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Editor

Captain Benjamin T. Kash

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Memorandum of Law— The Legality of Snipers

Editor's Note: The following memorandum addresses a concern that the Army's use of snipers in combat might violate the law of war. After examining the roles established for snipers in Army and Marine Corps doctrines and the general international acceptance of the use of snipers in combat, the memorandum concludes that this concern is unfounded. As long as snipers comply with the legal constraints that govern all combatants, the use of snipers does not violate the law of war.

DAJA-IO

29 September 1992

MEMORANDUM FOR DA, AMCCOM (SMCAR-CCJ
(MR. SMALL)),
PICATINNY ARSENAL,
NEW JERSEY
07806-5000

SUBJECT: Legality of Snipers

1. On 18 September 1992, a request was made for information as to the legality of snipers. This opinion has been prepared to provide the information requested.

2. The legality of snipers has not been addressed directly. In 1990, this office reviewed the legality of sniper use of open-tip ammunition and briefly addressed the legality of snipers as such; a copy of that opinion was published in the February 1991 edition of *The Army Lawyer* (DA Pam. 27-50-218).

3. The United States Army (FM 23-10 [draft]) defines *sniper* as

a soldier with special ability, training, and equipment who is designated to deliver discriminating and highly accurate rifle fire against targets which, because of range, size, location, fleeting nature or visibility cannot be engaged successfully by the average rifleman.

The United States Marine Corps (FMFM 1-3B) defines *scout-sniper* as

a Marine who is highly trained in fieldcraft and marksmanship who delivers long-range precision fire at selected targets from concealed positions in support of combat operations, with a secondary mission of gathering information for intelligence purposes.

4. The law of war recognizes the legality of the taking of the lives of enemy combatants. Article 15 of Army General

Orders No. 100 (1863), also known as the Lieber Code, set forth a principal that remains the law of war today: "Military necessity admits of all direct destruction of life or limb of armed enemies . . ." This statement does not limit lawful attacks to persons armed at the moment of the attack, but includes all persons who are combatants.

5. A sniper's ability to engage enemy targets at longer ranges than an average rifleman does not have any bearing on the legality of the sniper's mission. Enemy combatants are lawful targets at all times, wherever they may be located, regardless of the activity in which they are engaged when they are attacked. See, for example, *Army Field Manual 27-10, The Law of Land Warfare* (1956). In discussing the prohibition on assassination, paragraph 31 states,

[T]he prohibition on assassination] does not . . . preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.

(Assassination is defined in a 2 November 1989 opinion of this office, which subsequently was published in the December 1989 issue of DA Pam. 27-50-204, *The Army Lawyer*.)

Soldiers lawfully may be attacked behind their lines by any lawful means. A sniper's work is indistinguishable from a law of war standpoint from other lawful means. The practice of nations at war in their employment of snipers in virtually every conflict in this century is an acknowledgement through state practice of the legality of snipers.

6. Ignorance of the law of war has suggested on occasion that a sniper's work is less than legal. For example, in Charles W. Henderson's *Marine Sniper* (New York, 1986), its author quotes (p. 107) then-Captain E. J. Land, USMC, as declaring that

As a sniper, . . . you will be killing the enemy when he is unaware of your presence. You will be assassinating him without giving him the option to run or fight, surrender or die. You will be, in a sense, committing murder on him—premeditated.

This is the unenlightened view of sniping; it also is legally incorrect. Captain Land was correct in stating that sniping does not afford an enemy combatant an opportunity to run, fight, surrender, or die. Neither does an artillery barrage or rocket attack, a land mine, an ambush, a commando raid, or an airstrike. Attack of enemy personnel by any lawful means, including sniping, is neither assassination nor murder—it is lawful killing. The element of surprise is a fundamental principle of war, and does not make an otherwise legitimate act of violence unlawful.

