

TJAGSA Practice Notes

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

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

Consumer Law Note

Federal Trade Commission Staff Issues Informal Interpretation of FCRA Changes

The Fair Credit Reporting Act¹ (FCRA) underwent significant changes effective 30 September 1997.² Businesses are now struggling to determine how to implement these new provisions. Businesses can seek guidance by requesting staff interpretations from the Federal Trade Commission (FTC). The FTC recently answered one such request made by an automobile dealer's association in August 1997.³ This request asked several questions relating to access to credit reports.⁴ The key question from a legal assistance practitioner's perspective was whether an automobile dealership could obtain a copy of a con-

sumer's credit report if the consumer simply visits the showroom.⁵ The FTC opined that the dealership could not.⁶

One of the key changes to the FCRA was the establishment of prerequisites that users of credit reports must meet before a credit reporting agency may issue a report for an authorized purpose.⁷ Most significant were the limitations placed on the "catch-all" provision, which allows a user to request a credit report when he has a "legitimate business need."⁸ Under the new law, the legitimate business need must arise from a transaction "initiated by the consumer,"⁹ or the business must obtain the consumer's permission in writing.¹⁰ The FTC opined that a business satisfies this provision only where "the consumer clearly understands that he or she is initiating the purchase or lease of a vehicle and the seller has a legitimate business need for the consumer report information in order to complete the transaction."¹¹ Thus, the FTC views the decision as a two-part test. First, the consumer must initiate the transaction. Second, the user must have a legitimate business need for a credit report to process that transaction.¹²

The informal staff opinion letter gave the following examples of consumer behavior that did *not* warrant access to a credit report: (1) asking questions about pricing and financing and (2) taking a test drive.¹³

1. Pub. L. No. 91-508, 84 Stat. 1127 (1970).

2. See Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, ARMY LAW., Aug. 1997, at 19.

3. *FTC Issues Opinion Letter for Auto Dealers*, Report 781, CONSUMER CREDIT GUIDE (CCH) (Feb. 24, 1998) [hereinafter CCH REPORT].

4. Informal Staff Opinion Letter from David Medine, Division of Credit Practices, Bureau of Consumer Protection, Federal Trade Commission (Feb. 11, 1998), reprinted in FEDERAL FAIR CREDIT REPORTING, CONSUMER CREDIT GUIDE (CCH) ¶ 26,608 [hereinafter Staff Letter]. The letter addressed the issue of access to credit reports, the form required for mandatory notices to consumers when a credit report is requested for employment purposes, and user and credit reporting agency responsibilities when an adverse employment action is taken based on a credit report.

5. *Id.*

6. *Id.*

7. See 15 U.S.C.A. § 1681b (West 1998) (defining the purposes for which a credit reporting agency may issue a credit report and the prerequisites that must be met). The section makes clear that reports may issue "under the [listed] circumstances and no other . . ." *Id.* § 1681b(a).

8. *Id.* § 1681b(a)(3)(F).

9. *Id.* The FCRA also allows a user to obtain a credit report in order to "review an account to determine whether the consumer continues to meet the terms of the account." *Id.*

10. *Id.* § 1681b(a)(2).

11. Staff Letter, *supra* note 4.

12. *Id.*

13. *Id.*

In determining whether there was a legitimate business need for a credit report, the FTC staff looked to the nature of the transaction. The staff opined that the "dealer must have a specific need for the information directly related to the completion of the transaction."¹⁴ The following are examples of situations where there is no legitimate business need for a credit report, even if the consumer initiates a transaction: obtaining information for purposes of negotiating or transactions where the consumer intends to pay cash.¹⁵ There *is* a legitimate business need, however, where the consumer is requesting financing from the dealership or presents a personal check for payment.¹⁶

While this informal advisory opinion is not binding on the FTC, it does express the staff's enforcement view of the statute.¹⁷ Consequently, it is important, particularly at this time of transition to the new provisions of the FCRA. For the legal assistance practitioner, the opinion demonstrates the powerful new protections available to soldiers for automobile and other consumer purchases. In the past, sellers may have used the social security number from the soldier's leave and earnings statement to obtain a credit report. This would enhance the seller's position and limit the soldier's options, since the seller would know a great deal about the soldier and his consumer credit history before any negotiations began. By restricting access to this information, the new provisions of the FCRA place the soldier on more of an equal footing with the seller.

Soldiers must still be diligent to maintain their credit ratings, since their credit histories will be available to businesses before any financing arrangements are made. Still, the limitations on the seller's access to the soldier's credit information should help the soldier to shop for, to select, and to negotiate better terms for consumer purchases. These and other new FCRA protections should be featured in the preventive law efforts of all legal assistance offices. Major Lescault.

Tax Law Note

Estimating Tax Withholding

Estimating the correct amount of tax withholding is an important component of tax planning. The goal is to ensure that

the taxpayer has no more tax withheld each month than necessary. At the same time, the taxpayer needs to be careful to ensure that enough taxes are withheld to avoid a tax penalty at the end of the year for under withholding of taxes.¹⁸ Although there are several exceptions to the under withholding penalty,¹⁹ the safest way to avoid the penalty is to ensure that the taxpayer has enough tax withheld during the year so that he will not owe any additional taxes at the end of the year.

