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Editor

Captain Benjamin T. Kash

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Creative Settlement Strategies

Jessica L. Parks
Board Member

United States Merit Systems Protection Board

*Editor's Note—Merit Systems Protection Board Member Jessica L. Parks presented these remarks in an address to the 41st Federal Labor Relations Course at The Judge Advocate General's School.**

Introduction

When the French political observer de Tocqueville traveled through America in the 1800's, he noted that Americans were a litigious lot. We have not changed much. We still seem to amaze the citizens of other countries with our fondness for law suits. While Americans are said to have no great fondness for lawyers, there *are* a lot of lawyers and they are needed for nearly all important acts and events in our lives. We have built up elaborate structures to present our claims and complaints against one another, to decide who is right, and to get a pronouncement to that effect from an impartial third party. If everyone in the United States who had a right and a reason to take someone else to court actually did so, litigation surely would absorb most of this nation's energies.

Other ways to resolve disputes exist. At a time when all of us are trying to do more with less, we need to look at alternatives. The alternative I want to present is the settlement of appeals filed with the Merit Systems Protection Board (MSPB or Board). I intend to tell you something about the Board's view of settlement, some reasons for you to consider settlement favorably, and some approaches you can take. My message is that settlement is a respectable, advantageous, and economical resolution to many cases and that cultivating positive attitudes and creative strategies in settlement is worth your while.

Settling Cases

The MSPB settles a lot of cases. It has not always done so. Recently, I visited our regional office in St. Louis. An administrative judge there told me that when he first began raising the possibility of settlement with parties to a case, they would respond, "Can we do that?" They did not even realize they could settle.

Since 1983, the MSPB has relied increasingly on pre-hearing conferences and settlement negotiations to resolve

appeals. The rate of settlement has risen accordingly. Around forty percent of initial appeals filed in our regional offices are dismissed for untimeliness or lack of jurisdiction. In fiscal year (FY) 1985, eighteen percent of the cases that were not dismissed were settled. By FY 1988, the rate had risen to forty-eight percent. It has held steady at about that level for the past three years. Last fiscal year, that amounted to nearly 2000 cases settled.

How Do We Do It?

The Board has adopted a policy favoring settlement and has let that fact be known. This policy is not an idiosyncrasy of ours. We are in the mainstream of adjudicators—from the federal district courts to the Federal Labor Relations Authority—in our emphasis on informal resolution of disputes. The MSPB's procedures require our administrative judges to focus the parties' attentions on settlement at the very beginning of each adjudication. Nearly all of the roughly 7000 appeals filed with the Board annually go first to an administrative judge in one of our eleven regional offices. The Board promotes resolution through settlement at that stage.

We train our administrative judges to facilitate settlements. One useful resource for this purpose is the Federal Judicial Center's publication, *Settlement Strategies for Federal District Judges*. Our administrative judges attend training and exchange techniques with each other, both informally and in formal settings. I am proud to say that our success in the use of alternative methods of resolving disputes has been cited in the deliberations of both houses of Congress on the Administrative Dispute Resolution Act of 1990. Alternative methods of dispute resolution have become a tradition with us and our administrative judges have considerable expertise in this area.

I have heard more than once that our administrative judges are overly enthusiastic in encouraging settlements. I even have been asked whether their performance standards require them to settle a certain number of their cases. The answer to that question is "no." That the Board has an interest in settlements is true. That interest is reflected in performance standards that require general adherence to a number of practices, including engaging the parties to a dispute in settlement activities. Performance above the fully successful level *can* be demonstrated through expert and creative settlement efforts, but we have no numerical requirements and

* These remarks also were presented at meetings sponsored by the Office of Personnel Management in St. Louis, Missouri, and Philadelphia, Pennsylvania; by the Department of Labor in Washington, D.C.; and by the Society of Federal Labor Relations Professionals in Virginia Beach, Virginia. The author wishes to express her appreciation to Linda L. Bowdoin, her executive assistant, for assisting in the preparation of these remarks.

no positive requirements for settlement as opposed to other methods of managing cases.

Some of our administrative judges pursue settlement very directly. They place settlement before the parties as an objective and direct their attentions toward it throughout the prehearing stage. Other administrative judges hardly mention settlement to the parties at all, but they assure at the outset of prehearing discussions that each side knows what the other already has offered. At the end, settlement is raised as a possibility, based on the positions the parties have taken and the interests they have expressed during the prehearing conferences. Both approaches have resulted in high rates of settlement. I think this demonstrates that the parties themselves see advantages in settlement. Whichever approach is used, the administrative judge certainly will follow the Board's practice of requiring prehearing conferences.

When the parties settle an appeal, the administrative judge usually dismisses it, based on the settlement. The administrative judge first must determine that the parties actually have reached a settlement, that they understand its terms, and that they agree about whether to have it entered into the record. If the settlement agreement becomes a part of the record, then it is enforceable by the Board. The administrative judge must conclude that an agreement is lawful on its face and freely entered into by the parties before it is entered into the record. "Last chance" agreements, in which appellants waive their rights to appeal to the Board, also must be found to have been entered into in good faith. Of course, the parties can settle a case without the administrative judge's involvement. If such a settlement is reached and the appeal is withdrawn, the Board loses jurisdiction over it. In these cases, the settlement agreement is not enforceable by the Board.

Why Should You Settle?

You should settle if settlement promotes your client's interest. In that connection, I would like to dispel a couple of bogus reasons for settlement and then suggest to you what I think are some good reasons to settle.

In the department of the bogus, I have been told that some parties see an administrative judge's enthusiasm for settlement as dangerous. Some practitioners have told me that they were concerned that their refusals to settle might dispose the administrative judge to rule against them at the hearing. I would like to address that question from two points of view.

First, I served as an administrative judge in the Board's regional office in Atlanta for three years. My tenure in that job was at the beginning of the Board's emphasis on settlement. I personally enjoyed helping the parties settle their disputes. The process generally is a positive one that often results in a solution that satisfies both parties. I never would have been influenced to make an inappropriate ruling against a party who did not settle and I do not think my colleagues would have done so.

Second, I not only was an administrative judge for the Board, but also represented an agency before the Board for about five years when settlement was reaching its current high level. Because we approached settlement reasonably and cooperated in settlements when they made sense, we did not feel at a disadvantage when we had cases that we could not settle in good conscience. When we had to decline to settle, we did not hesitate to point out to the administrative judge our reasonable overall record in settling previous cases.

While I cannot speak first-hand on settlement of cases from the point of view of appellants, I do have some experience that inclines me toward the same conclusion from that perspective. As a private practitioner in North Carolina, I represented employees in their appeals of personnel actions and defendants in criminal cases. I never settled an employment case, but the resolution of criminal cases without trial through "plea bargaining" is, of course, a very common and accepted practice. I can recommend that representatives of appellants keep an open mind to settlement for the same reasons I would recommend settlement to agencies.

I think you should *not* settle simply to avoid falling into disfavor with the administrative judge. Although it may be in accordance with human nature to have that concern, I just do not think the concern is realistic.

Moreover, you should *not* settle just to save the Board time and trouble. While we would like for you to have the Board's interests at heart, we realize that we probably are pretty far down on your list of beneficiaries. Actually, although settlement *generally* is more economical for the Board, that is not true in each and every case. Settlement can be an even *longer* procedure in some cases. The Board encourages settlement for a number of reasons, including overall economy. As taxpayers, we all should have economy of government in mind as we approach our jobs, but the Board's convenience and economy are not the main reasons for you to consider settlement.

You *should* try to settle cases in which settlement is in your client's best interest. Let me review with you some reasons why your client's interest may be served by settlement. Not all these reasons will apply to all cases, but some of them will apply to most. Keep in mind, as you consider the reasons that I give you, that you probably will need to present those same reasons to your client if you decide to pursue settlement. Sometimes, convincing your client is the hardest part of the process.

Settlement Eliminates the Element of Surprise at the Outcome of the Case

We all know that no case is a certain winner. Surprises that come up at the hearing can undermine a position that originally seemed very secure. In a settlement, you know the outcome and you participate in its creation.

Settlement Places You and the Other Party in Control

This always has been my favorite reason to settle. If the case is adjudicated, the administrative judge is in charge. Always remember that the parties have much greater latitude in choosing a resolution than the administrative judge has.

Settlement Can Get You a Better Deal than a Decision from the Administrative Judge

As an administrative judge, I sometimes was frustrated by the limited choices I had in deciding a case. I could reverse or uphold the agency's action, or mitigate the penalty. That was it, other than the question of attorneys' fees. Administrative judges are limited in their decisions to separating the winners from the losers. The options open to the parties are far more varied.

For example, consider a performance case in which the appellant had been removed after forty years of service. In settlement, she was allowed to resign with a clean record and was given a \$6000 cash settlement to redeposit in the retirement system, so that her annuity was increased. The agency did not have to go to hearing and ran no risk of losing a complicated performance case. The administrative judge could not have rendered a decision that accommodated both parties in this manner.

Also, consider the case of an employee removed for unacceptable performance by an agency that was about to undergo a reduction in force (RIF). In settlement, the employee was reinstated and "RIFed," based partly on his lack of standing because of his unacceptable performance rating. The agency no longer had the employee and the employee did not have a removal on his record—but the employee's last performance rating of record was "unacceptable," which would provide fair warning to other federal agencies if the employee applied for another government job.

A common type of settlement agreement is the "last chance" agreement. In a "last chance" agreement, the appellant is reinstated to his or her position and withdraws the appeal. Accordingly, the employee gets his or her job back with an opportunity to keep it. The agency gets the employee's concession that, if the employee commits another violation of performance or conduct standards, he or she may be removed without recourse to procedural or appellate rights.

You also can consider packaging a number of related issues into one settlement agreement. For example, if an employee has filed more than one administrative or judicial action based on personnel actions instituted by the supervisor who removed the employee, the employee may be interested in withdrawing all of the actions in return for assignment to a job with another supervisor. Assuming that this resolution suits all the agency officials involved, it could be a good deal for everyone.

Settlement Can Save You Money and Staff Time

The time spent in prehearing conferences can be considerably less than the time required to present the case at hearing.

This not always will be so, but the time spent in settlement should be considered in the context of the time that would be required of witnesses at the hearing, travel costs, and the time of the staff who would have to represent the parties at the hearing.

Settlement Can Cut Down on Psychological Wear and Tear on Your Witnesses

For some witnesses, the news that they will not have to testify is something like the news that they will not have to undergo amputation of a limb. I have been told by managers that they feel as though *they* are on trial at the Board's hearings. Appellants and agencies' witnesses generally are unaccustomed to the procedures of a hearing and I have been surprised by the intensity of the anxiety that some of them have expressed. Some of their reactions call to mind what the witnesses must have felt in *Alice in Wonderland* when the King of Hearts presided at trial. His instructions to a witness went, "Give your evidence, . . . and don't be nervous, or I'll have you executed on the spot." He later expanded on the instructions, saying, "Give your evidence, . . . or I'll have you executed whether you are nervous or not." The author remarked, "This did not seem to encourage the witness at all . . ."

I never have seen a judge take the King of Hearts' approach; I am certain that our administrative judges do not. But you probably have seen, as I have, a perfectly honest and reliable witness begin to sweat and stammer when he or she is testifying under oath at a hearing. The witness's testimony loses credibility because the witness is scared. This is not good for your case.

Further, testimony can be acrimonious. After all, to prevail, the agency usually must discredit the appellant's performance, integrity, or competence in the hearing room in the presence of the appellant. The resulting bad feelings must be dealt with later. If you settle the case, you can avoid these disadvantages.

Settlement Can Contribute to a More Harmonious Workplace

I think that the division of an agency's staff into "us" and "them"—whether or not employees and managers actually must appear as witnesses—is reduced through settlement. Because the settlement process is shorter, the length of a staff's preoccupation with the dispute also is reduced. Moreover, a "compromise" solution supports the perception that the two sides to the dispute are not "out for blood," but are out to solve problems. An attitude of problem solving in the workplace is productive for both management and employees. Disputes over personnel actions present an opportunity to put this approach into practice.

Settlement Can Resolve a Problem Quickly

Our administrative judges render decisions with great dispatch in comparison with other administrative forums of the

government. Virtually every case is decided within 120 days of the filing of the appeal. The parties, however, can come to settlement in much less time than that. Moreover, settlement tends to be a once-and-for-all solution. Settled cases generally are not further appealable to the Board in Washington, D.C., or to the courts.

Settlement Can Resolve Cases that Would Be Embarrassing or Damaging if Contested

One settlement in which I was involved as the agency's representative fits this category. You probably know of others. My case involved a removal for sexual harassment. The employee was a manager and the charges identified about half a dozen women as his victims. Some were agency employees—and some were employees of local agencies with whom we did business, which made this a very sensitive case. If the case had gone to hearing, all those women would have had to testify. Their testimonies would have subjected them and the agency to embarrassment. Because a chance that the agency will not make its case always exists, the manager might have been returned to his job. The witnesses feared retaliation if that should happen. One whole division of the office was caught up in the various aspects of the case. It ended in a settlement in which the manager waived all rights to appeal. He received a long suspension and then was allowed to use accrued leave until he was eligible for optional retirement. After he became eligible for retirement, he was to be demoted to a nonsupervisory position in another division of the office. As was expected, rather than accept the demotion, he retired. This was a complicated solution, but the problem also was complex.

In another sexual harassment case recently appealed to one of the MSPB's regional offices, the agency's position was undermined by several witnesses who recanted their original statements in support of the agency's charges. The agency stood a good chance of losing the case; however, both the agency and the employee believed it would be detrimental to all concerned for the employee to return to the current workplace. Their solution was a demotion, coupled with a training program and the opportunity for repromotion to a supervisory job at another location, with closer managerial supervision, after one year of good behavior.

Some Cases Should Not Be Resolved Through Settlement

Finally, you should remember that not every case is suitable for settlement. For example, one of our administrative judges found himself with the same appellant, removed for the third time for unacceptable performance. The employee had entered into two "last chance" agreements and the agency had made some procedural errors that had convinced it that it could not prevail at the hearing in at least one of those instances. The third time around, settlement would have been very hard to justify from the agency's point of view. When settling is not in your client's interest, my advice to you is, do not settle.

How Do You Settle?

First, *keep cool*. One barrier to settlement can be the parties' emotional stakes in vindicating their respective positions.

Developing an emotional investment in a case in which you are involved personally is easy. I would encourage you, as *representatives*, to serve your clients as sympathetic, but objective, sources of information and advice.

Second, *identify your objective*. If your objective is to prevail at all costs and to humiliate the other side, reexamine your objective. *Try to concentrate less on winning cases and more on solving problems.*

You may have been trained to judge your effectiveness by the number of cases you win. Many of you advise your clients throughout the process leading up to the appeal. You naturally want a clear-cut and decisive judgment by a third party to justify your hard work and aggravation. A third-party decision in your favor may send the message that similar cases will turn out similarly and may discourage the conduct that you want to discourage. Nevertheless, rarely is a case a certain winner. I never have seen one. Because you cannot rely with 100 percent certainty on prevailing, identifying other objectives is wise.

Is the agency's objective to get the employee out of the workplace? If so, does the agency care whether the employee goes by removal or retirement? Is the objective both to get this person out of the workplace and to put a future employer on notice of the employee's misconduct? If so, maybe a long suspension, coupled with a resignation, would accomplish that. Is the objective to keep the employee out of the office that he or she has disrupted? If the employee is rehabilitated, might this be achieved by an organizational or geographic reassignment?

When I address groups of appellants' representatives on this subject, I ask them to consider an appellant's objective similarly. Is the appellant's objective to go back to work? If so, could he or she meet the objective by taking another job in the organization under another supervisor? Could the appellant meet the objective through resignation and clearing his or her record, so that he or she could look for another job? Or could the appellant take a cash settlement to tide him or her over until he or she is eligible to receive a retirement annuity? Your client needs your help in identifying his or her real objective.

Third, *identify the other party's objectives*. What does the other side want? What parts of the other party's objectives are compatible with what you want? Can you fashion an agreement that meets both objectives—or, at least, comes close?

Fourth, *prepare your case early*. Do your homework by developing your evidence and researching the MSPB's case law. Your homework includes educating the administrative judge on the reasons why your position is the correct one. For an agency, this can mean letting the judge know enough about the agency's mission and the appellant's place in it that the judge clearly can see why the agency had to take the action it took. For the appellant, this can mean presenting details about the particular circumstances of the job and the persons involved so that the reasonableness of the appellant's complaint is clear.

A well-prepared party will have an advantage at a hearing, of course, but it also has the advantage in prehearing discussions. Both the other party and the administrative judge will tend to take the prepared party's position as the starting point to discuss settlement. The side that is unprepared is at a disadvantage in comparison.

Fifth, *realistically assess your chances of prevailing in a decision.* Keep evaluating the case as it develops through discovery and the prehearing conferences. If you stand a strong chance of losing at the hearing, you have a very strong reason to approach the case in an inventive and conciliatory manner.

Sixth, *take advantage of the expertise available to you and listen to other people's ideas.* Listen to the demands of the other party. Even if they are unrealistic, you may be able to build a reasonable solution on them. They may not be expressed perfectly, but a germ of a practical solution upon which you can expand may exist in almost any suggestion from the other side. Loosen up and use the expertise of the administrative judge as a facilitator.

Last, *keep your client informed of the developments in the case.* Do not surprise the client with a recommendation to settle. If you do, a perfectly reasonable settlement may be turned down. If your client fails to hear from you until you present the proposed settlement, he or she may be operating on the assumption that the case is a sure winner and that nothing can be gained by settling. That is an understandable attitude if the client is not kept informed. The person who must make the final decision to accept or reject a settlement should be kept informed throughout the preliminary discussions.

Be sure you know who can make the final decision. In one recent performance removal case, the appellant was offered a very attractive settlement. Because of the appellant's potential, the agency was willing to take him back in another wage grade job at a one-grade demotion (with a rate of pay fifty cents per hour less than that of his original job) and a chance for repromotion in a year. The appellant was told he needed to make a decision quickly because the offered job had to be filled. The appellant was slow in responding and the agency filled the job with someone else. The appellant ultimately had

to accept a job three grades below his old job, which disappointed both the agency and the appellant. The appellant actually had hesitated for so long because his wife was adamant that he should not take a reduction in pay. In this case, the person in a position to agree was not the one you would think. That person was not the appellant, but the appellant's wife. If the administrative judge had known that, the situation could have been explained to the wife, who might have agreed to an offer better than the one that her husband ultimately accepted. That may seem like an unusual example, but having a comparable situation in government is not unusual—some confusion often exists as to who can authorize a settlement. The identity of a person with real authority to settle a case is not always readily apparent, but finding out is always worthwhile.

Settlement Failures—All Is Not Lost

What if all these efforts do not pay off? What if you go through all the steps and still cannot find terms of settlement acceptable to both sides? This happens. Even in these cases, however, I think you can count on a payoff. Prehearing conferences clarify issues for both sides. They establish limits on presentation of evidence—for example, sixteen character witnesses will not appear for the appellant—and generate stipulations that cut down on time and effort at the hearing. The preparation educates the administrative judge on the case and reduces the time required for the hearing and writing the decision.

Conclusion

I encourage you to use the Board's prehearing processes to explore settlement. Often, settlement will benefit both parties. I urge you to educate your clients and to convince them that this routine approach to the resolution of disputes does not represent a failure of nerve. Rather, it is one approach to solving their problems. When settlement works, your side has won because its most important objectives have been accomplished with speed and certainty. When I represented the parties to cases, I always counted settlements as wins. I wish you very good luck in that pursuit.

Major Fraud Against the United States

*Major Scott W. MacKay, USAR
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Over the past year, United States attorneys across the country have availed themselves of a powerful statutory weapon for

the prosecution of procurement fraud.¹ The major fraud statute, 18 U.S.C. § 1031,² proscribes procurement fraud in

¹ See, e.g., *United States v. My Brands, Inc.*, No. S3 91 Cr. 993 (S.D.N.Y. June 26, 1992); *United States v. Maddox*, No. Cr. 92-00015-L(M) (W.D. Ky. Jan. 22, 1992); *United States v. Leshner*, No. S3 91 Cr. 82 (S.D.N.Y. May 5, 1991).

² 18 U.S.C. § 1031 (Supp. II 1990).

the performance of any contract or subcontract, awarded by the United States, that is valued at \$1 million or more. Section 1031 is as broad and flexible as the federal mail and wire fraud statutes,³ but it does not require the Government to prove that an accused used the mail or a telecommunication system to effect a fraud. A violation of section 1031 also carries a harsher maximum sentence than a violation of the mail fraud or wire fraud statutes. An accused convicted of violating section 1031 may be sentenced to be confined for ten years and fined up to \$1 million.⁴ Under some circumstances, a convicted accused may be fined up to \$5 million.⁵ Conversely, absent aggravating circumstances, a violation of the mail fraud or wire fraud statutes carries a maximum penalty of five years' imprisonment and a \$1000 fine.⁶

This article should help judge advocates to understand 18 U.S.C. § 1031, whether they serve as special assistant United States attorneys, as procurement fraud advisors, or in some other capacities involving the prevention or prosecution of procurement fraud. The article discusses section 1031's statutory language, identifies the essential elements of the offense it proscribes, and comments upon several issues that may arise in a prosecution under the statute. The article also provides a sample form indictment for charging a violation of subsection 1031(a). Because no court has expressed its judicial interpretation of section 1031 in a reported decision, the author has based his conclusions upon the statute's legislative history and upon decisions in which courts have discussed analogous mail, wire, and bank fraud statutes.⁷

The Statute

Troubled by continuing reports of widespread fraud against the United States, Congress enacted the Major Fraud Act of 1988.⁸ Section 2(a) of the act—later codified as 18 U.S.C. §

³*Id.* §§ 1341, 1343. The breadth and flexibility of 18 U.S.C. § 1031 and the mail and wire fraud statutes call to mind one commentator's observation on the popularity of the mail fraud statute with federal prosecutors:

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with IOB-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.

Jed S. Rakoff, *The Federal Mail Fraud Statutes* (pt. 1), 18 Duq. L. Rev. 771 (1980).

⁴18 U.S.C. § 1031(a) (Supp. II 1990).

⁵*Id.* § 1031(b).

⁶See *id.* § 1341 (maximum penalty for mail fraud that does not "affect[] a financial institution"); *id.* § 1343 (maximum penalty for fraud by wire, radio, or television that does not "affect[] a financial institution").

⁷See *id.* §§ 1341, 1343, 1344.

⁸Pub. L. No. 100-700, 102 Stat. 4631.

⁹S. REP. No. 503, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.A.N. 5969, 5969.

¹⁰See *United States v. Mason*, 902 F.2d 1434, 1437-38 (9th Cir. 1990) (finding no violation of the Ex Post Facto Clause when the acts alleged in the indictment as separate executions of a bank fraud scheme evidently occurred after 18 U.S.C. § 1344 became effective); *United States v. Whitney*, 688 F. Supp. 48, 52-53 (D. Me. 1988) (same).

1031—introduced powerful sanctions against the perpetrators of large-scale procurement fraud. By enacting this section, Congress hoped to "provide federal prosecutors with an additional criminal statute targeting major procurement fraud committed against the United States . . . [and] to enhance the deterrence, prosecution, and punishment of such fraud."⁹

Section 1031 states, in pertinent part,

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,

in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is \$1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both.

Section 1031 applies only to conduct occurring on, or after, November 19, 1988. This limitation, however, is not absolute. For example, section 1031 may reach a scheme that originated before November 1988 if the perpetrator acted to further the scheme after section 1031 entered into effect.¹⁰

A Scheme or Artifice

Patterned generally after the federal bank fraud statute,¹¹ section 1031 also resembles the mail and wire fraud statutes from which the bank fraud statute derived.¹² Accordingly, the legislative history of section 1031 declares, "The phrase 'scheme or artifice' should be interpreted in the same manner as that phrase is interpreted under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343."¹³ To emphasize the broad reach that Congress envisioned for section 1031, the legislative history then notes, "According to well-established case law, the phrase [scheme or artifice] 'is to be interpreted broadly.' The [Supreme] Court has interpreted [this] phrase 'to includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'"¹⁴

Section 1031 prohibits the execution of a scheme or artifice to defraud the United States or to obtain money or property by false or fraudulent pretenses, representations, or promises. A scheme executed intentionally to defraud the United States is actionable, regardless of whether the perpetrator actually made any false representations. Similarly, an intentional scheme to obtain money by false pretenses is actionable, even if the Government cannot prove that the perpetrator targeted the United States as a victim.¹⁵

A plot to defraud the United States necessarily includes a scheme to deprive the federal government of both a tangible property right and an intangible right of honest services.¹⁶ Accordingly, section 1031 should prohibit acts committed to

defraud the federal government of any of the following rights: the right to control its own expenditures;¹⁷ the right to receive full value on government contracts;¹⁸ the right to expect the contracting parties to proceed in good faith;¹⁹ and the right to procure goods and services free from fraud, deceit, trickery, and dishonesty.²⁰

The phrase, "false or fraudulent pretenses, representations, or promises," is not limited to statements that are patently false. It also encompasses half-truths and the knowing concealment of facts that are material or important to the matter in question.²¹

To establish a violation of section 1031, the Government need not prove that the accused actually defrauded the United States or obtained money by false pretenses. Like its mail, wire, and bank fraud counterparts, section 1031 specifically prohibits attempts to execute fraudulent schemes or artifices. The ultimate success or failure of an accused's efforts is immaterial.²²

Scienter Requirement

To violate section 1031, one knowingly must act in furtherance of a plan with the intention of defrauding the United States or of obtaining money or property by false or fraudulent pretenses. The legislative history explains that "knowing" includes "the concept of willful blindness or deliberate ignorance,"²³ remarking that this interpretation reflects "the normal 'knowing' standard used in many Federal and state criminal

¹¹H.R. REP. NO. 610, 100th Cong., 2d Sess. 6 (1988); cf. 18 U.S.C. § 1344 (Supp. II 1990).

¹²S. REP. NO. 225, 98th Cong., 1st Sess. 378 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3519 (observing that 18 U.S.C. § 1344 was "modeled on the present wire and mail fraud statutes, which have been construed by the courts to reach a wide range of fraudulent activity"). See generally 18 U.S.C. §§ 1341, 1343 (Supp. II 1990).

¹³S. REP. NO. 503, supra note 9, at 11, reprinted in 1988 U.S.C.C.A.N. at 5975.

¹⁴Id. at 11-12 (quoting *McNally v. United States*, 107 S. Ct. 2875, 2879-80 (1987)), reprinted in 1988 U.S.C.C.A.N. at 5975.

¹⁵See *United States v. Clausen*, 792 F.2d 102, 104-105 (8th Cir.) (remarking that the phrases "scheme to defraud" and "scheme to obtain money by false or fraudulent pretenses, representations, or promises" in wire fraud statute should be read independently of each other), cert. denied, 479 U.S. 858 (1986).

¹⁶See 18 U.S.C. § 1346 (Supp. II 1990) ("[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

¹⁷See *United States v. Biaggi*, 909 F.2d 662, 687 (2d Cir. 1990), cert. denied sub nom. *Simon v. United States*, 111 S. Ct. 1102 (1991).

¹⁸See *United States v. Telink, Inc.*, 681 F. Supp. 1454 (S.D. Cal. 1988).

¹⁹Id.

²⁰See *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), cert. denied, 111 S. Ct. 2024 (1991); *United States v. Washita Constr. Co.*, 789 F.2d 809 (10th Cir. 1986). See generally 2 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 40.13 (5th ed. 1990).

²¹See *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986) (mail fraud prosecution), cert. denied, 479 U.S. 1069 (1987). See generally 2 DEVITT ET AL. supra note 20, § 40.13.

²²See *United States v. Kelley*, 929 F.2d 582 (10th Cir.), cert. denied, 112 S. Ct. 341 (1991).

²³H. R. REP. NO. 610, supra note 11, at 6 (citing *United States v. Jewell*, 532 F.2d 679 (9th Cir. 1976); *United States v. Jacobs*, 470 F.2d 270 (2d Cir.), cert. denied sub nom. *Lavelle v. United States*, 414 U.S. 821 (1973)).

statutes.²⁴ To prove an accused's "intent to defraud," the Government must show that the accused sought to deceive the United States in the hope of securing financial gain, or of depriving the federal government of money, property, or other rights.²⁵

Charging as a Separate Count Each Act in Execution of the Scheme

Section 1031's operative language, "whoever knowingly executes, or attempts to execute, any scheme or artifice," reasonably may be construed to allow the Government to charge each act in the execution, or the attempted execution, of a major fraud scheme as a separate violation of the statute. Accordingly, in a typical procurement fraud case, each false statement, claim, or invoice that an accused presents while carrying out a single fraudulent plan represents a separate wrongful act that is chargeable in a separate count.

The legislative history of section 1031 supports this interpretation of the statute. Addressing subsection 1031(c),²⁶ which limits the fine a court may impose for multiple violations of the statute, the legislative history discloses that Congress fully expected a federal prosecutor to bring separate counts—and to obtain multiple convictions—for the acts an accused commits in the furtherance of a single major fraud scheme. It observes,

Subsection 1031(c) provides that the "maximum fine imposed upon a defendant for a prosecution, including [a] prosecution with multiple counts, . . . shall not exceed \$10 million." This provision . . . address[es] a concern that the [G]overnment may charge in a single judicial proceeding that a large number of related incidents are separate violations of this section. The committee determined that, except as otherwise expressly provided[,] . . . the aggregate of fines that a court may impose under this section in a

single judiciary proceeding is \$10 million for any single defendant . . . [Similarly,] a single corporate defendant should not be subjected to multiple \$10 million fines where there is in fact a single scheme, regardless of the number of prosecutions brought.²⁷

The derivation of section 1031 from the mail and wire fraud statutes further supports the argument that each act performed to realize a major fraud scheme may be charged in a separate count. The latter statutes expressly provide that each mailing or transmission in the furtherance of a fraudulent scheme may be prosecuted as a separate crime.²⁸

Section 1031's derivation from the bank fraud statute,²⁹ however, may lend credence to a contrary argument. At present, the federal appellate courts are divided on whether 18 U.S.C. § 1344 allows the Government to charge as a separate offense each act in the execution of a bank fraud scheme.³⁰ In a jurisdiction that has ruled against the United States on this issue, an accused could use the similarities between section 1031 and the bank fraud statute to strengthen a claim that multiple acts arising from a single procurement fraud scheme must be tried as a single violation of section 1031.