7. Any weapon can be used for unlawful purposes. A soldier who uses his M9 pistol to kill a civilian without justification has committed an act of murder—this makes the soldier a criminal, but it does not make the M9 an illegal weapon. The same is true with respect to sniping; an individual who fires a sniper rifle at a noncombatant has made illegal use of a lawful weapon. Engagement of an unlawful target would make the sniper a criminal, but would not make sniping illegal. This distinction is recognized in *Marine Sniper* in the following anecdote from the Vietnam War (p. 114):

[Gunnery Sergeant Carlos Hathcock, USMC] watched three silhouette figures walking along the dikes that divided the rice fields and lotus ponds and, as they emerged into a streak of sunlight . . . he put his eye to the M-49 spotting scope . . . Examining them closely . . . he saw that the men carried hoes, not rifles. They were farmers.

In the corner of his eye, Hathcock caught the student who took the first watch behind the sniper rifle . . . tightening his grip around the small of the gun's stock, preparing to shoot one of the men. Saying nothing, Hathcock placed his hand over the rear optic of the rifle's scope. The [Marine] turned and smiled guiltily.

Hathcock motioned for the other student to take the sniper rifle. The first Marine would spend the remainder of the day with his instructor, but once they returned [to their headquarters], he would be gone.

The anecdote contradicts the previous *Marine Sniper* quote; the sniper in question (Gunnery Sergeant Carlos Hathcock) clearly understood the difference between attacking a lawful target, such as an enemy combatant, and murdering a noncombatant farmer. Had the Marine student shot the farmer before Gunnery Sergeant Hathcock could intervene, his act would have been one of murder in violation of article 118, Uniform Code of Military Justice, for which he could have been prosecuted. His illegal act would not have made the art of sniping unlawful, however.

8. **Conclusion.** A sniper is a lawful weapon system. Sniper use by the armed services of the United States is entirely consistent with the law of war obligations of the United States.

FOR THE JUDGE ADVOCATE GENERAL:

W. HAYS PARKS
Special Assistant for
Law of War Matters

Recent Property Settlement Issues for Legal Assistance Attorneys

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Introduction

Many legal assistance attorneys (LAAs) find that helping a soldier or a military dependent with a divorce settlement is a demanding task. An LAA must understand the nuances of domestic relations laws of many different jurisdictions to serve the mobile military clientele properly. This article examines developing issues relating to the divisibility of retired pay and discusses how divorce courts may treat the Armed Forces' new voluntary separation incentives.

Background

In community property states, income earned by either spouse during a marriage constitutes marital property from which each party may claim an equal share.¹ In noncommunity property states, courts apply equitable distribution principles when dividing property—that is, they attempt to divide property fairly after examining the equities of each case.² In an equitable distribution jurisdiction, marriage itself creates no interest in property.

¹S. REP. No. 502, 97th Cong., 2d Sess. (1982) reprinted in 1982 U.S.C.A.N. 1596. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington currently follow this doctrine. See *id.*

²*Id.* at 2, 1982 U.S.C.A.N. at 1596-97.

Before 1981, state courts in both community property and equitable distribution jurisdictions freely divided military retirement incomes as marital property in divorce proceedings.³ In 1981, however, the United States Supreme Court upset this approach to property distribution when it decided *McCarty v. McCarty*.⁴ Richard McCarty, a retired Army colonel, appealed from a California court order awarding his wife a half interest in his military retired pay. The Supreme Court reversed the California decision, holding that federal law preempted a state court from dividing military retired pay.⁵ The Court concluded that federal law clearly identified retired pay as a personal entitlement of the retiree, to which the retiree's former spouse had no claim.⁶

The following year, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA or Act).⁷ The express purpose of the Act was to reverse *McCarty*⁸ by returning the retired pay issue to the states.⁹ Significantly, the USFSPA does not endow the spouse of a service member with a right under federal law to claim a share of the service member's retired pay; however, it does allow state courts to divide military retirement incomes according to state laws.¹⁰

