." The COMA declined to find that the principles underlying the polygraph are so judicially recognized that it is unnecessary to re-establish them in each case (like fingerprint or ballistics evidence) because of criticism of the scientific principles on which the polygraph and polygrapher's opinion is based, the importance of the precision of the questions, the way the examiner intended them, and the examinee understood them, the examinee's state of mind, and other conditions such as whether the examinee was taking medications, illegal drugs, or attempting countermeasures to control the physical responses to be recorded by the polygraph. *Gipson*, 24 M.J. at 248-49.

¹⁸ *Scheffer*, 41 M.J. at 691.

¹⁹ *Id.* at 691-92.

²⁰ *Id.* at 692.

²¹ 39 M.J. 555 (A.C.M.R. 1994).

the exculpatory results of two polygraph tests administered by the Army Criminal Investigation Command. The ACMR examined and found largely unpersuasive the drafters' policy reasons for MRE 707 stating that several of those reasons were "in the nature of matters that are routinely resolved by trial judges under [MRE] 403."²² The ACMR rejected the drafters' final reason (concerns about reliability), characterizing it to be, "in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations—not to mention the observation in *Gipson* that "[t]he greater weight of authority indicates that it [the polygraph] can be a helpful scientific tool."²³

In rejecting *Williams*, the AFCCA reasoned that merely because military judges often are called on to resolve issues similar to some of the concerns expressed by the drafters of MRE 707, or that the Department of Defense uses the polygraph as an investigative tool, does not bar the President from deciding that other more compelling factors substantially outweighs the probative value of polygraph evidence.²⁴ Moreover, the decision in *Gipson* simply established a methodology for military judges to resolve the admission of all manner of scientific evidence, not just polygraph evidence, while expressing reservations about the scientific reliability of polygraph evidence.²⁵

Practitioners will not have to wait long for the CAAF to resolve the divergent views of the Air Force and Army Courts of Criminal Appeals regarding the constitutionality of MRE 707. Following the ACMR's decision in *Williams*, The Judge Advocate General of the Army certified the following issue to the CAAF: "Whether Military Rule of Evidence 707 violates the accused's Fifth Amendment right to a fair trial or his Sixth Amendment right to produce favorable witnesses."²⁶ The CAAF heard oral arguments in *Williams* on 30 March 1995.

The direction that the CAAF takes in *Williams* remains to be seen. However, because no federal or state court has found that a constitutional right to present exculpatory polygraph evidence exists, it would be surprising if the CAAF reached this conclusion and affirmed the ACMR's decision in *Williams*. While the CAAF, in dicta, has suggested that defense introduction of exculpatory polygraph evidence may have constitutional dimensions, its comments give little indication that those constitutional concerns are sufficient to cause it to conclude that MRE 707 exceeds the President's rule-making authority. This is particularly true given the criticism in *Gipson* of the scientific principles underlying polygraph evidence.²⁷ For example, writing for the COMA in *Gipson*, Judge Cox noted that while a few courts have experimented with the notion that an accused has an independent, constitutional right to present favorable polygraph evidence, there is no right to present such evidence unless it is shown to be relevant and helpful.²⁸

In *United States v. Rodriguez*,²⁹ the COMA suggested, without concluding, that an accused may have a due process right to present exculpatory polygraph evidence under certain circumstances.³⁰ In *Rodriguez*, the COMA held that it was error for the government to present the results of polygraph test to rebut the accused's testimony, without requiring a proper foundation to show reliability. Judge Wiss, joined by Chief Judge Sullivan and Judges Cox and Gierke, opined in a footnote that, at least for an accused, due process and fundamental fairness might compel admission of exculpatory polygraph evidence, provided the accused demonstrates the requisite foundation of relevance, reliability, and helpfulness to the factfinder consistent with *Gipson*.³¹

However, in an opinion concurring with the result in *Rodriguez*, Judge Crawford forcefully replied to the majority's footnote, arguing that neither due process and fundamental fair-

²² *Id.* at 558 (fear that court members would be misled, concern that a confusion of issues would arise, and the possibility that the trial would incur a substantial waste of time).

²³ *Id.* at 555 (quoting *Gipson*, 24 M.J. at 249).

²⁴ *Scheffer*, 41 M.J. at 691.

²⁵ *Id.*

²⁶ *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994), *certificate for review filed*, 39 M.J. 408 (C.M.A. Feb. 25, 1994) (No. 94-5006/AR). The COMA granted the government's motion to file amicus curiae brief on behalf of the United States Air Force. *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994), *interlocutory order*, 40 M.J. 48 (C.M.A. May 16, 1994) (No. 94-5006/AR).

²⁷ *Gipson*, 24 M.J. at 248-49; *see also Scheffer*, 41 M.J. at 689-90.

²⁸ *Gipson*, 24 M.J. at 252.

²⁹ 37 M.J. 448 (C.M.A. 1993).

³⁰ *Id.* at 452 n.2.

³¹ *Id.*

ness nor Article 46, UCMJ,³² compels admission of exculpatory polygraph evidence.³³ Pointing to various federal and state court decisions, Judge Crawford concluded, "[n]either the Constitution nor the Code requires admissibility of polygraph evidence."³⁴

In light of the unsettled application of MRE 707(a), trial defense counsel should vigorously seek admission of exculpatory polygraph evidence. In opposition, trial counsel should rely on the text of the Rule and the AFCCA's holding in *Scheffer* to block polygraph evidence pursuant to MRE 707(a). Major MacKay, Individual Military Augmentee.

Wilson v. Arkansas: Fourth Amendment May Require Police to Knock and Announce

In *Wilson v. Arkansas* the United States Supreme Court ruled that the Fourth Amendment, in some situations, requires police officers to knock and announce their presence before entering a house to conduct a search.³⁵ The Supreme Court held that the common law "knock and announce" principle forms a part of the reasonableness inquiry under the Fourth Amendment.

The accused in *Wilson*, Sharlene Wilson, made a series of narcotics sales to an undercover police informant. During the last sale, Wilson waved a semiautomatic pistol in the informant's face and threatened to kill her if she turned out to be working for the police.³⁶

The next day, the police obtained warrants to arrest Wilson and search her home. The police entered Wilson's home by opening an unlocked screen door. While entering, they identified themselves as police officers and stated they had a warrant. Inside, the police seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition. They found Wilson in a bathroom, flushing marijuana down the toilet.³⁷

At her trial on narcotics charges, Wilson moved to suppress the evidence seized from her home because the police had failed

to "knock and announce" before entering her home. The trial court summarily denied the motion and Wilson was convicted of all charges. The Arkansas Supreme Court affirmed her conviction, holding that the Fourth Amendment did not require the knock and announce principle.³⁸

The Supreme Court reversed the Arkansas Supreme Court's decision. Justice Thomas, delivering the opinion of the unanimous Court, reasoned that the framers of the Fourth Amendment thought that the manner in which an officer enters a home should be considered when assessing the reasonableness of a search because the common law "knock and announce" rule was part of early American law.³⁹ Although Justice Thomas found that the knock and announce principle forms a part of the reasonableness inquiry under the Fourth Amendment, he also noted that not every entry need be preceded by an announcement. The Court remanded the case to the Arkansas Supreme Court so that it could determine whether an announcement was required before the police could enter Wilson's home.⁴⁰

Justice Thomas did not define which circumstances require an announcement, leaving this task to the lower courts. However, he indicated that threats of physical violence or the possibility of destruction of evidence would justify the police's failure to knock and announce. Justice Thomas noted that Wilson's previous threats and the risk of destruction of evidence might have given the police adequate justification for failing to announce their entry.

In the past, courts have focused primarily on the second clause of the Fourth Amendment, which requires warrants based on probable cause.⁴¹ However, recently many courts have begun to focus more on the first clause of the Fourth Amendment, which requires that searches be reasonable.⁴² Some judges view the reasonableness of a search as the primary factor in determining its validity under the Fourth Amendment.⁴³ *Wilson* is an example of this new focus.

³² Uniform Code of Military Justice art. 46, 10 U.S.C.A. § 846 (1988) provides that the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

³³ *Rodriguez*, 37 M.J. at 453 (Crawford, J., concurring).

³⁴ *Id.* at 455.

³⁵ 63 U.S.L.W. 4456 (U.S. May 22, 1995).

³⁶ *Id.* at 4457.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 4458.

⁴⁰ *Id.* at 4459.

⁴¹ The second clause of the Fourth Amendment provides: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

⁴² The first clause of the Fourth Amendment states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

⁴³ For example, Judge Cox has stated that "[t]he Fourth Amendment only protects military members against unreasonable searches within the context of military society." *United States v. Lopez*, 35 M.J. 35, 45 (C.M.A. 1992) (Cox, J., concurring with modest reservations).

The extent of *Wilson's* application to the military is open to debate.⁴⁴ The common law knock and announce rule was developed in the context of civilian homes, not military quarters.⁴⁵ Arguably, the knock and announce requirement of *Wilson* may not apply in the barracks because barracks rooms have been treated differently than private homes under the Fourth Amendment.⁴⁶ However, the requirement probably applies to other types of military quarters—such as family quarters or bachelor officer quarters—which have been treated similar to civilian homes for Fourth Amendment purposes.⁴⁷ Until the issue is resolved, military police officers and others conducting searches should assume that the requirement applies to all types of military quarters, including the barracks.

Defense counsel should argue that the failure of the military police officers or other officials conducting a search to knock and announce their presence violates the Fourth Amendment. Furthermore, if any damage was caused during the unannounced entry, defense counsel should point this out because the knock and announce rule was designed, in part, to prevent unnecessary damage to a suspect's home.⁴⁸

Prosecutors confronted with these arguments should attempt to establish that an announcement would have placed those conducting the search in danger or led to destruction of evidence. The most effective way to do this is to present testimony of the officials who conducted the search.

Wilson requires government officials conducting a search to knock and announce their presence before entering a home in some situations. Until the courts clarify the extent of the requirement, military police and other officials conducting searches should satisfy this requirement, unless an announcement would endanger them or lead to destruction of evidence. Major Masterton.

Contract Law Notes

Bell Tolls For 8(a) Program—All Affirmative Action Programs Now Subject to Strict Scrutiny

The United States Supreme Court recently handed down an opinion which is likely to have far reaching consequences on how the government procures goods and services. In *Adarand Constructors, Inc. v. Peña*,⁴⁹ the Court departed from recent precedent and vacated a judgment of the United States Court of Appeals which had upheld a Department of Transportation (DOT) program providing cash incentives to prime contractors who subcontracted with minority firms.⁵⁰ In a five to four opinion, the Court determined that all racial classifications, even those imposed for "benign" purposes, must be analyzed by a reviewing court using strict scrutiny.⁵¹ Hence, only those programs that are narrowly tailored to meet a compelling government interest will pass constitutional muster.

⁴⁴ The requirement may not apply to the military at all if, as Judge Crawford has suggested, the Fourth Amendment does not apply to the military. See *Lopez*, 35 M.J. at 41 ("The Supreme Court has never expressly applied the Bill of Rights to the military . . ."); *United States v. Taylor* 41 M.J. 168 (C.M.A. 1994) ("Because of the 'special needs' in the military . . . the Fourth Amendment may not apply in total."). See also Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110 (1994).

⁴⁵ *Wilson*, 63 U.S.L.W. at 4457-58.

⁴⁶ In *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993), the United States Court of Military Appeals (COMA) held that a warrant or authorization is not required to apprehend a soldier in a barracks room. The COMA reasoned that the Fourth Amendment only requires a warrant if an apprehension occurs in a "home" and that a barracks room is not a "home." The COMA observed that Rule for Courts-Martial (R.C.M.) 302(e)(2), provides that an arrest warrant or authorization is only required in a "private dwelling," and that a living area in military barracks is not a "private dwelling." MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 302(e)(2) (1984) [hereinafter MCM]. In a concurring opinion, Judge Wiss stated that the majority's opinion necessarily rests on the proposition that there is no Fourth Amendment reasonable expectation of privacy in a barracks room. *McCarthy*, 38 M.J. at 405 (Wiss, J., concurring). Arguably, this holding means that there is no need for officials to knock and announce their presence prior to conducting a search in the barracks, because of the lessened (or nonexistent) expectation of privacy in the barracks.