The Government may cite several well-reasoned judicial opinions to dispute this position. For example, in *United States v. Poliak*, the Ninth Circuit rejected an argument that the ten counts charged in an indictment, corresponding to the drawing of ten checks, should be merged into a single scheme of bank fraud. Noting that the bank fraud statute holds liable anyone who "knowingly executes" a scheme to defraud, the court opined, "[T]his language plainly and unambiguously allows charging each execution of the scheme to defraud as a separate act. We find no legislative intent to the contrary. Here, Poliak wrote ten separate checks, each a different and separate execution of the scheme to defraud the banks."³¹

Similarly, in *United States v. Schwartz*, the accused was convicted of three counts of bank fraud for depositing three checks drawn on accounts with insufficient funds. He

²⁴*Id.* (citing 18 U.S.C. §§ 1028, 1341, 1344 (1988)).

²⁵See *United States v. George*, 477 F.2d 508, 512 (7th Cir.), cert. denied, 414 U.S. 827 (1973). See generally 2 DEWITT, et al., *supra* note 20, § 40.14.

²⁶See generally *infra* notes 46-50 and accompanying text.

²⁷S. REP. NO. 503, *supra* note 9, at 12-13, reprinted in 1988 U.S.C.C.A.N. at 5976.

²⁸See, e.g., *United States v. McClelland*, 868 F.2d 704 (5th Cir. 1989).

²⁹18 U.S.C. § 1344 (Supp. II 1990).

³⁰Compare *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988) and *United States v. Schwartz*, 899 F.2d 243 (3d Cir.) (each forged check or check drawn on insufficient funds in prosecutions under 18 U.S.C. § 1344 was a separate act in execution of the scheme and was chargeable separately), cert. denied, 111 S. Ct. 259 (1990) with *United States v. Lemons*, 941 F.2d 309 (5th Cir.) (in prosecution under 18 U.S.C. § 1344, separate check transactions related to fraudulent loan scheme were merely part of the execution of a single scheme to defraud and were not chargeable separately), *reh'g denied*, 948 F.2d 1287 (5th Cir. 1991).

³¹*Poliak*, 823 F.2d at 372.

appealed, claiming that he was guilty of only one offense. The Third Circuit disagreed. Quoting *Poliak*, the court held that "each deposit was a separate violation of 18 U.S.C. § 1344(a)(1), because in making each deposit Schwartz was executing his scheme to defraud [the bank]."³²

In *United States v. Lemons*,³³ however, the Fifth Circuit expressly rejected the analysis applied in *Poliak* and *Schwartz*. Lemons, a former bank officer, was convicted of a number of offenses—among them, seven separate counts of bank fraud. The bank fraud charges derived from his improper authorization of a large loan in exchange for a substantial kickback, which he received in seven payments. Contrasting the bank fraud statute with the mail and wire fraud statutes, the court observed,

[T]hat each act in execution of a scheme is a punishable offense under the mail or wire fraud statutes does not allow reading the bank fraud statute to likewise punish each act in execution of a scheme or artifice to defraud. . . . [T]he mail and wire fraud statutes punish each act in furtherance, or execution, of the scheme; but the bank fraud statute imposes punishment only for each execution of the scheme

[In the instant case], there was but one scheme and one execution. The movement of the benefit to Lemons, although in several separate stages or acts, was only part of but one performance, one completion, one execution of that scheme To hold otherwise, on these facts, [would] render[] the reach of § 1344 potentially boundless.³⁴

"The *Lemons* court thus concluded that the unit of prosecution of an 'execution' of a scheme, as used in Section 1344, is the completed scheme."³⁵

A careful examination of the bank fraud statute and its origins reveals the flaws in the Fifth Circuit's reasoning. The

statute does not limit the scope of the term "executes." Moreover, as the United States argued in its unsuccessful petition for a rehearing,

Congress [unquestionably] drafted Section 1344 on the lines of the mail and wire fraud statutes. In doing so . . . [it] did not limit its effort to pattern Section 1344 after Section [sic] 1341 and 1343 only in the breadth of the prosecutable fraudulent schemes. . . . Congress knew and intended that Section 1344 be given the breadth of its mentor statutes in every respect. . . . The Ninth Circuit relied on this reasoning when it concluded that when Congress drafted Section 1344 expressly along the line of the mail and wire fraud statutes, it made Section 1344 subject to a construction consistent with its models.³⁶

A federal court well might hesitate to accept *Lemons* as authority that each act in the execution of a major fraud scheme cannot be charged separately. Even if the court regularly applied this rule in bank fraud prosecutions, it probably would not do so in a case brought under 18 U.S.C. § 1031, given the explicit acknowledgement in that statute's legislative history that an accused may be convicted of multiple offenses arising from a single scheme.³⁷

A Question of Jurisdiction

Section 1031 applies to the completed or attempted execution of a fraudulent scheme "in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is \$1,000,000 or more."³⁸ As the legislative history explains, "[t]he phrase 'value of the contract' refers to the value of the contract award, or [to] the amount the government has agreed to pay to the provider of services,

³²*Schwartz*, 899 F.2d at 248.

³³*Lemons*, 941 F.2d at 309.

³⁴*Id.* at 318.

³⁵United States Petition for Rehearing at 4, *United States v. Lemons*, 941 F.2d 309 (5th Cir.) (No. 90-1287), *reh'g denied*, 948 F.2d 1287 (5th Cir. 1991).

³⁶*Id.* at 9-10 (citing *Poliak*, 823 F.2d at 372).

³⁷See *supra* note 27 and accompanying text.

³⁸18 U.S.C. § 1031(a) (Supp. II 1990). Neither the statute, nor its legislative history, defines "contract" or "subcontract." To find a definition of these terms, one must look to the *Federal Acquisition Regulation* (FAR), which prescribes policies and procedures for the acquisition of goods and services by all federal executive agencies.

Subpart 2.101 of the FAR states,

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral [sic] contract modifications.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 2.101 (1 Apr. 1984).

Similarly, FAR 44.101 defines "subcontract" as "any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes, but is not limited to purchase orders, and changes and modifications to purchase orders." *Id.* subpt. 44.101.

whether or not this sum represents a profit to the contracting company."³⁹

Subcontractors apparently may be held liable for procurement fraud under section 1031 if either the prime contract or the subcontract is valued at \$1 million or more. Similarly, the statute could reach a fraudulent supplier whose share in a \$1 million procurement represents only a fraction of the procurement's total value. This interpretation follows from Congress's failure to apply jurisdictional language separately to each category of persons or entities identified in the statute. Section 1031 prohibits the execution of a fraud scheme "in any procurement of property or services."⁴⁰ This prohibition applies to an individual or a business involved in procurement as a prime contractor, a subcontractor, or a supplier "if the value of the contract, subcontract, or any constituent part thereof . . . is \$1,000,000 or more." The plain meaning of this qualifying language is that a contractor, subcontractor, or supplier is subject to section 1031 if the value of any of the component parts of a "procurement of property or services" equals or exceeds \$1 million.

Arguably, if Congress had intended to limit an accused's liability exclusively to instances in which the accused's share of a procurement is worth \$1 million or more, it would have done so explicitly. By changing the text of the statute only slightly, Congress could have limited liability under section 1031 expressly to fraud

in the procurement of property or services as a prime contractor with the United States, if the value of the prime contract is \$1,000,000 or more, or as a subcontractor or supplier on a contract with the United States, if the value of the subcontract, or any constituent part thereof, is \$1,000,000 or more.

Congress's implicit refusal to apply the minimum value requirement in this manner supports the conclusion that a contractor, subcontractor, or supplier may be held liable for engaging in a major fraud scheme if any component of the procurement has a value of \$1 million or more.

One also could argue persuasively that section 1031's jurisdictional language must be interpreted literally to preserve the efficacy of the statute. To impute to the statute an unwritten jurisdictional requirement that an accused's share in a procurement must equal or exceed \$1 million could permit a subcontractor or a supplier to escape criminal liability for a fraudulent act that disrupts a multi-million dollar procurement, simply because the perpetrator's own award falls short of the jurisdictional minimum.

On the other hand, the only comment in the legislative history of section 1031 to refer to the statute's jurisdictional language suggests, by negative implication, that Congress actually intended to condition a subcontractor's liability upon the value of the subcontract award. The drafters remarked that "a subcontractor awarded a subcontract valued at \$1,000,000 or more is covered by this section, regardless of the amount of the contract award to the contractor or other subcontractors."⁴¹ Although this comment is not particularly illuminating, it supports an argument that a person or entity identified in section 1031 is not liable under the statute unless that person's or entity's share of the procurement is worth at least \$1 million.

This argument is strengthened further by the judicial rule of lenity. The rule of lenity provides that when a criminal statute is capable of two rational readings, one harsher and more expansive than the other, a court should apply the less expansive interpretation, absent definite congressional guidance to the contrary.⁴² Here, the statutory language is not clear and the legislative history does not address the issue explicitly. Prudence dictates that a federal attorney prosecuting a subcontractor that has committed procurement fraud should charge the subcontractor with mail fraud, wire fraud, or another applicable offense—either alternatively or in lieu of a section 1031 count—if the value of the subcontract is less than \$1 million.

Elements of the Offense

The language of the statute and the legislative history indicate that the following elements comprise an offense under 18 U.S.C. § 1031:

- The accused executed, or attempted to execute, a scheme or artifice;
- The accused did so knowingly, with the intent to defraud the United States or to obtain money or property by false or fraudulent pretenses, representations, or promises;
- The accused executed, or attempted to execute, the scheme or artifice in a procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a prime contract with the United States; and

³⁹S. REP. NO. 503, *supra* note 9, at 12, reprinted in 1988 U.S.C.A.N. at 5975-76.

⁴⁰18 U.S.C. § 1031(a) (Supp. II 1990).

⁴¹S. REP. NO. 503, *supra* note 9, at 12, reprinted in 1988 U.S.C.A.N. at 5976 (emphasis added).

⁴²McNally v. United States, 483 U.S. 350, 359-60 (1987).

- The value of the contract, subcontract, or constituent part thereof—that is, the sum the government agreed to pay the accused for property or services—was not less than \$1 million.

Penalties

The maximum penalty for a violation of subsection 1031(a) is imprisonment for ten years, a fine of \$1 million, or both, unless aggravating circumstances exist that would permit the court to impose a harsher punishment. Subsection 1031(b) raises the maximum fine for a single offense to \$5 million if (1) the gross loss to the government, or the gross gain to the accused, is not less than \$500,000; or (2) the offense involved a conscious or reckless risk of serious personal injury.⁴³ The federal sentencing guidelines contain a similar provision, requiring a court to increase by two levels the base offense level for any offense involving fraud or deceit, including a violation of section 1031, "if the offense involved the conscious or reckless risk of serious bodily injury."⁴⁴ "If the resulting offense level is less than level 13, [the court must] increase [the offense level] to level 13."⁴⁵

Subsection 1031(c) provides that the maximum fine that a court may impose upon a convicted accused in a prosecution under section 1031 shall not exceed \$10 million. Congress adopted this provision out of "concern that the [G]overnment [might] charge in a single judicial proceeding that a large number of related incidents are separate violations of this section."⁴⁶ Except as otherwise provided in subsection 1031(d), Congress limited "the aggregate of fines that a court may impose under this section in a single judicial proceeding [to] \$10 million for any single defendant, regardless of the number of counts or violations of this section which are alleged."⁴⁷

⁴³The term "conscious" means the defendant knew the risk [existed] [T]he term "reckless" [should] . . . be interpreted consistently with the generally understood requirements for a finding of recklessness or criminal negligence. The [latter] term does not include negligent acts or omissions [that] may create grounds for liability in civil cases but . . . fall short of the standard for recklessness." S. REP. NO. 503, *supra* note 9, at 12, *reprinted in* 1988 U.S.C.C.A.N. at 5976. The "term 'serious injury' . . . mean[s] severe injury, such as fractures, severe lacerations, or damage to internal organs, or injury [that] could result in temporary or permanent disability, but does not necessarily mean lifethreatening injury." *Id.*

⁴⁴UNITED STATES SENTENCING GUIDELINES § 2F1.1(b) (4) (1990).

⁴⁵*Id.* The United States Sentencing Commission added section 2F1.1(b)(4) to the federal sentencing guidelines in response to a congressional directive "to provide for appropriate penalty enhancements, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred." *See generally* Major Fraud Act of 1988, Pub. L. No. 100-700, § 2(b), 102 Stat. 4631, 4632 (1988).

⁴⁶S. REP. NO. 503, *supra* note 9, at 12, *reprinted in* 1988 U.S.C.C.A.N. at 5976.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.* at 13, *reprinted in* 1988 U.S.C.C.A.N. at 5977.

⁵²*Id.*

A corporation and its subsidiaries constitute a single accused under section 1031(c).⁴⁸ The legislative history expressly addresses this limitation, stating:

Some have expressed concern that the limitation in Subsection 1031(c) could be interpreted to permit prosecutors to bring multiple prosecutions against separate subsidiaries or divisions of a single corporate defendant, for conduct [that otherwise] would . . . be prosecuted in a single proceeding, in order to circumvent the \$10 million limitation. It is the committee's view that a single corporate defendant should not be subjected to multiple \$10 million fines where there is in fact a single scheme, regardless of the number of prosecutions brought.⁴⁹

Congress, however, emphasized that this limitation shall "not prevent multiple proceedings, for example, where several independent schemes or artifices have been perpetrated by the same defendant."⁵⁰

The foregoing limitations notwithstanding, subsection 1031(d) declares that "[n]othing in . . . section [1031] shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. § 3571(d)." The legislative history adds that a court could impose a penalty based on 18 U.S.C. § 3571(d) "despite either the \$1 million (or \$5 million) maximum fine per count, or the \$10 million cap on the aggregate fine for all counts."⁵¹

To ensure that the sentence for a conviction obtained under section 1031 is "proportional to the offense,"⁵² subsection 1031(e) directs a sentencing court to consider the factors set

forth in 18 U.S.C. §§ 3553⁵³ and 3572⁵⁴ and in the federal sentencing guidelines when it determines the quantum of a fine.⁵⁵ In particular, the court should consider "(1) the need to reflect the seriousness of the offense, including harm or loss to the victim and the gain to the defendant; (2) whether the defendant previously has been fined for a similar offense; and (3) . . . other pertinent equitable considerations."⁵⁶

Seven-Year Statute of Limitations

Subsection 1031(f) extends the statute of limitations for prosecutions under section 1031 to seven years. This extension does not affect the tolling of the statute of limitations pursuant to 18 U.S.C. § 3292 or any other statutory or judicially established basis for interrupting the running of the statute.⁵⁷

Whistleblower Protection and Reward Payments

Because of a drafting error, section 1031 has two subsections (g). The first subsection, found in the original legislation, protects "whistleblowers" by creating a civil cause of action for any person who is discharged or otherwise is harmed by an employer in retaliation for assisting in a prosecution or an investigation under section 1031. This provision closely resembles the protective clause found in the False Claims Act.⁵⁸

Congress added the second subsection 1031(g) when it enacted the Major Fraud Act Amendments of 1989.⁵⁹ This subsection authorizes the Attorney General to draw up to \$250,000 from appropriated funds to reward a person who furnishes information "relating to a possible prosecution" under the Major Fraud Act. It also allows the Attorney General, when appropriate, to ask a court to reimburse the Department of Justice for this reward from the criminal fine the court has imposed upon a convicted accused. Finally, subsection 1031(g) sets forth instances in which a reward is precluded. For example, a government employee who reports a violation of section 1031 in the performance of his or her official duties is ineligible for a reward, as is any individual who personally participated in a violation of the statute.⁶⁰

to constitute a **Conclusion** if it is only a . . .
edit in the original text.

Flexible and far-reaching, section 1031 is a formidable tool for prosecuting major procurement fraud. Many investigations now underway may uncover criminal activities for which prosecutions under section 1031 are appropriate and warranted. Vigorously applied, this statute should curb the spread of fraud in the federal procurement system.

Appendix:

A Sample Form Indictment

COUNT _____

MAJOR FRAUD AGAINST THE UNITED STATES

18 U.S.C. § 1031(a)

THE CONTRACT AWARD

1. On or about _____, 19____, the United States, in a procurement of (property) (services), awarded (prime contract) (subcontract) number _____, to _____, the value of said (prime contract) (subcontract) being in excess of \$1,000,000.

THE SCHEME AND ARTIFICE

2. Beginning on or about _____, 19____, and continuing up to on or about _____, 19____, in connection with the foregoing procurement, the defendant, _____, devised a (scheme) (artifice) (scheme and artifice) to (defraud the United States) (obtain money or property by means of false/fraudulent/false and fraudulent pretenses/representations/promises).

3. It was part of the (scheme) (artifice) (scheme and artifice) to (defraud the United States) (obtain money or property by means of false/fraudulent/false and fraudulent pretenses/representations/promises) that the defendant would and did _____, [Describe the manner, method, or means of the scheme or artifice.]

⁵³ See generally 18 U.S.C. § 3553 (1988) (setting forth factors a trial court must consider when imposing a sentence pursuant to federal sentencing guidelines).

⁵⁴ See generally *id.* § 3572 (setting forth factors a court imposing a fine must consider in addition to the factors enumerated in 18 U.S.C. § 3553).

⁵⁵ See 18 U.S.C. § 1031(e) (Supp. II 1990).

⁵⁶ *Id.*

⁵⁷ S. REP. NO. 503, *supra* note 9, at 14, reprinted in 1988 U.S.C.C.A.N. at 5978.

⁵⁸ See generally 31 U.S.C. § 3730(h) (Supp. II 1990).

⁵⁹ Pub. L. No. 101-123, § 2, 103 Stat. 759, 759.

⁶⁰ See generally H.R. REP. NO. 273, 101st Cong., 1st Sess. 1-5 (1988), reprinted in 1989 U.S.C.C.A.N. 593-597.

EXECUTION OF THE SCHEME AND ARTIFICE

4. On or about _____, 19____, within the _____ District of _____, and elsewhere, the defendant, _____, knowingly (executed) (attempted to execute) the (scheme) (artifice) (scheme and artifice) with the intent to (defraud the United States) (obtain money or property by means of false/fraudulent/false and fraudulent pretenses/representations/promises), in that he/she committed, or caused to be committed, the following acts [and in doing so caused (a gross

loss to the United States) (a gross gain to defendant) of \$500,000 or more] [, which acts involved a conscious and reckless risk of serious personal injury]: _____ [Describe the accused's specific acts in execution of the scheme, charging each act as a separate count. These acts may include submission of a false or fabricated certification, inspection report, quality assurance record, or test result; presentation of a false or fraudulent claim or invoice; delivery of material not in conformity with contract specifications; or receipt of payment under the contract.]

Domicile of Military Personnel for Voting and Taxation

Captain Gilbert Veldhuyzen, USAR,
and Commander Samuel F. Wright, USNR

In a crisis, United States military personnel are the first to risk their lives in the defense of freedom and our constitutional form of government. Of all of our citizens, however, service members may face the greatest frustrations in exercising the fundamental right to vote. Almost invariably, these frustrations result from complications inherent in military voters' assignments to duty stations far from their home states.

This article explores current developments in the law of domicile. It should help legal assistance attorneys (LAAs) to advise their clients about the interrelationship between voting, domicile, and taxation.

An Overview of Issues Related to Domicile

Most state election codes permit a person to vote only in the state, county, and precinct of his or her "residence." The "residence" these codes contemplate, however, usually is very similar to "domicile," as that term is used in other legal contexts. For example, the Texas Election Code provides, "[R]esidence" means domicile, that is, one's home and fixed place of habitation to which [one] intends to return after any temporary

absence."¹ Significantly, a number of judicial decisions distinguish between "actual" and "legal" residence, finding only the latter equivalent to domicile.²

To establish legal residence, an individual must maintain a physical presence in a particular locale and must manifest the intent to reside there indefinitely. As the Texas Code remarks, "The mere intention to acquire a new residence is not sufficient to acquire a new residence, unless the individual moves to that location; moving to a new location is not sufficient to acquire a new residence unless the individual intends to remain there."³ The burden of establishing domicile in a state generally rests upon the party who seeks to claim the benefits of that domicile.⁴

A service member may maintain domicile in his or her home of record throughout his or her military career if he or she never demonstrates an intent to establish a new domicile elsewhere. The California Election Code states, "A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place while employed in the service of the United States."⁵

¹TEX. ELEC. CODE ANN. § 1015(a) (West 1990).

²See *Wolff v. Baldwin*, 9 N.J. Tax 11 (1986).

³TEX. ELEC. CODE ANN. § 200.031(i) (West 1990).

⁴See, e.g., *Bowman v. Dubose*, 267 F. Supp. 312, 313-314 (D.S.C. 1967).

⁵CAL. ELEC. CODE § 206 (West 1991).

Intent in the Establishment of Domicile

An individual can evince an intent to establish domicile in a variety of ways.⁶ In particular, "[e]vidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue."⁷ The act of voting in a state election arguably demonstrates the voter's interest in the public affairs of that state. From this interest, a court reasonably may infer that the voter's presence in the state is not merely temporary. Moreover, a person who applies for voter registration or an absentee ballot represents himself or herself to be a voting resident of that state. He or she later may be estopped from denying that representation. Because the act of voting may indicate an individual's domiciliary intent, it may have important consequences—among them, the voter's acquisition or loss of residence in a particular state.

At least one state election code provides, "[A] person loses his residence in this State if he [or she] votes in another state's election, either in person or by absentee ballot."⁸ Even so, most courts have declined to rule that the act of voting conclusively establishes residence. For example, in *Fiske v. Fiske*,⁹ the Washington Supreme Court considered a retired Army officer's claim to be a Washington resident. The court opined that Colonel Fiske could have claimed Washington domicile, had he not become a California domiciliary shortly after entering active duty. Addressing Fiske's assertion that he later reacquired his status as a Washington resident, the court acknowledged that Fiske had returned to Washington to visit relatives, had registered his car there, and had voted by absentee ballot in several Washington elections. It concluded, however, that Fiske remained a Californian, stating, "The[] acts [Fiske described] show [only] an intention to acquire a residence in Washington at some time in the future. That is not enough. The intention to establish a residence must relate to a present residence."¹⁰

⁶See N.Y. ELEC. LAW § 3-104(2) (McKinney 1991):

In determining a voter's qualification to register and vote . . . [t]he board . . . may consider the applicant's financial independence, business pursuits, employment, income sources, residence for income tax purposes, age, marital status, residence of parents, spouse and children, if any, leaseholds, sites of personal and real property owned by the applicant, motor vehicle and other personal property registration, and other such factors that it may reasonably deem necessary to determine the qualification of an applicant to vote in an election district within its jurisdiction.

⁷Comptroller of the Treasury v. Lenderking, 303 A.2d 402, 405 (Md. 1973).

⁸ME. REV. STAT. ANN. tit. 21-A, § 112 (West 1991).

⁹290 P.2d 725 (Wash. 1955).

¹⁰*Id.* at 728.

¹¹*Altamari v. Meisser*, 259 N.Y.S.2d 680, 681 (App. Div. 1965).

¹²380 U.S. 89 (1965).

¹³*Id.* at 94.

¹⁴For arguments to restrict the voting rights of service members, see, for example, *Township of New Hanover v. Kelly*, 296 A.2d 554 (N.J. Super. Ct. Law Div. 1972). In *Kelly*, attorneys for New Hanover argued that the town had an overriding interest in restricting the right to vote in local elections to individuals who were affected substantially by local electoral decisions. See *id.* at 555. The attorneys claimed that "military personnel do not have a stake equal to those residents in the operation of the local government," adding that New Hanover has no "power to tax . . . military personnel . . . [and cannot] enforce its ordinances upon military personnel." See *id.* The court flatly rejected these arguments, concluding, "To forbid a soldier ever to controvert the presumption of nonresidence imposes an invidious discrimination in violation of the 14th Amendment [because] . . . the Constitution of the United States [in no way indicates] that occupation affords a permissible basis for distinguishing between qualified voters within the state." *Id.* at 557.

¹⁵502 P.2d 856 (Alaska 1972).

A service member's absence from his or her home state while serving on active duty "does not conclusively freeze [his or her] voting residence at [his or her] last preservice domicile until [the service member's] military service has ended."¹¹ A service member may change domicile if he or she is physically present in a state and has formed the requisite intent to remain there. The United States Supreme Court upheld this concept in *Carrington v. Rash*.¹² In *Rash*, the Court considered a provision of the Texas Constitution that barred any member of the Armed Forces who moved to Texas while serving on active duty from acquiring Texas domicile. The Court denounced this practice as unconstitutional, declaring that, if service members actually "are . . . [Texas] residents . . . [who intend to] mak[e] Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation."¹³

Service Members' Equal Protection Issues

The demands of a military lifestyle often restrict a service member's political expression. Voting on an absentee ballot requires considerably more planning than simply driving to the polls on election day. Service members should not be burdened with additional barriers to political representation. Nevertheless, some state and local governments, fearing the effects that large military voting blocs might have on the social and political fabrics of local communities, have discriminated actively against service members.¹⁴

Any law that denies service members a voting right that it affords to the rest of the population is constitutionally suspect. *Egan v. Hammond*,¹⁵ a decision of the Alaska Supreme Court, illustrates this principle clearly. In *Hammond*, the court examined the state constitution's exclusion of military personnel from elections held to decide apportionment issues. Although

the court acknowledged that the state conceivably could exclude "some military [personnel from elections] . . . as a permissible device for limiting the impact of transients and nonresidents on legislative districting,"¹⁶ it concluded that, in the instant case, "the clause of the Alaska Constitution seeking to exclude military as a class is unconstitutional."¹⁷ If a state-imposed distinction affects a fundamental right, such as voting, the distinction is constitutional only if it is justified by a compelling state interest.¹⁸

Service members living on military installations once faced substantial difficulties in establishing domicile. Some state laws permitted a service member to claim domicile in the state in which he or she was stationed only if the service member lived in a civilian community.¹⁹ The Supreme Court laid this issue to rest in *Evans v. Cornman*,²⁰ holding that the occupants of a federal enclave must be treated as actual residents of the state in which the enclave is located. If a potential voter meets all the other criteria of domicile, his or her decision to live on a military base "should be a neutral fact" in determining his or her state of legal residence.²¹

The durational residence requirements in state election codes are not directed specifically at service members. Nevertheless, they may have a disproportionate impact on military personnel because of the frequency with which the military services reassign their members. The Supreme Court has held that durational residence requirements longer than thirty days are unconstitutional, unless the state can prove by compelling evidence the administrative necessity of a longer period.²²

Practical Considerations in the Establishment of Domicile

Social, political, cultural, and financial factors affect a person's decision to become a legal resident of a particular state. Because voting may be considered evidence of domiciliary

intent,²³ a service member should consider carefully how voting in a state election could advance or jeopardize his or her goals. Taxation often will be a service member's prime consideration in choosing domicile.

As has been explained above, domicile is a matter not only of physical presence, but also of intent. A service member's claim of domicile in a state should reflect his or her actual intent to live there. This claim should not be made lightly. If a soldier stationed in Florida claims an intent to become a Florida domiciliary, he or she has declared a commitment to live in Florida whenever military duties do not require his or her presence elsewhere. A service member reasonably may consider a state's tax policy when deciding where he or she intends to live after leaving military service, but he or she should not claim domicile in a state solely to evade taxes.

The residence provision the Soldiers' and Sailors' Civil Relief Act (SSCRA) applies to tax liability issues resembles residence provisions appearing in most state election codes.²⁴ The SSCRA provides that, for purposes of taxation, a member of the Armed Forces "shall not be deemed to have [gained or] lost a domicile or residence . . . solely by reason of [his or her presence in, or absence from, a state] in compliance with military . . . orders."²⁵ As long as the service member maintains domicile in the home state, the service member will owe no income tax on military pay to the state in which he or she is stationed.²⁶ Similarly, the service member will not have to pay taxes to the state in which he or she is stationed for personal property that is titled exclusively in that service member's name and is not used in a trade or business.²⁷

Because the concepts of "voting residence" and "taxation domicile" interrelate so closely, a member of the Armed Forces should seek legal advice before changing his or her voting residence. If his or her current state of legal residence has no state income tax, or forbears from taxing military personnel who are not physically present in the state, the

¹⁶*Id.* at 869.

¹⁷*Id.*

¹⁸*See Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969).

¹⁹*See, e.g., Kankelborg v. Kankelborg*, 90 P.2d 1018, 1019 (Wash. 1939).

²⁰398 U.S. 419 (1970).

²¹*Kashman v. Onandonga County*, 282 N.Y.S.2d 394, 397 (App. Div. 1967).

²²*Marston v. Lewis*, 410 U.S. 679 (1973).

²³*See supra* text accompanying note 7.

²⁴*See generally* 50 U.S.C.A. App. § 574 (West Supp. 1992).

²⁵*Id.* § 574(1).

²⁶*Id.*

²⁷*Id.*

service member probably would prefer casting an absentee ballot in the home state's elections to voting directly in the state in which he or she is stationed. On the other hand, if the service member's state of legal residence taxes his or her military salary and the service member presently is stationed in a state that has no income tax—or has a lower tax rate than the service member's home state—he or she may wish to establish domicile in the state in which he or she is stationed. Accordingly, the service member may want to register to vote there to evince the intent to make that state home.