Congress drafted the USFSPA to strike a balance between the competing interests of retirees and their former spouses. On the one hand, Congress recognized that most retired service members have served the United States for more than twenty years and are entitled to reap the benefits of their labors. Moreover, retired pay is not a true pension because a military retiree is subject to recall to active duty.¹¹ Accord-

ingly, a military pension may be categorized as reduced pay for reduced services and should remain the property of the retiree after the marriage is dissolved. Finally, the military services use retired pay as a personnel management tool to retain qualified service members and to encourage older members to step aside. Representatives of the Armed Forces had argued that, if service members knew that their retirement benefits could be divided, the services might not be able to attract and retain enough people to maintain an effective fighting force.¹²

On the other hand, Congress acknowledged the sacrifices and contributions of military spouses. The spouses of many service members must abandon their own careers to follow the service members around the world. Only rarely can a military spouse ensure his or her own retirement security by contributing toward a pension or health system. Congress saw the USFSPA as a way to compensate spouses for these sacrifices.¹³

The states implemented the USFSPA without incident. No significant issues arose under the statute until 1989, when the Supreme Court decided *Mansell v. Mansell*.¹⁴ In that case, a California court divided a former Air Force officer's gross retired pay pursuant to the parties' separation agreement. Major Mansell's retired pay included Veterans' Administration (VA) disability pay. To accept disability pay, Mansell had to waive an equivalent amount of his retired pay. Nevertheless, because VA payments are nontaxable,¹⁵ this arrangement benefitted Major Mansell by increasing his monthly income.¹⁶

³*Id.* at 2, 1982 U.S.C.C.A.N. at 1597. See generally TJAGSA Practice Note, *State-by-State Analysis of the Divisibility of Military Retired Pay*, ARMY LAW., May 1992, at 37.

⁴453 U.S. 210 (1981).

⁵*Id.*

⁶*Id.* at 228. Noting that this ruling would disadvantage former spouses, the Court invited Congress to remedy the problem. See *id.* at 235-36.

⁷Pub. L. No. 97-252, tit. X, §§ 901-996, 96 Stat. 718, 730 (1982) (codified as amended at scattered sections of 10 U.S.C.).

⁸S. REP. NO. 502, *supra* note 1, at 1, 1982 U.S.C.C.A.N. at 1596.

⁹See 10 U.S.C. § 1408(c)(1) (1988) ("A court may treat disposable retired . . . pay . . . either as property solely of the member or as property of the member and his [or her] spouse in accordance with the law of the jurisdiction of such court").

¹⁰S. REP. NO. 502, *supra* note 1, at 4, 1982 U.S.C.C.A.N. at 1598. Conceivably, a court could award a service member's nonmilitary spouse all of the service member's military pension, even if the couple were married only one day. A court more often will divide military retired pay in accordance with a formula reflecting the length of the marriage and the military spouse's time in service. For a good discussion of formulas for dividing military retired pay, see LEGAL ASSISTANCE BRANCH, ADMINISTRATIVE LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY, JA 274, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT, app. D (Aug. 1991) [hereinafter JA 274].

¹¹See *McCarty*, 453 U.S. at 213; see also 10 U.S.C. § 688(a) (1988).

¹²S. REP. NO. 502, *supra* note 1, at 7-8, 1982 U.S.C.C.A.N. at 1601-03.

¹³*Id.* at 6, 1982 U.S.C.C.A.N. at 1601.

¹⁴490 U.S. 581 (1989).

¹⁵See 38 U.S.C. § 5301(a) (1988).

¹⁶*Mansell*, 490 U.S. at 585.