⁴⁷ Apprehensions in family quarters are treated like apprehensions in civilian homes under the Fourth Amendment. Rule for Courts-Martial 302(e)(2) provides that apprehension authorizations or warrants are required in "private dwellings," which include military single family houses, duplexes and apartments. MCM, *supra* note 46, R.C.M. 302(e)(2). In *United States v. Jamison*, 2 M.J. 906 (A.C.M.R. 1976), the Army Court of Military Review held that a proper warrant or authorization was required to apprehend a soldier in a noncommissioned officer housing area. Bachelor officer quarters also are treated like civilian homes for Fourth Amendment purposes. In *United States v. Kalisky*, 37 M.J. 105 (C.M.A. 1993), the COMA held that an accused had a Fourth Amendment expectation of privacy in the back patio of his bachelor officer quarters. In a dissenting opinion, Judge Crawford pointed out that the majority's opinion treated bachelor officer quarters differently than barracks rooms. *Id.* at 112 (Crawford, J., dissenting). Bachelor enlisted quarters, on the other hand, have been treated like the barracks for Fourth Amendment purposes. In *United States v. McCormick*, 13 M.J. 900 (N.M.C.M.R. 1982) the Navy-Marine Court of Military Review upheld a warrantless apprehension in a bachelor enlisted quarters, treating the quarters like a barracks room.

⁴⁸ *Wilson*, 63 U.S.L.W. at 4459.

⁴⁹ No. 93-1841, 1995 U.S. LEXIS 4037 (U.S. June 12, 1995).

⁵⁰ *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537 (10th Cir. 1994).

⁵¹ 1995 U.S. LEXIS 4037, at *51.

Anyone familiar with the tortuous history of the Court's affirmative action jurisprudence knows that the Court has had an exceedingly difficult time articulating a standard to apply to affirmative action cases.⁵² A consensus appeared to develop in the late 1980s after the appointment of several justices by President Reagan. In *Richmond v. J.A. Croson Co.*,⁵³ the Court dealt a serious blow to affirmative action programs when it struck down a Richmond, Virginia, ordinance requiring prime contractors on city construction contracts to subcontract at least thirty percent of the dollar amount of the contract to "Minority Business Enterprises." Applying the strict scrutiny analysis, the Court held that the Fourteenth Amendment prohibited such race-based actions which were not narrowly tailored to remedy the effects of prior discrimination. However, in a startling about face just one year later, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,⁵⁴ the Court upheld the Federal Communications Commission's policy of granting a preference to minorities when distributing broadcast licenses. The Court reasoned that such "benign" racial classifications were within the power of Congress because they served "important governmental objectives" and were "substantially related to achievement of those objectives."⁵⁵

After *Metro*, the Supreme Court did not address affirmative action litigation until 1995, when it agreed to hear the *Adarand* case. In *Adarand*, the DOT awarded a highway construction con-

tract to Mountain Gravel & Construction Company. The contract included a Subcontractor Compensation Clause (SCC)⁵⁶ which provided that the contractor would receive additional compensation if it subcontracted with firms controlled by "socially and economically disadvantaged individuals."⁵⁷ Mountain Gravel subsequently solicited bids from subcontractors to perform the guardrail portion of the contract. Although Adarand Constructors submitted the low bid, Mountain Gravel awarded the subcontract to a minority firm, Gonzales Construction Company,⁵⁸ thereby becoming entitled to a bonus payment of \$10,000.⁵⁹

After losing in federal district court and the Court of Appeals for the Tenth Circuit, Adarand Constructors asserted in the Supreme Court that the race-based presumptions used by the DOT violated its right to equal protection of the law.⁶⁰ The Supreme Court agreed, announcing a new "strict scrutiny" for all racial classifications, federal or state, benign or otherwise. The Court expressly overruled *Metro*, finding that their decision in *Metro* was a departure from the *Croson* strict scrutiny standard and could not be justified under Congress' power under the Fourteenth Amendment to enforce equal protection guarantees.⁶¹ In a strongly worded concurring opinion, Justice Thomas described the SCC program as "racial paternalism" with consequences "as poisonous and pernicious as any other form of discrimination."⁶²

⁵² See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (petitioner successfully challenged medical school's practice of reserving a number of spaces in its entering class for minority students, although court failed to reach a majority opinion); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Court upholds ten percent set-aside for minority businesses in the Public Works Employment Act of 1977—court failed to reach majority opinion).

⁵³ 488 U.S. 469 (1989).

⁵⁴ 497 U.S. 547 (1990).

⁵⁵ *Id.* at 564-65. The Court applied an "intermediate scrutiny" previously used by three justices in *Fullilove*, 448 U.S. 448. See *supra* note 52. In *Fullilove*, the Court recognized that Congress has the power to enforce the Fourteenth Amendment, a power not available to state or local governments. See U.S. CONST. amend. XIV, § 5. In *Metro*, the Court distinguished *Croson* as a case involving racial classifications by state and local governments which required strict scrutiny.

⁵⁶ The Small Business Act, 15 U.S.C. § 631 et seq. (1988), authorizes federal agencies to provide incentives to contractors to encourage subcontracting with small business concerns owned and controlled by socially and economically disadvantaged individuals. *Id.* § 637(d)(4)(E). The Act also requires contractors on certain contracts to negotiate a subcontracting plan which provides the "maximum practical opportunity" for such disadvantaged firms to perform the contract. *Id.* § 637(d)(4)(C) and (D). Mountain Gravel's contract with the DOT was awarded pursuant to a DOT appropriations act, the Surface Transportation and Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132. This Act adopted the Small Business Act's definition of "socially and economically disadvantaged individuals" and required expenditure of not less than ten percent of the appropriated funds on small business concerns owned and controlled by socially and economically disadvantaged individuals.

⁵⁷ The Small Business Act defines "socially disadvantaged individuals" as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. 15 U.S.C. § 637(a)(5) (1988). "Economically disadvantaged individuals" are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. *Id.* § 637(a)(6)(A). The Act requires contractors to presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. *Id.* § 637(d)(3)(C).

⁵⁸ Gonzalez was certified as a small business controlled by "socially and economically disadvantaged individuals."

⁵⁹ The contract provided that the contractor was entitled to additional compensation of ten percent of the subcontract amount, but not to exceed one and a half percent of the original contract amount. 1995 U.S. LEXIS 4037, at *17. See also *Adarand*, *supra* note 50, at 1542.

⁶⁰ Adarand's claim arose under the Fifth Amendment, which prohibits the government from depriving anyone of "life, liberty, or property, without due process of law." U.S. CONST. amend. V.

⁶¹ See discussion of *Metro*, *supra* note 55. The Court also held that *Fullilove* is "no longer controlling" to the extent that it held federal racial classifications to a "less rigorous standard" than strict scrutiny. 1995 U.S. LEXIS 4037, at *66.

⁶² 1995 U.S. LEXIS 4037, at *75.

What does this case mean for the future of the Small Business Act's 8(a) program, the Department of Defense's (DOD) Small Disadvantaged Business (SDB) Program, and the scores of other programs designed to provide government contract dollars to minority owned firms?⁶³ First, it is important to note what the Court did not do. The Court did not strike down these programs. Rather, the Court returned the case to the Court of Appeals to determine whether the interests served by the SCC program are compelling and whether the program is narrowly tailored, i.e., appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate."⁶⁴ Further, the Court left the door open for possible affirmative action in specific cases. Noting the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country," the Court implied that remedial discrimination may still be permissible so long as it meets the "compelling interest" and "narrowly tailored" requirements.⁶⁵

Nevertheless, it might be impossible for the government to demonstrate a "compelling" interest in maintaining such broad based programs as the 8(a) set-aside program and the SDB program. For example, in *Croson* the Court found that the City of Richmond failed to show a compelling interest in requiring subcontracts with minority firms because the city presented no evidence that either the city or its prime contractors had discriminated on the basis of race against minority subcontractors.⁶⁶ The Court also found that the statute was not narrowly tailored because the city failed to consider race-neutral means to increase minority participation in city contracting, and the thirty percent quota unrealistically assumed that minorities will choose a particular trade "in lockstep proportion to their representation in the local population."⁶⁷

As a result of the *Croson* decision, over 200 plaintiffs have successfully challenged various state and local minority contractor preference programs.⁶⁸ A similar fate probably awaits the 8(a) program, the SDB program, and other programs designed to assist minority firms in obtaining government contracts. Although minority firms have undoubtedly benefitted from these programs,⁶⁹ it seems unlikely that the government could demonstrate nationwide discrimination in all industries such that these programs could survive in their present form.

Recent rumblings from Congress indicate that affirmative action programs will find limited support in the near future.⁷⁰ In response to *Adarand*, the Justice Department is preparing to issue guidelines to all federal agencies advising them to review their affirmative action programs.⁷¹ The guidelines will advise agencies to focus on whether similar results could be achieved through race-neutral programs, whether the program is finitely structured, and whether the program is narrowly tailored to meet "definable discrimination" rather than "broadly directed at historical racial programs."⁷² The end result of this review process will likely be a complete overhaul or elimination of many federal minority preference programs. Major Causey.

Employment Law Practice Notes

Compensatory Damages, Settlement, and Relations in the Equal Employment Opportunity Complaint Process

On May 3, 1995, Deputy Assistant Secretary of the Army John W. Matthews issued a policy memorandum to Army Equal Employment Opportunity (EEO) Officers that delegates authority for awarding compensatory damages in EEO complaints to activity

⁶³ The "8(a) program" is named after section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), which requires the Small Business Administration to enter contracts with other federal agencies and arrange for the performance of those contracts with socially and economically disadvantaged small business concerns. The Department of Defense (DOD) SDB Program generally requires DOD activities to set-aside for SDBs all contracts where there is a reasonable expectation of receiving two or more offers from SDBs, if award will be made at not more than ten percent above fair market price. See DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 219.502-2-70 (1 Apr. 1984). In unrestricted acquisitions, the contracting officer must provide a ten percent evaluation preference to all SDB offers. *Id.* subpt. 219.70. The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7102, 108 Stat. 3243, 3368, authorizes civilian agencies to implement a program similar to the DOD SDB program.

⁶⁴ *Adarand*, 1995 U.S. LEXIS 4037, at *69-*70 (quoting *Fullilove*, 448 U.S. at 513).

⁶⁵ *Id.* at *68-*69. The Court specifically noted that in 1987, every justice on the Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. *Id.* (citing *United States v. Paradise*, 480 U.S. at 167).

⁶⁶ 488 U.S. at 480, 499-501 (the Court noted that conclusory statements that there is racial discrimination in the construction industry, and reliance on the disparity between contracts awarded to minority firms and the minority population of the City of Richmond, were of "little probative value").

⁶⁷ *Id.* at 507.

⁶⁸ Kenneth A. Martin et al., *Is This the End of Federal Minority Contracting?*, FED. LAW., Feb. 1995, at 44, 48.

⁶⁹ Over 5000 firms are in the 8(a) program. In fiscal year 1994, these firms received over 6000 new contracts and 19,000 contract modifications, valued at over four billion dollars. See United States General Accounting Office, *Status of SBA's 8(a) Minority Business Development Program*, GAO/T-RCED-95-122, March 6, 1995 (Statement of Judy England-Joseph, Director, Housing & Community Development Issues, Resources, Community, & Economics Division).

⁷⁰ *Affirmative Action Programs Take Hits From All Sides*, 37 GOV'T CONTRACTOR ¶ 175 (Mar. 29, 1995) (Senator Dole intends to introduce legislation prohibiting preferential treatment for any person based on membership in a favored group).

⁷¹ Alan Devroy, *Reno to Issue Guidelines for Federal Affirmative Action*, WASH. POST, Jun. 23, 1995, at A1.

⁷² *Id.*

and installation commanders. This memorandum also eliminates the dollar limit on the local command's authority to award attorney fees in EEO settlements. These changes to Army policy present interesting challenges and opportunities for the labor counselor.

The Army incorporates the EEO Commission's current guidance on award of compensatory damages in the administrative process. The complainant must establish a prima facie case of discrimination and support a claim for compensatory damages by objective or other valid evidence. However, of particular interest to labor counselors is paragraph 1h, which states that a settlement agreement "which includes payment of compensatory damages must be in writing and drafted by the activity labor counselor."⁷³ This requirement for involvement of a labor counselor appears to differ from other Army guidance, but the apparent conflict can be reconciled.

The same Army policy memorandum that delegates authority for awarding compensatory damages also lifts the previous dollar limitation on payment of attorney fees in EEO settlements.⁷⁴ The memorandum modifies the interim complaints regulation and states:

[a]n Activity commander or designee may agree to pay attorney fees in settlement of an EEO complaint only after consultation with the labor counselor and EEO officer. The labor counselor is responsible for evaluation of any claim or request for attorney fees and for providing legal advice to ensure that the activity does not agree to pay more than the maximum allowable attorney fees in any case. The labor counselor, as agency representative, must negotiate the settlement on behalf of the agency and *should* draft the settlement agreement.⁷⁵

This revision to the interim regulation makes the labor counselor the lead player in any settlement agreement that awards attorney fees.⁷⁶ The labor counselor therefore *must*, not "should," ensure

that these settlement agreements fully comply with law, regulation, and policy before approving the agreement for signature.