Once a service member has established domicile in a particular state, he or she may retain domicile there even after his or her transfer to another state. The service member, however, should take care to show his or her continuing intent to maintain his or her domiciliary status and should avoid acts that appear to evince an intent to establish domicile in another state. *Envall v. Comptroller of the Treasury*²⁸ may clarify these points. Envall, an officer of the United States Public Health Service, was a resident of Nevada. When Envall moved to Maryland, he maintained his driver's license and car registration in Nevada, but voted and purchased a home in Maryland. Reviewing these facts, a Maryland court held that Maryland, not Nevada, was Envall's domicile for tax purposes.²⁹

Domicile of Spouses

Some states presume that "the residence of a married woman is . . . the place where her husband has his residence."³⁰ These provisions, however, may be unconstitutional.³¹

Other states recognize that spouses may have independent domiciles.³² This rule sometimes leads to the anomalous result that a husband and wife who live together in the same house may be domiciled in different states. Suppose, for

example, that a Texan enlists in the Army. While stationed in Virginia, he meets a woman domiciled in Maryland and marries her. Shortly after the wedding, the soldier is transferred to California and his wife moves there with him. The soldier's wife would not become a Texas domiciliary solely because she married a Texan; nor would she become a California domiciliary simply by moving to California. Instead, she would keep Maryland as her domicile unless she manifested a contrary intent.

In the scenario described above, the wife would have to pay California income tax on any compensation she earned there, even if she maintained her Maryland domicile. The SSCRA protects only the military salary and allowances of an active duty member of the Armed Forces. Accordingly, a state may require the spouse of a service member to pay taxes on income earned within the state and on personal property kept there. That the spouse never votes in the state and never considers it to be his or her legal residence is irrelevant.³³

The spouse of a service member might prefer to vote in the state in which the service member is stationed, even if the service member votes in his or her home state. Voting in person generally is more convenient than voting by absentee ballot and the governmental decisions of the state in which the spouse presently lives probably would affect the spouse more directly than the acts of his or her home state. Moreover, the spouse may vote locally without fear of adverse tax consequences because he or she must pay state taxes on income earned in the state, regardless of whether he or she actually votes there. Finally, if the spouse votes in his or her home state, he or she might face demands for state income taxes from two states. In any event, before a military couple makes a significant domicile decision, both husband and wife should seek legal advice and should understand the applicable voting and tax provisions of the relevant states.

²⁸No. 1128, 1982 WL 1763 (Md. T.C. 1982).

²⁹See *id.* at *3; cf. *Wolff v. Baldwin*, 9 N.J. Tax 11 (1986) (one cannot establish domicile solely by paying taxes or voting, absent the simultaneous convergence of physical presence and domiciliary intent).

³⁰*Rodriguez v. Thompson*, 542 S.W.2d 480, 484 (Tex. Civ. App. 1976); see also *Seegers v. Strzempek*, 149 F. Supp. 35, 37 (E.D. Mich. 1957).

³¹See, e.g., *Kane v. Fortson*, 369 F. Supp. 1342 (N.D. Ga. 1973). In *Kane*, the court held,

The joint operation of Georgia Code §§ 79-403, 79-407, and 34-632, insofar as it establishes an irrebuttable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates the nineteenth amendment of the Constitution of the United States.

Id. at 1343.

³²"The domicile of a married woman shall be established by the same facts and rules of law as that of any other person for the purpose of voting and office-holding." *Altimari v. Meisser*, 259 N.Y.S.2d 680, 682 (App. Div. 1965).

³³Some states specifically permit the husband or wife of a service member to claim the same voting residence as his or her military spouse. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 112(11) (1991). The Maine statute provides,

A spouse of a member of the Armed Forces on active duty may have the same voting residence as his or her spouse. A member of the Armed Forces on active duty, whose spouse has a place of residence in this State, may establish a residence in the place of residence of the spouse by filing an affidavit with the registrar declaring an intention to reside in that place upon severance from the Armed Forces.

Id. These provisions, however, do not exempt the spouse of a service member from paying taxes to the state in which that spouse earns income.

Uniformed and Overseas Citizens' Absentee Voting Act

The Uniformed and Overseas Citizens' Absentee Voting Act³⁴ provides that a United States citizen residing temporarily outside the United States may vote by absentee ballot in elections for federal offices in the state in which he or she was qualified to vote before leaving the United States—even if he or she maintains no home in the state, owns no property in it, and has no intention ever to return there.³⁵ Most Americans abroad also are eligible under state laws to vote full ballots—that is, to cast absentee ballots for both state and federal candidates. Nevertheless, a service member or spouse living overseas might prefer to cast a limited ballot under the federal act because voting in this manner “shall not affect, for purposes of any Federal, State, or local tax, the residence or domicile of a person exercising [this] right.”³⁶ If the voter decided to cast a full ballot under state law, the state might construe this act as evidence of the voter's intent to change domicile³⁷—an interpretation that could have serious tax consequences for the voter.

Remedies Available for Voter Registration Denials

Most state election codes expressly provide for judicial review of denials of voter registration applications.³⁸ These statutes, however, rarely provide frustrated voters with much time to perfect their appeals. For example, in Virginia, a rejected applicant must appeal to the state circuit court within ten days of the denial of his or her registration application.³⁹

The local bar association might be able to provide attorneys who are willing to represent an applicant *pro bono*. An LAA also could contact Reserve Component judge advocates for assistance. In some cases, an LAA might persuade the secretary of state or the state board of elections to advise a local official to reverse a denial of a voter registration application.

Federal Voting Assistance Program

The Department of Defense maintains the Federal Voting Assistance Program (FVAP) to protect the voting rights of military personnel, their dependents, and civilian employees stationed overseas. The FVAP produces the *Voting Assistance Guide*,⁴⁰ a publication that explains how to use the Federal Post Card Application (FPCA) to register to vote and describes the requirements for registration and absentee voting in the fifty-four states and territories.

Anyone who believes that a state or local official is exhibiting a pattern of discrimination against service members should contact the FVAP without delay.⁴¹ The FVAP also can help LAAs to advise clients experiencing complicated voting problems.

Suggested Reforms of State Laws for Military and Overseas Voters

In 1988, voting by military personnel, their dependents, and civilian employees stationed overseas reached an all-time high. The ballots they cast represented 3.5 percent of the national vote. The percentage of eligible military spouses and dependents who actually voted increased from twenty-seven to fifty-nine percent between 1984 and 1988. In the 1988 presidential election, however, five to nine percent of the military personnel and overseas citizens who attempted to vote could not do so. A plethora of complications arising from state election procedures essentially deprived these citizens of their rights to vote.⁴²

The following is a list of reforms that should enfranchise absentee voters who previously have been denied the opportunity to vote for systemic reasons:

³⁴ Pub. L. No. 99-410, tit. I, 100 Stat. 924, 924 (1986). See generally 42 U.S.C. §§ 1973ff-1 to 1973ff-6 (1988).

³⁵ See, e.g., 42 U.S.C. § 1973ff-6(1) (1988).

³⁶ *Id.* § 1973ff-5.

³⁷ See generally *supra* text accompanying note 7.

³⁸ See, e.g., VA. CODE ANN. § 24.1-67 (Michie 1985).

³⁹ See *id.*

⁴⁰ DEP'T OF ARMY, PAMPHLET 360-503, VOTING ASSISTANCE GUIDE (1992).

⁴¹ The program's address and phone number are:

Federal Voting Assistance Program
Office of the Secretary of Defense
Pentagon, Room 1B457
Washington, D.C. 20301
(703) 695-0663 or DSN 225-0663

⁴² AMERICAN LEGISLATIVE EXCH. COUNCIL, THE NEED FOR REFORM OF STATE LAWS FOR MILITARY AND OVERSEAS VOTERS 2 (1991).

- Allow overseas voters at least forty-five days to receive and return absentee ballots.

According to the Department of Defense, this is the minimum time in which a ballot can be sent to a voter overseas and still return in time for an election. Thirty-four states now provide forty or more days of ballot transmission time to absentee voters in general elections.

- Authorize the electronic transmission of absentee ballots and absentee ballot requests.

Allow certain very isolated personnel—that is, for example, submariners, missionaries, and Peace Corps volunteers—to complete special state write-in absentee ballots. A state should distribute these ballots ninety days before an election. Each ballot should be blank and should be available before the state prints the regular absentee ballots. Twenty-one states now provide these special ballots.

- Accept the FPCA for voter registration and absentee voting. Eight states still require voters to submit state forms.

- A single FPCA should serve as a request for absentee ballots for all elections during the calendar year. Thirteen states and territories still require a voter to submit a separate appli-

cation for each election. At present, confusion frequently disenfranchises overseas voters; many submit applications only for the primary election, mistakenly assuming that the state also will send them ballots for the general election.

- Eliminate "not earlier than" requirements. Eleven states still do not accept applications received before particular dates.

- Eliminate notarization requirements for absentee ballots. Having a document notarized overseas often is difficult and notarization requirements add nothing to the security of the absentee voting process. Thirteen states still have notarization requirements.

- Enact late registration procedures for persons recently separated from the Armed Forces.

These recommendations, originally formulated by Congress,⁴³ are available in a special reprint produced by the American Legislative Exchange Council.⁴⁴

The rights of American service members and their dependents to vote in state and national elections should not be denied or infringed. Encouraging states to adopt uniform, simplified voting procedures will make one of the nation's fundamental rights more readily accessible to the individuals who have done the most to safeguard that right.

⁴³See 42 U.S.C. § 1973ff-3 (1988).

⁴⁴See generally AMERICAN LEGISLATIVE EXCH. COUNCIL, *supra* note 42. Persons interested in obtaining copies of this publication should address their requests to the following address:

American Legislative Exchange Council
214 Massachusetts Ave. NE
Washington, DC 20002.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

United States v. Cowan: Conditional Suspensions of Punishment

May a convening authority condition a suspension of forfeitures upon an accused's initiating and maintaining an

allotment for the support of dependents? Addressing this question in *United States v. Cowan*,¹ the Court of Military Appeals indicated clearly that the convening authority may.

In her posttrial submissions,² Private First Class Cowan asked the convening authority to set aside the forfeitures of her pay so that she could support her child financially.

¹34 M.J. 258 (C.M.A. 1992).

²See MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1105 (1984) [hereinafter MCM].

Disregarding the advice of his staff judge advocate, the convening authority granted Cowan conditional clemency. He suspended her forfeitures in excess of \$724.20 for one year, contingent upon her prompt initiation and maintenance of an allotment, payable to Cowan's sister, for the care of Cowan's minor daughter.

On appeal, the Court of Military Appeals considered whether the convening authority exceeded his authority by placing conditions on the suspension of the forfeitures. It concluded that a convening authority's power conditionally to grant clemency is inherent in the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial*. Noting that the power to modify the findings and sentence of a court-martial are within the sole discretion of the convening authority,³ the court observed that the "sole discretion" to modify a sentence necessarily includes the power to suspend a sentence.⁴ The court then quoted Rule for Courts-Martial 1108(a), which states, "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted."⁵ It emphasized that this rule does not proscribe conditional suspensions of punishments.⁶

The court concluded that, in exercising his or her discretionary powers to modify the findings and sentence, a convening authority may impose reasonable and lawful conditions upon the suspension of punishment.⁷ Those conditions may not increase the severity of the sentence, violate public policy or duly issued regulations, or conflict with the provisions of the *Manual for Courts-Martial* or the UCMJ.⁸

Remarking that, in the instant case, the suspension of forfeitures was "purely a matter of clemency for the benefit of the appellant's daughter,"⁹ the court held that the conditions the convening authority imposed on Cowan did not increase the severity of her sentence.¹⁰ The court also found that these

conditions did not violate public policy or Army regulations. Instead, they allowed Cowan to comply with the regulatory requirement that she support her child.¹¹ Finally, the court held that the conditions of suspension did not violate the *Manual for Courts-Martial* or the UCMJ.¹²

In upholding the conditional suspension in *Cowan*, the court warned of the dangers that can arise from "lawful but cumbersome conditions of suspension."¹³ Noting that some conditions may prove difficult to enforce, the court cautioned convening authorities to limit their "actions to . . . avoid such problems."¹⁴

Cowan gives a defense counsel an excellent opportunity to obtain additional clemency for his or her clients. What defense counsel has not represented a client who unquestionably would go to jail, leaving behind an unemployed spouse and several children in need of care? *Cowan* allows the convening authority to show compassion for family members who, through no fault of their own, have no means of support. Before this decision, a convening authority presented with a meritorious clemency petition pleading for relief on behalf of the accused's family often would hesitate to grant this relief because he or she could not be certain that the accused would not divert the money to his or her own selfish purposes. *Cowan* gives the convening authority a means of ensuring that the money benefits the accused's family, not the accused.

A defense counsel should remind the convening authority of the convening authority's broad discretion to grant clemency—including conditional clemency. The defense counsel should not shy from proposing possible conditions of suspension to the convening authority, keeping in mind the admonition of the Court of Military Appeals to avoid "cumbersome conditions." Used prudently, *Cowan* may permit defense attorneys to obtain relief that previously was nearly unattainable. Captain Diedrichs.

³*Cowan*, 34 M.J. at 259 (citing UCMJ art. 60(c) (1) (1988); *United States v. Spurlin*, 33 M.J. 443 (C.M.A. 1991); *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988); *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1987)).

⁴*Id.* (citing UCMJ art. 71(d) (1988)).

⁵*Id.*

⁶*Id.* at 260 (remarking, "[Rule for Courts-Martial] 1108(d) does discuss limitations on suspension; however, the only limitations are time limitations").

⁷*See id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* at 260 & n.2 (citing DEP'T OF ARMY, REG. 608-99, PERSONAL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (4 Nov. 1985)).

¹²*Id.* at 260 ("[b]oth parties . . . agree that the convening authority in this case did not exceed the power granted under the Uniform Code of Military Justice or the *Manual for Courts-Martial*").

¹³*Id.* (quoting *United States v. Cowan*, 32 M.J. 1041, 1046 (A.C.M.R. 1991) (Johnson, J., concurring in part and dissenting in part), *aff'd*, 34 M.J. 258 (C.M.A. 1992)).

¹⁴*Id.*

Dereliction and the Self-Imposed Duty

A recent Court of Military Appeals decision provides valuable guidance to defense counsel representing accused charged with derelictions of duty. In *United States v. Dallman*,¹⁵ the court held that the breach of a self-imposed duty cannot constitute dereliction of duty under UCMJ article 92 and, therefore, is not a violation of UCMJ articles 133 or 134.¹⁶

Major Dallman, the accused, was the Chief of Psychiatry at Winn Army Hospital, Fort Stewart, Georgia. There, he befriended Mr. W and Ms. W, two employees of the hospital snack bar. Mr. W was legally blind and suffered from partial paralysis of his legs. Both Mr. W and Ms. W were civilians and were not entitled to treatment at military medical facilities.

Complaining of his poor health and difficult financial situation, Mr. W asked Major Dallman to help him to obtain medication for his various ailments. In response, Dallman prescribed various drugs for Mr. W over a ten-month period.¹⁷ The accused also treated Ms. W, who complained of insomnia, by prescribing Seconal for her. Dallman did not examine either patient before prescribing the drugs.

Pursuant to his guilty pleas, Dallman was convicted of wrongful distribution of federally controlled drugs, conduct unbecoming an officer, and wrongful distribution of a state-controlled drug.¹⁸ He was sentenced to dismissal from the service, confinement for twelve months and the forfeiture of \$833 pay per month for seven months.¹⁹ Pursuant to a pretrial agreement, the convening authority approved only the dismissal and the forfeitures.²⁰

During the providence inquiry, the accused admitted that he was derelict in failing to order certain diagnostic medical tests and procedures before prescribing the drugs. He stated that his failure to perform the necessary procedures was

irresponsible and did not comport with acceptable standards of care for the medical profession or for the Army.

The Army Court of Military Review affirmed the findings of guilty, holding that the accused's dereliction of medical duties was sufficient to establish conduct unbecoming an officer. In so ruling, the Army court considered the seriousness of the offense, the duration of the accused's misconduct, the "negative impact on the military community upon learning that a military doctor [had] failed to abide by accepted professional standards of medical care," and the appellant's stipulation that he had accepted money from Mr. W in exchange for the prescriptions.²¹

The Court of Military Appeals disagreed with the Army Court of Military Review, holding that Dallman's plea was improvident because the charge had failed to allege a violation of a duty. The Court of Military Appeals opined that "[a]n essential element of any dereliction in performance of duties is that the accused 'had certain duties.'"²² These duties may be imposed by "treaty, statute, regulation, lawful order, standard operating procedures, or custom of the service."²³

The providence inquiry revealed the accused's duty to perform physical examinations before prescribing drugs. This standard of care is universal among physicians. As a military physician, however, Major Dallman was forbidden from providing medical services to Mr. W and Ms. W.²⁴ Accordingly, Dallman's duty to examine these particular patients before prescribing drugs for them was not imposed by any treaty, statute, regulation, order, procedure, or custom of the service. On the contrary, this duty was self-imposed and, therefore, outside the scope of Dallman's military duties.²⁵

Dallman is significant because the Court of Military Appeals firmly refused to criminalize the breach of a self-imposed duty. The court stated emphatically that the failure to carry out a self-imposed duty—even a duty that an accused

¹⁵34 M.J. 274 (C.M.A. 1992).

¹⁶See *id.* at 276. See generally UCMJ art. 133 (conduct unbecoming an officer); *id.* art. 134 (general article). The Court of Military Appeals remanded the case to the Army Court of Military Review for a reassessment of the sentence on the remaining findings of guilty. See *Dallman*, 34 M.J. at 276.

¹⁷The drugs Major Dallman prescribed to Mr. W included Talwin, Valium, Tega Tussin, Seconal, Dexedrine, Thioridazine, and Placidyl. See *Dallman*, 34 M.J. at 275.

¹⁸*Id.* at 274.

¹⁹*Id.*

²⁰*Id.*

²¹*United States v. Dallman*, 32 M.J. 624, 628-29 (A.C.M.R. 1991), *aff'd in part, rev'd in part*, 34 M.J. 274 (C.M.A. 1992).

²²*Dallman*, 34 M.J. at 275 (quoting MCM, *supra* note 2, pt. IV, ¶ 16b(3)(a)).

²³*Id.* Because they were not active duty or retired service members or military dependents, Mr. W and Ms. W were not entitled to military medical care. See *id.*

²⁴*Id.*

²⁵See *id.*

assumed while performing his or her military duties—is not a criminal act under UCMJ articles 92, 133, or 134. Previously, the Army Court of Military Review had hesitated to include within the meaning of the word “duty” various nonmilitary duties that an accused performed voluntarily, for additional pay, after his or her regular duty hours.²⁶ In *Dallman*, the Court of Military Appeals applied an identical rule to an action taken during duty hours.

Significantly, Major Dallman was charged with, and convicted of, conduct unbecoming an officer because of dereliction of duty. The charge focused on Dallman’s failure to examine his patients before prescribing drugs for them.²⁷ Had Dallman been charged with dereliction of duty for providing unauthorized treatment to civilians who were not entitled to military medical care, the court may have reached a different result.

How far the courts will go in refusing to criminalize the breach of a nonmilitary duty is unclear. *United States v. Tanksley*,²⁸ a case now pending before the Court of Military Appeals, may provide an answer.

Sergeant First Class Tanksley, an active duty soldier assigned to a Reserve signal company at Camp Parks, California, was responsible for maintaining electronic equipment assigned to the company. He had the authority to requisition materials he needed to accomplish that mission.

An inventory of unit property revealed a massive accumulation of unauthorized supplies and equipment at the company. A subsequent investigation identified Sergeant Tanksley as one of the persons who had ordered and received the unauthorized supplies and equipment. Contrary to his pleas, a general court-martial convicted Sergeant Tanksley of dereliction of duty, making a false official statement, and willfully suffering the loss of military property.²⁹

The Army Court of Military Review affirmed the accused’s conviction for dereliction of duty, holding that the court-martial properly found Sergeant Tanksley guilty of willful

failure to acquire light sticks and bayonets.³⁰ On review, the Court of Military Appeals will determine whether the Government’s failure to prove the existence of a duty on Sergeant Tanksley’s part to acquire the light sticks and the bayonets rendered the evidence legally insufficient to support a finding that Tanksley was guilty of dereliction of duty.

Defense counsel should consider the ramifications of *Dallman* in any dereliction of duty case, especially when the Government seeks to obtain a conviction using a “back-door” charge of conduct unbecoming an officer. As *Dallman* shows, the breach of a self-imposed duty cannot give rise to a charge of dereliction of duty, or to an associated charge of conduct unbecoming an officer. The defense counsel also should pay close attention to *Tanksley*, which soon will determine how broadly *Dallman* may be applied. Ms. Johnson, Summer Intern.

The Pitfalls of Charging Offenses Under the Assimilative Crimes Act

Pursuant to the Assimilative Crimes Act,³¹ a service member who commits an offense under state law may be tried by court-martial for violating UCMJ article 134.³² The accused, however, must have committed the underlying offense at a location that is subject to the “exclusive or concurrent jurisdiction” of the United States.³³ In *United States v. Dallman*³⁴ and *United States v. Jones*,³⁵ the Court of Military Appeals addressed the requirement that a military judge conducting a providence inquiry must investigate the jurisdictional status of the site of the offense.

In *Dallman*, the Court of Military Appeals found improvident the appellant’s pleas of guilty to wrongful distribution of dangerous drugs in violation of a state statute. The court found the providence inquiry inadequate, in part, because the military judge had failed to inquire into the federal jurisdiction element of the offenses. The court also noted that the trial defense counsel neither conceded that the federal government

²⁶ See *United States v. Garrison*, 14 C.M.R. 359, 361-62 (A.B.R. 1954) (holding that a dereliction of a nonmilitary duty is not a military criminal offense).

²⁷ See *Dallman*, 34 M.J. at 275.

²⁸ CM 9001116 (A.C.M.R. 31 July 1991) (unpub.), petition for review granted, CM 9001116 (C.M.A. 19 June 1992).

²⁹ See UCMJ arts. 92, 107, 108 (1988).

³⁰ *Tanksley*, CM 9001116, slip op. at 4 (A.C.M.R. 31 July 1991).

³¹ 18 U.S.C.A. § 13(a) (West Supp. 1992).

³² UCMJ art. 134 (1988).

³³ *United States v. Irvin*, 21 M.J. 184, 186 (C.M.A. 1986); *United States v. Perry*, 12 M.J. 112, 113 (C.M.A. 1981) (summary disposition); *United States v. Harris*, 27 M.J. 681, 682 (A.C.M.R. 1982).

³⁴ 34 M.J. 274 (C.M.A. 1992).

³⁵ 34 M.J. 270 (C.M.A. 1992).

had jurisdiction over the offenses, nor indicated that he had discussed the jurisdictional issue with his client. The court distinguished *United States v. Kline*,³⁶ in which the Government alleged, and the defense counsel conceded, the existence of federal legislative jurisdiction.

In *Jones*, the court affirmed the conviction of an accused who had pleaded guilty to violating an assimilated state statute that prohibited inhaling or delivering an intoxicant. At the providence inquiry, the trial judge neither stated the elements of the assimilated state statute, nor defined "exclusive or concurrent federal jurisdiction." The record, however, revealed that the judge articulated the jurisdictional element, that the accused discussed it with his defense counsel, and that the accused unconditionally pleaded guilty to the assimilated offense.³⁷ Accordingly, the Court of Military Appeals ruled that the providence inquiry was adequate.

The commission of an offense on a military installation not always will trigger federal jurisdiction under the Assimilative Crimes Act. "[T]he existence of exclusive or concurrent Federal jurisdiction requires the consent of the State where the installation is located."³⁸ As the Court of Military Appeals stated in *United States v. Williams*,³⁹ "[T]o demonstrate that exclusive or concurrent Federal jurisdiction exists as to a military installation or other property owned by the United States, [the Government] must . . . establish[] not only that the State involved ceded jurisdiction, but also that the United States accepted the cession."⁴⁰

Federal jurisdiction not always will blanket an entire military installation. One geographical section of an installation may be subject to exclusive or concurrent federal jurisdiction, while another section of the same installation is not.⁴¹ Accord-

ingly, the application of the Assimilative Crimes Act may hinge on the precise location of the situs of the offense on a military installation.

The Government may prove that the site of an offense is subject to federal jurisdiction by a mere preponderance of the evidence.⁴² Moreover, the existence of federal legislative jurisdiction over a geographical location is a matter of law⁴³ and, therefore, may be noticed judicially.⁴⁴ This judicial notice, however, may not be implied—it must be expressed on the record of trial.⁴⁵ When the existence of federal legislative jurisdiction is purely a matter of law, the judge's determination is final.⁴⁶ On the other hand, when some factual uncertainty exists about the jurisdictional status of an offense site, the finder of fact must determine whether the location is subject to federal legislative jurisdiction.⁴⁷

When the Government invokes the Assimilative Crimes Act to charge a state offense under UCMJ article 134, the charged act need not be service-discrediting or prejudicial to good order and discipline.⁴⁸ Significantly, however, if the Government alleges a violation of state law under the Assimilative Crimes Act at trial and an appellate court later determines that the Government failed to prove federal legislative jurisdiction, the Government cannot fall back on the assertion that the charged conduct also happened to be service-discrediting or prejudicial to discipline.⁴⁹

The Assimilative Crimes Act does not permit the trial by court-martial of every service member who violates a state criminal statute on land subject to federal jurisdiction. Provisions of UCMJ article 134 specifically exclude state capital crimes from trials by courts-martial.⁵⁰ Moreover, "a service member cannot be prosecuted under the Assimilative

³⁶21 M.J. 366 (C.M.A. 1986).

³⁷*Jones*, 34 M.J. at 272.

³⁸*United States v. Williams*, 17 M.J. 207, 212 (C.M.A. 1984).

³⁹*Id.* at 207.

⁴⁰*Id.* at 212 (citing *Adams v. United States*, 319 U.S. 312 (1943)).

⁴¹*Id.*

⁴²*Id.* at 213; see also *United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981).

⁴³*Williams*, 17 M.J. at 215.

⁴⁴MCM, *supra* note 2, Mil. R. Evid. 201; *United States v. Carter*, 430 F.2d 1278, 1280 (10th Cir. 1970).

⁴⁵*United States v. Irvin*, 21 M.J. 184, 187 (C.M.A. 1986).

⁴⁶UCMJ art. 51(b) (1988).

⁴⁷*United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984); see also *United States v. Cassidy*, 571 F.2d 534 (10th Cir.), *cert. denied*, 436 U.S. 951 (1978).

⁴⁸*United States v. Sadler*, 29 M.J. 370, 374 (C.M.A. 1990).

⁴⁹*Id.* at 375.

⁵⁰See UCMJ art. 134(c)(5)(b) (1988).

Crimes Act, as incorporated in Article 134, for conduct which clearly falls within the purview of a specific punitive article of the Uniform Code [of Military Justice]."⁵¹ Finally, "the Assimilative Crimes Act cannot be utilized to redefine existing Federal offenses or to enlarge the punishments

⁵¹ *United States v. Irvin*, 21 M.J. 184, 188 (C.M.A. 1986).

⁵² *Id.* at 189.

⁵³ *Id.*; see also *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984).

authorized for them."⁵² Consequently, when state law and the UCMJ both encompass an offense and the state law provides for the harsher punishment, the provisions of the UCMJ shall determine the maximum punishment for the offense.⁵³ Captain Lewis.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Note

The Good Faith Exception to the Exclusionary Rule Applies to Commanders, Says the Court of Military Appeals in *United States v. Lopez*

In deciding *United States v. Lopez*,¹ the five judges of the Court of Military Appeals showed little sign of unanimity—between them, they produced four diverse opinions. A majority of the judges agreed, however, "that the good faith exception to the exclusionary rule applies to . . . commander[s]."²

Practitioners will welcome *Lopez* for at least three reasons. First, it resolved the controversy that split the court—then comprised of three judges—in *United States v. Morris*.³ Second, it revealed the factors the court considers most persuasive as evidence that an application of the good faith exception is justified. Third, it established the standard of review an appellate court must use in examining a trial judge's application of the good faith exception to a command-authorized search or seizure.

Staff Sergeant Frank Lopez, the accused, was an Air Force noncommissioned officer stationed in Spain. One of his duties was to issue ration cards to other members of his

squadron. Apparently, the accused issued himself at least three unauthorized ration cards, which he used to purchase tax-exempt items. Lopez's illegal activity was reported to the security police, who then notified Lopez's squadron commander, Major Harrison. Harrison knew that the accused was responsible for issuing ration cards. He also knew that Lopez previously had experienced financial difficulties. After hearing from the security police, Major Harrison decided that he had probable cause to believe that records relating to the unlawful issuing of ration cards could be found in Lopez's desk. He also expected to find unauthorized ration cards in the accused's car or barracks room. Accordingly, Major Harrison authorized a search of the accused's desk, car, and room. Before doing so, however, Harrison telephoned the installation staff judge advocate (SJA) to request an opinion on the lawfulness of the proposed search. The SJA agreed that Harrison's information "was sufficient for a search authorization."⁴ The search resulted in the seizure of a number of unauthorized ration cards.

Lopez was tried and convicted for stealing ration cards and for using them illegally. At trial, he moved to suppress the seized ration cards on the grounds that Major Harrison had lacked probable cause to authorize the search. The trial judge denied this motion. Although the judge agreed that Major Harrison had lacked probable cause, he found the evidence admissible under the good faith exception in Military Rule of Evidence (MRE) 311(b)(3).

¹ No. 66675, 1992 WL 207882 (C.M.A. 12 Aug. 1992).

² See *id.* at *1.

³ 28 M.J. 8 (C.M.A. 1989).

⁴ *Lopez*, No. 66675, 1992 WL 207882, at *1.