During 1998, the importance of planning a taxpayer's withholdings has increased because of the Taxpayer Relief Act of 1997.²⁰ Prior to the enactment of this legislation, taxpayers with the same income and same number of dependents paid approximately the same amount of tax. As a result of the Taxpayer Relief Act of 1997, this is no longer always true. Taxpayers with dependents who are under the age of seventeen at the end of this year and taxpayers who are putting dependents through college could pay significantly less taxes in 1998. For example, a taxpayer with two children who are under the age of seventeen at the end of this year can expect to pay \$800 less in income taxes than a taxpayer who has two children who are not under the age of seventeen. In addition, a taxpayer who has a freshman or sophomore in college may pay \$1500 less in taxes than a taxpayer who does not. The obvious question for the tax planner is why should these taxpayers have to wait until next year to receive the benefit of these new credits. The answer is that they do not. By adjusting their W4 tax withholding forms now, these taxpayers can begin to receive some of those tax savings now.

In addition to this new need to do some tax planning with regard to withholding, there continues to be a need for assistance for taxpayers who owe taxes each year and who need to increase the amount of income taxes being withheld from their pay. Married couples with dual incomes and taxpayers with investment income frequently encounter this problem. The question is how much will their tax withholdings increase if they claim one less dependent? The information in this note can also be used to assist taxpayers in these situations.

Several pieces of information are needed to determine how much a taxpayer needs to have withheld during 1998 and how much will be withheld from the taxpayer if he claims a certain number of exemptions. First, how much will the taxpayer earn

14. *Id.*

15. *Id.*

16. *Id.*

17. CCH REPORT, *supra* note 3.

18. I.R.C. § 6654 (CCH 1997).

19. *Id.* §§ 6654(d),(e). There is no penalty when the total taxes shown on the return are greater than or equal to the required annual payment. The required annual payment is the *lesser* of: (1) 90% of the tax shown on the return or (2) 100% of the tax shown on the preceding tax year's return. A taxpayer also does not owe a penalty when the total amount of his underpayment is less than \$1000.

20. Pub. L. No. 105-34, 111 Stat. 788 (1997) (codified in scattered sections of 26 U.S.C.).

during 1998? This is not that difficult for most military personnel. Military pay for 1998 has already been set. So long as a taxpayer does not have significant unknown income from other sources (for example, mutual funds), the amount of his income is readily determinable. Even if the taxpayer does have an uncertain amount of income from mutual funds, a taxpayer can usually make an educated guess as to the amount of this income. Second, how much income tax will the taxpayer owe for 1998? Again, this is not difficult. All the information needed to calculate a taxpayer's 1998 income tax is readily available. The Internal Revenue Service has already published the income tax rates, standard deductions, and personal exemptions for 1998.²¹ Finally, how much income tax will be withheld from a taxpayer based on his filing status and number of withholdings claimed on the IRS Form W4? This information is likewise readily available.²²

Assuming that the taxpayer knows his approximate income for the year, the following information is needed to determine his approximate tax for the year. The personal exemption for 1998 is \$2,700.²³ The standard deductions for 1998 are:²⁴

Married Individuals filing a joint return	\$7100
Head of Household	\$6250
Single	\$4250
Married Filing Separately	\$3550

This is all the information needed to estimate taxable income. For example, Major Poor is a married client who has been in the Army for more than ten years. As a result, his monthly base pay is \$3721.20. He receives no other taxable income from the military, and he has no other income from any other source. He does not own a house or file an itemized return. He is married and has three children. All three children will be under the age of seventeen at the end of 1998 and will qualify for the new tax credit.

Major Poor's taxes for 1998 can be estimated using the above information. His gross income will be \$44,654.40, which is the product of \$3721.20 times twelve. His taxable income will be \$26,754.40, which is the difference of \$44,654.40 minus both the standard deduction of \$7100 and five times the personal exemption amount of \$2700.

The tax rate tables for 1998 are:

Married Individuals Filing Joint Returns and Surviving Spouses

<i>If Taxable Income Is:</i>	<i>The Tax Is:</i>
Not Over \$42,350	15% of the taxable income
Over \$42,350 but not over \$102,300	\$6352.50 plus 28% of the excess over \$42,350
Over \$102,300 but not over \$155,950	\$23,138.50 plus 31% of the excess over \$102,300
Over \$155,950 but not over \$278,450	\$39,770 plus 36% of the excess over \$155,950
Over \$278,450	\$83,870 plus 39.6% of the excess over \$278,450

Heads of Household

<i>If Taxable Income Is:</i>	<i>The Tax Is:</i>
Not Over \$33,950	15% of the taxable income
Over \$33,950 but not over \$87,700	\$5092.50 plus 28% of the excess over \$33,950
Over \$87,700 but not over \$142,000	\$20,142.50 plus 31% of the excess over \$87,700
Over \$142,000 but not over \$278,450	\$36,975.50 plus 36% of the excess over \$142,000
Over \$278,450	\$86,097.50 plus 39.6% of the excess over \$278,450

Unmarried Individuals (Other Than Surviving Spouses and Heads of Households)

<i>If Taxable Income Is:</i>	<i>The Tax Is:</i>
Not Over \$25,350	15% of the taxable income
Over \$25,350 but not over \$61,400	\$3802.50 plus 28% of the excess over \$25,350
Over \$61,400 but not over \$128,100	\$13,896.50 plus 31% of the excess over \$61,400
Over \$128,100 but not over \$278,450	\$34,573.50 plus 36% of the excess over \$128,100
Over \$278,450	\$88,699.50 plus 39.6% of the excess over \$278,450

21. Rev. Proc. 97-57, 1997-52 I.R.B. 20.

22. U.S. INTERNAL REVENUE SERV., PUB. 15, CIRCULAR E, EMPLOYER'S TAX GUIDE (1998) (including 1998 wage withholding and advance earned income credit payment tables).