The only settlement agreements not addressed by this policy memorandum are those that award no compensatory damages or attorney fees. The settlement paragraph of the basic interim complaints regulation does not even mention the labor counselor.⁷⁷ However, this oversight must be read in context with the remainder of the regulation and the labor counselor's responsibilities as the agency representative in EEO complaints.

The labor counselor is the Army's designated representative in EEO complaints.⁷⁸ One of the labor counselor's specific responsibilities as the Army's representative is to review settlement agreements for legal sufficiency.⁷⁹ The labor counselor therefore *must* add, delete, edit, and revise every settlement agreement until it fully complies with law, regulation, policy, and the parties' intent. Labor counselors who experience repeated problems with EEO officers refusing to incorporate their legal sufficiency objections in settlement agreements should raise the matter through the staff judge advocate to the commander.

The labor counselor's responsibilities and authority also extend beyond settlement agreements. As the agency representative, the labor counselor must be involved in every aspect of the EEO complaint after a formal complaint has been filed. Because acceptance or rejection of the complaint takes place after the formal complaint is filed, the labor counselor's involvement should begin there.

In its April 25, 1995, bulletin, the Equal Employment Opportunity Compliance, Complaints, and Review Agency (EEOCRA) emphasized the importance of teamwork between the labor counselor and the EEO officer. The bulletin stated, however, that the EEO officer "retains authority to accept an otherwise dismissable complaint" over the objection of the labor counselor and that the labor counselor has no power to "veto EEO officer decisions." These comments should be interpreted as applying only to issues of acceptance or dismissal of complaints *within the authority* of the EEO officer. Labor counselors should not attempt to infringe on EEO officers' discretionary authority,

⁷³ Memorandum, Deputy Assistant Secretary of the Army John W. Matthews, to all EEO Officers, subject: Compensatory/Attorney Fees Settlement Policies, enclosure, "Settlement Policy—Compensatory Damages" (May 3, 1995).

⁷⁴ Army policy previously limited local authority for payment of attorney fees to six thousand dollars.

⁷⁵ DEP'T OF ARMY, REG. 690-600, Equal Employment Opportunity Discrimination Complaints, para. 4-4b(5) (3 May 1995 revision to interim version of 25 March 1993) (emphasis added) [hereinafter AR 690-600].

⁷⁶ Other portions of the revised regulation require the labor counselor to compile supporting documentation, make a written recommendation on fees, and coordinate awards with both the Labor and Employment Law Division of the Office of the Judge Advocate General and with the EEOCRA. See, e.g., *id.* paras. 4-4b(7), 4-4c(1), 4-4c(3) (3 May 1995 revision).

⁷⁷ *Id.* para. 2-10.

⁷⁸ *Id.* para. 6-6.

⁷⁹ *Id.* para. 1-4i(3).

but they *must* fulfill their representational responsibilities and ensure that EEO officers do not exceed their authority.

The EEO officer has the authority to administer the EEO complaint process and to make factual determinations in accepting or dismissing allegations of discrimination. For example, whether the complainant raised a particular matter in the course of counseling is a factual matter solely for the EEO officer's determination. In other matters, however, the EEO officer may have no option but to seek the labor counselor's legal assessment of an issue and defer to that legal analysis.

Under the Equal Employment Opportunity Commission's (EEOC) rules for processing federal sector discrimination complaints,⁸⁰ the Army only has the authority to process complaints within the purview of the federal discrimination laws.⁸¹ Complainants often will raise issues that require a legal analysis to determine whether the complaint must be dismissed under EEOC rules.⁸² The issue of purview requires application of legal theories such as standing and "aggrieved."⁸³ To fall within this purview, a complainant must suffer "some direct harm which [sic] affects a term, condition, or privilege of employment."⁸⁴ Allegations outside the purview of the federal discrimination laws are not "dismissable" complaints that can be processed in the best interests of the command.⁸⁵ They must be dismissed. When the labor counselor determines that a complaint is not within the purview of the EEO complaint process, the EEO officer must reject the allegation and notify the complainant of the applicable appeals procedure.⁸⁶

In these times of downsizing, employee unrest results in an increase of EEO complaints. To maintain a positive civilian per-

sonnel program, effective teamwork is essential among the labor counselor, the EEO officer, the civilian personnel officer (CPO), and management. Labor counselors should strive to assist the EEO officer and CPO in every way possible and become an ally in the EEO complaint process. Each member of the management team has a key role to play in protecting the interests of both employees and management. These roles should complement each other. Teamwork is most critical during the initial stages of the complaint and in settlement—particularly the settlement of complaints involving compensatory damages or unlimited attorney fees. Labor counselors should always strive to be "coordinational," not confrontational with team members. However, they also must ensure that they protect the interests of the Army. That is, after all, their job. Major Hemicz.

To Award or Not to Award—The Agency's Discretion to Award Backpay After Termination of an Indefinite Suspension

The United States Court of Appeals for the Federal Circuit (CAFC) recently modified its interpretation of an employee's right to back pay following reinstatement from an indefinite suspension. Under this revised analysis, the agency has the discretion, depending on the circumstances, to reinstate an employee with or without back pay following an indefinite suspension.

In *Richardson v. United States Custom Service*,⁸⁷ the CAFC reviewed an arbitrator's award of back pay to two customs inspectors following their acquittal on criminal charges.⁸⁸ The agency had suspended the employees indefinitely after their indictment by a federal grand jury for assault on a federal of-

⁸⁰ 29 C.F.R. § 1614 (1995).

⁸¹ The pertinent section of the EEOC rules states that "[t]he agency shall dismiss a complaint . . ." *Id.* § 1614.107. AR 690-600, *supra* note 75, para. 2-5, echoes these limitations on the compliant process.

⁸² One of the bases for dismissing a discrimination complaint is when the complaint raises a matter already pending in a civil action in a United States District Court. 29 C.F.R. § 1614.107(c) (1995). A legal analysis of the civil complaint and the substance of the administrative complaint may be necessary to determine whether the allegation *must* be dismissed under this section.

⁸³ The EEOC equates the requirement that an individual be "aggrieved" with the standing requirement to file a civil action in court. See EEOC COMPLIANCE MANUAL, vol. II, § 605.3 (1983) ("An individual seeking to file a charge of employment discrimination must have standing to do so."). For a thorough discussion of standing, see *Warth v. Seldin*, 422 U.S. 490 (1975).

⁸⁴ *March v. Health and Human Svcs.*, EEOC No. 01940975 at 3 (June 3, 1994). This scope restriction comes directly from Title VII of the Civil Rights Act of 1964, as amended, which prohibits discrimination that "discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges or employment." 42 U.S.C. § 2000e-2(a)(1) (1995).

⁸⁵ It is unclear what the EEOCRA bulletin intended by a "dismissable" complaint. The EEOC regulations are quite specific in *requiring* the dismissal of complaints that do satisfy the criteria for acceptance in 29 C.F.R. § 1614.107 (1995). Neither the EEOC regulations nor the interim AR 690-600 defines "dismissable" complaint or otherwise provides for acceptance of allegations that do not fully satisfy the EEOC regulatory criteria.

⁸⁶ Under 29 C.F.R. § 1614 (1995), Subpt. D, a complainant can appeal to the EEOC the dismissal of a complaint or a portion of a complaint.

⁸⁷ 47 F.3d 415 (Fed. Cir. 1995).

⁸⁸ In appealing a suspension for more than fourteen days taken by an agency under Chapter 75 of Title 5, United States Code, an employee may elect review by the MSPB or by an arbitrator under an applicable negotiated grievance procedure. *Cf.* 5 U.S.C. § 7701 (1995) (MSPB jurisdiction) with 5 U.S.C. § 7121(e)(1) (1995) (arbitrator's authority). The CAFC has appellate jurisdiction over both options. See 5 U.S.C. § 7703 (1995) (appeals from MSPB decisions); 5 U.S.C. § 7121(f) (1995) (review of arbitration awards).

ficer.⁸⁹ After the employees were acquitted, the agency reinstated them without back pay, effective the day of their acquittal. An arbitrator awarded the employees back pay for the period of suspension, finding that the suspension was invalid and unjustified because the employees were acquitted of the underlying charges.⁹⁰

After reviewing prior cases, the CAFC found that any decisional rule it might declare would be an arbitrary imposition of judicial law making. Congress simply failed to provide specific guidance for these cases. To adopt the employees argument, that any such suspension is "conditioned" on the successful prosecution of the underlying charges, would add another arbitrary complication to "an already convoluted field."⁹¹ The government argued that reinstated employees can *never* receive back pay. The court found that such an interpretation could deny remuneration to a deserving employee.

Under the CAFC's analysis in *Richardson*, the agency has sole discretion to determine whether to grant back pay to an employee who has been suspended indefinitely because of pending criminal charges and then acquitted of all charges. "[T]he agency is neither required to nor precluded from making the reinstatement with back pay retroactive to the date of the suspension."⁹² The agency's determination would be reviewable only for an abuse of discretion, but the CAFC would *not* have jurisdiction over the appeal.⁹³

Upon reinstatement of an employee from indefinite suspension, agency advocates can take advantage of this flexible ap-

proach to deny back pay awards. Employees will argue their right to back pay and threaten appeal of the agency's decision. Under the abuse of discretion standard, however, success on appeal will be unlikely. The agency can, however, offer a settlement that provides for some back pay to entice the employee to waive further appeal. The indefinite suspension in the employee's record would be modified to a shorter period of indefinite suspension. This would entitle the employee to some back pay but avoid the Back Pay Act requirement of an unwarranted or unjustified personnel action. An employee who refuses to accept the agency's settlement offer is left with no back pay and the nearly insurmountable task of surviving the agency's motion to dismiss in the Court of Federal Claims. Major Hernicz.

Employees Must Still Obey and Grieve?

With its decision in *Fleckenstein v. Department of the Army*,⁹⁴ the Merit Systems Protection Board (MSPB or Board) sent shock waves through the federal civilian personnel and management communities. The *Fleckenstein* holding appeared to reverse a longstanding precedent that an employee cannot refuse to obey a management directive that the employee perceives as improper or illegal—the employee is obligated to obey the directive and challenge the order collaterally by appeal or other grievance process.⁹⁵ Over the scathing dissent of Member Amador,⁹⁶ the majority's decision in *Fleckenstein* appeared to say that an employee is justified in refusing a management order the employee reasonably believes is not authorized by law or regulation. The MSPB has since clarified the *Fleckenstein* decision in a series of

⁸⁹ Amorphous, at best, describes the statutory authority for suspending indefinitely an employee facing criminal charges. The courts have interpreted the statutory authority to shorten the notice period when a crime is suspected as allowing the agency to also suspend the employee pending the outcome of criminal charges. Cf. 5 U.S.C. § 7513(b) (1995) (providing for thirty days advance notice of proposed action in normal suspension actions) with 5 U.S.C. § 7513 (b)(1) (1995) (allowing the shortening of the notice period to seven days where "there is reasonable cause to believe the employee has committed a crime for which imprisonment may be imposed"). See also, *Parraras-Carayannis v. Dept. of Justice*, 9 F.3d 955 (Fed. Cir. 1993) and *Dunnington v. Dept. of Justice*, 956 F.2d 1151 (Fed. Cir. 1992) (discussing the agency's authority to suspend an employee without pay pending the outcome of criminal proceedings).

⁹⁰ Under the Back Pay Act, an employee is only entitled to an award of back pay when the employee has undergone an "unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b) (1995).

⁹¹ *Richardson*, 47 F.3d at 420.

⁹² *Id.* at 421.

⁹³ Such an appeal would probably fall under the jurisdiction of the Tucker Act, 28 U.S.C. § 1491 (1995), and be filed in the Court of Federal Claims. The cause of action would allege that the denial of back pay constituted a violation of the Back Pay Act. The Court of Federal Claims would review the agency's decision under the Administrative Procedure Act, 5 U.S.C. § 706 (1995), which allows reversal of a discretionary agency discretionary decision only if it is found "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." The CAFC applies a similar standard in appeals of adverse actions under 5 U.S.C. § 7703 (1995). It will overturn any reviewable agency action found to be "(1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." However, reinstatement following indefinite suspension is not a personnel action appealable under Chapters 71 or 75 of Title 5, United States Code. The court exercised jurisdiction over the arbitrator's decision in *Richardson* because the issue of back pay had not been resolved. It advised, however, that "jurisdiction would no longer lie [in the CAFC] for future claims brought in the same manner." *Richardson*, 47 F.3d at 418.