The Air Force Court of Military Review disagreed. It concurred with the trial judge that Harrison had lacked probable cause, but concluded that Harrison's personal involvement in investigating and prosecuting Lopez precluded any finding that Harrison was "neutral and detached."⁵ Consequently, the Air Force court refused to apply the good faith exception to Harrison's command-authorized search. It reversed Lopez's conviction and dismissed the charges.⁶ The Judge Advocate General of the Air Force then certified Lopez to the Court of Military Appeals. After reviewing the case, that court reversed the Air Force Court of Military Review.

In her lead opinion, Judge Crawford wrote at some length about the "totality of the circumstances"⁷ test a commander must use to determine whether he or she has probable cause to authorize a search or seizure.⁸ Ultimately, however, she declined to determine whether Major Harrison actually had probable cause when he authorized the search. Adopting an approach that contrasted sharply with the analyses of the trial judge and the Air Force court, Judge Crawford declared, "We need not determine if there was sufficient probable cause. Because there was more than a 'bare bones' presentation of facts to Major Harrison, we hold that the good-faith exception to the exclusionary rule applies."⁹

Judge Crawford then analyzed how, and why, the good faith exception applied to this command-authorized search. She first examined the drafters' analysis to MRE 311(b)(3).¹⁰

⁵32 M.J. 924, 927 (A.F.C.M.R. 1991).

⁶*Id.*

⁷Commanders, judges and magistrates must use a "totality of the circumstances" test when determining probable cause under the Fourth Amendment. See generally MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 315(f)(2) (1984) [hereinafter MCM]; Illinois v. Gates, 462 U.S. 213 (1983).

⁸See Lopez, No. 66675, 1992 WL 207882, at *2 to *3.

⁹*Id.* at *3. Judge Wiss's approach to this probable cause issue is markedly different. See *id.* at *15 (Wiss, J., concurring); see also *infra* text accompanying note 23.

¹⁰MCM, *supra* note 7, MIL. R. EVID. 311 analysis, app. 22, at A22-17.

¹¹468 U.S. 897 (1984).

¹²6 M.J. 307 (C.M.A. 1979).

¹³Lopez, No. 66675, 1992 WL 207882, at *3 (citing MCM *supra* note 7, MIL. R. EVID. 311 analysis, app. 22, at A22-17). Judge Crawford's reference to levels of command and oaths merits further discussion. Either factor could affect a court's decision to apply the good-faith exclusion substantially.

That an appellate court considering whether to apply the good faith exception to a command-authorized search will scrutinize a search authorized by the commander of a company, battery, troop, or similar element more closely than it would a search ordered by a division or corps commander seems axiomatic. Experience shows that the larger the unit an officer commands, the less he or she will be involved personally in maintaining good order and discipline in his or her command. A commander's personal contact with soldiers lessens as the level of command increases. A division commander, for example, is far removed from the daily disciplinary matters faced by the company commanders in that division. This personal distance strengthens the Government's argument that the division commander is "neutral and detached" when he or she authorizes a search or seizure.

A command-authorized search or seizure need not be supported by an oath. See United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981). Nevertheless, most judge advocates agree that using an oath or affirmation is a good practice. An oath impresses upon the affiant the seriousness of the event and the corresponding importance of relating accurate information to the commander. This heightens the reliability of the information, making the commander's reliance on that information appear more reasonable.

¹⁴Lopez, No. 66675, 1992 WL 207882, at *5.

¹⁵*Id.* at *6; cf. *id.* at *3 (remarking that Harrison had based his decision on "more than a 'bare bones' presentation of the facts").

¹⁶*Id.* at *6.

¹⁷*Id.*; cf. MCM, *supra* note 7, MIL. R. EVID. 311(b)(3).

She noted that the analysis states expressly that the good faith exception articulated in *United States v. Leon*¹¹ applies to searches and seizures authorized by a commander if he or she is "neutral and detached, as defined in *United States v. Ezell*."¹² Judge Crawford then identified seven other factors that a court may consider in deciding whether to apply the good faith exception. These factors were (1) the level of command of the authorizing commander; (2) whether the commander had received legal training on search and seizure rules; (3) the clarity of the rule governing the search or seizure at issue; (4) whether the evidence supporting the authorization was given under oath; (5) whether the commander had reduced the search authorization to writing; (6) whether the defect in the authorization was one of form, not substance; and (7) whether the commander had obtained "the advice of a judge advocate" before authorizing the search or seizure.¹³

Finding that Major Harrison had been "impartial" and had "not [been] motivated solely by revenge or vindictiveness," Judge Crawford concluded that Harrison had been neutral and detached.¹⁴ She also opined that the information available to Major Harrison when he authorized the search had amounted to "a substantial basis for finding probable cause."¹⁵ Finally, she concluded that the police "reasonably [had] relied upon" the search authorization in searching the accused's desk, room, and car.¹⁶ Accordingly, she found that the good faith exception applied to Harrison's search authorization.¹⁷

Judge Gierke concurred with Judge Crawford's lead opinion. Unlike the three other concurring members of the Court, Judge Gierke did not write a separate opinion.

Chief Judge Sullivan concurred in the result; however, he specifically disassociated himself from two aspects of the lead opinion. First, he objected to Judge Crawford's equating the term "impartial" with the phrase "neutral and detached."¹⁸ The Chief Judge stated that he could not accept the "proposition, albeit implied, that the 'good-faith exception' to the exclusionary rule . . . requires [only] that the commander issuing [a] search authorization be 'impartial' rather than neutral and detached." Second, he rejected the lead opinion's suggestion that "Manual rules" are dispositive of Fourth Amendment issues in the military courts. Chief Judge Sullivan insisted that the *Manual for Courts-Martial's* rules are outcome-determinative only when they "fully satisfy the demands of the Constitution and the Bill of Rights as applied in the military context."¹⁹

Judge Wiss also concurred in the result. He disagreed, however, with the common conclusion of Chief Judge Sullivan and Judges Crawford and Gierke that the standard for appellate review of a commander's probable cause determination is the "substantial basis" test. Judge Wiss rejected the majority view that the rationale behind *Leon*—that excluding evidence has no "significant deterring effect"²⁰ on judges or magistrates—applies to command-authorized searches.²¹ Remarking on the important—and often personal—role that a commander plays in maintaining good order and discipline in his or her command, Judge Wiss reasoned that an appellate court should not afford a command-authorized search or seizure the "great deference" customarily given to a search or seizure authorized by a judge or a magistrate.²² Judge Wiss would require a trial counsel to establish an "adequate factual basis" in the record to ensure that an "appellate court[] may

conclude that [a] particular commander in [a] case is the sort of official that the Supreme Court in *Leon* had in mind."²³ In advancing this assertion, Judge Wiss clearly proposed a de novo standard for appellate review, although he did not use that term explicitly.

Judge Cox's concurring opinion is the most interesting of the four. He began by stating that he concurred "with modest reservations." That Judge Cox actually meant that he concurred only in the result was immediately apparent, for he plainly did not like the legal reasoning used by the other four judges. Adhering to his longstanding view that civilian Fourth Amendment doctrine has little place in military society,²⁴ Judge Cox refused to follow the examples of his fellow judges in his analysis of Major Harrison's search authorization.²⁵ He rejected the idea that the good faith exception applies to command-authorized searches and seizures.²⁶ Instead, Judge Cox insisted that no commander can be "neutral and detached" in granting a search authorization. He remarked, "The very term, 'neutral and detached commander,' is an oxymoron, for how can a person 'command' a military unit and still be detached, disinterested, and neutral?"²⁷ The litmus test that Judge Cox would apply to determine the lawfulness of a command-authorized search is whether the commander acted *reasonably* in ordering the search.²⁸ Reviewing the record in *Lopez*, Judge Cox concluded, "[T]his commander had ample reason to authorize the search; so did the police officers conducting the search. Indeed, everyone acted in good faith."²⁹ Because everyone acted reasonably, Judge Cox agreed with the majority that evidence seized during Harrison's command-authorized search was admissible under the Fourth Amendment.³⁰

Lopez marks a dramatic change in the law. Three years earlier, in *United States v. Morris*,³¹ the three judges of the Court of Military Appeals could not agree on whether the

¹⁸ *Lopez*, No. 66675, 1992 WL 207882, at *11 (Sullivan, C.J., concurring).

¹⁹ *Id.*

²⁰ *Id.* at *3 (lead opinion, citing MCM, *supra* note 7, MIL. R. EVID. 311 analysis, app. 22, at A22-17 (C2, 15 May 1986)).

²¹ See *id.* at *14 (Wiss, J., concurring).

²² *Id.* at *15 to *16.

²³ *Id.* at *16.

²⁴ See, e.g., *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992) (Cox, J., concurring); *United States v. Schmitz*, 33 M.J. 24 (C.M.A. 1991); *United States v. Morris*, 28 M.J. 8 (C.M.A. 1989) (Cox, J., concurring in part and dissenting in part).

²⁵ *Lopez*, No. 66675, 1992 WL 207882, at *9 (Cox, J., concurring).

²⁶ *Id.* at *18 n.6.

²⁷ *Id.* at *9.

²⁸ *Id.* at *9 to *10.

²⁹ *Id.* at *10.

³⁰ See *id.*

³¹ 28 M.J. 8 (C.M.A. 1989).

good faith exception applied to command-authorized searches. Citing MRE 311(b)(3), then-Judge Sullivan held that the exception did apply. Chief Judge Everett asserted that it did not. He reasoned that "the association of commanding officers with law enforcement and with the maintenance of discipline is too great to permit equating them to . . . magistrate[s]."³² Judge Cox refused to consider the applicability of the good faith exception because he found that the commander had acted reasonably and responsibly in authorizing the search.³³

The three-way split in *Morris* essentially deprived military practitioners of clear guidance on the issue of good faith in command-authorized searches and seizures. *Lopez* eliminated this problem. Although Judge Cox continued to find the good faith exception inapplicable and irrelevant, a clear majority of the Court of Military Appeals ruled that the good faith exception applies to command-authorized searches and seizures.³⁴

Several other aspects of *Lopez* deserve discussion. First, all five judges declined to decide whether Major Harrison's search authorization was supported by probable cause.³⁵ A careful reading of MRE 311 shows that they properly refused to consider this issue. Military Rule of Evidence 311(b)(3) requires only that the authorizing commander have information that provides a "substantial basis for determining the existence of probable cause."³⁶ Consequently, if a court finds that the information available to the commander provided a substantial basis for the commander's decision, the court need not examine the probable cause issue further. Unfortunately, in declining to rule on whether probable cause actually existed in the instant case, Judge Crawford commented only briefly on what evidence constitutes a substantial basis for a commander's probable cause determination. Without citing to any authority, she merely stated that, because the information on which

Major Harrison had acted was "more than a 'bare bones' presentation of facts,"³⁷ the court did not have to address the probable cause issue further. The "bare bones" standard, however, is not found in MRE 311, nor did Judge Crawford define it further in *Lopez*. The standard is unhelpful because it blurs the "substantial basis" test enunciated in MRE 311(b)(3).

Second, many military justice practitioners seeking guidance on the proper application of the good faith exception to the exclusionary rule will conclude that the most significant factor in *Lopez* is the commander's decision to speak to a lawyer before authorizing the search. Judges Crawford, Gierke, and Wiss—a majority of the court—identified Harrison's conversation with the SJA as persuasive evidence that Harrison had acted in good faith. Each of these three judges cited the drafters' analysis of MRE 311 to support his or her reliance on this factor. To place too great an emphasis on this element of their decisions, however, would be unwise. Had Harrison not talked to a judge advocate, his failure to do so might not have precluded the court from applying the good faith exception to the search. No one factor in the analysis appears outcome-determinative. A court must weigh every relevant factor identified in the analysis. Major Harrison's use of a lawyer appeared to be important to a majority of the Court of Military Appeals because it reflected reasonableness—a fundamental Fourth Amendment requirement.³⁸

One final aspect of *Lopez* will be important to practitioners. This case set the standard for appellate review of a trial judge's application of the good faith exception. A majority—Chief Judge Sullivan, Judge Crawford, and Judge Gierke—agreed that the "substantial basis" test a court must use to review a magistrate's determination of probable cause also applies to commanders.³⁹

³²*Id.* at 12.
³³*Id.* at 18 (Cox, J., concurring in part and dissenting in part).

³⁴Judge Crawford declared in the second paragraph of her lead opinion that "[a]ll five judges agree that the good-faith exception to the exclusionary rule applies to this commander." See *Lopez*, No. 66675, 1992 WL 207882, at *1. This assertion is incorrect. Chief Judge Sullivan, Judge Gierke, and Judge Wiss agreed with Judge Crawford's reasoning. See *id.* at *10 (Sullivan, C.J. concurring); *id.* at *14 (Wiss, J., concurring). Judge Cox, however, does not believe that the good faith exception has any relevance to command-authorized searches or seizures. See *id.* at *18 n.6 (Cox, J., concurring). In *Lopez*, he simply acknowledged that "[a]lthough I do not believe that the good faith exception, created in *United States v. Leon* is apropos to command-ordered searches and seizures, the reasoning advanced by Judge Crawford in reaching her conclusions is sufficiently analogous to my view to permit me to concur with her that this search was carried out in good faith and was reasonable under the Fourth Amendment." *Id.* at *10 (citation omitted). In sum, three judges of the Court of Military Appeals agreed with Judge Crawford's legal analysis of this command-authorized search; one took another approach, but reached the same result.

³⁵Chief Judge Sullivan, and Judges Cox, Crawford, and Gierke did not believe that the question of whether probable cause actually existed was relevant to an application of the good faith exception. By implication, they suggested that, in *Lopez*, the issue remained unresolved. Judge Wiss, however, stated that he would not "reevaluate" the conclusion of the trial judge and Air Force Court of Military Review that Major Harrison had lacked probable cause. He remarked, "I view that conclusion in the accused's favor as the law of the case." *Id.* at *15 (Wiss, J., concurring). Given that factual determinations made by the trial court and court of review are binding on the Court of Military Appeals, Judge Wiss's view is the better approach.

³⁶MCM, *supra* note 7, MIL. R. EVID. 311(b)(3)(B) (emphasis added); see also STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 249 (3d ed. 1991).

³⁷*Lopez*, No. 66675, 1992 WL 207882, at *3.

³⁸See *id.* at *5; see also *id.* at *17 (Wiss, J., concurring). This emphasis on reasonableness dovetails with Judge Cox's view on how the Fourth Amendment should apply to the military. See *id.* at *10 (Cox, J., concurring); see also *supra* note 24 and accompanying text.

³⁹See, e.g., *Lopez*, No. 66675, 1992 WL 207882, at *3, *6; *id.* at *10 (Sullivan, C.J., concurring). Judges Wiss and Cox did not agree. Judge Wiss essentially would have substituted a de novo standard for the substantial basis test. The difficulty with this approach is that adopting a de novo standard ignores the plain language of MRE 311. See MCM *supra* note 7, MIL. R. EVID. 311(b)(3)(B). Judge Cox does not believe that the good faith exception applies to a commander. See *Lopez*, No. 66675, 1992 WL 207882, at *18 n.6 (Cox, J., concurring). From his perspective, the issue of a standard of review had no relevance. Were Judge Cox's view to prevail in a future decision, he apparently would use a "totality of the circumstances" test to evaluate a commander's reasonableness in authorizing a search or a seizure and would accord reasonableness "its ordinary meaning." *Id.* at *10.

Lopez shows that the good faith exception to the exclusionary rule applies to command-authorized searches that meet the requirements of MRE 311(b)(3). After *Lopez*, a trial counsel arguing for the application of the good faith exception should insist that the trial judge need not address the issue of probable cause if a "bare bones" presentation of facts was made to the commander. Defense counsel, on the other hand, should argue that MRE 311(b)(3) requires a "substantial basis" test and that the "bare bones" test mentioned in Judge Crawford's lead opinion cannot override the plain language of the *Manual for Courts-Martial*. Defense counsel also should argue that, even if a "substantial basis" existed for a commander's decision to authorize a search, the good faith exception should apply only if the commander was neutral and detached and the police executing the authorization acted reasonably. Both trial and defense counsel must develop the record carefully to allow appellate review of the trial judge's application of the new rule expressed in *Lopez*. Major Borch.

Contract Law Note

Fiscal Law Update:

Congress Proposes Major Changes in the Funding of

Minor Military Construction Projects

Each year, Congress asserts control over military spending through the annual authorization and appropriation acts. In the February issue of *The Army Lawyer*,⁴⁰ we reported that Congress had increased the funding thresholds for unspecified minor construction projects to \$1.5 million and had authorized obligations of up to \$300,000 from operation and maintenance funds for individual minor construction projects. To differentiate more clearly between military construction

investment and routine, recurring expenses, Congress now proposes to expand the definition of "military construction" to include any alteration, repair, or minor construction project that extends the useful life of a facility and costs more than \$15,000.⁴¹ Congress also proposes to amend 10 U.S.C. § 2805 by reducing from \$300,000 to \$15,000 the funding threshold for minor construction or repair projects using operation and maintenance funds.⁴² If enacted, these changes will alter significantly the manner in which the Department of Defense (DOD) classifies and funds minor construction projects.

What will this mean to an individual installation? The impact may be substantial. To comprehend the impact of the proposed changes, one must understand how the DOD currently classifies and funds its minor military construction projects. To understand the classification and funding process, one should begin with a review of key definitions. "Military construction" currently includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation."⁴³ A "minor construction project," on the other hand, is construction at a military installation that involves a single undertaking with an approved cost of less than \$1.5 million.⁴⁴ Congress generally funds construction projects in the annual military construction appropriation act.⁴⁵ In this act, Congress also appropriates limited funds for minor construction projects.⁴⁶ These funds are known as unspecified minor construction funds. An installation must submit a request to Headquarters, Department of the Army, to obtain approval of, and funding for, any minor construction project whose cost is expected to exceed \$300,000.⁴⁷

The military construction funds are not the DOD's only source of monies for construction. Congress expressly has authorized the DOD to use alternative funds to finance certain construction projects. Accordingly, DOD components may use procurement funds to provide government-owned facilities to contractors;⁴⁸ research and development funds to

⁴⁰See Anthony M. Helm et al., *1991 Contract Law Developments—The Year in Review*, ARMY LAWYER, Feb. 1992, at 3, 7.

⁴¹H.R. CONF. REP. NO. 527, 102 Cong., 1st Sess. 314 (1992).

⁴²Congress also would reduce to \$15,000 the amount that the DOD could draw from operation and maintenance funds to carry out minor construction projects and repair projects involving Reserve Component facilities. *Id.* at 315.

⁴³10 U.S.C. § 2801(a) (1988).

⁴⁴To qualify as a minor construction project, a proposal must include all work needed to produce a complete and usable facility or a complete and usable improvement to a facility. 10 U.S.C.A. § 2805(a) (West Supp. 1992); DEP'T OF ARMY, REG. 415-35, CONSTRUCTION: MINOR CONSTRUCTION, EMERGENCY CONSTRUCTION, AND REPLACEMENT OF FACILITIES DAMAGED OR DESTROYED, paras. 2-1(a), 2-2; *id.* glossary, sec. II [hereinafter AR 415-35].

⁴⁵Congress funds military construction in a lump sum appropriation for each of the military departments. See, e.g., Military Construction Appropriations Act, 1992, Pub. L. No. 102-136, 105 Stat. 637 (1991).

⁴⁶For fiscal year 1992, Congress appropriated to the Army \$11 million for unspecified minor military construction projects. See *id.* Use of military construction appropriations requires written approval from Headquarters, Department of the Army. See DEP'T OF DEFENSE, DIRECTIVE 4270.24, UNSPECIFIED MINOR CONSTRUCTION, EMERGENCY CONSTRUCTION, AND RESTORATION OR REPLACEMENT OF DAMAGED OR DESTROYED FACILITIES (Mar. 23, 1983) [hereinafter DOD DIR. 4270.24]; AR 415-35, *supra* note 44, para. 2-1.

⁴⁷AR 415-35, *supra* note 44, para. 2-6.

⁴⁸Department of Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511, 104 Stat. 1863 (1990).

finance research, developmental, or test facilities;⁴⁹ and operation and maintenance funds to finance minor military construction projects costing \$300,000 or less.⁵⁰

In the past, the DOD has favored the use of operations and maintenance funds to finance minor construction projects within the statutory limitation of 10 U.S.C. § 2805(c).⁵¹ Using operation and maintenance funds for minor construction projects permits a service secretary to expend available unspecified minor construction funds for other purposes. Moreover, an installation commander currently can draw on operation and maintenance funds without obtaining approval from his or her service secretary—or the secretary's designated representative—to finance minor military construction projects that do not exceed \$300,000.⁵²

An installation currently may use operation and maintenance funds to finance a maintenance and repair project, regardless of its cost,⁵³ that is performed "in connection with a facility"⁵⁴ and to finance minor construction projects under \$300,000. "Maintenance" includes the recurring, periodic, or scheduled work necessary to preserve a facility in a condition adequate to ensure that the facility may be used effectively for its designated functional purpose.⁵⁵ "Repair" is the restoration of a failed, or failing, facility to a condition adequate to permit it to be used effectively for its designated functional purpose.⁵⁶

By enacting the proposed changes, Congress would limit an installation commander's use of operation and maintenance funds, permitting the commander to use these funds to finance only minor construction projects costing less than \$15,000. Congress also would reclassify as military construction many projects presently classified as repairs. Consequently, an installation would have to draw on the unspecified military

construction account to fund any nonrecurrent facility work, costing more than \$15,000, that is performed to extend the useful life of the facility. The installation could continue to classify as expenses facility work under \$15,000 that extends the useful life of a facility and work over \$15,000 that is routine or recurrent and is necessary to preserve the physical structure of a facility or its support system. This concession is important because the proposed amendments specifically permit installations to continue to draw on the operation and maintenance account to fund work classified as expenses.

If enacted, the amendments Congress has proposed would affect operations throughout the DOD. They sharply would reduce not only the number of minor military construction projects approved at the installation or major command levels, but also the number of projects approved at the secretarial level. Major Cameron.

International Law Note

Civil Disturbance Rules of Engagement: Joint Task Force Los Angeles

Late on the evening of 1 May 1992, as Los Angeles seethed in the turmoil of the most serious civil disturbances an American city has experienced in this century, the commander of the newly created Joint Task Force (JTF) Los Angeles directed the drafting of joint rules of engagement (ROE). The new rules were to consolidate the ROE contained in a Defense Department operation plan called "Garden Plot"⁵⁷ with the ROE developed by the elements comprising the JTF. Creating and coordinating the ROE for this mission was a formidable

⁴⁹ See 10 U.S.C. § 2353 (1988). Department of Defense Directive 4275.5 also permits the use of research and development funds to construct facilities on a military installation if a contractor later will operate and maintain them. See DEP'T OF DEFENSE, DIRECTIVE 4275.5, ACQUISITION AND MANAGEMENT OF INDUSTRIAL RESOURCES (Oct. 6, 1980). The directive further authorizes the use of these funds for minor construction projects costing \$300,000 or less. *Id.*; cf. 10 U.S.C.A. § 2805(c) (1) (West Supp. 1992).

⁵⁰ 10 U.S.C.A. § 2805(c) (1) (West Supp. 1992). Use of military construction appropriations for projects in this category requires written approval from Headquarters, Department of the Army (Corps of Engineers). See AR 415-35, *supra* note 44, para. 2-1.

⁵¹ The DOD requires installations to use operations and maintenance funds for projects with a funded cost of \$300,000 or less. See generally DOD DIR. 4270.24, *supra* note 46.

⁵² A major command (MACOM) must approve the use of operation and maintenance funds for minor military construction projects costing \$300,000 or less. A MACOM, however, often will delegate this authority to its installation commanders. Cf. AR 415-35, *supra* note 44, paras. 1-6(b), 2-6(c) (authorizing MACOMs to delegate approval authority).

⁵³ A MACOM may approve projects costing \$2 million or less. DEP'T OF ARMY, REG. 420-10, FACILITIES ENGINEERING: MANAGEMENT OF INSTALLATION DIRECTORATES OF ENGINEERING AND HOUSING, para. 3-2 (2 July 1987) [hereinafter AR 420-10]. The Secretary of the Army may approve projects exceeding the MACOM approval level. *Id.*

⁵⁴ National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290 (1991).

⁵⁵ AR 420-10, *supra* note 53, sec. II.

⁵⁶ *Id.*

⁵⁷ Dep't of Defense, Civil Disturbance Plan Garden Plot (15 Feb. 1991).

able task. The rules had to guide soldiers assembled from a variety of commands in their uses of force to respond to street rioting that threatened the safety of every local citizen and task force member.

Civil disturbance ROE almost always must be geared to diverse force compositions. Joint Task Force Los Angeles was composed of 9844 members of the California National Guard, drawn from the 40th Infantry Division (Mechanized) and the 49th Military Police Brigade; 1500 Marines from Camp Pendleton; and 1767 soldiers from the Army's 7th Infantry Division (Light) at Fort Ord. At any given time between the 1st and 6th of May, 2600 National Guard troops, 440 Marines, and 680 active duty soldiers could be found patrolling the streets of Los Angeles. That these individuals be provided with concise ROE to guide them in the performance of their critical mission was essential.

The ROE created for JTF Los Angeles reflected input from each of the commands participating in the mission, together with specific guidance provided by Forces Command, United States Army; the Joint Chiefs of Staff; and Headquarters, Department of the Army. The Commanding General, JTF Los Angeles, approved the final draft of the ROE at approximately 0100 hours on 2 May 1992. Using local purchase procedures, a field ordering officer acquired 12,000 pocket-sized copies of the ROE, which then were distributed to the troops dispersed throughout Los Angeles. By 1300 hours on the 2 May, each member of the JTF had a copy of the ROE and each had been briefed by an active duty judge advocate about the meanings and effects of these rules.

Key issues addressed in drafting the ROE for members of JTF Los Angeles included the proper uses of lethal and non-lethal force, warning requirements, limits on automatic fire of weapons, changes to arming orders, use of sniper teams, and employment of riot control agents. The following passage duplicates the ROE used by JTF Los Angeles:

Los Angeles Civil Disturbance ROE (1992)
Joint Task Force, L.A.
(as of 020100 May 1992)

A. Every service [member] has the right under law to use reasonable and necessary force to defend himself [or herself] against violent and dangerous personal attack. The limitations described below are not intended to infringe this right, but to prevent the indiscriminate use of force.

B. Force will never be used unless necessary, and then only the minimum force necessary will be used.

- (1) Use nondeadly force to:
 - (a) control the disturbance;
 - (b) prevent crimes; [and]
 - (c) apprehend or detain persons who have committed crimes.
- (2) Use deadly force only when:
 - (a) lesser means of force [are] exhausted or unavailable;
 - (b) risk of death or serious bodily harm to innocent persons is not significantly increased by the use; and
 - (c) purpose of use [is:]
 - 1—self-defense, to avoid death or serious bodily harm;
 - 2—prevention of [a] crime involving death or serious bodily harm;
 - 3—prevention of destruction of public utilities that have been determined vital by the TF commander; or
 - 4—detention, or prevention of escape, of persons who present a clear threat of loss of life.
- (3) When possible, the use of deadly force should be preceded by a clear warning that such force is contemplated or imminent.
- (4) Warning shots will not be used.
- (5) When firing, shots will be aimed to wound, if possible, rather than kill.
- (6) Weapons will not be fired on automatic.
- (7) When possible, let civilian police arrest lawbreakers.
- (8) Allow properly identified news reporters freedom of movement, so long as they do not interfere with your mission.
- (9) Do not talk about this operation, or pass on information or rumors about it, to unauthorized persons; refer them to your commander.
- (10) The JTF commander withholds authority for use of riot control agents and sniper teams.

C. Arming orders:

| Arming Order | Rifle | Bayonet Scabbard | Bayonet | Pistol | Baton | Magazine/Chamber | Control |
|--------------|-------|------------------|----------|-----------|-------|-------------------------|------------|
| AO-1 | Sling | On Belt | Scabbard | Holstered | Belt | In Pouch /Empty | OIC/ NCOIC |
| AO-2 | Port | On Belt | Scabbard | Holstered | Belt | In Pouch /Empty | OIC/ NCOIC |
| AO-3 | Sling | On Belt | Fixed | Holstered | Hand | In Pouch /Empty | OIC/ NCOIC |
| AO-4 | Port | On Belt | Fixed | Holstered | Hand | In Pouch /Empty | OIC/ NCOIC |
| AO-5 | Port | On Belt | Fixed | Holstered | Hand | Weapon /Empty | OIC/ NCOIC |
| AO-6 | Port | On Belt | Fixed | In Hand | Belt | Weapon /Locked & Loaded | OIC |

These carefully crafted ROE accomplished their purpose. The service members deployed in JTF Los Angeles carried approximately 350,000 rounds of ammunition and 3700 tear gas grenades, but they fired only twenty rounds throughout the entire crisis.⁵⁸ Unit commanders strictly accounted for each shot fired. National Guard soldiers fired fourteen shots at an individual who attempted to run them down with his car.⁵⁹ Task force members fired two more rounds at another person who tried to run over police and National Guard soldiers, and the final four rounds were used in subduing a robbery suspect who resisted arrest.⁶⁰ The remarkable fire discipline the JTF troops displayed while patrolling the streets of Los Angeles may be attributed not only to their outstanding training and discipline, but also to the ROE that had been drafted for the mission.

Operational law judge advocates confronted with similar situations and missions in the future can draw upon these ROE. Significantly, the JTF Los Angeles ROE do not deny—and actually emphasize—the soldier's inherent right of self-defense. Rules of engagement that fail to address this issue clearly invite tragic mistakes.⁶¹ That planners should tailor ROE specifically to the mission their units shall perform is equally important. Although the civil disturbance ROE used in Los Angeles well suited the needs of that operation, they may not

provide a suitable example for other situations. To aid operational law planners, the International Law Division, The Judge Advocate General's School, U.S. Army, (TJAGSA) has included the Los Angeles ROE and other civil disturbance ROE in the new *Operational Law Handbook*.⁶² Lieutenant Commander Rolph.