23. *Id.*

24. Rev. Proc. 97-57, 1997-52 I.R.B. 20.

Married Individuals Filing Separate Returns

Single Person (to include head of household)

<i>If Taxable Income Is:</i>	<i>The Tax Is:</i>	If the amount of wages (after subtracting withholding allowance) is:		The amount of income tax to withhold is:	of excess over:
		<u>Over</u>	<u>But not over</u>		
Not Over \$21,175	15% of the taxable income				
Over \$21,175 but not over \$51,150	\$3176.25 plus 28% of the excess over \$21,175	0	\$211	0	
Over \$51,150 but not over \$77,975	\$11,569.25 plus 31% of the excess over \$51,150	\$221	\$2242	15%	\$211
Over \$77,975 but not over \$139,225	\$19,885 plus 36% of the excess over \$77,975	\$2242	\$4788	\$303.15 plus 28%	\$2242
Over \$139,225	\$41,935 plus 39.6% of the excess over \$139,225	\$4788	\$10,804	\$1016.13 plus 31%	\$4788

Married Person

If the amount of wages (after subtracting withholding allowance) is:		The amount of income tax to withhold is:	of excess over:
<u>Over</u>	<u>But not over</u>		
0	\$538	0	
\$538	\$3896	15%	\$538
\$3896	\$8038	\$503.70 plus 28%	\$3896
\$8038	\$13,363	\$1663.46 plus 31%	\$8038

Using the tax table for married filing a joint return for 1998, Major Poor's initial estimated income tax for 1998 is \$4013.16, which is fifteen percent of \$26,754.40. This initial estimate can be reduced because Major Poor will qualify for \$1200 of tax credits for his three children. Thus, Major Poor's estimated tax liability for 1998 is \$2813.16.²⁵

Once a taxpayer determines his tax liability for 1998, he next needs to estimate the amount of income taxes that will be withheld from his pay. Again, there is a simple formula to determine the amount of income taxes that will be withheld from a taxpayer's wages. Since most legal assistance clients are paid either monthly or biweekly, only that withholding information is contained in this article. All active duty service members are treated as being paid monthly for tax purposes, even if they receive a mid-month paycheck. United States government civilian employees are paid biweekly.

If the taxpayer is paid monthly, take his monthly gross income²⁶ and subtract \$225.00 for each exemption claimed on IRS Form W4. Take this amount and use the appropriate table to determine the amount of taxes that will be withheld from the taxpayer.

If a taxpayer is paid biweekly, take his biweekly gross income and subtract \$103.85 for each exemption claimed on IRS Form W4. Compare this amount to one of the following tables:

Single Person (to include head of household)

If the amount of wages (after subtracting withholding allowance) is:		The amount of income tax to withhold is:	of excess over:
<u>Over</u>	<u>But not over</u>		
0	\$102	0	
\$102	\$1035	15%	\$102
\$1035	\$2210	\$139.95 plus 28%	\$1035
\$2210	\$4987	\$468.95 plus 31%	\$2210

25. $(.15 \times \$26,754) = \4013.16 . $\$4013.16 - \$1200 = \$2813.16$.

26. For service members, monthly gross income generally consists of base pay plus hazardous duty pay, if applicable. Gross income does not include BAH, BAS, or any other nontaxable allowance. The amount of gross income a service member has each month is reflected in the federal tax section of his leave and earnings statement.

Married Person

<u>Over</u>	<u>But not over</u>	The amount of income tax to withhold is:	of excess over:
0	\$248	0	
\$248	\$1798	15%	\$248
\$1798	\$3710	\$232.50 plus 28%	\$1798
\$3710	\$6167	\$767.86 plus 31%	\$3710

Assuming that Major Poor claims a status of married with five dependents on his IRS Form W4, he will have \$3704.76 of federal taxes withheld from his income in 1998. This result is achieved by taking his monthly taxable income of \$3721.20; reducing it by \$1125 (five times \$225); using the married taxpayer withholding rate table; and multiplying the result by twelve.

Since Major Poor's estimated taxes for 1998 are \$2813.16, he can expect to receive a refund of \$891.60. Instead of waiting until the end of the year, however, Major Poor can adjust his W4 now and receive more money right now. If Major Poor were to claim a filing status of Married with seven dependents on his IRS Form W4, he would achieve an optimal result. First, he would have \$67.50 more income each month.²⁷ He would also still be entitled to a refund of \$81.60 at the end of the year.²⁸

The information in this article can also be used to assist taxpayers who are not having enough income taxes withheld. This typically occurs when both spouses work or when the taxpayers have investment income. These taxpayers typically need to claim fewer exemptions than they would otherwise be entitled to take on the IRS Form W4. This is necessary so that enough taxes are withheld to cover the taxes on their investment income. Legal assistance attorneys can use the information in this article to help their clients determine the proper number of exemptions to claim on IRS Form W4. Legal assistance attorneys should always ensure that their clients have enough

income taxes withheld so that their clients do not get large tax bills and run the risk of having to pay penalties.

Providing this type of assistance can be a valuable service to legal assistance clients. Practitioners should exercise caution and ensure that their advice does not result in a client having too little taxes withheld. Legal assistance attorneys should never advise a client to claim more exemptions than allowed by his circumstances and the instructions that accompany IRS Form W4. Taxpayers who claim more exemptions than allowed can be subject to criminal and civil penalties.²⁹ Lieutenant Colonel Henderson.