⁹⁴ 63 M.S.P.R. 470 (1994).

⁹⁵ The most frequently cited case for this rule is *Gragg v. U.S. Air Force*, 13 M.S.P.R. 296 (1982), *dismissed*, 717 F.2d 1343 (Fed. Cir. 1983). The MSPB found its decision in *Fleckenstein* "not inconsistent" with *Gragg*, but did overrule it "[t]o the extent that *Gragg* could be interpreted as indicating that an employee can be disciplined for a refusal to obey an order that the agency is not entitled to have obeyed." *Fleckenstein*, 63 M.S.P.R. at 474.

⁹⁶ Member Amador described the majority's decision as "eradicate[ing] a principle of civil service law which has been a pillar of federal sector employer-employee relations." *Fleckenstein*, 63 M.S.P.R. at 477. Among his objections to the majority's decision, Member Amador believed the decision "flout[ed] both common sense and a long accepted principle of civil service law" and would "open a veritable Pandora's box of evils and lead to the inevitable disintegration of discipline in the federal workforce." *Id.*

cases and reinstated much of the rule which that case appeared to vacate.

The appellant's supervisor in *Fleckenstein* had proposed a five-day suspension. In preparing his response to the suspension, the appellant accessed office records after hours. The appellant's supervisor saw him with the records and attempted to retrieve them, but the appellant refused to return them. The supervisor proposed the appellant's removal for various charges, including insubordination and unauthorized use of government records. Instead of removing the appellant, the deciding official imposed a thirty-day suspension, which the MSPB administrative judge (AJ) sustained.

On petition for review to the MSPB, the appellant argued that the supervisor's order was not authorized. He had prepared notes from discussions with his attorney concerning his defense to the proposed suspension, which were mixed in among the documents she demanded.⁹⁷ Because those notes were privileged, the supervisor could not demand the entire stack of documents from him. The MSPB majority agreed with *Fleckenstein* and held that an agency fails in its burden to prove insubordination unless it proves the order from management was authorized when given.⁹⁸

Since *Fleckenstein*, the MSPB has gone out of its way to "clarify" its holding and substantially limit its application. In *Heath v. Department of Transportation*,⁹⁹ the MSPB sustained the appellant's removal based, in part, on theft of government property. The MSPB found that the management's request to screen all property the appellant removed from his office was "while undoubtedly upsetting to the employee, . . . within the employer's prerogative, and . . . expected to entail only a momentary glance at any particular item to determine whether it was personal or agency property."¹⁰⁰

⁹⁷ The appellant had typed four pages of notes from a discussion held with his attorney. The majority of the MSPB believed it would have been "unreasonable to have expected the appellant to separate out these papers from the other documents while [the supervisor] was demanding the entire package." *Id.* at 475. Member Amador responded in his dissent:

[t]he majority rather weakly opine that it would be "unreasonable" to have expected the appellant to sort out these papers when his supervisor was demanding the entire package. No doubt this opinion is based on my colleagues' concern over the palpitations they imagine the appellant must have suffered. However, for one of merely normal capacities, the task of separating four pages of work prepared by one's attorney from five pages of agency work reports is easily accomplished.

Id. at 476-477.

⁹⁸ *Id.* at 474-475.

⁹⁹ 64 M.S.P.R. 638 (1994).

¹⁰⁰ *Id.* at 648. The MSPB cited *Fleckenstein*, but held "the facts in the instant case do not indicate that the appellant was in any way precluded from separating personal documents from agency documents." *Id.*

¹⁰¹ Members of the MSPB serve overlapping, nonrenewable seven year terms. See 5 U.S.C. § 1202. The term of Vice-Chairman Jessica Parks expired on March 1, 1995.

¹⁰² DA-0752-94-0187-I-1, 1995 WL 170533 (Apr. 5, 1995).

¹⁰³ The MSPB reversed literally thousands of such USPS "reassignments." See, e.g., *Robinson v. U.S. Postal Serv.*, *Robinson v. U.S. Postal Serv.*, 63 M.S.P.R. 307 (1994).

¹⁰⁴ The MSPB later affirmed the AJ's decision in *Anderson v. U.S. Postal Serv.*, 64 M.S.P.R. 233 (1994).

¹⁰⁵ The MSPB apparently borrowed this language from the Supreme Court case of *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S.S. 827, 837 (1990). Justice O'Connor attempted to reconcile the "apparent tension" between conflicting rules of interpretation applying to retroactive or retrospective application of laws. *Id.*

¹⁰⁶ *Cooke*, 1995 WL 170533 at *4.

The best clarification of the *Fleckenstein* rule came after the departure of Vice-Chairman Parks¹⁰¹ in *Cooke v. United States Postal Service*.¹⁰² This case was one of hundreds of "reassignment" cases out of the United States Postal Service (USPS).¹⁰³ The USPS reassigned the appellant from his technical training position to a lower-graded customer service position and then to a processing and distribution position. The appellant claimed transportation difficulties getting to his new work location and simply failed to report for either job.

The appellant appealed his reassignment, which the MSPB AJ reversed as a demotion by reduction in force without due process.¹⁰⁴ While that appeal was pending, the USPS removed the appellant for absence without leave (AWOL). In the initial decision from *Cooke's* appeal of his removal, the MSPB AJ found that management based the AWOL charge on the appellant's failure to report to his new assignment. Since that reassignment was improper, the AWOL charge was not authorized and the removal improper.

In its petition for review, the USPS argued that it based the reassignment on legitimate reasons and that the appellant was obligated to report for his new duties. After recognizing the "apparent tension"¹⁰⁵ between an employee's refusal to follow management reassignment orders and the impact of reversal of the reassignment, the MSPB reversed the AJ and reinstated the agency's removal for AWOL. The Board agreed that the USPS had legitimate management reasons for reassigning the appellant. The USPS was not motivated by bad faith and the USPS could not have reasonably known that the MSPB would find reduction in force procedures were required. In such circumstances, an employee is obligated to obey management's reassignment order.¹⁰⁶

The Board distinguished *Fleckenstein* by the legitimate attorney privilege involved in that case. It also found that the appellant in *Fleckenstein* would have suffered immediate and irreparable harm had he complied with the supervisor's orders. In *Cooke*, however, the appellant had no legitimate privilege to refuse the reassignment and faced no harm that could not be undone by later corrective action. "His only proper recourse, therefore, was to obey the order and, as he did, challenge its validity on appeal."¹⁰⁷

The *Cooke* decision is significant for two reasons. First, it clarifies and severely limits the MSPB's anomalous decision in *Fleckenstein*. Only where a legitimate privilege exists and irreparable harm will result should the *Fleckenstein* rule apply.¹⁰⁸ Second, and perhaps more importantly, Chairman Erdreich and Member Amador agreed in the outcome of *Cooke*. This is a good sign for future application of the *Cooke* rule.¹⁰⁹ Major Hernicz.

International Law Notes

Legal Support to Current Operations in Haiti

Background

A succession of United Nations (UN) Security Council Resolutions authorized the UN Secretary General to establish the United Nations Mission in Haiti (UNMIH) under the command of the UN. The UNMIH consists of civilian, military, and civilian police components.¹¹⁰

¹⁰⁷ *Id.* at *5.

¹⁰⁸ The MSPB failed to clearly define what constitutes a "legitimate" privilege. It did, however, cite the attorney work product privilege of Fed. R. Civ. Pro. 26(b)(3) for justification for *Fleckenstein*'s disobedience. Hopefully, any future application of the "legitimate" privilege will require a solid basis in law or federal rule.

¹⁰⁹ In many cases since the departure of Vice-Chairman Parks, the remaining two members have not agreed on the outcome of cases. Member Amador is a republican appointed by President Bush and Chairman Erdreich is a democrat appointed by President Clinton. To say that they occasionally disagree is more than a mild understatement. In response to many recent petitions for review, they have issued decisions without opinions. These are cases in which they cannot agree. The AJ's initial decision becomes the final decision of the MSPB in these cases. See 5 C.F.R. § 1201.113 (1995).

¹¹⁰ The Secretary General, in 1993, recommended that the UNMIH be created in order to implement the Governors Island Agreement of 3 July 1993. This Agreement called for assistance to Haiti in modernizing the Haitian armed forces and establishing a separate police force. Signed by deposed President Aristide and Commander in Chief of the Haitian Armed Forces, Lieutenant General Cedras, the Agreement also provided for the restoration of Aristide to the Presidency, the early retirement of Cedras, and the establishment of dialogue among the political parties under the auspices of the United Nations Organization of American States to restore a functioning parliament. The UNMIH was composed of civilian police and military personnel capable of providing instruction in engineering skills and performing humanitarian engineering tasks. *Report of the Secretary General on Haiti*, U.N. SCOR, U.N. Doc. S/26480 (Sep. 21, 1993); *Report of the Secretary General Concerning Haiti*, U.N. SCOR, U.N. Doc. S/26352 (Aug. 25, 1993). The Security Council authorized the dispatch of the UNMIH to execute these duties. S.C. Res. 867, U.N. SCOR, U.N. Doc. S/RES/867 (Sep. 23, 1993). However, because of the civil unrest, the UNMIH was not able to begin performing its mission, under an expanded mandate and size, until the following year.

¹¹¹ S.C. Res. 975, U.N. SCOR, U.N. Doc. S/RES/975 (Jan. 30, 1995).

¹¹² S.C. Res. 940, U.N. SCOR, U.N. Doc. S/RES/940 (Jul. 31, 1994).

¹¹³ *Report of the Secretary General on the Question Concerning Haiti*, U.N. SCOR, at 12, U.N. Doc. S/1995/46 (Jan. 17, 1995).

¹¹⁴ *Id.*

¹¹⁵ Letter from Kofi Annan, Under Secretary General for Peace-keeping Operations, to Major General Joseph W. Kinzer, subject: General Guidelines for the Force Commander (Mar. 1, 1995).

¹¹⁶ See Unclassified cable from U.S. Mission, U.S.U.N., to Secretary of State, Wash. D.C., subject: UNMIH (Nov. 3, 1994) (on file with author).

The UNMIH replaced the United States led Multinational Force on 31 March 1995 after a determination by the UN Security Council that a stable and secure environment in Haiti had been established.¹¹¹ The UNMIH mission is to assist the Government of Haiti in sustaining the secure and stable environment established by the Multinational Force; to protect international personnel and key installations; to create a democratically based police force; and to establish an environment conducive to the organization of fair and free elections.¹¹²

The military component of the UNMIH has the primary responsibility for protecting international personnel and key installations.¹¹³ In keeping with traditional notions of peacekeeping, personnel of the military component are permitted to use force only in self-defense.¹¹⁴ Force may also be employed to overcome forcible attempts impeding the discharge of the UNMIH's mission. The military component does not, however, perform day-to-day law and order duties.

The UNMIH Command and Staff

For the first time in the history of the the UN and the United States, a UN peacekeeping force is being commanded by a United States Army General Officer, Major General Joseph W. Kinzer.¹¹⁵ Approximately one-half of Major General Kinzer's staff, as well as the total military component of 6000 personnel, are United States service members, the majority from the Army.¹¹⁶ Equally precedent setting is the assignment of a United States Army Judge

Advocate, Major William A. Hudson, as the senior UNMIH staff legal officer.¹¹⁷ Another United States Army Judge Advocate is also assigned to the military contingent to the UNMIH, United States Forces Haiti.¹¹⁸

Major Hudson is assisted by a Canadian Forces major. Their duties include advising the commander and his staff on UN Security Council Resolutions, UN Secretary General Reports, the UNMIH Status of Forces Agreement, international treaties, and other UN documents relevant to the mission; rules of engagement (ROE) interpretation and training; and providing legal advice concerning UN administrative rules and procedures.¹¹⁹ They also monitor and assist the many UN activities associated with democracy building in Haiti.

Training the UNMIH Staff

In an effort to prepare the UNMIH staff for its mission, the UNMIH civilian and military staffs participated in a course of instruction organized and conducted by the Battle Command Training Program (BCTP), Fort Leavenworth, Kansas. The course took place from 4 to 10 March 1995 in Port au Prince, Haiti, and was designed to familiarize the participants with how the civilian and military components of a UN peacekeeping operation work and to introduce them to the "Fort Leavenworth" style of the military decision making process. The legal instruction consisted of familiarization with the UNMIH ROE for the military component¹²⁰ and the UN-Government of Haiti Status of Forces Agreement.¹²¹ The group of instructors assembled by BCTP included a core group of United States multi-service officers and civilians with special expertise in peacekeeping and military decision making process techniques. Several officers from Canada, Sweden, and Austria who had served on prior UN peacekeeping missions were selected to teach several classes.