Legal Assistance Items

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

Tax Note

Deductibility of Loan Origination Fees

Many legal assistance clients purchase homes using loans guaranteed by the Department of Veterans' Affairs (VA) or

⁵⁸Harry Summers, *Fire Discipline All the Way to L.A.*, WASH. TIMES, May 21, 1992, at G-4.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹That ambiguous and unduly restrictive ROE contributed to the deaths of 241 Marines in the 1983 terrorist bombing of the Marine battalion landing team headquarters in Beirut, Lebanon, was a principle finding of the Long Commission. See COMM'N ON BEIRUT INT'L AIRPORT TERRORIST ACT, DEP'T OF DEFENSE, REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983 (Dec. 20, 1983). Obviously, the American presence in Beirut in 1983 did not involve a law enforcement mission and had no domestic civil and criminal law consequences. The ROE for Beirut primarily were concerned with avoiding accidental combat actions or injuries.

⁶²INT'L L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (1992).

the Federal Housing Administration (FHA). For many years, the Internal Revenue Service (IRS) refused to allow a taxpayer to claim as deductible interest the "loan origination fee," or "points," the taxpayer had to pay a lending institution to obtain a VA or FHA loan.⁶³ Early this year, however, the IRS apparently reversed this policy. It announced in Revenue Procedure 92-12 that a cash basis taxpayer⁶⁴ who purchased a principal residence after 1990 may deduct the points he or she paid to finance this transaction if he or she satisfies a five-part test set forth in the revenue procedure.⁶⁵

This announcement generated considerable excitement in the military community because it implied that a service member who pays a VA or FHA loan origination fee may deduct that fee as interest. In listing examples of deductible points, the IRS specifically mentioned "loan origination fees."⁶⁶ It also stated that a taxpayer can fulfill one element of the five-part test simply by showing that the settlement statement (Form HUD-1) from his or her purchase of the home identifies the amount the taxpayer would deduct as points. Many military taxpayers can satisfy this requirement without difficulty. In most home purchases financed with VA loans, the settlement statement discloses a loan origination fee, calculated as a percentage of the loan amount.⁶⁷

The IRS recently ratified this interpretation of its announcement when it amended Revenue Procedure 92-12. Revenue Procedure 92-12A states unequivocally that a taxpayer may deduct a VA or FHA loan origination fee if the taxpayer satisfies the requirements of Revenue Procedure 92-12.⁶⁸ Accordingly, many military taxpayers who used VA or FHA loans to purchase homes in tax years beginning after 31 December 1990 now may deduct their VA or FHA loan origination fees as interest on Schedule A, *Itemized Deductions*.

Legal assistance attorneys should publicize this information to ensure that it reaches service members and military retirees. A taxpayer who purchased a home in 1991 or 1992 using a

VA or FHA loan should review his or her tax return and Form HUD-1. If the taxpayer previously filed a federal income tax return without deducting the VA or FHA loan origination fee, he or she may want to file a Form 1040X, *Amended U.S. Individual Income Tax Return*, to correct his or her tax liability and to obtain a refund.

In the past, some military taxpayers have treated VA and FHA loan origination fees as purchase expenses on their moving expense forms. Any taxpayer who did so and found that his or her moving expenses exceeded the maximum deductible amount should consider reporting the VA or FHA loan origination fee as points on Schedule A and recalculating his or her moving expenses. This approach should increase the taxpayer's total itemized deductions, reduce his or her income tax liability, and result in a refund.

Revenue Procedure 92-12 appears below as it will appear in the *Cumulative Bulletin*. Taxpayers hoping to deduct loan origination fees should note that they may do so only if they satisfy *all* of the requirements listed in section three of the revenue procedure. They also should understand that the revenue procedure does not apply to points paid on refinancing a loan.⁶⁹ Major Hancock.

Revenue Procedure 92-12

Section 1. Purpose

In order to minimize possible disputes regarding the deductibility of points paid in connection with the acquisition of a principal residence, the Internal Revenue Service will, as a matter of administrative practice, treat amounts as points that are deductible for the taxable year during which they are paid by a cash basis taxpayer if the requirements of section 3 of this revenue procedure are satisfied.

⁶³Rev. Rul. 67-297, 1967-2 CB 87. The purchaser's loan origination fee often is referred to as "points." Because VA or FHA loan purchasers have not been able to deduct loan origination fees as interest, they usually have treated the fees as purchase expenses and have applied them toward their moving expense deductions. See TJAGSA Practice Note, *Deductible Moving Expenses*, ARMY LAW., Aug. 1991, at 46.

⁶⁴Most taxpayers are cash basis taxpayers. A cash basis taxpayer uses the cash method of accounting for tax purposes. He or she reports all items of income in the year in which he or she actually or constructively receives them and deducts all expenses in the year they are paid. An accrual basis taxpayer, on the other hand, reports income when it is earned, regardless of when he or she actually receives it, and deducts expenses when he or she incurs them, not when they are paid. See generally INTERNAL REVENUE SERV., PUB. 538, ACCOUNTING PERIODS AND METHODS (1992).

⁶⁵Rev. Proc. 92-12, 1992-3 IR.B. 27; see also TJAGSA Practice Note, *Deductibility of Home Mortgage "Points,"* ARMY LAW., Mar. 1992, at 41 (discussing Revenue Procedure 92-12 and describing the five-point test).

⁶⁶Rev. Proc. 92-12, § 3.01, 1992-3 IR.B. 27.

⁶⁷See Bernard P. Ingold, *The Department of Veterans' Affairs Home Loan Guaranty Program: Friend or Foe?*, 132 MIL. L. REV. 231, 237-39 (1991) (discussing VA financing requirements).

⁶⁸See Rev. Proc. 92-12A, § 1, 1992-26 IR.B. 20. Neither Revenue Procedure 92-12A, nor Revenue Procedure 92-12, address the "VA funding fee" imposed pursuant to 38 U.S.C.A. § 3729 (West Supp. 1992). The IRS probably will not extend to funding fees the "interest" interpretation it now applies to loan origination fees. Accordingly, many service members probably will continue to include funding fees as purchase expenses when calculating their moving expense deductions.

⁶⁹In most cases, a taxpayer may deduct points paid when refinancing an existing loan only to the extent that he or she uses the new loan's proceeds to improve his or her primary residence. Rev. Rul. 87-22, 1987-1 C.B. 146. Consequently, points on many refinancing loans are amortized over the lives of the loans. See Rev. Proc. 87-15, 1987-1 C.B. 624.

Section 2. Background

.01 Section 461(g)(1) of the Internal Revenue Code provides that interest that is paid by a cash basis taxpayer and that is properly allocable to any period (A) with respect to which the interest represents a charge for the use or forbearance of money, and (B) which is after the close of the taxable year in which the interest is paid, must be capitalized and treated as if it were paid in the period to which it is allocable.

.02 Section 461(g)(2) of the Code provides that the rules of section 461(g)(1) do not apply to points paid in connection with indebtedness that is incurred in connection with the purchase or improvement of, and that is secured by, the principal residence of the taxpayer to the extent that, under regulations prescribed by the Secretary, the payment of points is an established business practice in the area in which the indebtedness is incurred and the amount of points paid does not exceed the amount generally charged in that area.

Section 3. Application

The Service will, as a matter of administrative practice, treat as deductible points any amounts paid by a cash basis taxpayer during the taxable year in cases where all of the following requirements are satisfied:

.01 *Designated on Uniform Settlement Statement.* The Uniform Settlement Statement prescribed under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. sections 2601 *et seq.* (i.e., the Form HUD-1) must clearly designate the amounts as points incurred in connection with the indebtedness, for example as "loan origination fees" (including amounts so designated on Veterans Affairs (VA) and Federal Housing Administration (FHA) loans), "loan discounts," "discount points," or "points."

.02 *Computed as Percentage of Amount Borrowed.* The amounts must be compared as a percentage of the stated principal amount of the indebtedness incurred by the taxpayer.

.03 *Charged Under Established Business Practice.* The amounts paid must con-

form to an established business practice of charging points for loans for the acquisition of personal residences in the area in which the residence is located, and the amount of points paid must not exceed the amount generally charged in that area. Thus, if amounts designated as points are paid in lieu of amounts that are originally stated separately on the settlement statement (such as appraisal fees, inspection fees, title fees, attorney fees, property taxes, and mortgage insurance premiums), those amounts are not deductible as points under this revenue procedure.

.04 *Paid for Acquisition of Principal Residence.* The amounts must be paid in connection with the acquisition of the taxpayer's principal residence, and the loan must be secured by that residence. See sections 4.02 through 4.05 of this revenue procedure for examples of points that do not satisfy this requirement.

.05 *Paid Directly by Taxpayer.* The amounts must be paid directly by the taxpayer. An amount is so paid if the taxpayer provides, from funds that have not been borrowed for this purpose as part of the overall transaction, an amount at least equal to the amount required to be applied as points at the closing. The amount provided may include down payments, escrow deposits, earnest money applied at the closing, and other funds actually paid over at closing.

Section 4. Limitations

This revenue procedure does not apply to the following amounts:

.01 Points paid in connection with the acquisition of a principal residence, to the extent that the points are allocable to an amount of principal in excess of the aggregate amount that may be treated as acquisition indebtedness under section 163(h)(3)(B)(ii) of the Code.

.02 Points paid for loans the proceeds of which are to be used for the improvement, as opposed to the acquisition, of a principal residence.

.03 Points paid for loans to purchase or improve a residence that is not the tax-

payer's principal residence, such as a second home, vacation property, investment property, or trade or business property.

.04 Points paid on a refinancing loan, home equity loan, or line of credit, even though the indebtedness is secured by a principal residence.

.05 Points paid by the seller of a principal residence to or on behalf of the buyer as part of the transaction. In applying section 3.05, these amounts are deemed not to have been paid directly by the taxpayer. If the seller pays any amount to or on behalf of the buyer, and the buyer and the seller do not explicitly allocate the amount to points, the amount is allocated, to the extent possible, to expenditures other than points.

Section 5. Effective Date

This revenue procedure is effective for points paid by cash basis taxpayers during taxable years beginning after December 31, 1990.

Section 6. Effect on Other Documents

Rev. Rul. 57-541, 1957-2 C.B. 319, and Rev. Rul. 67-297, 1967-2 C.B. 87, which provide for the treatment of loan origination fees on FHA and VA loans, will not apply to cash basis taxpayers who satisfy the requirements of this revenue procedure with respect to loan origination fees paid during taxable years beginning after December 31, 1990.

Consumer Law Note

Direct Deposit Military Pay—Prime Target for Attachment by Judgment Creditors

Is a service member who deposits military pay directly into his or her banking account vulnerable to a judgment creditor? May a judgment creditor evade a statutory prohibition on garnishment of federal wages⁷⁰ simply by asking a court to

attach a service member's military pay *after* the federal government has deposited the pay electronically in a financial institution? The answer to both questions appears to be yes, unless a state law prevents the attachment.⁷¹

An LAA cannot advise a client simply to stop using direct deposit. On 22 April 1992, the Comptroller of the Department of Defense approved a policy *requiring* military personnel and DOD civilian employees regularly to use electronic transfers to deposit their wages directly into their bank accounts. The Defense Finance and Accounting Service (DFAS) later promulgated guidelines to implement this policy.⁷² These guidelines became effective on 1 August 1992. They provide, in relevant part,

DOD considers the requirement to participate in . . . [the] direct deposit [and] electronic transfer [program] . . . a reasonable condition of employment for civilians, including those who through a competitive selection are promoted or reassigned, and a condition of service for military personnel for actions including commissions, enlistments, reenlistments, and retirements.

All personnel presently enrolled in [the direct deposit program,] and those enrolled [in this program] on or after August 1, 1992, are required to continue under the program. In addition, on or after August 1, 1992, enrollment is required for:

a. Military members not currently enrolled in [the direct deposit program]—[upon] . . . enlistment, reenlistment, appointment as an officer, or acceptance of a regular commission.

b. Active duty military accessions—upon arrival at their first permanent duty station[s].

c. Reserve and National Guard personnel—upon arrival at their first unit[s] of assignment; when mobilized or recalled to active duty; and after demobilization or deactivation.

⁷⁰See 42 U.S.C. § 659 (1988) (precluding garnishment of military pay for obligations other than child support and alimony).

⁷¹Attorneys in the field report an increasing trend among judgment creditors to attach military wages after the government has deposited these wages directly into a debtor-service member's bank account. The author is aware of no federal prohibition on attachment of military pay once the pay is deposited in a financial institution.

⁷²Memorandum, Director, Defense Fin. and Accounting Serv., subject: Implementing Guidelines for Direct Deposit (21 July 1992). The DFAS point of contact for direct deposit issues is Mr. Bruce Budlong. He may be reached at (703) 607-1588.

d. Military retirees, annuitants, and Voluntary Separation Incentive (VSI) separations—military personnel retiring or recalled to active duty; new annuitants; and members separating under [the] VSI Program.

e. New service academy and Reserve Officer Training Corps (ROTC) midshipmen and cadets.

f. New Armed Forces Health Professions Scholarship Program participants.

g. New[ly hired] civilian employees and [employees who have been] competitively promoted or reassigned.⁷³

The DFAS guidelines exempt certain categories of personnel from the enrollment requirements. They also specify that the initiation of direct deposit payments to civilian employees in bargaining units will proceed subject to union negotiations. Finally, the guidelines contain a grandfather clause that exempts from mandatory enrollment certain persons who previously were not enrolled, or were not required to enroll, in the direct deposit program.⁷⁴

A service member may request a waiver of the direct deposit and electronic fund transfer requirements. The opportunities for such a waiver, however, appear to be very limited. An active duty service member's unit commander may waive the service member's enrollment requirement for up to one year if the commander determines that excusing the service member from enrollment would serve the best interests of both the service member and the DOD. The commander also may extend an existing waiver, subject to the same criterion.

⁷³ See *id.*

⁷⁴ Service members, retirees, and annuitants who neither enrolled, nor were required to be enrolled, in a direct deposit program before 1 August 1992 need not participate in such a program immediately. The DOD will compel them to enroll in a direct deposit program only if they enlist, reenlist, accept regular or reserve commissions, retire, are mobilized, or are recalled to active duty. See *id.* Similarly, DOD civilian employees who neither enrolled, nor were required to enroll, in a direct deposit program before 1 August 1992 must initiate direct deposit accounts only if they are promoted or reassigned competitively, separated and reemployed, mobilized, or recalled to active military service. *Id.*

⁷⁵ "[W]aivers [generally] should be temporary . . . and [should] allow individuals sufficient time to resolve short term problems prior to disenrollment" from a direct deposit program. *Id.*

⁷⁶ A nonexempt individual may apply for a waiver by submitting a written request to the designated approving authority. The applicant must provide adequate documentation to substantiate the waiver request. An approving authority must notify the servicing finance office in writing when he or she grants a waiver, stating that he or she has excused the applicant temporarily from the direct deposit requirement and informing the office of the waiver's expiration date.

⁷⁷ Any attorney who has prevented a judgment creditor from attaching a client's directly deposited military pay is encouraged to notify the author at DSN 274-7115 (ext. 368) or commercial (804) 972-6368.

⁷⁸ Pub. L. No. 100-180, § 638, 101 Stat. 1019, 1106-08 (1987).

⁷⁹ See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 662, 103 Stat. 1352, 1465 (1989).

⁸⁰ According to Department of Defense policy, proceedings are "initiated" on the date of the home study, or on the date of the child's placement in the adoptive home, whichever occurs later.

The guidelines provide that a commander or other approval authority may grant a waiver to ease a payee's financial difficulty, to compensate for a payee's financial irresponsibility, or to respond to other extenuating or compelling circumstances. Practically speaking, a unit commander probably would not approve a waiver to permit a service member to avoid payment of court-ordered attachments.⁷⁵ Nevertheless, LAAs should consider waiver requests in appropriate cases. Procedures for submitting requests are detailed in the guidelines.⁷⁶

Can an LAA pursue any other actions on behalf of a client facing attachment? Should the LAA advise the client to close the account into which the client's pay is deposited? The guidelines warn that "individuals (except retirees and annuitants) who fail to establish a [direct deposit] account or to secure a waiver from the appropriate authority, in the manner [prescribed], will be subject to administrative action." Occasionally, however, circumstances will dictate that a client must stop direct deposit immediately. The LAA then should be prepared to persuade the client's chain of command that the punitive provision is not mandatory, but is merely a policy statement allowing a commander to initiate administrative actions in appropriate cases. Effective advocacy on behalf of the client is essential, especially when creditors obtained default judgments, the client received no advance notice of the resulting attachments, and the client's family will experience substantial hardship if the direct deposit continues. Major, Hostetter.⁷⁷

Family Law Note

Adoption Reimbursement Update

Section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 created an adoption reimbursement test program.⁷⁸ Under that program,⁷⁹ a soldier who "initiated"⁸⁰ the adoption of a child between 1 October 1987

and 30 September 1990 could claim reimbursement of up to \$2000 for necessary adoption expenses.⁸¹ A soldier who adopted more than one child could recover up to \$2000 per adoption, up to a maximum of \$5000 per calendar year.⁸² The test program expired at the end of fiscal year 1990. Soldiers wishing to submit reimbursement applications for adoptions initiated during the test period had to do so no later than 30 September 1991.

Section 651 of the National Defense Authorization Act for Fiscal Years 1992 and 1993⁸³ reinstated this program permanently.⁸⁴ The permanent program is available to service members who serve at least 180 consecutive days on active duty. Like the test program, the permanent program permits a soldier to recover up to \$2000 in "qualifying expenses"⁸⁵ for each adoption. A soldier may claim reimbursement for the adoptions of more than one child; however, the soldier may not receive more than \$5000 in one calendar year.⁸⁶ Any money a soldier receives under the program is taxable to the soldier as income.

The program has several significant limitations. A soldier may claim qualifying expenses only for the adoption of a child under the age of eighteen.⁸⁷ The travel expenses the soldier, or his or her spouse, incurs in completing the adoption cannot be reimbursed⁸⁸ and no payments of any kind are permitted before an adoption becomes final.⁸⁹ Finally, the expenses a soldier incurs by arranging a private adoption are not reimbursable. The program will reimburse only the "reasonable and necessary expenses"⁹⁰ a service member incurs in obtaining an adoption through a state or local agency, or through a nonprofit voluntary agency that is authorized by law to place children for adoption.

A soldier must file for reimbursement within one year of completing an adoption. At present, final procedures to

process and pay claims have not been promulgated. The DOD anticipates that soldiers will apply for reimbursements at their local personnel offices. Once a personnel office has reviewed and certified a claim, it will forward the claim to the DFAS center in Cleveland, Ohio, for payment. The local office itself actually will not process or pay the claim.

Any soldier who completed an adoption after 5 December 1991, and now is close to separation or retirement, should register his or her intent to apply for reimbursement before leaving active duty. A soldier can do so by mailing a letter to the DFAS center in Indianapolis, Indiana,⁹¹ or by sending written notice to the local finance and accounting office. This notification should include the following information: (1) the soldier's name and social security number; (2) the soldier's retirement or expiration term of service (ETS) date; (3) the date the adoption was finalized; and (4) an address and telephone number at which the soldier can be reached after his or her retirement or ETS.

Legal assistance attorneys may obtain additional information about the adoption reimbursement program by calling Captain Laurel L. Wilkerson of the Army Legal Assistance Office, Office of The Judge Advocate General. She may be reached at DSN 227-3170 or (703) 697-3170. Major Connor.

Estate Planning Notes

Pennsylvania Living Will Statute

A summary of the living will statutes for all fifty states and the District of Columbia appeared in the May 1992 issue of *The Army Lawyer*.⁹² Pennsylvania subsequently enacted a living will statute⁹³ that does not appear in that summary.

⁸¹ Pub. L. No. 100-180, § 638(c), 101 Stat. 1019, 1107 (1987).

⁸² *Id.*

⁸³ Pub. L. No. 102-190, § 651, 105 Stat. 1290, 1385 (1991) (codified at 10 U.S.C.A. § 1052 (West Supp. 1992)).

⁸⁴ Although the program is supposed to be permanent, the House conference report calls for the General Accounting Office to conduct a two-year study to assess the value of the program as an incentive for recruitment and retention. H.R. REP. NO. 311, 102d Cong., 1st Sess. 554 (1991).

⁸⁵ Qualifying expenses are "reasonable and necessary expenses," specifically including adoption agency fees, placement fees, legal fees and court costs, medical expenses, expenses relating to the biological mother's pregnancy and childbirth, and temporary foster care. See 10 U.S.C.A. § 1052(g)(1) (West Supp. 1992).

⁸⁶ *Id.* § 1052(e).

⁸⁷ *Id.* § 1052(a).

⁸⁸ *Id.* § 1052(g)(1)(A).

⁸⁹ *Id.* § 1052(c).

⁹⁰ See *id.* § 1052(g); cf. *supra* note 85.

⁹¹ A soldier sending written notice to DFAS should mail the letter to the following address: Director, Defense Finance and Accounting Service, Indianapolis Center, ATTN: DFAS-IN-SAE-C (R. Hill), Indianapolis, IN 46249-2250

⁹² TIAGSA Practice Note, *Living Will Laws*, ARMY LAW., May 1992, at 44.

⁹³ The Advance Directive for Health Care Act, 1992 Pa. Laws 24 (amending 20 PA. CONS. STAT. §§ 5401-5416, effective 16 Apr. 1992).

In its new legislation, Pennsylvania recognized an individual's right to refuse "life-sustaining treatment." The Pennsylvania legislators applied this critical term very broadly.⁹⁴ Like most other living will laws, the Pennsylvania statute includes artificial resuscitation and mechanical respiration in its definition of life-sustaining treatment. To these heroic measures, however, the statute adds invasive surgical procedures, kidney dialysis, the use of blood products and antibiotics, and nutrition or hydration by artificial or invasive procedures.⁹⁵ Significantly, the Pennsylvania law requires the maker of a living will to state specifically the forms of treatment he or she does not want to undergo.⁹⁶

Like most states, Pennsylvania requires that a statutory living will be written and properly witnessed.⁹⁷ The living will becomes operative only if the declarant subsequently becomes incompetent and is diagnosed as being permanently unconscious or in terminal condition.⁹⁸

The Pennsylvania law authorizes the declarant to appoint surrogates to make his or her health care decisions if he or she becomes incompetent.⁹⁹ It also limits the implementation of the living will of a pregnant woman,¹⁰⁰ immunizes from civil or criminal liability health care workers who withhold treatment from a patient pursuant to a living will,¹⁰¹ and clarifies the obligations of insurance providers to policyholders who execute living wills.¹⁰²

The statute includes a sample living will.¹⁰³ The state legislature recommends that declarants use the sample format, but does not require them to do so. After revising the form to reflect the conditions of military life, the Army included it in the Legal Automation Army-Wide System, Automated Legal Assistance Services Software (LAAWS-LA), version 4.01—an update to LAAWS-LA version 4.0—which was distributed earlier this summer. The Army version of the Pennsylvania sample directive appears below. Major Peterson.

DECLARATION

I, (client's name), (Social Security Number), of Pennsylvania, a member of the United States Armed Forces,

currently in (current duty location) pursuant to military orders, being of sound mind, willfully and voluntarily make this declaration to be followed if I become incompetent. This declaration reflects my firm and settled commitment to refuse life-sustaining treatment under the circumstances indicated below.

I direct my attending physician to withhold or withdraw life-sustaining treatment that serves only to prolong the process of my dying, if I should be in a terminal condition or in a state of permanent unconsciousness.

I direct that treatment be limited to measures to keep me comfortable and to relieve pain, including any pain that might occur by withholding or withdrawing life-sustaining treatment.

In addition, if I am in the condition described above, I feel especially strong about the following forms of treatment:

I () do () do not want cardiac resuscitation.

I () do () do not want mechanical respiration.

I () do () do not want tube feeding or any other artificial or invasive form of nutrition (food) or hydration (water).

I () do () do not want blood or blood products.

I () do () do not want any form of surgery or invasive diagnostic tests.

I () do () do not want kidney dialysis.

I () do () do not want antibiotics.

I realize that if I do not specifically indicate my preference regarding any of the forms of treatment listed above, I may receive that form of treatment.

Other instructions: _____

I () do () do not want to designate another person as my surrogate to make medical treatment decisions for me if I

⁹⁴ See 20 PA. CONS. STAT. §§ 5403, 5405(b) (Supp. 1992).

⁹⁵ *Id.* § 5403. Other than Pennsylvania, only three states have statutory provisions allowing for deprivation of nutrition and hydration. See TJAGSA Practice Note, *supra* note 92, at 45-50.

⁹⁶ 20 PA. CONS. STAT. § 5403 (Supp. 1992).

⁹⁷ *Id.* § 5404(a).

⁹⁸ *Id.* § 5405.

⁹⁹ *Id.* § 5404(b).

¹⁰⁰ *Id.* § 5414.

¹⁰¹ *Id.* § 5407.

¹⁰² *Id.* § 5410(b) ("[n]o policy shall be legally impaired or invalidated in any manner by the withholding of life-sustaining treatment from an insured patient, notwithstanding any term of the policy to the contrary").

¹⁰³ *Id.* § 5404(b).

should be incompetent and in a terminal condition or in a state of permanent unconsciousness.

Name and address of surrogate (if applicable): _____

Name and address of substitute surrogate (if surrogate designated above is unable to serve): _____

I made this declaration on the _____ day of (month, year).

Declarant's signature: _____

Declarant's address: _____

The declarant or the person on behalf of and at the direction of the declarant knowingly and voluntarily signed this writing by signature or mark in my presence.

Witness's signature: _____

Witness's address: _____

Witness's signature: _____

Witness's address: _____

Georgia Living Will Statute¹⁰⁴

Georgia recently amended its living will statute. The statute¹⁰⁵ now enables a person to execute a directive ordering health care providers to withhold life-sustaining procedures, nourishment, and hydration from the person if he or she enters a coma with no reasonable expectation of regaining consciousness or a persistent vegetative state.¹⁰⁶ A declarant previously could direct only that life-sustaining procedures be withheld if he or she entered a terminal condition.¹⁰⁷

¹⁰⁴First Lieutenant James Guelcher, an LAA assigned to the Office of the Staff Judge Advocate, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia, provided the information used in this note.

¹⁰⁵See 1992 Ga. Laws 1926.

¹⁰⁶GA. CODE ANN. § 31-32-3(b) (Michie Supp. 1992); *but cf. id.* § 31-32-11(d) (limiting efficacy of a living will when the declarant also has executed a durable health care power of attorney). Subsection 11(d) provides,

Unless otherwise specifically provided in a durable power of attorney for health care, a living will is . . . inoperative as long as . . . an agent [can] . . . serve pursuant to a durable power of attorney [granting] . . . the agent authority [to direct] . . . the withdrawal or withholding of life-sustaining . . . treatment under the same circumstances as those covered by a declaration under this chapter.

See id. § 31-32-11(d).

The Georgia statute precisely defines the terms "coma" and persistent vegetative state. A coma is a "profound state of unconsciousness caused by disease, injury, poison, or other means and for which it has been determined that there exists no reasonable expectation of regaining consciousness." *Id.* § 31-32-2(2). A "persistent vegetative state" is a "state of severe mental impairment in which only involuntary bodily functions are present and for which there exists no reasonable expectation of regaining significant cognitive function." *Id.* § 31-32-2(9).

¹⁰⁷See GA. CODE ANN. § 31-32-2 (Michie 1991) (amended 1992).

¹⁰⁸*Cf.* GA. CODE ANN. § 31-32-3(b) (Michie Supp. 1992) (sample living will).

¹⁰⁹Throughout the remainder of the form, the author uses "NAME" where the client's name should appear. The LAAWS-LA Living Will program inserts the client's name wherever NAME appears in the form.

The amended statute expressly recognizes a living will executed under the previous statute, regardless of the form used or the date of execution. Nevertheless, when drafting a living will for a client who expects to use that document in Georgia, an LAA should use the form printed below.¹⁰⁸ This form—a modification of the sample directive set forth in the amended statute—also may be found in LAAWS-LA version 4.01. Major Hancock.

LIVING WILL

Living will made on _____, 199__.

I, (client's name),¹⁰⁹ (social security number), of (client's domicile), a member [or spouse of a member] of the United States Armed Forces, currently in (current duty location) pursuant to military orders, being of sound mind, willfully and voluntarily make known my desire that my life shall not be prolonged under the circumstances set forth below and do declare:

1. If at any time I should [check each option desired]:

- have a terminal condition,
- become in a coma [sic] with no reasonable expectation of regaining consciousness, or
- become in a persistent vegetative state [sic] with no reasonable expectation of regaining significant cognitive function,

as defined in and established in accordance with the procedures set forth in paragraphs (2), (9), and (13) of Code Section 31-32-2 of the Official Code of Georgia Annotated.* I direct that the application of life-sustaining procedures to my body [check the option desired]:

- including nourishment and hydration,
- including hydration, but not nourishment, or
- excluding nourishment and hydration,

be withheld or withdrawn and that I be permitted to die;

2. In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this living will shall be honored by my family and physician(s) as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of such refusal;

3. If I am a female and I have been diagnosed as pregnant, this living will shall have no force and effect, unless the fetus is not viable and I indicate by initialing after this sentence that I want this living will to be carried out. _____ (Initial)

4. I understand that I may revoke this living will at any time;

5. I understand the full import of this living will, and I am at least 18 years of age and am emotionally and mentally competent to make this living will;

NAME
of _____,
County, Georgia.

I hereby witness this living will and attest that:

(1) NAME is personally known to me and I believe NAME to be at least 18 years of age and of sound mind;

(2) I am at least 18 years of age;

(3) To the best of my knowledge, at the time of the execution of this living will, I:

(A) Am not related to NAME by blood or marriage;

(B) Would not be entitled to any portion of the estate of NAME by will or by operation of law under the rules of descent and distribution of this state;

(C) Am not the attending physician of NAME or any employee of the attending physician or an employee of the hospital or skilled nursing facility in which NAME is a patient;

(D) Am not directly financially responsible for medical care rendered to NAME; and

(E) Have no present claim against any portion of the estate of NAME;

(4) NAME has signed this document in my presence as above-instructed, on the date above first shown.