SSCRA Note

Child Support and Paternity Case Stay Actions Impacted by the Welfare Reform Act of 1996

The "military stay" provision of the Soldiers' and Sailors' Civil Relief Act³⁰ (SSCRA) is frequently used for civil court actions. This provision states:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as a plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.³¹

The stay provision applies to pre-service and in-service court actions and proceedings. Upon request by a soldier's representative,³² a civilian court may stay any hearing or ruling on such action, if the service member is unavailable (for example, unable to take leave)³³ and would be prejudiced or "materially affected" by his inability to attend the court proceedings personally.³⁴ As a result of the passage of the Welfare Reform Act of 1996,³⁵ however, the first prong of the stay requirement may be harder to meet.

27. If Major Poor claimed M5 on his I.R.S. Form W-4, \$308.73 of taxes would be withheld each month. If he claimed M7, \$241.23 of taxes would be withheld. As a result, he would have \$67.50 less in taxes withheld each month if he changed his I.R.S. Form W-4 withholding election from M5 to M7.

28. Major Poor's withholding for the year would be \$2894.76, and his anticipated taxes would be \$2813.16. Thus, he can expect a refund of \$81.60.

29. I.R.C. §§ 6682, 7205 (CCH 1997).

30. Act of October 17, 1940, ch. 888, 54 Stat. 1178 (as amended) (currently codified at 50 U.S.C. App. §§ 501-593 (1994)).

31. *Id.* § 201 (current version at 50 U.S.C. App. § 521).

The Welfare Reform Act directed the Department of Defense (DOD) to promulgate regulations to facilitate service members in obtaining leave for appearances in paternity and child support cases.³⁶ On 10 September 1997, the Department of Defense, in compliance with the Welfare Reform Act, promulgated the following change to *Department of Defense Directive 1327.5, Leave and Liberty*:³⁷

When a service member requests leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, leave shall be granted, unless: (a) the member is serving in or with a unit deployed in a contingency operation or (b) exigencies of military service require a denial of such request. The leave shall be charged as ordinary leave.³⁸

The Department of the Army is in the process of revising *Army Regulation 608-99, Family Support, Child Custody, and Paternity*,³⁹ and *Army Regulation 600-8-10, Leaves and Passes*,⁴⁰ to conform to the requirements of the Welfare Reform Act and *DOD Directive 1327.5*.⁴¹ The “exigencies of military service” provision will probably be quite narrowly construed to avoid shielding service members from meeting their legitimate child support obligations.⁴²

What does this change mean for legal assistance attorneys who are attempting to obtain stays for their clients in paternity and child support cases? Civil courts will start to take notice of this new leave provision, which should limit successful stay attempts in child support and paternity support cases where the service member is not truly unavailable to attend court proceedings.⁴³ Nonetheless, those service members who are most deserving of a stay should be able to point to their contingency operation deployments or military exigency situations to bolster their requests for stays.

If the child support claim arises out of divorce or paternity proceedings that may be resolved by an administrative hearing,⁴⁴ this new directive will not have much impact. Administrative hearings are not subject to the SSCRA stay provisions. Thus, there are no stays for such administrative proceedings. Nonetheless, these proceedings will most likely be subject to the new “liberal leave” provision of the Welfare Reform Act.⁴⁵

Civilian courts are already very reluctant to hold up child support or paternity support determinations. This is especially true when all of the facts are available to make the necessary child support calculations and when the amount of support is based on current child support formulas.⁴⁶ Unless the service member falls outside the formula guidelines, there is no factual dispute as to how much the service member owes for support. Civil courts, concerned for the welfare of children, are unlikely to find that military service materially affects a service mem-

32. Legal assistance attorneys are strongly discouraged from directly contacting a court to assert a stay. Several states consider such stay requests by attorneys to be an appearance, which precludes the client from being able to reopen a default judgment under Section 520 [50 U.S.C. App.], if the stay request is denied. See *Artis-Wergin v. Artis-Wergin*, 444 N.W.2d 750, 753-54 (Wis. Ct. App. 1989); *Skates v. Stockton*, 683 P.2d 304, 306 (Ariz. Ct. App. 1984); Mary Kathleen Day, Comment, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 TULSA L.J. 45, 55 (1991); Major Howard McGillin, *Stays of Judicial Proceedings*, ARMY LAW., July 1995, at 68; Michael A. Kirtland, *Civilian Representation of the Military C*L*I*E*N*T*, 58 ALA. LAW. 288, 289 (1997). The better courses of action are to have the service member's commander request the stay or to request that opposing counsel raise the issue before the court. See *Cromer v. Cromer*, 278 S.E.2d 518 (N.C. 1981); *Sacotte v. Ideal-Werk Krug*, 359 N.W.2d 393 (Wis. 1984).

33. 50 U.S.C. App. § 521 (1994).

34. *Id.*

35. Welfare Reform Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

36. *Id.* § 363(b), 110 Stat. 2248.

37. U.S. DEP'T OF DEFENSE, DIR. 1327.5, LEAVE AND LIBERTY (24 Sept. 1985).

38. *Id.* (IO 4, 10 Sept. 1997). The change became effective immediately.

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

40. U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES (1 July 1994).

41. Telephone interview with John T. Meixell, Staff Counsel, Legal Assistance Policy Division, Office of The Judge Advocate General, U.S. Army (Mar. 9, 1998).