The International and Operational Law Division, Office of The Judge Advocate General (DAJA-IO), also provided extensive legal support to the BCTP by preparing the legal portion of the course of instruction. The BCTP was originally tasked to cre-

ate a generic "off-the-shelf" course of instruction for the military staff of any UN peacekeeping operation. The DAJA-IO developed an outline of instruction that would orient a judge advocate to UN peacekeeping principles, UN administrative rules and procedures pertinent to peacekeeping operations, and numerous international conventions that might impact on an operation. A DAJA-IO attorney¹²² accompanied the instructional team to Haiti to assist in the presentation of instruction on the UNMIH Status of Forces Agreement and UNMIH ROE. The DAJA-IO also conducted a functional area review of the Staff Legal Officer's duties and responsibilities with the UNMIH attorneys.

Judicial Mentors Program

The United States Agency for International Development (USAID), with assistance from the Department of Justice (DOJ), initiated a Judicial Mentors Program in Haiti in order to train Haitian judicial officials in the areas of investigative techniques, case management, interaction with police, and the roles and responsibilities of judicial officers.¹²³ To assist in implementing this program, Army Reserve judge advocates assigned to civil affairs units and other civilian attorney Army Reserve civil affairs officers were selected and tasked with conducting an assessment of the Haitian judicial system, proposing short and long term solutions to perceived problems, and recommending viable solutions to the overcrowded conditions at the Haitian National Penitentiary. Assigned to Haiti from January to April, 1995, these attorneys were vital to the reinstatement of the Haitian judicial process. Among their many accomplishments, their recommendation for, and assistance in, transporting judges to jails and the National Penitentiary to review pretrial detention cases substantially helped decrease prison overcrowding.¹²⁴ The USAID plans to continue this program by contracting with civilian attorneys.

Conclusion

United States Army judge advocates are currently playing a critical role in the international effort to build a permanent foundation for democracy in Haiti. Their experiences serve as prim-

¹¹⁷ Major Hudson is assigned to the Office of the Staff Judge Advocate, Headquarters, United States Army Special Operations Command, Fort Bragg, North Carolina. He is serving with the UNMIH in a temporary duty status for 179 days.

¹¹⁸ Captain Catherine M. With, Office of the Staff Judge Advocate, Headquarters, 25th Infantry Division (Light) & United States Army, Hawaii, Schofield Barracks, Hawaii, currently holds this position. Captain With and other members of the 25th Division, who deployed to Haiti for duty with the Multinational Force and then transitioned to UNMIH on 31 March 1995, will redeploy during the summer, 1995, and will be replaced by the 2nd Armored Cavalry Regiment.

¹¹⁹ Memorandum, International and Operational Law Division, Office of the Judge Advocate General, subject: UNMIH SOP Staff Legal Office Standard Operating Procedure (SOP) (1994).

¹²⁰ Memorandum, UNMIH Rules of Engagement (3 Mar. 1995) (on file with the author).

¹²¹ Agreement between the United Nations and the Government of Haiti on the status of the United Nations Mission in Haiti (21 Mar. 1995) (on file with the author).

¹²² Major Mark S. Ackerman, International Law Branch, International and Operational Law Division, Office of The Judge Advocate General.

¹²³ Memorandum, Mark L. Schneider, U.S. Agency for International Development, subject: Judicial Mentors Program (11 Jan. 1995) (on file with the author).

¹²⁴ Memorandum, Lieutenant Colonel Philip A. Savoie to Brigadier General Walter B. Huffman, subject: Interim Report, Haitian Judicial Mentorship Program (7 Apr. 1995) (on file with the author). Lieutenant Colonel Savoie is the Center Judge Advocate, Fitzsimons Army Medical Center, Aurora, Colorado. He served in Haiti in a temporary duty status.

ers for judge advocates who may be assigned to peacekeeping or other UN operations. To this end, under the auspices of the Center for Law and Military Operations (CLAMO), a Haiti "Uphold Democracy" After Action Review (AAR) was held at The Judge Advocate General's School, United States Army, from 8 to 10 May 1995. The AAR, chaired by then Colonel John D. Altenburg, Jr., brought together a significant number of military attorneys who had participated in the Multinational Force phase of operations in Haiti. A detailed report will be published in the near future. Major Ackerman.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them 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-ADALA, Charlottesville, VA 22903-1781.

Tax Law Note

Ohio State Income Tax Law Change¹²⁵

Beginning in tax year 1993, many military personnel from Ohio may not have to pay Ohio income tax on their wages earned

while stationed outside of Ohio. In late 1993, Ohio amended its definition of "resident" solely for Ohio state income tax purposes:¹²⁶

An individual who during a taxable year has no more than one hundred twenty contact periods in [Ohio], which need not be consecutive, and who during the entire taxable year has at least one abode outside [Ohio], is presumed to be not domiciled in [Ohio] during the taxable year.¹²⁷

Under this revised Ohio law, an individual "has one contact period" if the individual is away overnight from his abode¹²⁸ located outside Ohio, and while away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in Ohio.¹²⁹

Although the Ohio income tax law change was not aimed at Ohio military personnel specifically, many may take advantage of it to avoid Ohio income tax on their military income earned while stationed outside Ohio. For example, assume Major Jones, an Ohio resident as of December 31, 1992, is stationed outside of Ohio—living in Virginia on military duty all of 1993. If Major Jones did not return to Ohio for more than 120 contact periods in 1993 and had an abode outside of Ohio for all of 1993, Major

¹²⁵ Special thanks to Captain Scott B. Murray, Post Tax Officer, III Corps and Fort Hood, Fort Hood, Texas, for initial coordination with the Ohio Department of Taxation, Income Tax Audit Division. The Chief Counsel, Ohio Department of Taxation, has reviewed this practice note. He has agreed that the determination of residency under Ohio Revised Code § 5747.24 is only used for purposes of Chapters 5747 and 5748, state and school district income taxes. Letter from Mr. Lawrence, Chief Counsel, Department of Taxation to Lieutenant Colonel Hancock, received by fax (May 31, 1995) (on file with author) [hereinafter Lawrence Letter].

¹²⁶ OHIO REV. CODE ANN. §§ 5747.01(1); 5747.24 (Page's 1994 Supp). See Sherman, *Ohio's Recently Enacted Domicile and Residency Legislation*, 13 J. TAX'N 36 (1994) [hereinafter Sherman], for a detailed discussion, including many illustrative examples applying the tax law change. Mr. Sherman, Legal Counsel to the Ohio Department of Taxation, Income Tax Audit Division, began his article by observing:

In clarifying how individuals determine domicile solely for Ohio state and school district income tax purposes, the new law does not address domicile for estate tax purposes or for any other purpose (such as voting or in-state tuition).

Sherman, at 36. Moreover, Ohio Revised Code § 5747.24, "Domicile tests, presumptions," begins:

This section is to be used solely for the purposes of chapters 5747. and 5748. of the Revised Code.

Nevertheless, Mr. Sherman's article includes this example:

Example 13. Lee, age 18, has lived with her parents her entire life, has an Ohio driver's license, and voted in the most recent Ohio elections. The day after her high school graduation she enlists in the armed forces and gives her parents' Ohio address as her address. For the remainder of 1994 she is assigned to military bases located outside Ohio. (Assume that the military bases constitute her various abodes located outside Ohio.) During 1995 she has no more than 120 contact periods in Ohio, but she continues to vote in Ohio elections, and she maintains her Ohio driver's license. Relying upon ORC Section 5747.24(B), Lee does not file a 1995 Ohio individual income tax return [Form IT-1040], and Lee does not pay any 1995 Ohio individual income tax. Upon request of the tax commissioner, Lee submits a written statement under penalty of perjury stating that during all of 1995 she was not domiciled in Ohio and during all of 1995 she had at least one abode outside Ohio. At no time did Lee file with the military Form DD 2058. [Filing Form DD 2058 is part of a procedure authorized by the Soldiers and Sailors [Civil] Relief Act which enables a member of the armed services to change his or her state of domicile for all purposes.]

Results. Since Lee did not have more than 120 contact periods in Ohio during 1995, had at least one abode (the various military bases to which she was assigned) outside Ohio during all of 1995, and timely submitted the written statement under penalty of perjury, she is rebuttably presumed to be not domiciled in Ohio for purposes of Ohio's 1995 individual income tax. Because none of her 1995 income was earned or received in Ohio, she does not have to file the 1995 Ohio Form IT-1040; she does not have to pay any 1995 Ohio individual income tax. However, Lee may be guilty of perjury under ORC Section 2921.11; she is not liable for any 1995 Ohio individual income tax. Sherman at 44-45.

¹²⁷ OHIO REV. CODE ANN. § 5747.24(B) (1994).

¹²⁸ As one commentator observed, the Ohio law change does not define "abode" and an abode is "the place where a person dwells." Sherman, *supra* note 128, at 41.

¹²⁹ OHIO REV. CODE ANN. § 5747.24(A)(1) (1994).

Jones is presumed not to be domiciled in Ohio for Ohio income tax purposes. In other words, she owes no Ohio income tax on non-Ohio sourced income—her military pay earned while stationed outside of Ohio, any wages paid for part-time employment in Virginia, or any investment income earned outside of Ohio.¹³⁰

The Ohio Department of Taxation cannot challenge this presumption if, upon request by the Department, Major Jones submits an affidavit stating that she was domiciled outside of Ohio for all of 1993 and that she had at least one abode outside of Ohio for all of 1993. In order for the presumption of non-Ohio domicile to be irrefutable, Major Jones must sign the affidavit under penalty of perjury. All taxpayers should note, however, that Ohio's new income tax law does not relieve military members who are treated as nonresidents from Ohio income tax liability, other than military wages, which is sourced from Ohio—for example, a spouse's wages earned in Ohio, rental income from property located in Ohio, and capital gains from the sale of property located in Ohio.

This change has been effective since 1993 although many Ohio residents are still unaware of the change. Indeed, the 1994 Ohio Income Tax Return and Instructions booklet indicated that Ohio taxes Ohio residents' military pay even if the military members spent no time in Ohio during 1994. Nevertheless, the Ohio Department of Taxation, Income Tax Audit Division, has stated in writing that military personnel from Ohio are not subject to Ohio income tax on their military wages earned while stationed outside of Ohio if:

- (1) they have no more than 120 contact periods in Ohio during the tax year,
- (2) they have an abode outside Ohio for the entire year, and

- (3) upon request by the Department of Taxation they submit an affidavit, under penalties of perjury, stating that they were not domiciled in Ohio at any time during the year and confirming that they met both the "no-more-than-120 contact-periods-in-Ohio" test and the "abode-outside-Ohio-for-the-entire-year" test.¹³¹

Qualifying Ohio military personnel who filed as Ohio tax residents in 1993 or 1994 may wish to amend their Ohio Income Tax Return(s) to recover the Ohio income tax paid. They may do so by submitting Ohio Form IT-1040X to claim tax paid to Ohio for 1993 and/or 1994. These individuals should check the "NON-RESIDENT" block for their Residency Status and write "ORC 5747.24" in the Residency Status block. These individuals may also find it helpful to include an under-penalties-of-perjury affidavit. This affidavit should indicate that they had an abode outside of Ohio for the entire tax year and that they were not domiciled at any time during the tax year in Ohio for Ohio income tax purposes under the 120 contact period rule of Ohio Revised Code § 5747.24.¹³²

Finally, Ohio military personnel who are not Ohio residents for Ohio income tax purposes should not lose their Ohio residency for other purposes—for example, voting.¹³³

Legal assistance attorneys should advise Ohio military personnel that using the 120 contact period rule to avoid paying Ohio income tax of this Ohio Department of Taxation caution:

When individuals who had been domiciles of Ohio declare that they are not domiciled in this state, they are saying that they have abandoned their domicile in Ohio and have

¹³⁰ Of course, Virginia could tax Major Jones' income earned at a part-time job in Virginia.

¹³¹ Letter from Ohio Income Tax Audit Division, Ohio Department of Taxation, to Captain Murray, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas (Feb. 13, 1995) (copy on file with author).

¹³² Ohio Form IT-1040X requires an explanation of corrections on the back side. Ohio military members may find it helpful to use the following where appropriate:

Not domiciled in Ohio for state income tax purposes in (tax year 199_) under 120-contact period rule of Ohio Revised Code § 5747.24. Stationed in (location) entire year (or stationed outside Ohio entire year). Maintained abode at (address). Had less than 120 contact periods in Ohio.