Witness _____ Witness _____
 Soc. Sec. No. _____ Soc. Sec. No. _____

* Paragraph (13) Code Section 31-32-2 of the Official Code of Georgia Annotated provides:

"Terminal condition" means incurable condition caused by disease, illness or injury which, regardless of the application of life-sustaining procedures, would produce death. The procedure for establishing a "terminal condition" is as follows: Two physicians, one of whom must be the attending physician, who, after personally examining the declarant, shall certify in writing, based upon conditions found during the course of their examination, that:

(A) There is no reasonable expectation for improvement in the condition of the declarant; and

(B) Death of the declarant from these conditions will occur as a result of such disease, illness, or injury.

Additional witness are required when this living will is signed in a hospital or skilled nursing facility.

I hereby witness this living will and attest that I believe NAME to be of sound mind and to have made this living will willingly and voluntarily.

 Soc. Sec. No. _____ Witness _____

(By statute, this additional witness must be a medical director of [a] skilled nursing facility, or [a] staff physician not participating in the care of the patient, or [the] chief of the hospital medical staff, or [a] staff physician or hospital designee not participating in the care of the patient.)

Although Michigan has not enacted a living will law prescribing a specific living will form, a Michigan court probably would uphold a living will. One commentator has asserted persuasively that the Michigan Patient's Rights Act¹¹¹ indirectly validates living wills.¹¹² The Michigan act authorizes an individual to appoint a patient advocate to "exercise powers concerning care, custody, and medical treatment decisions" on the individual's behalf.¹¹³ The patient advocate must "take reasonable steps to follow the desires, instructions, or guidelines given by the patient while the patient was able to participate in care, custody, or medical treatment decisions, whether given orally or as written in the designation" appointing the patient advocate.¹¹⁴ The act presumes that "[t]he known desires of the patient expressed or evidenced while the patient is able to participate in medical treatment decisions are . . . in the patient's best interests."¹¹⁵ Because Michigan's statutes do not require a declarant to use a specific document to instruct his or her patient advocate, LAAs using the living will forms in LAWS-LA version 4.01 may select the option, "NONE OF THOSE LISTED BELOW," from the menu screen when selecting a form for this state. Major Hancock.

Legislation Affecting New York Veterans and Reservists

New York recently enacted legislation extending benefits to individuals who served in Operation Desert Shield; Operation Desert Storm; and the expeditions in Grenada, Lebanon, and Panama. This note summarizes notable changes the state legislature made to New York's civil service law, education law, insurance law, and tax law.

Civil Service

New York affords hiring and promotion preferences to veterans.¹¹⁶ A disabled veteran may add ten points to his or

her score on a competitive examination for an original appointment and five points to his or her score on a competitive promotion examination. A veteran who is not disabled may claim five additional points on an examination for an original appointment and 2.5 points in a promotion examination. As recently amended, the New York Civil Service Law extends these credits to holders of expeditionary medals for service in Lebanon (from 1 June 1983 to 1 December 1987), Grenada (from 23 October to 21 November 1983), and Panama (20 December 1989 to 31 January 1990) and to veterans who served in the Persian Gulf during Operations Desert Shield and Desert Storm (from 2 August 1990 to the end of hostilities with Iraq).¹¹⁷ The new legislation also provides that any service member whose military duties prevented him or her from taking an appointment examination after he or she applied for a competitive civil service position may compete for the position "by means of a special military make-up examination."¹¹⁸

The surviving family member of a deceased public employee who participated in the New York State health care plan is eligible for continued coverage under this plan if the deceased worked for the State of New York or "a political subdivision thereof" for at least ten years.¹¹⁹ A 1991 amendment waives this ten-year requirement if the deceased died while on active service in the Persian Gulf combat zone.¹²⁰

An employee enrolled in the New York public retirement system who takes leave from his or her job to serve on active duty ordinarily may obtain retirement service credit only if he or she pays an amount into the retirement fund equal to the sum that he or she would have contributed had he or she remained on a state or local payroll.¹²¹ The amendments waive the payment requirement for any person called to active duty on or after 1 August 1990, and before 1 January 1993, who did not receive his or her full salary from his or her civilian employer.¹²²

¹¹⁰Captain Lawrence W. Wilson, USAR, a special LAA in Grand Rapids, Michigan, provided the information used in this note.

¹¹¹MICH. COMP. LAWS ANN. § 700.496 (West Supp. 1992).

¹¹²See Marilyn A. Lankfer, *The New Michigan Patient's Rights Act*, 70 MICH. B. J. 582 (1991).

¹¹³MICH. COMP. LAWS ANN. § 700.496(1) (West Supp. 1992).

¹¹⁴*Id.* § 700.496(9)(b).

¹¹⁵*Id.* § 700.496(7)(f).

¹¹⁶N.Y. CIV. SERV. LAW § 85(2) (McKinney 1991).

¹¹⁷See *id.* § 85(1)(c) (5)-(8).

¹¹⁸N.Y. MIL. LAW § 243-b. (McKinney Supp. 1992).

¹¹⁹N.Y. CIV. SERV. LAW § 165-a (McKinney 1991).

¹²⁰N.Y. CIV. SERV. LAW § 165-a (McKinney Supp. 1992).

¹²¹N.Y. CIV. SERV. LAW § 243 (McKinney Supp. 1992).

¹²²*Id.* § 243-a.

Education. New York's education law prohibits unfair education practices.¹²³ An amendment to this law forbids a postsecondary educational institution from imposing an academic or financial penalty on any student who left the institution to serve on active duty in time of war. Accordingly, a veteran whose wartime service interrupted his or her studies before the end of a term should receive a tuition credit or a refund of tuition and fees.¹²⁴ Another amendment extends scholarship awards to children of deceased or disabled New York veterans who served during the periods of hostility identified above.¹²⁵

Tax

Before 1984, New York offered real estate tax exemptions only to homeowners who were "seriously disabled" or who had purchased their residences with funds derived from military service.¹²⁶ In the absence of disability, few Vietnam-era veterans qualified for this exemption. The legislature since has eliminated this "source of funding" restriction. Veterans, their spouses, and the unremarried surviving spouses of deceased veterans now may receive limited real estate tax exemptions for "qualifying residential real property."¹²⁷ Nominally, the basic tax exemption for this property is fifteen percent of the property's assessed value.¹²⁸ The exemption, however, may not exceed \$12,000 or "the product of [\$12,000] multiplied by the state equalization rate."¹²⁹ Veterans who served in a combat zone may claim an additional exemption,

which may not exceed ten percent of the assessed valuation, \$8000, or the product of \$8000 and the state equalization rate.¹³⁰ Veterans suffering from VA-determined disabilities of at least fifty percent may exempt up to half of the assessed valuation, but not more than \$40,000.¹³¹ These exemptions do not apply to school taxes;¹³² moreover, local tax authorities may reduce the exemptions to fixed statutory levels.¹³³

Ordinarily, a New York taxpayer who fails to file a state income tax return promptly risks penalties and the possible forfeiture of his or her refund.¹³⁴ New York tax law, however, provides a filing extension to any service member who serves in a region that the President has designated as a combat zone. The extension tolls the filing deadline until 180 days after the taxpayer leaves the combat zone or completes any related period of hospitalization, whichever occurs later.¹³⁵ The statute also relieves a service member who dies on active duty, or as a result of a service-connected injury or illness arising from service in a combat zone, from any state income tax obligation for the tax year of the decedent's death.¹³⁶

The 1991 amendments specifically extend these benefits to service members and veterans who served in the Persian Gulf during Operations Desert Shield and Desert Storm,¹³⁷ or who directly supported these operations under conditions that normally would entitle a service member to hostile fire pay—that is, for example, operating Patriot missile batteries in Israel.¹³⁸ Unfortunately, the amendments contain no comparable provisions for veterans who served in Lebanon, Grenada, or Panama.

¹²³N.Y. EDUC. LAW § 313 (McKinney Supp. 1992).

¹²⁴*Id.* § 313(1)(b), (d).

¹²⁵*Id.* § 668. The child of a disabled veteran is eligible for a scholarship only if his or her parent currently suffers from a service-related disability of 50% or more. See *id.*

¹²⁶N.Y. REAL PROP. TAX LAW § 458 (McKinney 1991).

¹²⁷N.Y. REAL PROP. TAX LAW § 458-a(2)(a) (McKinney Supp. 1992).

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.* § 458-a(2)(b).

¹³¹*Id.* § 458-a(2)(c).

¹³²*Id.* § 458-a(2)(d).

¹³³*Id.*

¹³⁴N.Y. TAX LAW § 696(a) (McKinney 1991).

¹³⁵*Id.*

¹³⁶N.Y. TAX LAW § 696(d) (McKinney Supp. 1992).

¹³⁷*Id.* § 696(e)(2).

¹³⁸*Id.* § 696(f).

Nonmilitary spouses of military personnel receive the same filing extension privileges as veterans. The amendments, however, do not relieve them of their obligations to pay state income taxes.¹³⁹

Insurance Law

Under the New York State Soldiers' and Sailors' Civil Relief Act,¹⁴⁰ the life insurance policy of a service member whose premium payments were current when he or she entered active duty cannot lapse for nonpayment of premiums until one year after the service member is deactivated.¹⁴¹ New York previously limited this protection to policies with a face amount of \$25,000 or less. The 1991 amendment increases the maximum face amount to \$100,000, exclusive of any Serviceman's Group Life Insurance coverage the policyholder might have.¹⁴²

¹³⁹*Id.* § 696(g).

¹⁴⁰N.Y. MIL. LAW §§ 300-328 (McKinney 1990 & Supp. 1992).

¹⁴¹N.Y. MIL. LAW § 316 (McKinney 1990) (amended 1991).

¹⁴²N.Y. MIL. LAW § 316(2) (McKinney Supp. 1992).

¹⁴³N.Y. INS. LAW § 336 (McKinney Supp. 1992).

¹⁴⁴*Id.*

¹⁴⁵*Id.* § 3203(c)(5).

¹⁴⁶Lieutenant Colonel Savitt, a New York practitioner, is an individual mobilization augmentee assigned to the Administrative and Civil Law Division, TJAGSA. He prepared this note using materials provided by Major James D. Shultz, Jr., another New York attorney.

Believing war risk exclusions inappropriate for life insurance policies issued to military personnel, New York legislators imposed a special notification requirement on insurance companies. A life insurance carrier who issues policies with war risk or special hazard exclusions now must notify the New York Superintendent of Insurance of these exclusions, describing in detail the effects they might have on a policyholder's coverage.¹⁴³ The Insurance Department then will disseminate appropriate information to the public.¹⁴⁴ Moreover, an insurance carrier may not use a war risk exclusion provision to bar a life insurance claim accruing six months after (1) the end of a war; (2) the insured's discharge, separation, demobilization, or release from active military service; or (3) the insured's permanent departure from the war zone, whichever occurs first.¹⁴⁵ Lieutenant Colonel Savitt, USAR.¹⁴⁶

Claims Report

United States Army Claims Service

Tort Claims Note

Actionable Duty Based on Military Regulations

This note updates an article published in *The Army Lawyer*¹ that discusses judicial decisions holding the United States

liable under the Federal Tort Claims Act (FTCA)² for injuries caused by federal employees who failed to follow mandatory organizational regulations. Chief among these decisions was *Sheridan v. United States*,³ in which the Supreme Court linked a Navy installation's promulgation of a gun-control regulation to the creation of an affirmative duty to safeguard the public.⁴

¹Joseph H. Rouse, *Actionable Duty Based on Military Regulations*, ARMY LAWYER, Aug. 1989, at 46.

²28 U.S.C. §§ 1346(b), 2671-2680 (1988).

³108 S. Ct. 2449 (1988).

⁴*See id.* at 2455.

Since the article's publication in 1989, the district court that received *Sheridan* on remand has issued a ruling in that case.⁵ In *Sheridan*, a sailor randomly shot civilians driving on a public road near a military base. Before the shooting, several other sailors found the assailant in a drunken stupor and attempted to take him to the local hospital emergency room. When he displayed a rifle, they ran away. They also neglected to report the situation to their superiors or to the installation security police. After reviewing these facts, the Supreme Court stated, "By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the government assumed responsibility to 'perform [its] good samaritan task in a careful manner.'"⁶

Receiving the case on remand from the Supreme Court, the district court noted that, in the absence of an obligation imposed by state law, a federal agency's failure to enforce its own regulation is not actionable under the FTCA.⁷ Finding that the state in which the injury occurred had imposed no duty on the United States to protect passersby from the sailor's misconduct, the district court ruled that the United States could not be held liable for its allegedly negligent failure to enforce the Navy regulation. Accordingly, it granted the Government's motion for summary affirmance.

The court likened the Navy regulation to a criminal ordinance. It then noted that no Maryland law holds a municipal corpora-

tion liable for failure to enforce an ordinance, adding, "There simply is no duty to the general public that gives rise to such liability."⁸ It concluded that no special relationship existed between the United States and the plaintiffs to create a duty of care in the instant case.⁹

The court briefly acknowledged the conundrum inherent in its comparison of the United States to a municipal corporation;¹⁰ It conceded that the fundamental inquiry in an FTCA action is whether the United States would be liable under the laws of the jurisdiction in which the injury occurred if the United States were a private person.¹¹ This evident incongruity, however, did not move the court to alter its decision because a private person is no more liable under Maryland law than a municipality for failing to enforce a criminal ordinance.¹² In *Doggett v. United States*,¹³ a Ninth Circuit decision, involved a similar military regulation. The commander of a Navy installation enacted the regulation to deter military personnel from drinking and driving. The *Doggett* court relied on this regulation to rule that the federal government could be held liable for the injuries the plaintiff suffered in an automobile accident caused by a drunken sailor. The court emphasized that the accident occurred because a Navy security guard allowed the sailor, who obviously was intoxicated, to drive off base in violation of the regulation.¹⁴

The *Doggett* court opined that the liability of the federal government "must be determined by analogy to state and municipal entities."¹⁵ Under California law, police officers owe a duty to the public to prevent visibly intoxicated drivers from operating automobiles.¹⁶ Equating the security guard's failure to enforce the Navy regulation with a breach of this public duty, the court found the United States could be held liable under the FTCA.¹⁷ The Ninth Circuit, however, failed

⁵ See *Sheridan v. United States*, 773 F. Supp. 786 (D. Md. 1991)

⁶ *Sheridan*, 108 S. Ct. at 2455 (citing *Indian Towing v. United States*, 350 U.S. 61, 65 (1955)). In a recent case, *In re Sabin Polio Vaccine Prods. Liab. Litig.*, 774 F. Supp. 952 (D. Md. 1991), the court held the United States liable under Maryland's good samaritan law upon finding that officials of the Division of Biological Standards, National Institutes of Health, knowingly permitted the distribution and sale of polio vaccine that did not meet federal regulatory standards. See *id.* at 954 (citing *Brady v. Ralph M. Parsons Co.*, 572 A.2d 1115, 1123 (Md. Ct. App. 1990); *Krieger v. J.E. Greiner Co.*, 382 A.2d 1069, 1081 (Md. 1978) (Levine, J., concurring); RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

⁷ *Sheridan*, 773 F. Supp. at 788 (citing *Tindall ex rel. Tindall v. United States*, 901 F.2d 53, 55 n.8 (5th Cir. 1990)).

⁸ *Id.* at 787.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (citing 28 U.S.C. 2874 (1988)).

¹² See *id.*

¹³ *Doggett v. United States*, 858 F.2d 555 (9th Cir. 1988).

¹⁴ See *id.* at 564.

¹⁵ *Id.* at 561.

¹⁶ See *id.* at 562-63.

¹⁷ See *id.* at 564 ("the base regulation define[d] the standard of conduct of the security guard because his function was analogous to that of a police officer and liability may therefore be imposed on the United States to the extent that it would be on a state or municipal entity").

to recognize that the tort liability of the United States actually should have hinged on whether a private person, not a public entity, would be liable under state law in the same circumstances.

Responding to the Army's continued emphasis on curbing problems arising from alcohol abuse,¹⁸ many local commanders have adopted measures to control drunken drivers. These measures generally are far more intrusive than expedients employed for similar purposes by private employers and civilian police organizations. Unlike their civilian counterparts, military commanders are not content merely to limit alcohol consumption at official and quasi-official social functions. They also charge unit-level officers and noncommissioned officers with controlling the off-duty actions of their soldiers, frequently directing them to confiscate keys to vehicles belonging to intoxicated soldiers or to curtail the possession and consumption of alcoholic beverages in barracks.

The government's potential liability under these circumstances must be analyzed in terms of the duties of a private employer, not of a municipality.¹⁹ Standing alone, the special relationship between superior and subordinate in a military setting cannot render the United States liable under the FTCA.²⁰

A civilian employer in Texas owes a more extensive duty of care to the public than employers in many other jurisdictions. Accordingly, this note's discussion of employer liability will focus primarily on Texas law.

In *Otis Engineering Corp. v. Clark*,²¹ an employee's continual, surreptitious drinking on the job finally prompted the employer to relieve him of his duties and to send him home. A supervisor escorted the employee to the parking lot, but allowed the employee to drive home by himself, even though the employee visibly was intoxicated. En route, the

employee collided with another car, killing its two occupants. The Supreme Court of Texas ruled that the employer could be held liable for the accident. It based this finding on the *Restatement (Second) of Torts*, section 319, which provides, "One who takes charge of a third person likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him [or her] from doing such harm."²²

The District Court for the Southern District of Texas subsequently applied *Otis Engineering Corp.* to hold the United States liable for the shooting death of a two-year old child and the serious injury to her pregnant mother. Both victims were shot by the child's father, a soldier who then was absent without leave from his unit. The court noted that the soldier's commander had referred the soldier to an Army mental health facility three times. Each time, the soldier received mental health counseling from an Army officer who was not qualified to administer this treatment. The court held that these counseling sessions created a special relationship between the soldier and the Army that ultimately rendered the United States liable for the injuries the soldier inflicted on his family.²³

Generally, an individual is under no duty to control another's conduct, even if he or she has the practical ability to do so.²⁴ Naturally, exceptions to this general rule exist. For instance, the employer-employee relationship may impose upon the employer a duty to oversee the conduct of his or her employees outside the normal scopes of their employments. This duty, however, is narrow. Ordinarily, the employer is liable for the off-duty torts of an employee only if they are committed on the employer's premises or with the employer's property.²⁵

In Texas, an employer who exercises control over an employee because of the employee's mental incapacity has a duty to act as a reasonably prudent employer would under similar

¹⁸ See generally DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM (21 Oct. 1988).

¹⁹ In the past, courts typically have viewed the federal government's liability for injuries caused by intoxicated service members in terms of state laws imposing liabilities on dram shops and social hosts. See Tort Claims Note, *Dram Shop Liability*, ARMY LAW., Aug. 1988, at 53; Michael B. Smith, *Liability for Providing Alcohol in a Social Setting and for Failing to Detain Intoxicated Drivers*, ARMY LAW., Mar. 1991, at 57.

²⁰ Smith, *supra* note 19; see *Louie v. United States*, 776 F.2d 819 (9th Cir. 1989) (citing *United States v. Shearer*, 473 U.S. 52 (1985); *Chappell v. Wallace*, 462 U.S. 296 (1983)).

²¹ 668 S.W.2d 307 (Tex. 1983); accord *D'Amico v. Christie*, 518 N.E.2d 896 (N.Y. 1987).

²² See *Otis Eng'g Corp.*, 668 S.W.2d at 311 & n.2 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)).

²³ *Peterson v. United States*, Civ. No. H-80-1397 (S.D. Tex. 1982).

²⁴ RESTATEMENT (SECOND) OF TORTS § 315 (1965).

²⁵ *Otis Eng'g Corp.*, 668 S.W.2d at 311 & n.2; accord *D'Amico*, 518 N.E.2d at 901-02 (employer was not liable for an accident, caused by an employee, that occurred outside of the employer's premises and did not involve the employer's property); see also *Bruce v. Chas. Roberts Air Conditioning*, 801 P.2d 456, 458-59 (Ariz. 1990) (holding that an employer who owned the premises on which employees and others drank beer after work was not liable to persons injured in an automobile accident caused by an employee driving home after drinking); *Johnston v. KFC Nat'l Management Co.*, 778 P.2d 159 (Haw. 1990) (employer who provided facilities, but not alcohol, for employees' party owed no duty of care to protect third persons from risk of injury in automobile accidents subsequently caused by off-duty employees). See generally *Williams v. United States Fidelity & Guar. Co.*, 854 F.2d 106, 108-09 (5th Cir. 1988) (interpreting Mississippi law); *Thompson v. Trickle*, 449 N.E.2d 910 (Ill. App. Ct. 1983); *Kuykendall v. Top Notch Laminates, Inc.*, 520 A.2d 1115, 1117-18 (Md. 1987); *Whittaker v. Jetway, Inc.*, 394 N.W.2d 111, 113-14 (Mich. Ct. App. 1986); *Meany v. Newell*, 367 N.W.2d 472, 474-75 (Minn. 1985) (finding no employer liability for casualties involving employees leaving company-sponsored parties); *McClure v. McIntosh*, 770 S.W.2d 406 (Mo. Ct. App. 1989).

circumstances to prevent the employee from harming others. This duty may be analogized to cases in which a defendant could have exercised some control over a dangerous person who recognizably posed a great danger of harm to others.²⁶ When employers²⁷ merely allowed an intoxicated employee to drive, Texas courts have denied liability.²⁸

Under the *Restatement (Second) of Torts*, section 324A, issues of governmental liability rarely would arise. The section states,

One who undertakes, gratuitously or for consideration, to render services to another which he [or she] should recognize as necessary for the protection of a third person or his [or her] things, is subject to liability to the third person for physical harm resulting from his [or her] failure to exercise reasonable care to protect his [or her] undertaking, if

- (a) his [or her] failure to exercise reasonable care increases the risk of such harm, or
 - (b) he [or she] has undertaken to perform a duty owed by the other to the third person, or
 - (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.²⁹
- Significantly, the military relationship between superior and subordinate does not give rise to a special relationship between the military and the public merely because a commander exercises a general right to control the conduct of personnel under his or her command.³⁰

Existing case law suggests that the United States rarely is liable when a service member's misconduct has injured a third party. Nevertheless, some risk of liability is inevitable. Although the Government may not be subject to liability under generally recognized state dram shop or social host liability laws, judge advocates should be aware of other theories of recovery, including inarticulately expressed claims that the government breached its "duty to act in a reasonable manner." The Washington Supreme Court has set forth a five-prong test for determining whether an employer should be held liable on a theory of *respondeat superior*.³¹ Applying this test by analogy to situations unique to the Army, a court would find the government liable if:

- (1) A service member consumed alcohol at a unit party, or some other government-hosted function that advanced the government's interest in some way and at which the service member's presence was requested or implicitly or expressly required;

- (2) The service member negligently consumed alcohol to the point of intoxication when he or she knew, or should have known, that he or she might have to operate a vehicle on a public highway upon leaving the function;

- (3) The service member caused an accident while driving from the function;

- (4) The proximate cause of the accident—that is, the intoxication—occurred when the service member negligently consumed the alcohol; and

²⁶ *Otis Eng'g Corp.*, 668 S.W.2d at 311; *Spruiell v. Schlumberger, Ltd.*, 809 S.W.2d 935, 939 (Tex. Ct. App. 1991).

²⁷ An employer generally cannot be held liable as a "social host" for the actions of an intoxicated employee. *See Spruiell*, 809 S.W.2d at 938; *Walker v. Children's Servs., Inc.*, 751 S.W.2d 717 (Tex. Ct. App. 1988). *But see Beard v. Graff*, 801 S.W.2d 158 (Tex. Ct. App. 1990), *error granted*, No. 04-89-00006-CV (Tex. Ct. App. June 19, 1991). After the Texas Court of Appeals decided *Beard*, the Texas legislature passed legislation excluding a social host from vicarious liability. *See TEX. ALCO. BEV. CODE ANN. § 2.01-2.02* (West Supp. 1991).

²⁸ *Crider v. United States*, 885 F.2d 294 (5th Cir.) (citing *Moore v. Times Herald Printing Co.*, 762 S.W.2d 933, 934 (Tex. Ct. App. 1988)), *reh'g denied*, 892 F.2d 78, cert. denied, 110 S. Ct. 2561 (1989); *Pinkham v. Apple Computer, Inc.*, 699 S.W.2d 387, 390 (Tex. Ct. App. 1985); *cf. El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 nn. 1-2 (Tex. 1987) (reviewing 41-state collection of cases and statutes pertaining to liability of alcohol beverage purveyors).

²⁹ *City of Denton v. Van Page*, 701 S.W.2d 831 (Tex. Ct. App. 1986) (liability based on explosion in a building that the fire marshal inspected negligently following previous fires); *Seay v. Travelers Indem. Co.*, 730 S.W.2d 774 (Tex. Ct. App. 1987) (negligent inspection of boilers by liability insurer followed by explosion injuring maintenance personnel); *see also Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131 (5th Cir. 1984) (burns caused when the employee of subsidiary company poured flammable solvents into 55-gallon drums, using unsafe procedures prescribed by principal manufacturer). None of these cases involved drunken misconduct. Finding a situation in which a driver who was injured by an intoxicated employee driving on a public highway could claim to have relied on the employer for reasonable care would be unusual.

³⁰ *See, e.g., Corrigan v. United States*, 815 F.2d 954, 957 (4th Cir.) (purported "special relationship" between Army private and Army would not justify an exception to Virginia law abolishing dram shop liability), *cert. denied*, 484 U.S. 926 (1987); *Hartzell v. United States*, 786 F.2d 964, 968 (9th Cir. 1986) (citing *Louie v. United States*, 776 F.2d 819, 826 (9th Cir. 1985) (plaintiffs may not pursue a cause of action based on a military relationship "where liability would not lie under state law")); *Sheridan v. United States*, 773 F. Supp. 786, 788 (D. Md. 1991) (citing *Tindall ex rel. Tindall v. United States*, 901 F.2d 53, 55 n.8 (5th Cir. 1990)); *see also Rouse, supra note 1*, at 47.

³¹ *See Dickson v. Edwards*, 716 P.2d 814, 820 (Wash. 1986); *accord Slade v. Smith Management Corp.*, 808 P.2d 401, 413-14 (Idaho 1991).

(5) Because the function was sponsored by, and beneficial to, the government, the service member's consumption of alcohol was within the scope of his or her employment.³²

A staff judge advocate should inform a commander that instituting measures such as "key control" or limiting the consumption and possession of alcohol in barracks may subject the United States to liability if the chain of command later fails to enforce these measures. A senior commander should institute and publish preventive measures formally to ensure that they are not subjected to the vagaries of unit policies.

A regulation should state its purpose clearly. If that purpose is to promote public safety, the regulation should be drafted precisely to outline mandatory duties and to clarify who must execute those duties. On the other hand, if the purpose is not to protect the public, the drafter should research state law and should draft the regulation narrowly, eschewing language that might create a duty that otherwise would not have existed under state law. Couching the regulation in language that appears to create a duty may make the United States liable under a state's doctrine of *respondeat superior*, even if the drafter actually did not intend to make the provision mandatory.³³

Establishing a program for drafting regulations will help to prevent the creation of novel causes of action or strained interpretations of existing theories of liability. Although command control over service members cannot be used as a basis for liability under the FTCA, the existence of this control places the United States in a more difficult position when it must defend a case in which a soldier's misconduct has caused serious injuries. Mr. Rouse and Major Engel, USAR.

Personnel Claims Note

Refunding Carrier Offset Money

During recent claims assistance visits, we discovered that some local contracting offices are directing finance offices to pay refunds from the claims deposit account (21_2020 22-0301 P202099.11-4230 FAJA S99999), using money that previously had been deposited by offsetting direct procurement method (DPM) contractors. These refunds are unau-

thorized. Claims offices should monitor offset actions to ensure that this practice stops.

Only the Commander, United States Army Claims Service (USARCS), or his designee may refund money from the claims deposit account. Granting unauthorized refunds frustrates the Commander's efforts to determine how much money is available in the account for reissue.

When a DPM contractor refuses to forward an acceptable check within 120 days, the claims office will forward the file, by memorandum, to the contracting office. This memorandum asks the contracting officer to offset the demand against the carrier's contract. The contracting officer reviews the file and, if appropriate, offsets the contractor. The offset money then is placed in the claims deposit account—the account into which all recovery money is deposited.

The DPM contractor may contest this offset, either by asking the contracting officer to reconsider the decision or by appealing the decision to the Armed Services Board of Contract Appeals (ASBCA). Either the ASBCA or the contracting officer may decide that an offset is improper. Neither, however, may refund money from the claims deposit account. Instead, the contracting office must return the claims file, with the new decision, to the claims office, which then must forward the file to the Personnel Claims and Recovery Division, USARCS, for action.

Each claims office should maintain a log of the files it forwards to its contracting office for offsets and should monitor progress on each file until the offset is completed. Deposits into the claims account also should be monitored closely and reconciled regularly.

If a contracting office is refunding offsets from the claims deposit account, the claims judge advocate should convince the contracting officer to stop this practice. The claims judge advocate also should notify the finance office that the claims deposit account may be used only for deposits. If the contracting officer persists in refunding carrier offsets, the claims judge advocate should contact the Commander, USARCS.

Below is the sample text of a new offset letter that claims offices should use in forwarding files to contracting offices. Copies of the letter were distributed at the Basic Workshop in May 1992 and at the Claims Training Workshop in July 1992. Please use this letter in place of the old offset letter when forwarding files. Captain Boucher.

³²See *Dickson*, 716 P.2d at 820.