42. *Id.*

43. See *Underhill v. Barnes*, 288 S.E.2d 905 (Ga. 1982) (denying stay request upon taking judicial notice of service leave regulations, where soldier made no effort to request leave, even though the soldier had leave available); *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980). See also *Bowman v. May*, 678 So.2d 1135 (Ala. Civ. App. 1996); *Judkins v. Judkins*, 441 S.E.2d 139 (N.C. 1994).

44. Welfare Reform Act of 1996, Pub. L. No. 104-193, § 363, 110 Stat. 2248 (1996).

45. *Id.*

ber's case when the service member has no good faith defense.⁴⁷ Similarly, the absence of the service member from a temporary child support hearing has been held to be non-prejudicial, since the decision is not final and is subject to further modification.⁴⁸

Despite these legal trends and this new legislation, a service member should still be able to obtain a stay in a contested paternity case⁴⁹ where the service member is serving in a deployed unit in a contingency operation. Likewise, soldiers should still be able to obtain stays in divorce cases⁵⁰ where child support is not the only issue. Lieutenant Colonel Conrad.

USERRA Note

Jury Trials for USERRA Cases

A federal district court recently held that, under the Uniformed Services Employment and Reemployment Rights Act⁵¹ (USERRA), plaintiffs may request jury trials in those cases where there is a claim for liquidated damages.⁵² In *Spratt v. Guardian Automotive Products, Inc.*,⁵³ the U.S. District Court for the Northern District of Indiana ruled that a plaintiff is entitled to a jury trial under the liquidated damages provision of the USERRA.⁵⁴ The court determined that the USERRA provides for double damages where willful employer noncompliance is shown. As a result, the USERRA converts such cases to suits at common law for Seventh Amendment⁵⁵ right to jury trial purposes.⁵⁶

Spratt marks a change in this area of the law. The previous reemployment rights statute, the Veterans' Reemployment Rights Act (VRRRA), had no liquidated damages provision for willful misconduct by the employer.⁵⁷ Most courts interpreted the VRRRA to have only provided for equitable remedies. Thus, under the VRRRA, plaintiffs were not entitled to jury trials.⁵⁸

46. 42 U.S.C. §§ 651-667 (1994).

47. *Ford v. Ford*, 1996 WL 685787 (Ohio 1996) (holding that, where the court has all of the facts to determine child support, the presence of the military member is not necessary at a child support modification hearing); *Power v. Power*, 720 S.W.2d 683 (Tex. Ct. App. 1986); *Jaramillo v. Sandoval*, 431 P.2d 65 (N.M. 1967) (holding that the determination of a service member's obligation as to future support, which had been resolved in his absence, is nonprejudicial since paternity was adjudicated with the service member present); Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 SANTA CLARA L. REV. 137, 154-57 (1992).

48. *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989). Most state temporary child support statutes do not require the appearance of both parties at a hearing. See, e.g., WIS. STAT. ANN. § 767.23(1)(a) (West 1997) (stating that the presence of only one party is required for a temporary support order).

49. See Baron, *supra* note 47, at 156-57. See also *Mathis v. Mathis*, 236 So.2d 755 (Miss. 1970) (holding that contested paternity must be resolved with the service member present, as absence materially affects his defense); *Stringfellow v. Whichelo*, 230 A.2d 858 (R.I. 1967).

50. See Baron, *supra* note 47, at 154-56. See also *Kramer v. Kramer*, 668 S.W.2d 457, 458-59 (Tex. Ct. App. 1984) (involving child custody in dispute); *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) (involving child custody in dispute); *Smith v. Smith*, 149 S.E.2d 468, 471 (Ga. 1966) (involving an alimony entitlement issue).

51. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. §§ 4301-4333 (West Supp. 1997)).

52. *Spratt v. Guardian Automotive Prods., Inc.*, No. 1:97-CV-323, 1998 WL 125939 (N.D. Ind. Mar. 17, 1998).

53. *Id.*

54. The USERRA liquidated damages provision states:

- (1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter—
 - (i) to require the employer to comply with the provisions of this chapter; and
 - (ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and
 - (iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
- (B) Any compensation under clauses (ii) and (iii) of subparagraph (A) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

38 U.S.C. § 4323(c) (West Supp. 1997). The provision does not apply to federal employees.

55. "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

56. See *Spratt*, 1998 WL 125939, at *5.

57. Compare 38 U.S.C. § 2022 (West Supp. 1991) (containing the VRRRA damages provision), with 38 U.S.C. § 4323(c) (West Suppl 1997). The VRRRA provision provided only for monetary recovery of actual wages lost, but not punitive (liquidated) damages.