After Congress enacted the USFSPA, Major Mansell returned to court to modify the divorce decree.¹⁷ He asserted that the order granting his ex-wife a share of his gross retired pay should be amended because the USFSPA allows a state court to divide only "disposable" retired pay.¹⁸ Mansell then pointed out that the USFSPA's definition of "disposable retired pay" does not include VA disability payments. Accordingly, he argued that he should receive a greater portion of his gross retired pay than the fifty percent originally contemplated in the divorce decree.¹⁹

The California Court of Appeals denied Major Mansell's request. In doing so, it relied on case law holding that the USFSPA had preempted *McCarty* completely and that a state court was free to treat all of a former service member's retired pay as community property.²⁰ After the California Supreme Court summarily denied his petition for review, Mansell successfully petitioned for certiorari.²¹

Arguing before the United States Supreme Court, Mrs. Mansell asserted that Congress enacted the USFSPA to overrule *McCarty* and to enable a state court freely to divide a former service member's gross retired pay.²² She also contended that the USFSPA is a garnishment statute that permits direct payments from federal retired pay.²³ To bolster this argument, Mrs. Mansell cited the USFSPA's savings clause, which states that the Act does not relieve a retired service member from liability for other payments a court might award to the service member's spouse.²⁴ In Mrs.

Mansell's opinion, this clause showed that the Act does not limit a state court's authority to divide retired pay, but only the amount of retired pay that the court can transfer directly to a retiree's former spouse.²⁵ After examining the USFSPA's statutory language, a majority of the Court concluded that the Act gives a state court only limited authority to divide retired pay.²⁶ The provisions of 10 U.S.C. § 1408(c)(1) permit a state court to consider "disposable retired pay" as marital property. The Act specifically defines "disposable retired pay" as a former service member's total retired pay, minus certain deductions—one of which is income received from the VA as disability payments. Accordingly, the Court observed that "state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property."²⁷ Although the majority conceded that some portions of the Act's legislative history supported Mrs. Mansell's argument, it decided that these provisions were not sufficiently clear to overcome the specific language of the statute.²⁸ The Court concluded that the Mansell division was improper because a state court may divide only nondisability military retired pay.²⁹

Justice O'Connor responded with a thoughtful dissent that espoused Mrs. Mansell's argument that Congress intended the USFSPA to overrule *McCarty* completely. Tracing the Act's legislative history, Justice O'Connor concluded that the

¹⁷*Id.*
¹⁸*Id.* at 586.

¹⁹For example, a court typically would split a former service member's gross retired pay of \$2000 evenly, awarding each party \$1000 before taxes. As interpreted by Major Mansell, the USFSPA definition of "disposable retired pay" specifically would exclude amounts a retiree receives for VA disability payments, permitting Mansell to deduct the VA payment from the gross amount before splitting the remainder. Accordingly, if Major Mansell were entitled to receive \$400 a month in VA payments, his disposable retired pay would be only \$1600. Consequently, his former spouse would receive only \$800 a month before taxes—an obvious reduction in the sum originally contemplated in the divorce settlement. For a more complete explanation of this example, see TJAGSA Practice Note, *McCarty and Preemption Revived: Mansell v. Mansell*, ARMY LAW., Sept. 1989, at 30.

²⁰*Mansell v. Mansell*, 5 Civ. No. F002872 (Jan. 30, 1987) (citing *Casas v. Thompson*, 720 P.2d 921, cert. denied, 479 U.S. 1012 (1986)), rev'd and remanded, 490 U.S. 581 (1989).

²¹See 487 U.S. 1217 (1988) (finding "probable basis for jurisdiction").

²²*Mansell*, 490 U.S. at 588.

²³*Id.* at 589.

²⁴*Id.* at 589-90; see also 10 U.S.C. § 1408(d) (1988).

²⁵*Mansell*, 490 U.S. at 590.

²⁶*Id.* at 589.

²⁷*Id.* at 588-89.

²⁸*Id.* at 592.

²⁹*Id.* at 583. Because of the procedural posture of this case, Major Mansell did not benefit from this decision. All subsequent cases were subject to this holding, but Major Mansell remained bound by the terms of his decree. For an excellent discussion of this dilemma, see TJAGSA Practice Note, *Mansell v. Mansell: An Epilogue*, ARMY LAW., Apr. 1990, at 74.