¹³³ Telephone interview with Mr. Bender, Chief Elections Counsel for the Ohio Secretary of State (the Ohio Elections Officer) (Mar. 22, 1995) (Mr. Bender indicated that Ohio military personnel who use the new 120 contact period rule for Ohio income tax purposes should still be able to vote in Ohio by absentee ballot). See OHIO REV. CODE ANN. § 3511, Armed Service Absent Voter's Ballots; and § 3511.11, Eligibility (1994), which states:

Any section of the Revised Code to the contrary notwithstanding, any person serving in the armed forces of the United States, or the spouse or dependent of any person serving in the armed forces of the United States who resides outside this state for the purpose of being with or near such service member . . . and who is a citizen of the United States, may vote armed service absent voter's ballots in such general or special election as follows:

(A) If the service member is the voter, he may vote only in the precinct in which he has a voting residence in the state, and that voting residence shall be that place in the precinct in which he resided immediately preceding the commencement of such service, . . . (emphasis added).

The Ohio Department of Taxation now agrees. See, Lawrence Letter, supra n.125.

no present intention to reestablish their domicile in Ohio. Although the determination of domicile under [Ohio Revised Code §] 5747.24 is used for tax purposes only, the individuals' statements may effect other rights and duties and should be made after thoughtful reflection and not solely to avoid state tax liabilities.¹³⁴

Currently, military personnel relying on Ohio's tax law revision must file with Ohio for a refund of their withholdings. The Defense Finance and Accounting Service (DFAS) has not implemented a procedure to exempt qualifying Ohioans from Ohio withholding, but this should only be a matter of time.¹³⁵ Lieutenant Colonel Hancock & Captain Murray.

Professional Responsibility Note

Legal Assistance Management: Conflicts of Interest

A common topic of telephone inquiries and the curriculum at The Judge Advocate General's School is the problem of handling conflicts of interest in legal assistance cases. This note reviews the ethical obligations and the policies in Army Regulation 27-3 (AR 27-3), The Army Legal Assistance Program, and provides some practical suggestions on managing conflict cases.

Rule 1.7 of the Army Rules of Professional Conduct for Lawyers (Army Rule)¹³⁶ prohibits an Army lawyer from representing a client whose interests are directly opposed to another present client. Perhaps the most frequent opportunity for an Army legal assistance attorney to face such a conflict is in domestic relations cases.¹³⁷ Two spouses contemplating separation or divorce are almost always in direct conflict. According to AR 27-3, both are eligible to receive legal assistance.¹³⁸ Since both the expertise

and the manpower to handle domestic cases is in the legal assistance office, who may or should provide legal advice to the parties?

For nonmilitary practitioners, the American Bar Association Model Rules of Professional Conduct (ABA Model Rule) provide an easy solution. Under ABA Model Rule 1.10, the principle of imputed disqualification would control.¹³⁹ If one lawyer working in a firm is conflicted from representing a particular party, all members of the firm are equally conflicted. If this rule applied to Army legal assistance, the first client to seek legal assistance would receive aid, while the second would have to hire a member of the civilian bar. While this solution might be feasible in the United States, the realities of worldwide military assignments and deployments, where few attorneys admitted to practice in the United States can be found, make the ABA standard unreasonable. It would be somewhat brutal to condition the receipt of legal assistance on which spouse passed through the doors of the office first. Further, legal aid is one of the benefits of military service. Consequently, Army Rule 1.10 contains no imputed disqualification.

Army Rule 1.10 requires Army lawyers to apply a functional approach. Under the functional approach, the Army rejects the automatic disqualification of ABA Model Rule 1.10, replacing it with a practical disqualification standard. The analysis under the practical disqualification standard focuses on the existence of a "real conflict of interest" while considering factors such as independent judgment, zealous representation, and protection of confidences.¹⁴⁰ Under this analysis, if an Army lawyer had a real conflict of interest, then the Army Rules would still disqualify that Army Lawyer from providing legal assistance. The burden under Army Rule 1.10 is clearly on the Army lawyer to be vigilant during representation to avoid a real conflict of interest.

Army policy published by AR 27-3 discusses and discourages the practice of representing within the same legal assistance of-

¹³⁴ See Lawrence Letter, *supra* n.125.

¹³⁵ Ohio taxpayers presumed not to be domiciled in Ohio for Ohio income tax purposes should expect the Defense Finance and Accounting Service (DFAS) to develop a statement similar to DD Form 2058-1, State Income Tax Exemption Test Certificate, for Ohio military personnel who do not have to pay Ohio income tax (Legal assistance attorneys should advise military personnel to watch for more information in the remarks section of the Leave and Earnings Statement). Presumably Ohio military personnel will file this election at the local Finance office. When accepted, DFAS should stop withholding Ohio income tax from the military pay. Of course, Ohio military personnel who later resume domicile in Ohio for Ohio income tax purposes should immediately change their withholding status when they are then again subject to Ohio income tax.

¹³⁶ DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.7 (1 May 1992) [hereinafter Army Rule].

¹³⁷ This does not suggest that domestic cases are the only opportunity for conflict in Army practice. Representing co-accused before a court-martial and counseling spouses about estate planning also present opportunities for conflicts.

¹³⁸ See DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 2-5a.(1) (30 Sep. 1992) [hereinafter AR 27-3] (active duty personnel and spouses eligible for legal assistance services).

¹³⁹ MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.10 (1993).

¹⁴⁰ See Comment, Army Rule 1.10.

vice both parties to a domestic dispute.¹⁴¹ Army policy concludes that it is *possible* for a supervisory attorney to decide to provide representation within the office to both spouses, but a detailed analysis *by the supervisory attorney* is required before authorizing such an extreme solution.¹⁴² Representation within the same legal office is the *last resort*.¹⁴³ Supervisory attorneys should only resort to that solution after considering representation by another military legal office, a United States Army Trial Defense Service attorney, or a reserve component attorney. If, and only if, the supervisory attorney decides that one of these alternates is unavailable, may the supervisor permit representation of both spouses in the same office.¹⁴⁴

Army policy places strict guidelines on dual representation. First, Army lawyers *must* obtain the informed consent of both parties.¹⁴⁵ Second, a written record of the client's consent must be placed in the client files.¹⁴⁶ Finally, the office must have procedures in place to preserve client confidentiality, including provision for separate clerical support and file storage.¹⁴⁷

As a practical matter, supervisory attorneys must ensure that there is a working means to capture potential conflict cases as they enter the office. In the past, the Legal Automation Army-Wide System legal assistance software contained a conflict checking module. Regardless of the software or other method employed, it remains the obligation of all involved Army legal assistance attorneys, particularly the supervisory attorney, to implement con-

flict identification procedures.¹⁴⁸ This includes asking clients basic "triage" questions regarding their legal problem. It could also include cross checking obvious complaints, such as separation agreements or nonsupport, against the client card data file. The most important task, however, is training. Supervisory attorneys must ensure that subordinate attorneys, and nonattorney assistants, receive regular training on conflict management procedures.¹⁴⁹

Once a real conflict of interest is identified, what practical steps must be considered? First, AR 27-3 suggests that the supervisory attorney attempt to find another attorney in a separate military law office to assist one of the clients. This military law office could be another Army judge advocate office on the same base or an office of a sister service at a nearby installation. This type of referral requires prior coordination. If there is another military base within a reasonable driving distance of the Army installation, the Army legal assistance office could offer to set up an appointment at that installation for the client, or the client could receive advice by telephone.¹⁵⁰ When referring a client to another military service, it is important to determine what legal assistance services are available because the various services differ widely in the scope of legal assistance programs. The Air Force, for example, does not regularly provide advice and counseling on separation agreements and divorces.¹⁵¹ If these referral options fail to produce a lawyer to represent one of the parties, the supervisory attorney should seek assistance from a reserve component judge advocate.

¹⁴¹ See AR 27-3, para. 4-9c. The regulation uses the term "legal office." *Id.* It is conceivable that this could mean the same legal assistance office. The ABA has reviewed the issue several times, most notably in ABA Committee on Ethics and Professional Responsibility Informal Opinions 1474 and 1309, as well as in Formal Opinion 343. In all opinions, the ABA recognized the special circumstances of military practice and discouraged, but did not absolutely preclude, the representation of both parties within the same legal assistance (or trial defense) office. *Cf. People v. Wilkins*, 268 N.E.2d 756 (N.Y., 1971) (no *per se* imputed disqualification in legal aid) with *Borden v. Borden*, 277 A.2d 89 (Conn. App. Ct. 1971) (husband and wife could not both be represented by legal aid in divorce).

¹⁴² AR 27-3, para. 4-9c.

¹⁴³ "Supervising attorneys may authorize exceptions [to the policy discouraging representation within the same office] as a last resort when other alternatives are not feasible." *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ It is important to note that the consent *alone* of the two parties is insufficient to eliminate the conflict on interest under Army Rule 1.7. An Army lawyer must conclude that there is neither a present *actual* conflict, nor the reasonable possibility of a future conflict. If the Army Lawyer concludes that these conditions exist, then the Army lawyer may obtain the informed consent of both parties for further representation. Army Rule 1.7. The comment to the rule notes that the standard is whether a disinterested lawyer viewing the situation would conclude that the client should consent to the representation. *Id.* Note also that ABA Model Rule 1.10(c) provides that a client may consent to representation before a conflicted lawyer in accordance with the consent rules applicable to ABA Model Rule 1.7! MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.10 and 1.7 (1993).

¹⁴⁶ AR 27-3, para. 4-9c(2).

¹⁴⁷ *Id.* para. 4-9c(3).

¹⁴⁸ *Id.* para. 4-9a states that supervisory attorneys will establish procedures to screen clients to avoid conflicts. Army Rule 5.1 requires all supervisory attorneys to make "reasonable efforts to ensure" other lawyers conform to the Rules. Army Rule 5.3 establishes the same responsibility over nonlawyer assistants.

¹⁴⁹ AR 27-3, para. 4-9a.

¹⁵⁰ *Id.* para. 3-7b includes telephonic counseling as one acceptable form of legal counseling. All ethical standards such as confidentiality are in full force during telephonic counseling.

¹⁵¹ See DEP'T OF AIR FORCE INST. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS, para. 1.2.1. (6 May 1994) (based on experience and expertise, staff judge advocates may authorize separation agreement and divorce assistance as an exception to the Air Force program).

Reserve component judge advocates provide several options. The Judge Advocate General's Corps Reserve Officer Legal Assistance Directory, prepared annually by the Legal Assistance Division, Office of The Judge Advocate General, contains the names, addresses, phone numbers, and areas of expertise of hundreds of reserve component judge advocates who are willing to assist active duty judge advocates with legal assistance cases.¹⁵² Additionally, reserve component judge advocate units across the United States may be willing to establish a working arrangement with nearby active component installations. This working relationship may be as informal as telephone inquiries or as formal as scheduling legal assistance clients for weekend or evening counseling by reserve attorneys.

Another source of conflict resolution is the United States Army Trial Defense Service (TDS). Army Regulation 27-3 establishes a criteria for referral of cases to TDS.¹⁵³ The ability to refer cases to TDS is governed by two factors. The first is the relationship between the staff judge advocate (SJA) and the senior defense counsel (SDC). The SJA and the SDC must agree on the types of cases that TDS and legal assistance will handle. Secondly, TDS attorneys may perform nondefense related duties only when their workload allows.¹⁵⁴

Finally, a supervising attorney may conclude that there is no reasonable source of assistance outside the Army legal assistance office. At this point, the supervising attorney may refer the client to another attorney in the office.¹⁵⁵ In this event, it is important to record all of the efforts taken to avoid this solution.

One additional concern must be addressed. While the Army Rules eliminate imputed disqualification, judge advocates remain subject to the rules imposed by their original licensing jurisdictions.¹⁵⁶ As a result, Army attorneys following Army Rule 1.10 and the guidance in AR 27-3 may violate their state ethical rules. Recent cases involving the "Thornburgh Memorandum" indicate that the federal rules of professional conduct may not provide a shield against state ethical investigations.¹⁵⁷ Army Rule 8.5 states that the Army Rules will control over state rules in a conflict between the two sets of rules.¹⁵⁸ This statement of supremacy does not, however, eliminate the risk of a state investigation. Army attorneys need to know when they are in a conflict of rules situation as well as a client conflict situation. At a *minimum*, Army lawyers are well-advised to follow their conflict management and resolution procedures to the letter. Major McGillin.