58. See *Spratt*, 1998 WL 125939, at *1.

In *Spratt*, the court reached its conclusion by reviewing the two possible sources for a constitutional right to trial by jury in federal cases: (1) where the statute expressly provides for trial by jury and (2) where the claim involves those rights and remedies typically enforced by a court of law, not a court of equity.⁵⁹ The court conceded that Congress did not expressly provide a right to jury trial in the USERRA statute,⁶⁰ but found that Seventh Circuit precedent provided that “actions seeking liquidated damages provided by statute are ‘suits at common law’ for constitutional purposes.”⁶¹ The court rejected the defendant’s argument that the USERRA liquidated damages clause provided only for “court” determination of actual damages suffered.⁶² The court observed that the word “court” could mean trial by either jury or jury.⁶³

The employer argued that Congress, in the USERRA’s legislative history, urged courts to incorporate into the USERRA the case law arising from the VRRRA.⁶⁴ The court replied that the legislative history should be read to encourage incorporation of those concepts and prior cases from the VRRRA that are still consistent with the USERRA. Since the VRRRA never had a liquidated damages provision, those VRRRA cases that indicate that there is no right to a jury trial would not be controlling in interpreting the USERRA liquidated damages provision.⁶⁵

The employer then argued that the monetary remedies provided under the USERRA were in fact restitution, which would make them equitable in nature, especially when they are combined with the injunctive nature of the other USERRA remedies.⁶⁶ The court responded that the USERRA liquidated damages provision, unlike the VRRRA back-pay provision, was not solely restitution for wages lost, but included a punitive aspect by doubling damages for willful employer violations of the statute.⁶⁷ Punitive damages are traditionally a legal remedy that must be imposed by a jury.⁶⁸

Finally, the employer argued that the USERRA liquidated damages provision was intertwined with, or solely incidental to, equitable remedies under the Act. The court pointed out that the USERRA, unlike its predecessor, has a distinct and separate remedy for willful employer violations; that remedy is not incidental to any equitable relief.⁶⁹ As a separate punitive remedy for willful employer violations, the liquidated damages provision is not part of any equitable scheme to make a wronged employee whole. Rather, it is a separate potential punishment for employers who willfully violate the USERRA.

The potential prospect of a jury trial in a USERRA case can result in extra bargaining power for reservists and veterans in dealing with recalcitrant civilian employers on job reemployment and military status discrimination questions. The high employer costs of defending a case before a jury include lengthy delays in case resolution, jury unpredictability as to damage awards, significant attorney fees and court costs, and productive time lost due to depositions and trial proceedings. These additional burdens on employers may encourage greater employer cooperation in seeking pre-trial settlement of USERRA cases where employer willful misconduct is an issue. Lieutenant Colonel Conrad.

International and Operational Law Note

When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War

On 12 August 1996, the Chairman of the Joint Chiefs of Staff issued an instruction⁷⁰ that is intended to implement the Department of Defense Law of War Program.⁷¹ With the following simple paragraph, this instruction established, as a mat-

59. *Id.* at *2-*3.

60. *Id.*

61. *Calderon v. Witvoet*, 999 F.2d 1010, 1014-17 (7th Cir. 1991). The court recognized a split of authority regarding whether actions seeking liquidated damages create a “suit at common law” for Seventh Amendment purposes outside of the Seventh Circuit. See *Lorillard v. Pons*, 434 U.S. 575, 577 n.2 (1978). The court compared the “willful misconduct” damages provisions of the law involved in the *Calderon* case to the present USERRA case and found the statutes similar. *Spratt*, 1998 WL 125939, at *3.

62. *Spratt*, 1998 WL 125939, at *5.

63. *Id.* See *Kobs v. Arrow Serv. Bureau, Inc.*, 134 F.3d 893, 896 (7th Cir. 1998).

64. *Spratt*, 1998 WL 125939, at *3. See H.R. Rep. No. 103-65, at 19 (1994), reprinted in 1994 U.S.C.C.A.N. 2452.

65. *Spratt*, 1998 WL 125939, at *3.

66. *Id.* See *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995).

67. *Spratt*, 1998 WL 125939, at *4.

68. *Id.* See *Tull v. United States*, 481 U.S. 412, 422 (1987).

69. *Spratt*, 1998 WL 125939, at *5.

ter of U.S. policy, the scope of applicability of law of war principles to U.S. operations:

The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by higher competent authorities, will apply law of war principles during all operations that are categorized as Military Operations Other Than War.⁷²

This one paragraph elevated the imperative that judge advocates understand, and be prepared to articulate, the “principles of the law of war.” United States policy now extends the application of these principles to virtually every conceivable military operation.⁷³ While the imperative of application of law of war principles to these operations is clear, the meaning of what constitutes “principles of the law of war” is not. The instruction gives no indication as to which principles the Department of Defense is referring.⁷⁴

Defining the “principles” of the law of war is no simple task. While there may be little dispute that concepts such as military necessity, proportionality, and the prevention of unnecessary suffering fall within this definition, the instruction arguably encompasses a much more extensive list of concepts related to regulating the conduct of combatants during conflict. The purpose of this note is to introduce judge advocates to a continuing series of practice notes, each of which will focus on a concept of the law of war which might fall under the category of “principle.” These notes will improve the practitioner’s understanding of law of war concepts and familiarize the practitioner with the substantive concepts that are potentially encompassed by the instruction.

To comprehend fully the significance of the instruction,⁷⁵ a discussion of how the law of war is triggered as a matter of international law is essential. The law of war is an aspect of international law, which is a body of law that regulates the conduct of states.⁷⁶ As a general proposition, international law requires some “justification” for intruding on the sovereign affairs of regulated states. In most cases, this “justification” results from the consensual obligations assumed by a state in exchange for receiving the benefit of being a member of the regulated community.⁷⁷

In the case of the law of war, it becomes binding on states (and therefore state actors) only if a state of conflict exists.⁷⁸ The extent of regulation is contingent on the nature of the conflict. If the conflict results from a dispute between two states, the entire body of the law of war is “triggered,” and the conduct and treatment of those involved or caught up in the conflict is regulated almost exclusively by international law.⁷⁹ If, however, the conflict is “not of an international character,”⁸⁰ the extent of regulation imposed by the law of war is much more limited.⁸¹ The extent of regulation is not significant to this discussion. Instead, the significance lies in the recognition that, as a matter of international law, the law of war becomes technically binding *only during periods of armed conflict or belligerent occupation*.