³³Unless a commander intends to charge a service member with violating article 92 of the Uniform Code of Military Justice for failure to obey a local regulation, he or she should not make the regulation compulsory. A regulation that imposes duties that are unnecessary or overly broad may create unexpected causes of action. See, e.g., *Lutz v. United States*, 685 F.2d 1178, (9th Cir. 1982) (a local regulation required service members bringing pets onto an installation to prevent them from harming installation residents; therefore, controlling a dog was an act in the scope of duty); *Washington v. United States*, 868 F.2d 332 (9th Cir. 1989) (holding that an off-duty service member who negligently caused a fire while repairing a privately owned vehicle at his quarters acted within the scope of employment); *Vollendorff v. United States*, Civ. No. 9135435 (9th Cir. 1991) (soldier required to take daily dose of chloroquine who failed to safeguard drug in his off-post quarters acted within the scope of employment). *Contra Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988) (finding "no principled limit to the reasoning in *Lutz*," Judge Bork remarked that "the case would seem to make the government an insurer to all manner of bizarre incidents").

(Office Symbol) (27) (Date)

MEMORANDUM FOR Directorate of Contracting, ATTN: Contracting Officer, _____

SUBJECT: Request for Offset Against (Name of Contractor), Contract Number _____

1. Claim file # (_____), (Claimant Name), is forwarded for your review, determination of liability, and collection.
2. The household goods of (Claimant Name) were placed in the control of (Contractor Name) under contract (#) on (Date). The goods were not delivered to the soldier in the same condition as when received by this contractor. The claimant filed a claim with the U.S. Government and was paid \$_____. I have determined that (Contractor Name) is liable to the U.S. in the amount of \$_____.
3. A demand against the contractor was (not honored/denied/rebuted). A satisfactory voluntary settlement cannot be reached because (NOTE: Explain why a settlement cannot be reached). If you determine that this contractor is not liable, please determine which contractor is responsible for this damage. Also, if this contractor currently does not have a contract, please determine if another federal agency has a contract with the contractor under which an offset can be made.
4. When completed, please return the contractor's check payable to the U.S. Treasurer, along with the file, to this office. If

funds are withheld from accounts payable, then please forward a copy of the collection voucher to verify that it was credited to the FY _____ appropriation account 21_2020 22-0301 P202099.11-4230 FAJA S99999. (NOTE: You must enter the last digit of the current fiscal year (FY) as the third digit of the account number. In FY 1993, for example, the account number should read 2132020 22-0301 P202099.11-4230 FAJA S99999. The fiscal year changes on 1 October every calendar year. All deposits must be made to the account for the current fiscal year, regardless of when the damage actually occurred.)

5. THIS IS A DEPOSIT ACCOUNT ONLY. If a refund of an offset is directed by the Armed Services Board of Contract Appeals, please expeditiously forward the entire claims file through the local claims office to the Commander, U.S. Army Claims Service (USARCS), Fort Meade, Maryland 20755-5360, for issuance of a refund check. IAW AR 27-20, only the Commander, USARCS, or his designee is authorized to issue a refund check to a contractor.
6. If settlement cannot be made, whether for contractual or administrative reasons, please return the file with your explanation to this office.

FOR THE STAFF JUDGE ADVOCATE:

Encl: _____ NAME
CPT, JA
Claims Judg Advocate

Contract Law Division Note

Contract Law Division, OTJAG

Preparing the Administrative Report for a GAO Bid Protest

The preparation of an administrative report in response to a General Accounting Office (GAO) bid protest provides an agency with its first opportunity to explain its position on the merits of the protest and to supply documentation to support that position. The report also is the agency's response to the protester's discovery request and, therefore, must be prepared carefully. A poorly prepared report can be a treasure trove for

a protester because the release of the report restarts the timeliness clock for new protests based on information the protester first discovers in the report.¹

Federal Acquisition Regulation (FAR) 33.104 outlines agency procedures for processing the protest an interested party has filed with the GAO to contest the solicitation or award of a contract. Late last year, the Department of Defense augmented this provision when it enacted subpart 233.1 to the Defense Federal Acquisition Regulation Supplement (DFARS).²

¹ See 4 C.F.R. § 21.2(a)(2) (1992).

² 56 Fed. Reg. 67,208, 67,218 (1991) (to be codified at 48 C.F.R. § 233.104).

Subpart 233.1 reflects changes in GAO bid protest procedures.³ It enumerates the documents that must comprise an administrative report and describes the circumstances under which an agency may withhold documents from the report.

Pursuant to DFARS 233.104, an agency must include copies of the following documents in any administrative report it files with the GAO:⁴

- The protest;
- The protester's offer;
- The offer that the agency is considering for award or that is the subject of the protest;
- All evaluation documents;
- The solicitation, including any specifications that are relevant to the protest;
- An abstract of offers, or relevant portions thereof;
- Any other documents the agency deems relevant to the protest;
- The contracting officer's signed statement, responding fully to the protest's allegations and setting forth findings, actions, and recommendations;
- A list of parties being provided with copies of the report; and
- A list of documents withheld from the protester or from an interested party and the agency's reasons for withholding these items. The list must identify any docu-

ment specifically requested by, and withheld from, the protester.

In addition to the documents in the report, the agency must make available to the GAO any document the protester has requested specifically,⁵ even if this item is irrelevant to the protest.⁶

The agency also must furnish copies of the report to the protester and to other interested parties. Generally speaking, these copies will contain the same documents as the report the agency has submitted to the GAO.⁷ The agency, however, may omit from these copies irrelevant documents;⁸ classified information; documents produced by, or previously furnished to, a party; and information that would give one party an unfair competitive advantage.⁹ Moreover, the agency may withhold a document upon determining that a federal statute or regulation bars the agency from disclosing information contained in the document to private parties.¹⁰

The parties' copies of the administrative report ordinarily must be redacted to remove all references to excludable information, including references made in the report's table of contents, the contracting officer's statement, and the agency's legal memorandum. The agency may redact entire documents, or parts of documents, to remove prohibited references.

When a document contains privileged information, or the release of the document would provide one party with a competitive advantage, a party may attempt to forestall the document's redaction by requesting a protective order.¹¹ The practical effect of a protective order is to compel the agency to release information that otherwise would have been excludable to individuals named in the order. Documents that are irrelevant, classified, or already in a party's possession still may be excluded from that party's copy of the report.

An agency may release documents identified in a protective order only in accordance with the terms of the order.¹² Current GAO practice requires an agency to stamp the following legend on the first page of a protected document:

³4 C.F.R. §§ 21.0 to 21.12 (1992).

⁴DEPT OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 233.104(3)(ii), (iii) (31 Dec. 1991) [hereinafter DFARS].

⁵A document request must describe specific documents. A copy of the agency's letter denying the protester's Freedom of Information Act (FOIA) request and general complaints of the agency's failure to share information with the public are insufficient. See *Cujar Defense Supply Co.*, B-242562.2, B-243520, June 12, 1991, 91-1 CPD ¶ 563.

⁶DFARS 233.104(a)(3) (iii).

⁷*Id.* at 233.104(a)(4); see also 4 C.F.R. § 21.3(c) (1992).

⁸Documents relating to allegations that would not establish a valid basis for protest, even if they undeniably were true, are irrelevant and need not be produced. *Mine Safety Appliances Co.*, B-242379.2, B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506.

⁹DFARS 233.104(a)(4)(i)(A).

¹⁰*Id.* at 233.104(a)(4)(i)(B). An agency may use the FOIA exemptions to justify withholding. See 5 U.S.C. § 552(b)(1)-(9) (1988). Agencies most frequently employ the exemptions governing confidential business information and internal government communications. See generally *id.* § 552(b)(4)-(5).

¹¹4 C.F.R. § 21.3(d)(1) (1992).

¹²DFARS 233.104(a)(4)(i)(A); see also 4 C.F.R. § 21.3(d)(1) (1992).

PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
GENERAL ACCOUNTING OFFICE PROTECTIVE
ORDER

The agency also must identify the document on the list of protected documents that accompanies the protective order.

An agency's goal in preparing an administrative report should be to support and document the challenged agency action without harming the government or an offeror by inadvertently releasing irrelevant, proprietary, or procurement-sensitive information to the protester or to an interested party. Questions about this process may be addressed to the Bid Protest Section, Contract Law Division, OTJAG, Autovon: 223-4071. Captain Kohns.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The Standards of Conduct Office normally publishes summaries of ethical inquiries that have been resolved after preliminary screening. These inquiries, which involve isolated instances of professional impropriety, poor communication, lapses in judgment, and similar minor failings, typically are resolved by counseling, admonition, or reprimand. More serious cases, on the other hand, are referred to The Judge Advocate General's Professional Responsibility Committee (PRC).

The following PRC opinion, which applies the Army's Rules of Professional Conduct for Lawyers¹ to an actual professional responsibility case, is intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for judge advocates. To stress education and to protect privacy, neither the identity of the office, nor the name of the subject will be published. Mr. Eveland.

Professional Responsibility
Opinion No. 91-1

The Judge Advocate General's
Professional Responsibility Committee

Factual Background

The client was a recruiter who sought help from a legal assistance office to obtain a separation agreement following the breakup of his marriage. The client and his wife were married on 12 March 1978 and had no children.

The attorney who assisted him was Mr. (formerly Captain) X, a part-time legal assistance attorney. The attorney interviewed the client on 5 April 1989. Based on information obtained in that interview, X prepared a separation agreement, which he provided to his client on 13 April. The client has asserted that X did not explain the agreement line by line during this second interview and that his appointment lasted only fifteen to twenty minutes. Mr. X insisted that he explained the agreement paragraph by paragraph and that the interview lasted approximately one hour. The client signed the agreement on 14 April. The client's wife signed it on 18 April, after seeking the advice of a lawyer in another office. The client eventually filed for divorce. The divorce became final on 18 January 1991. No evidence suggests that the separation agreement ever was filed with the court, or even was shown to the lawyer who handled the divorce.

The separation agreement reflects that the client and his wife already were living separate and apart and that they had divided their marital property and the obligations on their debts to their mutual satisfaction. In addition to standard provisions regarding waiver of claims against each other's estates and similar matters, the agreement provided that the client's wife reserved the right to claim any interest she might have in the client's military retirement if either party filed for a divorce. (No evidence suggests that the wife ever pursued, or was awarded, an interest in the client's military retirement.) The agreement also provided that the terms of the agreement would not be merged with the divorce decree and, therefore, would be binding forever.

¹ See DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICE: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA Pam. 27-26]. When the opinion was published, Department of the Army Pamphlet (DA Pam.) 27-26 was the controlling version of the Rules of Professional Conduct. On 1 June 1992, Army Regulation 27-26 superceded DA Pam. 27-26. See generally DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

Discussion of Complaint

The one provision of the separation agreement that gives rise to the complaint made against X is the following: "Support: The Husband agrees to pay the Wife *until she* dies or remarries as maintenance the sum of \$365.00 per month." The typographical error—that is, the insertion of the period—is reflected in the signed document. The language of the provision otherwise is consistent with one of the two maintenance options available in the computer format then used for separation agreements within the legal assistance office. The other option was a complete waiver of maintenance. Surprisingly, an attorney would have to modify the format to insert a provision for maintenance for only a limited duration. No one disputes that, under the circumstances of this case—or, for that matter, most cases—a provision for maintenance, unlimited in duration, would be very unusual.

The client asserted that he and his wife agreed to that amount of support only while they were separated. He added that he would not have agreed to that provision and that he was shocked when he learned of its meaning. The client's surprise upon learning this, and his earlier reluctance to provide financial support to his wife, whom he felt was earning a good salary—according to the client, about \$1000 per month—is supported by the testimony of other lawyers in the legal assistance office.

The allotment of \$365 that the client had been providing to his wife—an amount equal to the client's basic allowance for quarters at the with-dependents rate—began in October 1988 and ended in November 1990, shortly before the divorce became final. The client asserted that his former wife has not complained about not receiving the monthly \$365 checks since their divorce became final.

The attorney made several statements, during the hearing and to others, including the investigating officer, about this provision of the separation agreement. Another officer in the legal office reported that, when X first was advised of the unusual nature of the provision on 28 November 1990, X initially was equivocal about whether he had explained the provision to his client, but then stated unequivocally that he had.

In his preliminary findings, the investigating officer stated that X did not remember the client, but added that X had stated to him that his practice would have been to counsel the client on all the provisions of the separation agreement and to try to talk the client out of the permanent support. Mr. X's subsequent written statement and the summaries of his later testimony relating to this provision are noted below.

In his written statement, X declared,

I am reasonably certain that I explained to [the client] at least once the unusual nature of spousal support continuing until the death

or remarriage of his wife and that, based upon his wife's determination not to sign an agreement that limited her receipt of spousal support to a definitive period, he wished to make such provision. . . . I cannot state with certainty that I specifically advised [the client] that [this state's] courts normally provide spousal support for a limited duration. However, I sincerely believe that I did discuss the issue with him and recall that he did not wish to prolong the period during which he would be without a separation agreement. Further, it is my recollection that [the client] did not want to litigate the terms of his legal separation and that, without the support provision, his wife would not sign have signed [sic] the agreement. . . . At the time of its making, [the client] was under pressure to secure a separation agreement, even if that agreement contained a provision which through litigation he could have avoided.

In a subsequent telephone summary, X added,

I do not recall him insisting upon the term of support until his wife dies or remarries. I would characterize it as a resignation on his part that he was not going to have an agreement with his wife in the absence of him agreeing to that fact. He did not want to go to court over all of this. My understanding was that his wife was insisting on this provision. I am almost positive that he came in and said that this was going to be a required term of the agreement.

Within the four pages of handwritten notes that X took during his interview with his client is a note indicating that the client was providing his wife with an allotment of \$365 per month. No notation indicates the existence of any agreement between the parties on the duration for which this support was to continue. According to the investigating officer, X could not explain how he obtained from those notes the language, "until she dies or remarries."

The attorney also asserted that the client "was under pressure to secure a separation agreement, even if that agreement contained a provision which through litigation he could have avoided." He stated that this pressure came from the client's chain of command and from the client's own desire to avoid litigation. No evidence corroborates any of this. Although X, when first questioned, indicated he normally would try to talk a client out of such a provision, he did not indicate that he attempted to do that with this client. Very little in the separation agreement could be deemed to be to the client's advantage.

Factual Findings

Two of the three members of the committee find by clear and convincing evidence (in accord with the investigating officer's findings) that the client, at the time he signed the separation agreement, desired to provide support to his wife "for the period of separation, but not beyond" and that the provision in question was the result of a drafting error. The remaining member of the committee, although not convinced that a drafting error occurred, nevertheless finds by clear and convincing evidence that X failed to communicate effectively with his client and that, had he done so, he readily would have ascertained that the client desired to support his wife "for the period of separation, but not beyond."

Rules of Professional Responsibility

Rule 1.1 of the Rules of Professional Conduct for Lawyers provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation."² Discussing "thoroughness" and "preparation," the comment to this rule provides that "[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence."³ The comment also states that the issue of whether a lawyer has employed the required skill in a particular matter should be judged by relevant factors, such as "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, [and] the preparation and study the lawyer [was] able to give to the matter."⁴

Also at issue in this case are rules 1.3 and 1.4. Rule 1.3 provides that a lawyer should act with reasonable diligence and commitment in pursuing a client's interests.⁵ Rule 1.4 provides that an attorney should provide adequate explanations to the client to provide the client with a basis upon which to make informed decisions.⁶

Analysis

The attorney in this case graduated from law school in 1985, after having attended the school under the Army's Funded Legal Education Program. During his first tour of duty, he served as a legal assistance attorney for five to six months. His second and last tour of duty, during which he

prepared this separation agreement, began in May 1988. During the eleven months that followed, before assisting the client in question, X provided legal assistance on a part-time basis. The two staff judge advocates for whom X worked during his second assignment both expressed strong opinions regarding his high degree of diligence and thoroughness.

The investigating officer found that X had acquired substantial legal assistance experience from his first assignment, but had little experience with the procedures in the legal office of his second assignment, and that in that office, X may have tended to rely on existing forms—including the poorly drafted document that office used for separation agreements. The investigating officer also found that a great amount of turmoil existed in this legal office—so much so that, when the separation agreement was prepared, X was sharing the duties of the staff judge advocate with one of the civilian attorneys in the office. As a result, substantial demands were being made upon X's time.

Other matters are relevant in evaluating the competence of this attorney. The attorney was working only part-time as a legal assistance attorney and he never attended the legal assistance course at The Judge Advocate General's School. On the other hand, X saw the client twice before the agreement was signed. No evidence shows that any other pressing demands were made on X during these client interviews or during the time he had available to review the wording of the separation agreement. Mr. X's review of the separation agreement, given its importance regarding the client's property and income, at least should have included a thorough examination of provisions X had incorporated. Evidently, X was careless in proofreading, or in failing to proofread, the separation agreement. He has no excuse or justification for not exercising a greater degree of care in this case, particularly in light of his prior experience as a legal assistance attorney.

Conclusion

All members of the committee find by clear and convincing evidence that X violated rule 1.1 (competence), rule 1.3 (diligence), and rule 1.4 (communication) of the Army Rules of Professional Conduct for Lawyers.

In this case, even a minimum standard of competence would require that X communicate effectively with his client to ascertain precisely what the client wanted in the separation agreement, to advise the client on what the law and Army regulation required as to financial support of one's spouse,

²DA PAM 27-26, *supra* note 1, rule 1.1.

³See *id.*, rule 1.1 comment.

⁴*Id.*

⁵See *id.*, rule 1.3.

⁶See *id.*, rule 1.4.

and to counsel the client on the wisdom—or lack thereof—of the matters that the client wanted included in the agreement, including a discussion of whether a separation agreement even was advisable in his case. A minimum standard of competence also would require that X prepare a separation agreement that reflected the client's intent and that X proofread the agreement and explain its contents to the client.

Even if the conflicting facts are construed in a light most favorable to X, he clearly failed to explain to the client that a separation agreement to provide support to his wife until she died or remarried was not required by Army regulation or, in all likelihood, by applicable state law, and that this agreement was contrary to the client's best interests. Accordingly, X was not diligent in protecting the legal interests of his client and failed to communicate to his client what those interests were and how they best could be protected.

A matter in aggravation also exists in this case. On 4 January 1989—just three months before he drafted this separation agreement—X was counseled by his supervisor about his handling of a legal assistance case involving a real estate matter at his first duty station. The supervisor counseled X for

lack of diligence and for failing to communicate adequately with his clients. The counseling statement, however, reflected the supervisor's opinion that the "attorney's professionalism has been outstanding during this assignment" and that the supervisor considered this previous lapse "isolated and non-recurring."

Recommendation

The attorney should be censured by The Judge Advocate General in a memorandum of reprimand for violating rules 1.1, 1.3, and 1.4 of the Army Rules of Professional Conduct for Lawyers. Because this is not X's first violation of the rules, the memorandum should be filed in his official military personnel file. However, the Committee recommends against informing his state bar disciplinary committee because the violations were based on simple negligence and did not involve deceit, unjust enrichment, or other serious misconduct. Moreover, although it does not bear on the level of personal culpability, no evidence suggests that these violations caused any legal harm to the client or that they are likely to harm the client in the future.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department,
TJAGSA

Reserve Component Quotas for Resident Graduate Course

The Commandant, The Judge Advocate General's School, has announced that two student quotas in the 42d Judge Advocate Officer Graduate Course have been set aside for Reserve Component judge advocates. The forty-two-week, graduate-level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia, from 2 August 1993 to 13 May 1994. Graduates will be awarded the degree of Master of Laws in Military Law. Any Reserve Component Judge Advocate General's Corps (JAGC) captain or major who will have at least four years of JAGC experience by 2 August 1993 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may not apply to attend the resident course. Each application packet must include the following materials:

1. Personal data: The applicant's full name (including the applicant's preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, and home).

2. Military experience: A chronological list of the applicant's Reserve Component and active duty assignments.

3. Awards and decorations: A list of the applicant's awards and decorations.

4. Military and civilian education: A list of the schools the applicant has attended and the degrees the applicant has obtained, along with dates of completion for each course of instruction and any honors the applicant has received. The applicant also must include his or her law school transcript.

5. Civilian experience: The applicant should include a resume describing his or her legal experience.

6. Statement of purpose: In one or two paragraphs, the applicant should state why he or she wants to attend the resident graduate course.

7. Letter of recommendation:

a. If the applicant is assigned to a United States Army Reserve (USAR) Troop Program Unit, he or she should

include a letter of recommendation from his or her military law center commander or staff judge advocate.

b. If the applicant is a member of the Army National Guard (ARNG), he or she should include a letter of recommendation from his or her staff judge advocate.

c. If the applicant is a USAR individual mobilization augmentee (IMA), he or she should include a letter of recommendation from his or her staff judge advocate or proponent office.

8. Department of Army Form 1058 (for USAR applicants) or National Guard Bureau Form 64 (for ARNG applicants): The applicant must fill out the appropriate form and include it in the application packet.

Each applicant should forward his or her packet through appropriate channels, as described below:

1. If assigned to the ARNG, the applicant should forward the packet through the state chain of command to ARNG Operating Activity Center, ATTN: NGB-ARO-ME, Building E6814, Edgewood Area, Aberdeen Proving Ground, MD 21010-5420.

2. If assigned to a USAR Troop Program Unit (TPU) in the continental United States, the applicant should forward the packet through the chain of command of his or her Major United States Army Reserve Command to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200

3. If assigned to a USAR Control Group (IMA/Reinforcement) the applicant should send the packet to Commander,

ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200.

An application will not be considered unless it is received at the appropriate address not later than 15 December 1992.

Individuals selected to attend the course will be notified on or about 1 February 1993. An officer selected for attendance at the graduate course must be funded by the Army Reserve Personnel Center, the ARNG of his or her home state, or the Active Guard Reserve Management Directorate.

Judge Advocates Needed to Teach Reserve Officer Training Corps Military Justice Classes

During this academic year, Reserve Officer Training Corps (ROTC) cadets across the United States will receive seventeen hours of classroom instruction on military justice. The instructors for these classes must be judge advocates. See DEPT OF ARMY, REGULATION 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 19-7 (22 Dec. 1989). The professor of military science for each ROTC detachment is responsible for securing a judge advocate as an instructor. All instructors will receive a teacher's guide, methods of instruction training—in most cases, by videotape—and prepared examinations.

All USAR judge advocates may volunteer to teach ROTC military justice classes. A USAR judge advocate who serves as an ROTC instructor will be awarded retirement points for time spent in preparing and presenting classes. Any individual interested in instructing cadets should contact the professor of military science at the nearest ROTC detachment.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course. Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO

63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1992

2-6 November: 10th Federal Litigation Course (5F-F29).

2-6 November: 29th Criminal Trial Advocacy Course (5F-F32).

16-20 November: 35th Fiscal Law Course (5F-F12).

30 November-1 December: 1st Basic Procurement Fraud Course (5F-F36).

30 November-4 December: 14th Operational Law Seminar (5F-F47).

7-11 December: 42d Federal Labor Relations Course (5F-F22).

1993

4-6 January: 1993 USAREUR Tax CLE (5F-F28E).

4-8 January: 115th Senior Officers' Legal Orientation (5F-F1).

6-9 January: 1993 USAREUR Legal Assistance CLE (5F-F23E).

11-15 January: 1993 Government Contract Law Symposium (5F-F11).

11-15 January: 1993 PACOM Tax CLE (5F-F28P).

19 January-26 March: 130th Basic Course (5-27-C20).

1-5 February: 30th Criminal Trial Advocacy Course (5F-F32).

1-5 February: 1993 USAREUR Contract Law CLE (5F-F15E).

8-12 February: 116th Senior Officers' Legal Orientation (5F-F1).

22 February-5 March: 130th Contract Attorneys' Course (5F-F10).

8-12 March: 32d Legal Assistance Course (5F-F23).

15-19 March: 53d Law of War Workshop (5F-F42).

22-26 March: 17th Administrative Law for Military Installations Course (5F-F24).

29 March-2 April: 5th Installation Contracting Course (5F-F18).

5-9 April: 4th Law for Legal NCOs Course (512-71D/E/20/30).

12-16 April: 117th Senior Officers' Legal Orientation (5F-F1).

12-16 April: 15th Operational Law Seminar (5F-F47).

20-23 April: Reserve Component Judge Advocate Annual CLE Workshop (5F-F56).

26 April-7 May: 131st Contract Attorneys' Course (5F-F10).

17-21 May: 36th Fiscal Law Course (5F-F12).

17 May-4 June: 36th Military Judges' Course (5F-F33).

18-21 May: 1993 USAREUR Operational Law CLE (5F-F47E).

24-28 May: 43d Federal Labor Relations Course (5F-F22).

7-11 June: 118th Senior Officers' Legal Orientation (5F-F1).

7-11 June: 23d Staff Judge Advocate Course (5F-F52).

14-25 June: JAOAC, Phase II (5F-F58).

14-25 June: JATT Team Training (5F-F57).

14-18 June: 4th Legal Administrators' Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19 July-24 September: 131st Basic Course (5-27-C20).

19-30 July: 132d Contract Attorneys' Course (5F-F10).

2 August 1993-13 May 1994: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officers' Legal Orientation (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

December 1992

1-3: GWU, Source Selection Workshop, Washington, D.C.

1-4: ESI, ADP/Telecommunications (FIP) Contracting, Washington, D.C.

1-4: ESI, Procurement for Project Managers, Administrators, and COTRs, Washington, D.C.

5-11: AAJE, The Rule of Law, New Orleans, LA.

7: GWU, Joint Ventures and Teaming Arrangements, Washington, D.C.

7-9: GWU, Patents, Technical Data, and Computer Software, Washington, D.C.

8-10: ESI, International Contracting, Vienna, VA.

8-11: ESI, Contracting for Services, San Diego, CA.

8-11: ESI, Continuous Improvement and Total Quality Management, Washington, D.C.

10: GII, Fundamentals of New Mexico Environmental Law Compliance, Albuquerque, NM.

10-11: ESI, Export Controls and Licensing, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are in the August 1992 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 |
| Arizona | 15 July annually |
| Arkansas | 30 June annually |
| *California | 1 February annually |
| Colorado | Any time within three-year period |
| Delaware | 31 July biennially |
| *Florida | Assigned month every three years |
| Georgia | 31 January annually |
| Idaho | Every third anniversary of admission |
| Indiana | 31 December annually |
| Iowa | 1 March annually |
| Kansas | 1 July annually |
| Kentucky | 30 June annually |
| **Louisiana | 31 January annually |
| Michigan | 31 March annually |
| Minnesota | 30 August every third year |
| **Mississippi | 1 August annually |
| Missouri | 31 July annually |
| Montana | 1 March annually |
| Nevada | 1 March annually |
| New Mexico | 30 days after completing each CLE program |
| **North Carolina | 28 February annually |
| North Dakota | 31 July annually |
| *Ohio | Every two years by 31 January |
| **Oklahoma | 15 February annually |

| | |
|------------------|--|
| Oregon | Anniversary of date of birth--new admittees and reinstated members report after an initial one-year period; thereafter every three years |
| **Pennsylvania | Annually as assigned |
| **South Carolina | 15 January annually |
| *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 annually |
| West Virginia | 30 June biennially |
| *Wisconsin | 20 January biennially |
| Wyoming | 30 January annually |

For addresses and detailed information, see the July 1992 issue of *The Army Lawyer*.

- *Military exempt
- **Military must declare exemption

5. Pennsylvania CLE Requirements

a. On 7 January 1992, the Pennsylvania Supreme Court promulgated the Pennsylvania Rules for Continuing Legal Education and established the Pennsylvania CLE Board. The Pennsylvania CLE Board recently adopted regulations implementing the court's rules. These regulations require each active Pennsylvania lawyer to complete five hours of training per year on the Rules of Professional Conduct, as adopted by the Pennsylvania Supreme Court. The regulations also provide that each Pennsylvania lawyer will be assigned randomly by his or her attorney identification number into one of three compliance groups, each group having a different compliance period, effective 1 July 1992.

b. The Pennsylvania CLE Board will not approve CLE credit on the Rules of Professional Conduct from any CLE provider outside of the State of Pennsylvania. It will defer compliance with the CLE requirements, however, for members of the Armed Forces serving on active duty outside Pennsylvania. A service member must notify the Board of his or her departure from the service within thirty days after leaving active duty. He or she then must comply with the CLE requirement within twenty-four months.

c. To obtain a deferral, a service member must notify the Pennsylvania CLE Board in writing of his or her active duty status. Only attorneys serving on active duty are eligible for deferrals. Reservists and civilian attorneys of the Armed Forces must meet the CLE requirement implemented by the Board.

d. Any questions concerning Pennsylvania's CLE requirements should be directed to the Pennsylvania CLE Board. The Board may be contacted at the address and telephone number printed below.

Pennsylvania CLE Board
5035 Ritter Road, Suite 500
Mechanicsburg, Pennsylvania 17055
(717) 795-2119

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are 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 within 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 to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and are mailed only to those DTIC users whose organizations have facility clearances. 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 A239203 Government Contract Law Deskbook, vol.1/ JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, vol. 2/ JA-505-2-91 (276 pgs).

- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- AD A248421 Real Property Guide—Legal Assistance/JA-261-92 (308 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).
- *AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).
- AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260 (92) (156 pgs).
- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).
- AD A244032 Family Law Guide/JA 263-91 (711 pgs).
- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A245381 Tax Information Series/JA 269/92 (264 pgs).

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Office Manager's Handbook/ACIL-ST-290.
- AD A240047 Defensive Federal Litigation/JA-200(91) (838 pgs).
- AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).
- AD A239554 Government Information Practices/JA-235(91) (324 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs).

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers' Legal Orientation/JA-320(92) (249 pgs).

AD A251821 Trial Counsel & Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Guard & 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 & Pamphlets

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

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. 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 AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

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

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the 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 (301) 671-4335.