USFSPA "is primarily a remedial statute creating a mechanism whereby former spouses . . . may enlist the Federal Government to assist them in obtaining some of their property entitlements upon divorce."³⁰ Accordingly, she found that the term "disposable retired pay" limits only a state court's ability to garnish retired pay—not the court's authority to divide that pay.³¹

Justice O'Connor explained that Congress used the disposable definition only to give meaning to 38 U.S.C. § 3101(a), which exempts disability pay from garnishment. She opined that, "had Congress not excluded 'amounts waived' to receive veterans' disability benefits from the federal garnishment remedy created by the [USFSPA,] it would have eviscerated the force of the anti-attachment provisions of § 3101(a)."³²

Justice O'Connor then focused on Mrs. Mansell's savings clause argument. She accepted the majority's conclusion that the savings clause merely clarifies that the federal direct payments mechanism does not replace state court authority to divide and garnish property through other mechanisms. She asserted, however, that the majority opinion would prevent state courts from using these alternative mechanisms—an approach that contrasted sharply with the express purpose of the USFSPA's savings clause.³³

In reality, the majority view comports with the USFSPA. Justice O'Connor's dissent ignores the plain language of 10 U.S.C. § 1408(c), which allows a court to divide only disposable retired pay. Although a court may award a retiree's spouse up to 100% of a retiree's disposable pay, only half of this pay is subject to direct payment.³⁴ The savings clause only emphasizes that the retiree cannot avoid paying the rest of the court's award—it does not endow the court with jurisdiction over nondisposable pay, such as VA benefits. This reading is consistent with the purposes and language of the USFSPA. The Act clearly attempts to balance the rights of retirees against those of their former spouses. In reaching her decision, Justice O'Connor actually ignored legislative history which indicated that Congress rejected a bill that would have given state courts jurisdiction over gross retired pay.³⁵ Clearly, when Congress enacted the USFSPA, it meant exactly what it said—that a state court may divide all of a

retiree's disposable retired pay, but the retiree may claim the balance of his or her gross retired pay, free from division.

Despite Justice O'Connor's dissent, the majority view has prevailed. Congress apparently has acquiesced in the *Mansell* decision. When federal legislators amended the USFSPA in 1990,³⁶ they made no effort to redefine the definition of disposable retired pay to offset *Mansell*. The legislative history of the 1990 amendments remarks, "Current law provisions that permit the deduction from gross retired pay of amounts waived to receive veterans' disability compensation . . . and other entitlement-based reductions, [will] not be changed."³⁷ Presented with an ideal opportunity to reject *Mansell*, Congress evidently chose not to do so.

One of the more obvious drawbacks of *Mansell* is that it could increase the number of divorce cases that must be resolved through litigation. Although *Mansell* apparently would not prevent a service member and his or her spouse from agreeing to divide the service member's gross retired pay, the decision leaves the service member with little incentive to do so. Knowing that *Mansell* will prevent a divorce court from dividing his or her gross retired pay, a service member probably will refuse to settle in hopes of protecting any assets the court cannot reach.

A second drawback is that even an express, written agreement between the parties will not guarantee that a court will adopt a provision dividing the service member's gross retired pay. A court quite possibly could rule that *Mansell* unconditionally precludes the court from entering a judgment purporting to divide any part of the service member's retired pay in excess of his or her disposable retired pay.

After *Mansell*, state courts appear powerless to divide nondisposable retired pay. If this implication actually reflects the Court's holding, how far does *Mansell* extend? Many interesting issues may arise from the *Mansell* decision. Legal assistance attorneys must be aware of *Mansell*'s implications and must advise clients carefully of the potential pitfalls surrounding divisions of marital property.

³⁰*Mansell*, 490 U.S. at 597 (O'Connor, J., dissenting).

³¹*Id.* at 598.

³²*Id.*

³³*Id.* at 601.