This fact explains the significance of the U.S. policy to extend application of law of war principles to “all operations that are categorized as Military Operations Other Than War.”⁸² The impact of this policy is to extend application of these principles to operations that under international law would not necessarily trigger such application, because they do not involve “conflict.”⁸³ Judge advocates who are unfamiliar with law of war concepts that arguably fall into the category of “principles of the law of war” are therefore unprepared to provide the advice necessary to enable supported commands to comply

70. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01].

71. U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979) [hereinafter DOD DIR. 5100.77].

72. JCS INSTR. 5810.01, *supra* note 70, para. 4.a.

73. The United States Army defines Operations Other Than War as “[U]se of Army forces in peacetime” U.S. DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-0 (14 June 1993). Examples of peacetime use of the Army include “disaster relief, nation assistance, security and advisory assistance, counterdrug operations, arms control, treaty verification, support to domestic civil authorities, and peacekeeping.” *Id.* at 2-0-1. The DOD Dictionary defines Operations Other Than War as follows:

Military operations other than war—(DOD) Operations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war. Also called MOOTW.

U.S. DEP’T OF DEFENSE, JOINT PUBLICATION 1-02, DOD DICTIONARY (23 Mar. 1994) (updated through April 1997).

74. See JCS INSTR. 5810.01, *supra* note 70.

75. See *supra* note 70 and accompanying text.

76. “International law . . . consists of rules and principles of general application dealing with the conduct of states . . . with their relations *inter se*” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1986).

77. See ANTHONY D’AMATO, INTERNATIONAL LAW ANTHOLOGY 41-48 (1994).

with this instruction. The future installments in this series of practice notes will hopefully enable judge advocates to develop an understanding of some of these “principles.” Major Corn.

Contract and Fiscal Law Note

Armed Services Board of Contract Appeals Voids Contract Tainted by Fraud

In a rather interesting case, the Armed Services Board of Contract Appeals (ASBCA) held that a contract obtained through bribery was void.⁸⁴ Moreover, the ASBCA specifically concluded that the Army did not have to pay the German contractor for work it performed—even work ordered by the Army after it learned of the fraudulent conduct.⁸⁵

On 19 February 1990, the Army’s regional contracting office in Fuerth, Germany awarded a firm fixed-price requirements contract for the interior and exterior painting of troop buildings in Wertheim and Wuerzburg, Germany. The Army issued a number of delivery orders under the contract. The

Army did not contend that the contractor’s performance under the delivery orders was deficient.

German police investigators learned that the contractor bribed the Army’s contract specialist who was responsible for awarding the contract in this case. The contract specialist admitted that Mr. Jurgen Schuepferling, the owner of the contractor, gave her a bribe of DM 6000.00 to award the contract to his firm.⁸⁶ When questioned by the German authorities, Mr. Schuepferling said that he “might have” paid the contract specialist for the contract.⁸⁷

On 28 February 1991, Schuepferling was suspended from contracting with the government, making him ineligible to receive government contracts.⁸⁸ On 11 March 1991, the contracting officer ordered the Department of Engineering and Housing to stop issuing delivery orders and to stop processing all invoices under the contract with Schuepferling’s firm.⁸⁹ On or about 23 April 1991, however, the government decided to continue issuing delivery orders under the contract. The reason for the decision was that the government did not have any place, other than the buildings that needed painting, to house troops who were returning from Desert Storm.

78. U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9 (July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. “As the customary law of war applies to cases of international armed *conflict* and to forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law.” *Id.* (emphasis added). See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2-3, T.I.A.S. No. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3363 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3364 [hereinafter GPW]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3365 [hereinafter GC]; 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, art. 1, 16 I.L.M. 1391; 1977 Protocol II Additional to the Geneva Conventions, Dec. 12, 1977, art. 1, 16 I.L.M. 1391 [hereinafter GP II]. One commentator notes:

Humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it.

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 40 (Yves Sandoz et al. eds., 1987).

79. See generally FM 27-10, *supra* note 78, at 9. See also RICHARD I. MILLER, THE LAW OF WAR 17-27 (1975).

80. See GWS, *supra* note 78, art. 3; GWS Sea, *supra* note 78, art. 3; GPW, *supra* note 78, art. 3; GC, *supra* note 78, art. 3.

81. See *supra* note 80; see also GP II, *supra* note 78.

82. JCS INSTR. 5810.01, *supra* note 70, para. 4.a.

83. See *supra* note 73 and accompanying text.

84. Appeal of Schuepferling GmbH & Co., KG, ASBCA No. 45,564, 1998 WL 136175 (ASBCA Mar. 23, 1998).

85. *Id.* at 11.

86. *Id.* at 9.

87. *Id.* at 7. Mr. Schuepferling stated that he started paying bribes to obtain contracts because, without the payments, he was receiving fewer and fewer solicitations. However, he never complained to or sought information from U.S. Army contracting personnel with respect to not receiving solicitations.

88. *Id.* at 10. The contractor was eventually debarred for a period of approximately three years for his fraudulent conduct.