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

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

| Number | Title | Date |
|-----------------|---|-----------|
| AR 5-1 | Army Management Philosophy | 12 Jun 92 |
| AR 30-1 | Army Food Service Program, Interim Change I01 | 15 May 92 |
| AR 30-5 | Food Program, Interim Change I02 | 1 Apr 92 |
| AR 145-1 | Senior Reserve Officers' Training Corps Program: Organization, Administration, and Training | 15 May 92 |
| AR 220-1 | Unit Status Reporting | 1 May 92 |
| AR 420-70 | Buildings and Structures | 29 May 92 |
| AR 635-120 | Personnel Separations: Officer Resignations and Discharges, Interim Change I02 | 26 Jun 92 |
| CIR 25-92-1 | 1992 Contemporary Military Reading List | 1 Jun 92 |
| CIR 40-92-1 | Professional Speciality Recognition of Army Medical Department Officer and Enlisted Personnel | 18 May 92 |
| CIR 611-92-1 | Implementation of Changes to the Military Occupational Classification and Structure | 30 Apr 92 |
| DA Pam. 25-30 | List of New, Revised, Changed Publications, C3 | 1 Jul 92 |
| DA Pam. 25-69 | List of Approved Recurring Management Information Requirements | 1 Jun 92 |
| DA Pam. 360-526 | The Transition to Civilian Life | 1992 |
| DA Pam. 700-29 | Instructions for Preparing the Depot Maintenance Support Plan | 29 May 92 |
| JFTR | Joint Federal Travel Regulations, C67 | 1 Jul 92 |
| JFTR | Joint Federal Travel Regulations, C68 | 1 Aug 92 |

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. Instructions for Downloading Files From the LAAWS Bulletin Board Service.

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have 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. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

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

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

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

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes.

Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the "ZIP" extension.

(i) When 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 then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to 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.

(c) If 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, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

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

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After 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 on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the "ZIP" extension) you will have to "explode" it before entering the

ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip[space]xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the 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.

c. TJAGSA Publications Available Through the LAAWS BBS.

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

| <u>FILE NAME</u> | <u>UPLOADED</u> | <u>DESCRIPTION</u> | | |
|------------------|-----------------|--|------------|--|
| 121CAC.ZIP | June 1990 | The April 1990 Contract Law Deskbook from the 121st Contract Attorneys' Course | JA200A.ZIP | March 1992 Defensive Federal Litigation, vol. 1 |
| 1990_YIR.ZIP | January 1991 | 1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA. | JA200B.ZIP | March 1992 Defensive Federal Litigation, vol. 2 |
| 1991_YIR.ZIP | January 1992 | TJAGSA Contract Law 1991 Year in Review | JA210.ZIP | March 1992 Law of Federal Employment |
| 505-1.ZIP | February 1992 | TJAGSA Contract Law Deskbook, vol. 1, May 1991 | JA211.ZIP | March 1992 Law of Federal Labor-Management Relations |
| 505-2.ZIP | February 1992 | TJAGSA Contract Law Deskbook, vol. 2, May 1991 | JA231.ZIP | March 1992 Reports of Survey and Line of Duty Determinations—Programmed Text |
| 506.ZIP | November 1991 | TJAGSA Fiscal Law Deskbook, November 1991 | JA235.ZIP | March 1992 Government Information Practices |
| ALAW.ZIP | June 1990 | <i>The Army Lawyer and Military Law Review</i> Database (ENABLE 2.15). Updated through 1989 <i>The Army Lawyer Index</i> . It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF. | JA241.ZIP | March 1992 Federal Tort Claims Act |
| CCLR.ZIP | September 1990 | Contract Claims, Litigation, & Remedies | JA260.ZIP | May 1990 Soldiers' and Sailors' Civil Relief Act Pamphlet |
| FISCALBK.ZIP | November 1990 | The November 1990 Fiscal Law Deskbook | JA261.ZIP | March 1992 Legal Assistance Real Property Guide |
| | | | JA262.ZIP | March 1992 Legal Assistance Wills Guide |
| | | | JA267.ZIP | March 1992 Legal Assistance Office Directory |
| | | | JA268.ZIP | March 1992 Legal Assistance Notarial Guide |
| | | | JA269.ZIP | March 1992 Federal Tax Information Series |
| | | | JA271.ZIP | March 1992 Legal Assistance Office Administration Guide |
| | | | JA272.ZIP | March 1992 Legal Assistance Deployment Guide |
| | | | JA273.ZIP | March 1992 Legal Assistance Living Wills Guide |
| | | | JA274.ZIP | March 1992 Uniformed Services Former Spouses' Protection Act—Outline and References |
| | | | JA275.ZIP | March 1992 Model Tax Assistance Program |
| | | | JA276.ZIP | March 1992 Preventive Law Series |
| | | | JA285.ZIP | March 1992 Senior Officers' Legal Orientation |
| | | | JA290.ZIP | March 1992 SJA Office Manager's Handbook |
| | | | ND-BBS.ZIP | July 1992 TJAGSA Criminal Law New Developments Course Deskbook |

JA301.ZIP July 1992

Unauthorized Absence—
Programmed Instruction,
TJAGSA Criminal Law
Division

JA310.ZIP July 1992

Trial Counsel and Defense
Counsel Handbook,
TJAGSA Criminal Law
Division

JA320.ZIP July 1992

Senior Officers' Legal
Orientation Criminal
Law Text

JA330.ZIP July 1992

Nonjudicial Punishment
—Programmed Instruction,
TJAGSA Criminal Law
Division

JA337.ZIP July 1992

Crimes and Defenses
Handbook (DOWNLOAD
ON HARD DRIVE
ONLY.)

YIR89.ZIP January
1990

Contract Law Year in
Review—1989

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) 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 Law; or Doctrine, Developments, 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, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning 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.

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail).

To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to: "postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crank(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

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

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the following address: Office of the Staff Judge Advocate, Attn: Mrs. Bennett, United States Army Training Center and Fort Jackson, Fort Jackson, South Carolina 29207; telephone DSN 734-7657, commercial: (803) 751-7657.

Federal Supplements, vols. 1-500

Federal Reporter 2d, vols. 1-500

1945-1946

1945-1946

1945-1946

1945-1946

1945-1946

1945-1946

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US Army
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Charlottesville, VA 22903-1781

SECOND CLASS MAIL

Notes from the Field

Unlawful Command Influence: Raising and Litigating the Issue

Unlawful Command Influence

Practitioners of military justice should be familiar with the oft-quoted statement of the United States Court of Military Appeals (COMA) in *United States v. Thomas*: "Command influence is the mortal enemy of military justice."¹

Article 37, of the Uniform Code of Military Justice (UCMJ),² prohibits the exercise of unlawful command influence. That prohibition is established further in Rule for Courts-Martial (R.C.M.) 104.³ The rule provides in relevant part:

No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.⁴

The fundamental principle that underlies the UCMJ prohibition is the desire to free the military justice system from the operation of the subtle—and sometimes blatant—pressures that can be exerted in the military along command channels.⁵ Because the issue can prove elusive at the trial level, command influence is not waived if not raised at trial,⁶ and cannot be waived in a pretrial agreement.⁷ Actual unlawful command influence exists when the "convening authority has been

brought into the deliberation room," and apparent unlawful command influence exists when "a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair."⁸

Both actual and perceived fairness are at the heart of the unlawful command influence issue. The COMA recognizes this fairness, "One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command."⁹

Judicial Authorities and Their Legal Advisors

Each commander in an accused's chain of command has independent discretion to determine how charges will be disposed, except to the extent that a commander's authority has been withheld by superior competent authority.¹⁰ Although subordinate commanders may consider the guidance of superiors, they must understand and believe that their independent discretion is unfettered, and that they are free to accept or reject the views of their superiors.¹¹

Convening authorities, too, must exercise their powers free from "unseen strings or superiors influencing [their] actions."¹² The decision to refer charges to a court-martial, the level of disposition, and any other decisions concomitant with that authority, are functions in the office of the convening authority and are matters entirely in the convening authority's discretion.¹³ Moreover, the law recognizes a strong

¹ 22 M.J. 388, 393 (C.M.A. 1986).

² 10 U.S.C.A. § 837 (West 1993).

³ MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 104 (1984) [hereinafter MCM].

⁴ *Id.*

⁵ *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986).

⁶ *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983).

⁷ *Kitts*, 23 M.J. at 108.

⁸ *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990) *aff'd*, 33 M.J. 209 (C.M.A. 1991).

⁹ *United States v. Thomas*, 22 M.J. 388, 400 (C.M.A. 1986).

¹⁰ MCM, *supra* note 3, R.C.M. 401(a) discussion.

¹¹ *United States v. Rivera*, 45 C.M.R. 582 (C.M.A. 1972).

¹² *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987).

¹³ *United States v. Allen*, 31 M.J. 572, 591 (N.M.C.M.R. 1990).

presumption of correctness and regularity in the military justice system and the exercise of prosecutorial discretion by a convening authority.¹⁴ Nevertheless, the "very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong."¹⁵

In exercising his or her power, the convening authority may seek advice from the assigned legal advisor. Indeed, the convening authority, as an authorized official of the Army, is considered the legal advisor's client.¹⁶ In representing his or her client, a legal advisor shall exercise independent professional judgment and render candid advice.¹⁷ Moreover, in rendering advice, a legal advisor may refer not only to law but to other considerations such as relevant moral, economic, and social factors.¹⁸ The official comment to Rule 2.1 of the Army's *Rules of Professional Conduct for Lawyers* offers further guidance and states:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. . . . It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. . . . [A] lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.¹⁹

Considerations such as the fair and efficient administration of military justice in a convening authority's jurisdiction, are well within the range of acceptable advice from his or her legal advisor. Outside acceptable parameters for legal "advice," however, are policy suggestions from the convening

authority's superiors.²⁰ Further, a staff judge advocate acts "with the mantle of command authority."²¹ Therefore, trial counsel and chiefs of military justice also act with the trappings of command authority. Consequently, legal advisors must realize that command influence can be exerted through "legal" channels and must consider carefully the content of advice to commanders who exercise UCMJ authority. Indications of what "the boss" wants or will do when advising subordinate commanders must be avoided.

Raising the Issue—the Government

Obviously, when actual or apparent unlawful command influence is detected during the initial stages of a criminal investigation, or after preferral of charges but before referral of the case, the issue should be raised to the convening authority for inquiry and, if appropriate, remedial action.²² When the unlawful command influence issue surfaces after referral of the case, the convening authority still may take remedial action that could involve granting complete relief to the accused if merited. If the convening authority chooses not to take remedial action, or the issue arises during trial, trial counsel have an ethical duty to report the issue to the military judge.²³ Trial counsel must take this action because the existence of command influence can operate as a fraud on the court.²⁴ Moreover, the issue is best developed at the trial court level because of the availability of witnesses and evidence.

Raising the Issue—Defense Counsel

Counsel for the accused may raise a meritorious issue of command influence to the convening authority, or to the military judge through a motion to dismiss or for appropriate relief.²⁵ The ethical obligation to raise the issue also applies to counsel for the accused. The issue cannot be waived in a pretrial agreement and any *sub rosa* agreements must be revealed to the military judge.²⁶ Therefore, defense counsel

¹⁴ See, e.g., *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985) *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987); *Hagen*, 25 M.J. at 78.

¹⁵ *Hagen*, 25 M.J. at 86.

¹⁶ DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 1.13 (1 May 1992) [hereinafter AR 27-26].

¹⁷ *Id.* rule 2.1.

¹⁸ *Id.*

¹⁹ *Id.* cmt.

²⁰ *United States v. Hagen*, 25 M.J. 78, 87 (C.M.A. 1987).

²¹ *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986).

²² The existence of an unlawful command influence issue should be disclosed to counsel for the accused. MCM, *supra* note 3, R.C.M. 701(a)(6).

²³ *United States v. Levite*, 25 M.J. 334, 340 (C.M.A. 1987); AR 27-26 *supra* note 16, rule 3.3.

²⁴ *Levite*, 25 M.J. at 340.

²⁵ SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*, sec. 6-7 (3d ed. 1992); *accord* AR 27-26, *supra* note 16, rule 3.1.

²⁶ *United States v. Corriere*, 24 M.J. 701 (A.C.M.R. 1987).

must avoid the temptation to "sweep under the rug" a command influence issue in order to obtain a favorable pretrial agreement for their client.

Litigating the Issue

The COMA has stated that in cases when unlawful command influence *has been exercised*, no reviewing court may properly affirm findings and sentence unless persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.²⁷ Limited guidance, however, exists for military practitioners and lower courts on the mechanics of litigating the issue in the first instance. Moreover, the COMA consciously has avoided the question.²⁸ Nevertheless, in the interest of justice, trial courts should address such issues whenever possible. In that spirit, the Navy and Marine Corps Court of Military Review provides effective guidance in *United States v. Allen*.²⁹

The court in *Allen* provides that when determining whether unlawful command influence "has been exercised," the accused has the burden of going forward with evidence sufficient to raise the issue.³⁰ This approach is consistent with R.C.M. 905, which places the initial burden on the moving party—except on motions to dismiss because of lack of jurisdiction, denial of a speedy trial, or the running of the statute of limitations—when the burden falls on the government.³¹ Several courts have stated that mere unsupported assertions or speculation by the accused, or establishing a *possibility* of unlawful command influence, is not sufficient to raise the issue.³²

²⁷ *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

²⁸ *Levite*, 25 M.J. at 341 (Cox, J., concurring). In *Levite* Judge Cox writes,

The unfortunate aspect of the debate is that we, as lawyers, tend to reach an impasse on the legal technicalities of the matter. Who has the burden of proof? Who has the initial 'burden of persuasion'? This Court has not and, in my judgement, should not even attempt to assign these burdens.

Id.

In the same paragraph, however, Judge Cox goes on to provide—"[g]enerally"—the mechanical guidelines for litigation that the court of review relied on in *Allen*. *Id.* When it affirmed the lower court decision in *Allen*, the COMA, in an opinion authored by Judge Cox, was silent concerning the framework for litigation established by the lower court.

²⁹ *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990).

³⁰ *Id.*

³¹ MCM, *supra* note 3, R.C.M. 905 (c)(2)(A), (B). The alleged exercise, at any level, of unlawful command influence is not jurisdictional; see *United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983) (repudiating in part, *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977)).

³² See, e.g., *Green v. Widdecke*, 42 C.M.R. 1978 (C.M.A. 1970); *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985) *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987); *United States v. Serino*, 24 M.J. 848 (A.F.C.M.R. 1987).

³³ *Allen*, 31 M.J. at 591; *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J., concurring). Although expressly not assigning a "burden," Judge Cox writes in *Levite*,

An appellant who claims his court-martial has been unlawfully influenced had better declare and show that the proceedings were unfair and that the proximate cause of the unfairness resulted from unlawful command influence. If no causal connection between command influence and the injury (i.e., the 'unfair trial') appears, then an accused is not entitled to relief.

Levite, 25 M.J. at 341.

³⁴ *Allen*, 31 M.J. at 591.

The accused's burden includes: (1) asserting the facts of his or her allegation with sufficient particularity and substantiation so that if true, any reasonable person only could conclude that unlawful influence existed; (2) declaring that the proceedings were unfair; and (3) showing that the unlawful command influence was the proximate cause of that unfairness.³³

If the accused meets his burden, a rebuttable presumption of unlawful command influence is raised. The burden then shifts to the government to show, by clear and convincing evidence, that unlawful command influence does not exist or did not prejudice the accused.³⁴ If the government fails to rebut the presumption the military judge must fashion an appropriate remedy.

Conclusion

Unlawful command influence is the most elusive and troublesome issue facing military practitioners and their clients. Both the government and counsel for the accused have a duty to protect the court-martial process from unlawful command influence. The COMA rightfully admonishes those in the field to inquire into and completely develop such issues at the convening authority or trial court level. Nevertheless, the COMA has declined to provide definitive guidance on the manner in which the issue is to be litigated. Absent specific guidance from the COMA, military practitioners and lower courts should follow the framework for litigation set forth in *Allen*. Captain DeGiusti.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

4-8 October: 1993 JAG Annual Continuing Legal Education Workshop (5F-JAG).

14-15 October: Appellate Judges Conference.

18-22 October: USAREUR Criminal Law CLE (5F-F35E).

18 October-22 December: 132d Basic Course (5-27-C20).

18-22 October: 33d Legal Assistance Course (5F-F23).

25-29 October: 120th Senior Officers' Legal Orientation Course (5F-F1).

25-29 October: 55th Law of War Workshop (5F-F42).

1-5 November: 31st Criminal Trial Advocacy Course (5F-F32).

15-19 November: 37th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

29 November-3 December: 17th Operational Law Seminar (5F-F47).

2-3 December: 2d Procurement Fraud Orientation (5F-F37).

6-10 December: USAREUR Operational Law CLE (5F-F47E).

6-10 December: 121st Senior Officers' Legal Orientation Course (5F-F1).

1994

3-7 January: 44th Federal Labor Relations Course (5F-F22).

10-13 January: USAREUR Tax CLE (5F-F28E).

10-14 January: 1994 Government Contract Law Symposium (5F-F11).

18 January-25 March: 133d Basic Course (5-27-C20).

24-28 January: PACOM Tax CLE (5F-F28P).

31 January-4 February: 32d Criminal Trial Advocacy Course (5F-F32).

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

December 1993

1-3, ESI: International Contracting, Washington, D.C.

2, NYSBA: Forming and Advising the Not-for-Profit Corporation, New York, NY.

2, NYSBA: Trial of a Felony Case, Long Island, NY.

3, NYSBA: How to Try a Commercial Case, Rochester, NY.

3, NYSBA: How to Try a Commercial Case, Albany, NY.

3-4, ABA: Dynamics of Corporate Control, New York, NY.

5-9, NCDA: Forensic Evidence, Orlando, FL.

6, GWU: Joint Ventures and Teaming Arrangements, Washington, D.C.

6-10, ESI: Federal Contracting Basics, San Diego, CA.

6-10, ESI: Operating Practices in Contract Administration, Washington, D.C.

7, PBI: Ethical Issues Affecting Domestic Relations Lawyers, Philadelphia, PA.

7-8, GII: Environmental Laws and Regulations Compliance Course, New Orleans, LA.

7-10, ESI: Negotiation Strategies and Techniques, San Diego, CA.

7-10, ESI: ADP/Telecommunications (FIP) Contracting, Washington, D.C.

8-10, GWU: Federal Procurement of Architect and Engineer Services, Washington, D.C.

10, NYSBA: New York Appellate Practice, Albany, NY.

13-17, ESI: Managing Projects in Organizations, Washington, D.C.

13-17, GWU: Construction Contracting, Washington, D.C.

15, PBI: Ethical Issues for Estate Lawyers, Pittsburgh, PA.

16-17, WFU: Practical Family Law, Charlotte, NC.

16-17, WFU: Personnel Law Symposium, Atlanta, GA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.

AAJE: American Academy of Judicial Education, 1613 15th Street - Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

AALL: American Association of Law Libraries, 53 West Jackson Blvd., Suite 940, Chicago, IL 60604. (312) 939-4764.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

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

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

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

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

EEL: Executive Enterprises, Inc., 22 W. 21st Street, New York, NY 10010-6904. (800) 332-1105.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

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

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

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

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

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

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

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LEI: Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.

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

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

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

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

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

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

- NCJFC:** National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.
- NCLE:** Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.
- NELI:** National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.
- NITA:** National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).
- NJC:** National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.
- NJCLE:** New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.
- NKU:** Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Heights, KY 41076. (606) 572-5380.
- NLADA:** National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.
- NMTLA:** New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.
- NWU:** Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611-3069. (312) 503-8932.
- NYSBA:** New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.
- PBI:** Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.
- PHLB:** Prentice-Hall Law and Business, 270 Sylvan Avenue, Englewood Cliffs, NJ 07632. (800) 223-0231, (201) 894-8260.
- PLI:** Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.
- SBA:** State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.
- SBT:** State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.
- SCB:** South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.
- SLF:** Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.
- TBA:** Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.
- TLS:** Tulane Law School, Tulane University CLE, 8200 Hampson Avenue, Suite 300, New Orleans, LA 70118. (504) 865-5900.
- TPI:** The Philadelphia Institute, 2133 Arch Street, Philadelphia, PA 19103. (215) 567-4000.
- UCCI:** Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.
- UKCL:** University of Kentucky, College of Law, Office of CLE, Suite 260 Law Building, Lexington, KY 40506-0048. (606) 257-2922.
- UMLC:** University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.
- USB:** Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.
- VACLE:** Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.
- WFU:** Wake Forest University, School of Law—CLE, Box 7206 Reynolds Station, Winston-Salem, NC 27109-7206. (919) 761-5560.
- WSBA:** Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

| <u>Jurisdiction</u> | <u>Reporting Month</u> |
|---------------------|----------------------------------|
| Alabama** | 31 December annually |
| Arizona | 15 July annually |
| Arkansas | 30 June annually |
| California* | 1 February annually |
| Colorado | Anytime within three-year period |
| Delaware | 31 July biennially |
| Florida** | Assigned month triennially |
| Georgia | 31 January annually |

| <u>Jurisdiction</u> | <u>Reporting Month</u> |
|---------------------|----------------------------|
| Idaho | Admission date triennially |
| Indiana | 31 December annually |
| 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 |

| <u>Jurisdiction</u> | <u>Reporting Month</u> |
|---------------------|---|
| Oregon | Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially |
| Pennsylvania** | Annually as assigned |
| South Carolina** | 15 January annually |
| 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 annually |
| West Virginia | 30 June biennially |
| Wisconsin* | 20 January biennially |
| Wyoming | 30 January annually |

For addresses and detailed information, see the July 1993 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, 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 reg-

istered 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 B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).
- AD A259516 Legal Assistance Guide: Office Directory/JA-267(92) (110 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 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 A244032 Family Law Guide/JA 263-91 (711 pgs).
- *AD A266351 Office Administration Guide/JA 271(93) (230 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A259022 Tax Information Series/JA 269(93) (117 pgs).
- AD A256322 Legal Assistance: Deployment Guide/JA-272 (92) (364 pgs).
- AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

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

- AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).
- AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A255064 Government Information Practices/JA-235(92) (326 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A256772 The Law of Federal Employment/JA-210 (92) (402 pgs).
- AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

- AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).
- AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).
- AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).
- AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).
- AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).
- AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

- AD A262925 Operational Law Handbook (Draft)/JA-422 (93) (180 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 USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *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 estab-

lish 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, USAPDC, 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 JAGs 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.

b. Listed below are new publications and changes to existing publications.

| Number | Title | Date |
|--------------|--|-----------|
| AR 5-14 | Management of Contracted Advisory and Assistance Services | 15 Jan 93 |
| AR 30-18 | Army Troop Issue Subsistence Activity Operating Policies | 4 Jan 93 |
| AR 135-156 | Military Publications Personnel Management of General Officers, Interim Change 101 | 1 Feb 93 |
| CIR 11-92-3 | Internal Control Review Checklist | 31 Oct 92 |
| CIR 608-93-1 | The Army Family Action Plan X | 15 Jan 93 |
| JFTR | Joint Federal Travel Regulations, Change 75 | 1 Mar 93 |
| UPDATE 16 | Enlisted Ranks Personnel Update Handbook, Change 3 | 27 Nov 93 |

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- 1) Active duty Army judge advocates;
- 2) Civilian attorneys employed by the Department of the Army;
- 3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;
- 4) Active duty Army legal administrators, noncommissioned officers, and court reporters;
- 5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;
- 6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and
- 7) Individuals with approved, written exceptions to policy.

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

LAAWS Project Officer
 Attn: LAAWS BBS SYSOPS
 Mail Stop 385, Bldg. 257
 Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged 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 a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four 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 Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE 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. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask 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 on to 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.

c. *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> | <u>FILE NAME</u> | <u>UPLOADED</u> | <u>DESCRIPTION</u> |
|------------------|-----------------|---|------------------|-----------------|---|
| 1990_YIR.ZIP | January 1991 | 1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA. | JA231.ZIP | October 1992 | Reports of Survey and Line of Duty Determinations—Programmed Instruction. |
| 1991_YIR.ZIP | January 1992 | TJAGSA Contract Law 1991 Year in Review Article. | JA235-92.ZIP | August 1992 | Government Information Practices, July 92. Updates JA235.ZIP. |
| 505-1.ZIP | June 1992 | Volume 1 of the May 1992 Contract Attorneys Course Deskbook. | JA235.ZIP | March 1992 | Government Information Practices. |
| 505-2.ZIP | June 1992 | Volume 2 of the May 1992 Contract Attorneys Course Deskbook. | JA241.ZIP | March 1992 | Federal Tort Claims Act. |
| 506.ZIP | November 1991 | TJAGSA Fiscal Law Deskbook, Nov. 1991. | JA260.ZIP | October 1992 | Soldiers' and Sailors' Civil Relief Act Update, Sept. 92. |
| 93CLASS.ASC | July 1992 | FY TJAGSA Class Schedule; ASCII. | JA261.ZIP | March 1992 | Legal Assistance Real Property Guide. |
| 93CLASS.EN | July 1992 | FY TJAGSA Class Schedule; ENABLE 2.15. | JA262.ZIP | March 1992 | Legal Assistance Wills Guide. |
| 93CRS.ASC | July 1992 | FY TJAGSA Course Schedule; ASCII. | JA267.ZIP | March 1992 | Legal Assistance Office Directory. |
| 93CRS.EN | July 1992 | FY TJAGSA Course Schedule; ENABLE 2.15. | JA268.ZIP | March 1992 | Legal Assistance Notarial Guide. |
| ALAW.ZIP | June 1990 | <i>The Army Lawyer/Military Law Review</i> Database (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF. | JA269.ZIP | March 1992 | Federal Tax Information Series. |
| CCLR.ZIP | September 1990 | Contract Claims, Litigation, Litigation & Remedies. | JA271.ZIP | March 1992 | Legal Assistance Office Administration Guide. |
| FISCALBK.ZIP | November 1990 | The November 1990 Fiscal Law Deskbook. | JA272.ZIP | March 1992 | Legal Assistance Deployment Guide. |
| FSO_201.ZIP | October 1992 | Update of FSO Automation Program. | JA274.ZIP | March 1992 | Uniformed Services Former Spouses' Protection Act—Outline and References. |
| JA200A.ZIP | August 1992 | Defensive Federal Litigation, Part A, Aug. 92. | JA275.ZIP | March 1992 | Model Tax Assistance Program. |
| JA200B.ZIP | August 1992 | Defensive Federal Litigation, Part B, Aug. 92. | JA276.ZIP | March 1992 | Preventive Law Series. |
| JA210.ZIP | October 1992 | Law of Federal Employment, Oct. 92. | JA281.ZIP | March 1992 | AR 15-6 Investigations. |
| JA211.ZIP | August 1992 | Law of Federal Labor-Management Relations, July 92. | JA285.ZIP | March 1992 | Senior Officers' Legal Orientation. |
| | | | JA285A.ZIP | March 1992 | Senior Officers' Legal Orientation Part 1 of 2. |
| | | | JA285B.ZIP | March 1992 | Senior Officers' Legal Orientation Part 2 of 2. |
| | | | JA290.ZIP | March 1992 | SJA Office Managers' Handbook. |
| | | | JA301.ZIP | July 1991 | Unauthorized Absence—Programmed Text, July 92. |

| <u>FILE NAME</u> | <u>UPLOADED</u> | <u>DESCRIPTION</u> |
|------------------|-----------------|---|
| JA310.ZIP | July 1992 | Trial Counsel and Defense Counsel Handbook, July 1992. |
| JA320.ZIP | July 1992 | Senior Officers' Legal Orientation Criminal Law Text, May 92. |
| JA330.ZIP | July 1992 | Nonjudicial Punishment—Programmed Text, Mar. 92. |
| JA337.ZIP | July 1992 | Crimes and Defenses Deskbook, July 92. |
| JA4221.ZIP | May 1992 | Operational Law Handbook, Disk 1 of 2. |
| JA4222.ZIP | May 1992 | Operational Law Handbook, Disk 2 of 2. |
| JA509.ZIP | Oct 1992 | TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92. |
| JAGSCHL.ZIP | Mar 1992 | JAG School Report to DSAT. |
| ND-BBS.ZIP | July 1992 | TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92. |
| V1YIR91.ZIP | January 1992 | Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan. 92 Contract Law Symposium. |
| V2YIR91.ZIP | January 1992 | Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991. |
| V3YIR91.ZIP | January 1992 | Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991. |
| YIR89.ZIP | January 1990 | Contract Law Year in Review—1989. |

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 Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5_-inch or 3_-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning 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, Sergeant First Class Tim Nugent, commercial (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

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. The Army Law Library System

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions.

2. It is essential to ensure that all data is entered correctly and consistently across all systems.

3. Regular audits should be conducted to verify the integrity and accuracy of the information stored.

4. The second section covers the various methods used to collect and analyze data from different sources.

5. These methods include manual data entry, automated data collection, and data mining techniques.

6. The third part of the document describes the challenges associated with data integration and interoperability.

7. It highlights the need for standardized protocols and formats to facilitate the exchange of information.

8. The fourth section discusses the role of data in decision-making and the importance of data-driven insights.

9. It emphasizes the need for robust data analysis tools and skilled personnel to interpret the results.

10. The fifth part of the document addresses the security and privacy concerns associated with data storage and transmission.

11. It outlines the best practices for implementing security measures and protecting sensitive information.

12. The sixth section discusses the future trends in data management and the impact of emerging technologies.

13. It explores the potential of artificial intelligence, machine learning, and cloud computing in data analysis.

14. The seventh part of the document provides a summary of the key findings and conclusions of the study.

15. It offers recommendations for organizations looking to optimize their data management processes.

16. The final section includes a list of references and a glossary of terms used throughout the document.

17. The document concludes by emphasizing the ongoing nature of data management and the need for continuous improvement.

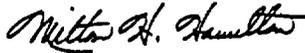
18. It expresses the hope that the information provided will be helpful and informative to the reader.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
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Chief of Staff

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