¹⁵² AR 27-3, para. 4-5, contains information regarding use of and referral to attorneys listed in the Reserve Officer Legal Assistance Directory.

¹⁵³ *Id.* para. 3-6g.

¹⁵⁴ Rules regulating the Trial Defense Service are in DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, Chapter 6 (8 Aug. 1994).

¹⁵⁵ As stated *supra* in note 6, this could be another division of the office of the staff judge advocate or, as an absolute last resort, and only under carefully controlled conditions, to another attorney in legal assistance.

¹⁵⁶ Army Rule 8.5(f).

¹⁵⁷ See *In re Doe*, 801 F. Supp 478 (D. N.M. 1992), *U.S. v. Ferrara*, 847 F. Supp. 9664, aff'd __ F.3d __, 1995 WL 301679 (state bar attempts to discipline Assistant United States Attorney for violation of New Mexico ethical rules while attorney operating under authority contained in letter from Attorney General Thornburgh).

¹⁵⁸ Army Rule 8.5(f)(1).

Claims Report

United States Army Claims Service

Tort Claims Note

Debris Removal in Federal Disaster Assistance Programs

In a major disaster, federal departments and agencies are permitted to clear debris and wreckage from publicly and privately owned lands and water.¹ Unfortunately, the use of the United States Army for this purpose has created major claims problems in three disasters, despite the provision of the Stafford Act, § 403(b), which states:

No authority under this Section shall be exercised unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property, and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the Federal Government against any claim arising from such removal.²

¹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 93-288, § 403, 88 Stat. 143, amended by Pub. L. 100-707 (codified prim.at 42 U.S.C. ch. 68).

² 42 U.S.C. § 5173(b) (1995).

The Federal Emergency Management Agency (FEMA) is responsible for representing the United States government in federally declared disasters and organizing the use of all federal departments and agencies. Logically, the FEMA would be responsible for obtaining an agreement from a state or local government to carry out the provisions of § 403(b). This has not been the case.

In 1977, after a severe storm hit Buffalo, New York, the United States Army Claims Service (USARCS) received a number of claims arising from the removal of privately owned vehicles buried in snow drifts. The New York State government finally paid these claims only after the FEMA belatedly agreed to terms with the state.

During Hurricane Hugo, which destroyed large portions of the South Carolina coast line in October 1989, Army troops were used extensively for debris removal. Once again no agreement existed with the state on the procedures for a state agency to process claims. Fortunately, only a few claims were filed, all of which the Army denied on the basis that they were the responsibility of the state. The USARCS attempted to enter into agreement with the FEMA on disposition of debris removal claims. The FEMA officials ultimately refused to sign the agreement, but a channel of communication was established.

Hurricane Andrew struck southern Florida in August of 1992, resulting in the use of hundreds of Army troops and equipment in debris removal, which in turn generated a number of debris removal claims. The FEMA did not arrange with the state on processing resulting claims. On receipt of what was considered a debris removal claim, the Fort Stewart, Georgia, claims office was instructed to forward the claim to the USARCS for redirection to the FEMA Headquarters in Washington, DC. This circuitous route was necessary because the FEMA attorney in Florida refused to cooperate with Army claims personnel. As it developed, referral to the FEMA Headquarters did not succeed in obtaining consent of the state to accept certain claims.

Two claims from Hurricane Andrew resulted in suits against the United States. In neither suit was the State of Florida joined as a codefendant. The United States prevailed in both suits. One claimant, B&D Farms, brought suit because heavy Army vehicles deposited and compacted gravel into their soil. The case was dismissed based on the immunity provision of the Stafford Act.³ Robert K. Ames Farms brought suit for contamination of land and soil compaction resulting from the Army using their land as a motor pool for heavy Army vehicles. The court rejected the government's argument that the Stafford Act immunity applied, but dismissed the case under the discretionary function exception to the Federal Torts Claim Act found in § 2680(a), Title 28, United

States Code.⁴ In *Robert K. Ames Farms*, Judge Moreno stated that the plaintiffs' argument that the use of farm land as a motor pool fell outside the scope of the Stafford Act was unjustified. However, Judge Moreno refused to apply the Stafford Act in the absence of binding decisions and any legislative history as to the meaning of clearing debris.

In Typhoon Iniki—which struck Hawaii approximately the same time as Hurricane Andrew hit Florida—from the outset, the local Army claims attorney was able to work closely with the FEMA and state representatives to establish a working arrangement with the state. In disputed cases, the local claims attorney dealt directly and successfully with the state.

The USARCS's policy has been to consider a claim arising out of debris clearance to include the use of vehicles and material, not only at the site of removal but also where vehicles and material are staged in the disaster area or movement between the staging and debris areas. Collision claims arising from vehicular accidents occurring between the home post and the disaster area or in the area of debris removal fall under the immunity provisions of the Stafford Act.

In future disaster relief efforts, Disaster Task Force staff judge advocates should immediately contact the area claims office⁵ and take measures to draft an agreement with state authorities implementing the immunity provisions of the Stafford Act. These agreements should define debris clearance, to include collision claims and all use of troops, vehicles, and materials in the disaster area. The state should be required to designate a claims office to receive these claims, either directly or through the Army. While the FEMA officials should be informed of these efforts, it is unrealistic to assume that the FEMA will take the initiative. Assistance in drafting an agreement may be obtained from the USARCS. Mr. Rouse.

Affirmative Claims Note

Department of Justice Annual Report

The Department of Justice (DOJ) recently issued its annual Federal Medical Care Recovery Act Agency Report for calendar year 1994. In this report, the DOJ detailed the number and dollar amounts of claims asserted and collected for each federal agency. The Department of the Army remained the leader in the total amount of money recovered. The Department of the Navy asserted the most claims both in number and in dollar value.

However, the DOJ expressed concern over the decrease in the average dollar amount of claims asserted and recovered. Prior to

³ *B&D Farms, Inc. v. United States*, Civ. No. 94-1449-CIV-Marcus (S.D. Fla., Dec. 21, 1994).

⁴ *Robert K. Ames farms v. United States*, Civ. No. 94-1488-CIV-Moreno (S.D. Fla., Mar. 3, 1995).

⁵ DEPT OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 1-7d (28 Feb. 1990); DEPT OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, app. B (15 Dec. 1989).

making a final assertion, claims personnel must obtain all billings for medical care provided to injured parties. Additionally, the DOJ suggested that claims personnel place greater emphasis on the larger claims. Although this approach should not be to the exclusion of the smaller claims.

Keep up the good work and we can be the leader in every category for 1995! Captain Park.

Personnel Claims Note

Full Replacement Protection

When a shipper purchases full replacement protection (FRP) and suffers loss or damage, the shipper must first submit a claim against the carrier. The domestic personal property rate solicitation process affords the carrier the option to repair an item, or if an item is destroyed, pay the claimant nondepreciated coverage for the loss. However, if the carrier denies the claim, fails to settle in thirty days, or a delay will cause a hardship, the claimant may submit a claim against the government.

The claims office would adjudicate this type of claim. The claims office will consider maximum allowance categories and pay the claimant based on the depreciated value of the items. However, the claims office will assert a demand against the carrier for the nondepreciated value of the items in the amount of FRP purchased by the claimant. A carrier has 120 days from the date of receipt to respond to a demand and can appeal to the General Accounting Office (GAO) if satisfactory settlement cannot be reached. In some cases, the final outcome may take as long as two years. When recovery is finally completed, the claimant will be paid the difference between the depreciated amount paid by the claims office and the amount recovered from the carrier if the amount recovered from the carrier exceeds the amount the claimant was originally paid.

A recent case involving errors made in processing an FRP claim precluded the USARCS's right to recover from the carrier.

The claimant purchased FRP which was duly noted on the government bill of lading. There was loss and damage to the shipment. In November 1993, the claimant telephoned the field claims office. The claims office correctly told the claimant that he must assert the claim against the carrier named on the government bill of lading. In December 1993, the claimant submitted a claim against the carrier for \$4018. The carrier responded by offering \$990. The claimant did not find the settlement offer satisfactory and contacted the claims office and was instructed to forward the carrier's offer to the claims office. The claims office indicated that it could pay for the items for which the carrier denied liability. The claimant filed a claim with the Army and was paid \$2263 in January 1994. The claimant then wrote a letter to the carrier accepting its offer of \$990 for the other items and was paid \$990 in February 1994. The claimant was not paid twice because the claims office paid the claimant for items that the carrier denied. Although the claims office and the carrier both paid for two items, the claimant was never paid more than he claimed.

In March 1995, the claims office asserted a demand against the carrier for \$2263. The carrier—which did not know of the Army payment to the claimant—denied all liability contending that it had settled with the claimant in February 1994. The carrier sent a copy of the cancelled \$990 and noted that the claimant, by endorsing the check, agreed to release the carrier and its agents from any other claims on this move. Although the USARCS could find no Comptroller General decisions on the subject, in a case with the same fact pattern a GAO settlement certificate released the carrier from liability; accordingly, the USARCS also released this carrier from liability.

When a claimant has FRP coverage and fails to reach a satisfactory settlement, claims office personnel must remind the claimant to reject the offer and return to the carrier any check received. The claims office should instruct the claimant not to cash a check that insufficiently covers the loss because the carrier can argue that the act of endorsing and cashing the check settles the claim against the carrier. By avoiding this situation, the claims office can adjudicate, pay the claim where appropriate, and then pursue the carrier for nondepreciated coverage. Ms. Schultz.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Enrollment in Command and General Staff Officer Nonresident Courses

Congratulations to the 108 judge advocates who completed the resident phase of the Judge Advocate Officer Advanced Course and received diplomas on June 30, 1995. These individuals and any other advanced course graduates at the rank of major or above are eligible to enroll in the nonresident Command and General Staff Officer Course. For further information and to request a catalog and enrollment form, call (913) 684-5584. Captain Storey.

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule

The Academic Year 1996 On-Site season is rapidly approaching with four locations scheduled for training in October. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units must attend each year the On-Site training within their geographic area. All other USAR

and Army National Guard judge advocates are encouraged to attend the On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. As always, *The Army Lawyer* will contain a monthly update to the On-Site schedule. If you have any

questions about this year's continuing legal education program please contact the local action officer listed below or call Captain Eric Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380. Captain Storey.

**THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
14-15 Oct	Willow Grove, PA 153d LSO/79th ARCOM Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	LTC Donald Moser (215) 925-5800
21-22 Oct	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	LTC Donald Betzold 6160 Summit Drive, #425 Brooklyn Center, MN 55430 (612) 566-8800
21-22 Oct	Naval Justice School, RI 94th ARCOM	MAJ Donald C. Lynde 94th ARCOM ATTN: AFRC-AMA-JA 695 Sherman Ave. Fort Devens, MA 01433 (508) 796-6332
27-29 Oct Note: 2.5 days	Dallas, TX 122nd ARCOM Stouffer-Dallas 2222 Stemmons Freeway Dallas, TX 75207	MAJ Barry Woofter (501) 711-7901
18-19 Nov	NYC 77th ARCOM/4th LSO	LTC Myron J. Berman 77th ARCOM Bldg. 637 Fort Totten, NY 11359 (718) 352-5703
06-07 Jan 96	Long Beach, CA	LTC Andrew Bettwy 10541 Calle Lee, Suite 101 Los Alamitos, CA 90720 (702) 876-7107
20-21 Jan	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	LTC Matthew L. Vadnal 6th LSO Bldg. 572 Seattle, WA 98199 (206) 281-3002

**THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
24-25 Feb	Denver, CO 87th LSO Doubletree Inn Aurora, CO	MAJ Kevin G. Maccary 87th LSO Bldg. 820, Fitzsimons AMC McWethy USARC Aurora, CO 80045-7050 (303) 977-3929
24-25 Feb	Salt lake City, UT National Guard Armory	LTC Michael Christensen HQ, UTARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
24-25 Feb	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridan St. Indianapolis, IN 46204	MAJ George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
02-03 Mar	Columbia SC 12th LSO/120th ARCOM	MAJ Paul Conrad 120th ARCOM Bldg. 9810, Lee Rd. Fort Jackson, SC 29207 (803) 751-6152
09-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
16-17 Mar	San Francisco, CA	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402-5589 (707) 544-5858
23-24 Mar	Chicago, IL 91st LSO/86th ARCOM	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434

**THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
26-28 Apr Note: 2.5 days	St. Louis, MO 89th ARCOM/MO ARNG	LTC John O'Mally 8th LSO ATTN: AFRC-AMO-LSO 11101 Independence Ave. Independence, MO 64054
04-05 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 BPN: (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 BPN: (305) 357-7600

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys 5F-F10

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

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

2. TJAGSA CLE Course Schedule

1995

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

2-6 October: 1995 JAG Annual Continuing Legal Education Workshop (5F-JAG).