89. *Id.* at 7. On 22 March 1991, the government’s regional counsel advised the contracting officer that “[p]lacing delivery orders in accordance with terms of the existing contract is not prohibited by FAR 9.405 or 9.405-1(b) The contract should not be modified to expand the scope of the work” *Id.*

The contractor completed work under the contract on or about 7 May 1991 and subsequently submitted several invoices for the work that it competed. The contracting officer notified the contractor in writing that payment on each invoice was being withheld due to preliminary findings that it paid substantial bribes to U.S. government employees in order to secure contract award. After a German court found the contract specialist guilty of accepting a bribe, the contractor filed a certified claim in the amount of DM 98,414.27—the amount of the unpaid invoices. On 12 January 1993, the contractor appealed the contracting officer’s “constructive”⁹⁰ denial of the claim.⁹¹

The Army filed a motion to dismiss the contractor’s claim based on a lack of jurisdiction. The Army argued that the contract was tainted with fraud because of the bribery and was, therefore, void ab initio. The contractor argued that the Army’s motion must be denied.

[I]n appellant’s opinion, the evidence does not establish that bribery either led to the award of the contract to appellant or affected appellant’s performance of the contract work. According to appellant, any payments which the Government alleges appellant made were not made to induce the Government to do anything regarding this contract which the Government was not legally obligated to do: i.e., to award the contract to the lowest responsible, responsive bidder In any case, the Government’s failure to terminate the contract, notwithstanding its knowledge of the alleged fraudulent conduct, together with its continued demands for and acceptance of appellant’s continued performance constitutes a ratification or affirmation of the contract by the Government thus negating any inherent Government right to avoid the contract.⁹²

The ASBCA concluded that the contractor’s argument was without merit. The board noted that the facts of the case “clearly and convincingly” establish that the contractor paid the contract specialist to manipulate the competitive bidding process with respect to the contract in question. In consideration for the payment of the DM 6000.00, the contract specialist gave Mr. Schuepferling the source list and deliberately failed to post the solicitation on the bulletin board for all competitors to see. Given these rather straightforward facts, the ASBCA found that the contract was tainted by fraud from the outset. Relying on *Godley v. United States*⁹³ and *J.E.T.S., Inc. v. United States*,⁹⁴ Administrative Judge J. Stuart Gruggel found that the contract was void ab initio and could not be ratified.⁹⁵

The most interesting part of the case is the fact that the Army issued delivery orders to the contractor after there was compelling evidence that showed that the contractor engaged in fraud. When the delivery orders were issued, government representatives were aware that there was a strong likelihood that the contractor would not be paid for the additional work. The ASBCA’s opinion does not indicate whether or not government representatives made this point clear to the contractor when they issued the delivery orders. Given this factual scenario, the contractor argued that the government was unjustly enriched by its work on the delivery orders.

Judge Gruggel specifically rejected the contractor’s unjust enrichment argument⁹⁶ and compared the subject case to *United States v. Amdahl Corp.*⁹⁷ In *Amdahl*, the U.S. Court of Appeals for the Federal Circuit found that a contract was void ab initio because its terms and conditions were contrary to a statute.⁹⁸ Judge Gruggel noted that in *Amdahl* there was no hint or suggestion that the contractor engaged in any type of fraud, unlike the subject case. More specifically, the judge stated:

It is well established that the absence of a criminal conviction of Mr. Schuepferling for bribery and assuming, arguendo, even the absence of a specific showing that the wrong-

90. It was a “constructive” denial of the claim because no final decision was issued.

91. *Schuepferling*, 1998 WL 136175, at 10. The ASBCA’s opinion does not specify what happened between 1993 and 1995. The opinion notes that in 1995, the contractor was convicted of bribing U.S. government officials on two other construction contracts. The German court’s order did not specify the instant contract. On 8 February 1996, the U.S. government notified the contractor of a gratuities clause violation proceeding to be held pursuant to FAR 52.203-3. On 22 May 1996, the Deputy Assistant Secretary of the Army (Procurement) concluded that the contractor committed a gratuities clause violation on the instant contract and accessed exemplary damages in the amount of approximately DM 24,000.

92. *Id.* at 11.

93. 5 F.3d 1473 (Fed. Cir. 1991).

94. 838 F.2d 1196, 1200 (Fed. Cir.), *cert. denied.*, 486 U.S. 1057 (1988).

95. *Schuepferling*, 1998 WL 136175, at 17-18.

96. *Id.* at 17.

97. 786 F.2d 387, 393-95 (Fed. Cir. 1986).

98. *Id.*

doing adversely affected the contract does not preclude our holding that the contract is void ab initio and cannot be ratified *This is due to the primacy of the public interest in preserving the integrity of the federal procurement process as well as the overriding concern for insulating the public from corruption.*⁹⁹

So where does this case leave the practitioner? The key lesson for the practitioner is to recognize the impact or significance of contractual remedies when combating procurement fraud. The Department of Defense's approach in combating

procurement fraud is commonly referred to as a coordination of remedies approach. That is, the government should unleash their criminal, civil, administrative, and contractual remedies against contractors who engage in fraud. Historically, contractual remedies have been the Rodney Dangerfield of the remedies. That is, they have often been neglected or ignored, in deference to sexier approaches, such as criminal or civil sanctions. This case highlights the impact that contractual remedies can have on a contractor, even under circumstances in which they have some equities in their corner. The lesson is to ensure that the government brings all of its weapons to bear against bad contractors. Major Wallace.

99. Schuepferling, 1998 WL 136175, at 18 (emphasis added).