10-13 October: 2d Ethics Counselors' CLE Workshop (5F-F201). *Bickers*

16-20 October: USAREUR Criminal Law CLE (5F-F35E).

16-20 October: 37th Legal Assistance Course (5F-F23). *Szuhelwitz*

16 October-21 December: 138th Basic Course (5-27-C20).

23-27 October: 132d Senior Officers' Legal Orientation Course (5F-F1).

30 October-3 November: 43d Fiscal Law Course (5F-F12).

13-16 November: 19th Criminal Law New Developments Course (5F-F35).

13-17 November: 61st Law of War Workshop (5F-F42).

4-8 December: USAREUR Operational Law CLE (5F-F47E).

4-8 December: 133d Senior Officers' Legal Orientation Course (5F-F1).

1996

8-12 January: 1996 Government Contract Law Symposium (5F-F11). *Miller
Fuld*

9-12 January: USAREUR Tax CLE (5F-F28E).

22-26 January: 48th Federal Labor Relations Course (5F-F22). *Gersch*

22-26 January: 23d Operational Law Seminar (5F-F47).

31 January-2 February: 2d RC Senior Officers Legal Orientation Course (5F-F3).

5-9 February: 134th Senior Officers' Legal Orientation Course (5F-F1).

5 February-12 April: 139th Basic Course (5-27-C20).

12-16 February: PACOM Tax CLE (5F-F28P).

12-16 February: 62d Law of War Workshop (5F-F42).

12-16 February: USAREUR Contract Law CLE (5F-F18E).

26 February-1 March: 38th Legal Assistance Course (5F-F23).

4-15 March: 136th Contract Attorneys' Course (5F-F10).

18-22 March: 20th Administrative Law for Military Installations Course (5F-F24). *Bickers*

25-29 March: 1st Contract Litigation Course (5F-F102).

1-5 April: 135th Senior Officers' Legal Orientation Course (5F-F1).

15-19 April: 1996 Reserve Component Judge Advocate Workshop (5F-F56).

15-26 April: 5th Criminal Law Advocacy Course (5F-F34).

22-26 April: 24th Operational Law Seminar (5F-F47).

29 April-3 May: 44th Fiscal Law Course (5F-F12).

29 April-3 May: 7th Law for Legal NCOs' Course (512-71D/20/30).

13-17 May: 45th Fiscal Law Course (5F-F12).

13-31 May: 39th Military Judge Course (5F-F33).

20-24 May: 49th Federal Labor Relations Course (5F-F22).

3-7 June: 2d Intelligence Law Workshop (5F-F41).

3-7 June: 136th Senior Officers' Legal Orientation Course (5F-F1).

3 June-12 July: 3d JA Warrant Officer Basic Course (7A-550A0).

10-14 June: 26th Staff Judge Advocate Course (5F-F52).

17-28 June: JATT Team Training (5F-F57).

17-28 June: JAOAC (Phase II) (5F-F55).

1-3 July: Professional Recruiting Training Seminar

1-3 July: 27th Methods of Instruction Course (5F-F70).

8-12 July: 7th Legal Administrators' Course (7A-550A1).

8 July-13 September: 140th Basic Course (5-27-C20).

22-26 July: Fiscal Law Off-Site (Maxwell AFB) (5F-12A).

24-26 July: Career Services Directors Conference.

29 July-9 August: 137th Contract Attorneys' Course (5F-F10). *Hussain*

29 July-8 May 1997: 45th Graduate Course (5-27-C22).	<u>Jurisdiction</u>	<u>Reporting Month</u>
30 July-2 August: 2d Military Justice Management Course (5F-F31).	Arizona	15 July annually
12-16 August: 14th Federal Litigation Course (5F-F29).	Arkansas	30 June annually
12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).	California*	1 February annually
19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).	Colorado	Anytime within three-year period
19-23 August: 63d Law of War Workshop (5F-F42).	Delaware	31 July biennially
26-30 August: 25th Operational Law Seminar (5F-F47).	Florida**	Assigned month triennially
4-6 September: USAREUR Legal Assistance CLE (5F-F23E).	Georgia	31 January annually
9-13 September: 2d Procurement Fraud Course (5F-F101).	Idaho	Admission date triennially
9-13 September: USAREUR Administrative Law CLE (5F-F24E).	Indiana	31 December annually
16-27 September: 6th Criminal Law Advocacy Course (5F-F34).	Iowa	1 March annually
	Kansas	1 July annually
	Kentucky	30 June annually
	Louisiana**	31 January annually
	Michigan	31 March annually
	Minnesota	30 August triennially
	Mississippi**	1 August annually
	Missouri	31 July annually
	Montana	1 March annually
	Nevada	1 March annually
	New Hampshire**	1 August annually
	New Mexico	30 days after program
	North Carolina**	28 February annually
	North Dakota	31 July annually
	Ohio*	31 January biennially
	Oklahoma**	15 February annually
	Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
	Pennsylvania**	Annually as assigned
	Rhode Island	30 June annually
	South Carolina**	15 January annually

3. Civilian Sponsored CLE Courses

October 1995

10-11, GWU: A Practical Introduction to Government Contracting, San Diego, CA.

11-12, GWU: Federal Procurement of Architect and Engineer Services, Washington, D.C.

12 GWU: Government Contract Compliance: Practical Strategies for Success, San Diego, CA.

30-3 November, GWU: Administration of Government Contracts, Washington, D.C.

30-3 November, GWU: Government Contract Law, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially

<u>Jurisdiction</u>	<u>Reporting Month</u>
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is 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: commercial (703) 274-7633, DSN 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 A265755	Government Contract Law Deskbook vol. 1/ JA-501-1-93 (499 pgs).
AD A265756	Government Contract Law Deskbook, vol. 2/ JA-501-2-93 (481 pgs).
AD A265777	Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD A263082	Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).
AD A281240	Office Directory/JA-267(94) (95 pgs).
AD B164534	Notarial Guide/JA-268(92) (136 pgs).
AD A282033	Preventive Law/JA-276(94) (221 pgs).
AD A266077	Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).
AD A266177	Wills Guide/JA-262(93) (464 pgs).
AD A268007	Family Law Guide/JA 263(93) (589 pgs).
AD A280725	Office Administration Guide/JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).

*AD A289411 Tax Information Series/JA 269(95) (134 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235 (94) (321 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

*AD A291106 The Law of Federal Labor-Management Relations/JA-211(94) (430 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338 (93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

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

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. 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 and Pamphlets

Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its 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 *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

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 paragraphs] 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 (410) 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. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

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

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

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

Requests for exceptions to the access policy should be submitted to:

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

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791 or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets 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 tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. Instructions for Downloading Files from the LAAWS BBS.

(1) Log on the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) 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] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem 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. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS 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 PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS 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. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-

modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in 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 LAAWS BBS). The PKUNZIP 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 instructions in paragraph (4)(a), above.

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

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	<i>Army Lawyer/Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.	JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.	JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.	JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.	JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.	JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA263.ZIP	August 1993	Family Law Guide, August 1993.	JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.	JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.	JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.	JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.	JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.	JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.	JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.	JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.	JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA275.ZIP	August 1993	Model Tax Assistance Program.	JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.	JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.			
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.			

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.	YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.	YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.	YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.
JA506-3.ZIP	November x 1994	Fiscal Law Course Deskbook, Part 3, October 1994.			
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.			
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.			
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.			
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.			
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.			
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.			
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.			
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.			
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.			
JAGSCHL.WPF	March 1992	JAG School report to DSAT.			
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.			
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.			

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-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.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h) above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at 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"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

MAJ Michael J. Cianci, Jr., TSgt Cheryl R. Burgan, *Military Water Rights in the West: A Rebuttal to the Argument that the Federal Reserved Rights Doctrine Does Not Protect Future Military Water Needs*, 22 REP., June 1995, at 1.

Wesley D. Dupont, Note, *Automobile Searches and Judicial Decisionmaking Under State Constitutions: State v. Miller*, 27 CONN. L. REV. 699 (1995).

Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995).

Peter C. Krier, Comment, *Ohio's Sanitary Landfills: State and Local Regulation of Solid Waste Disposal Facilities*, 63 U. CIN. L. REV. 817 (1995).

6. The Army Law Library Service

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. Nell Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

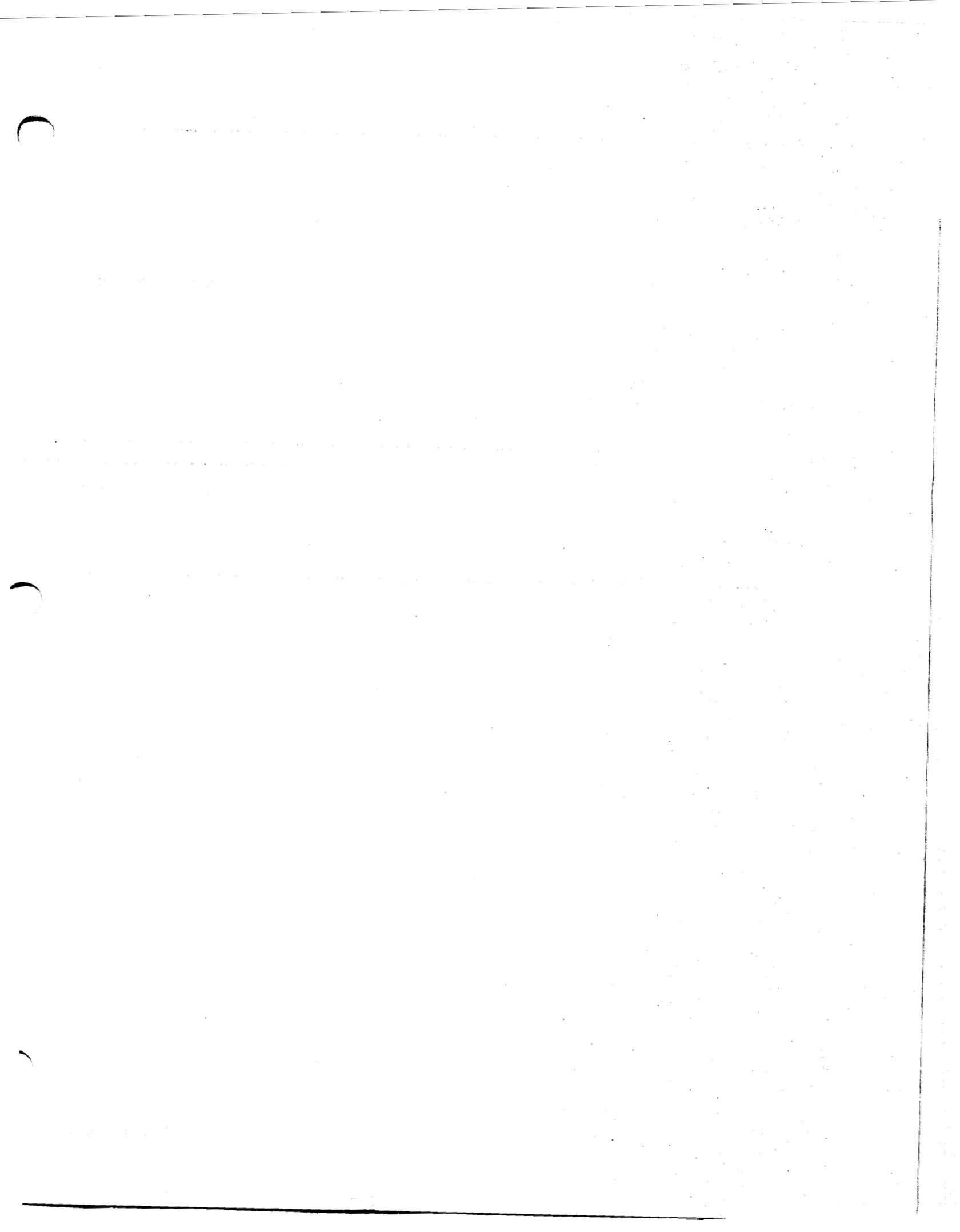
*U.S. Government Printing Office: 1995 -- 386-699/20004

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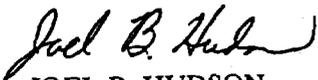


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General, United States Army
Chief of Staff

Official:

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JOEL B. HUDSON
Acting Administrative Assistant to the
Secretary of the Army

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Department of the Army
The Judge Advocate General's School
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Charlottesville, VA 22903-1781

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