³⁴See 10 U.S.C. § 1408(e)(1) (1988).

³⁵See *Mansell*, 490 U.S. at 593 n.17.

³⁶See generally National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1570 (1990).

³⁷H.R. REP. NO. 665, 101st Cong., 2d Sess. 279 (1990), reprinted in 1990 U.S.C.C.A.N. 3004, 3006. Instead of countermanding *Mansell*, the amendments dealt with tax withholdings, the retroactive effective date of the USFSPA, and the aggregate percentage of retired pay available to a retiree's multiple former spouses. See *id.* at 279-80, 1990 U.S.C.C.A.N. at 3005-06.

Chapter 61 Disability

Mansell dealt strictly with the divisibility of VA benefits. Nevertheless, it also may apply to a closely related disability benefit found in chapter 61 of title 10, United States Code.³⁸ A service member who is disabled and who accepts medical retirement before completing twenty years in service can qualify for benefits under this chapter.³⁹ Like VA benefits, benefits received under chapter 61 generally are not considered to be "disposable retired pay" as that term is defined in the USFSPA.⁴⁰ The Act, however, does not treat chapter 61 benefits exactly as it does VA benefits. A VA disability benefit is entirely immune to division as marital property. On the other hand, the "disposable retired pay" of a service member who accepts medical retirement under chapter 61 excludes only that portion of the service member's disability benefit that was computed using the member's disability rating.⁴¹ This sum often will constitute a medical retiree's entire disability benefit.

Chapter 61 benefits differ from VA benefits in another respect. The VA disability pay of a longevity retiree—that is, of a former service member who retired after at least twenty years of military service—typically will represent only a small portion of the retiree's gross retired pay. A medical retiree's chapter 61 benefits, however, generally will be his or her only retirement income from the federal government. Obviously, the former spouse of a medical retiree receiving benefits under chapter 61 will receive a much smaller share of the retirement income than the former spouse of a longevity retiree who receives VA disability benefits. Under some circumstances, the former spouse of a medical retiree will receive no share at all.

How will a court address chapter 61 disability retirement benefits? Although *Mansell* dealt solely with the divisibility of VA benefits, its language appears broad enough to encompass situations arising under chapter 61. If *Mansell* forbids a court from dividing any part of a former service member's retirement income other than his or her "disposable retired pay," any income a medical retiree receives under chapter 61 that is calculated using his or her disability rating will be out of reach of the retiree's former spouse.

Civil Service Employment

Another offshoot of *Mansell* is the scenario in which a former soldier takes a civil service position after retiring from the military. The Dual Compensation Act⁴² requires a retired officer who takes a civil service position to accept a reduction in retired pay.⁴³ In pertinent part, the USFSPA defines disposable retired pay as total retired pay, minus amounts "deducted from the retired pay . . . as a result of a waiver of retired pay required by law . . . to receive compensation [for federal civil service] under Title 5."⁴⁴ Accordingly, *Mansell* suggests that, by taking a civil service job, a military retiree unwittingly or vindictively may convert his or her retired pay into an asset that his or her ex-spouse cannot claim.

One court already has reached this conclusion.⁴⁵ In *Moon v. Moon*, the Missouri Court of Appeals held, with obvious distaste, that it was powerless to divide the portion of a military retiree's retired pay that the retiree waived after taking employment with the Federal Aviation Administration.⁴⁶ The court acknowledged that this holding allowed the retiree unilaterally to alter the terms of the final property division, but stressed that it could not evade the conclusion that *Mansell* dictated this result.⁴⁷

³⁸See 10 U.S.C.A. §§ 1201-1221 (West 1983 & Supp. 1992).

³⁹*Id.* § 1201(3). This article describes only one simplified scenario. The statute fully describes qualifications for chapter 61 benefits.

⁴⁰In pertinent part, 10 U.S.C. § 1408(a)(4)(B) defines "disposable retired pay" as total monthly retired pay, minus amounts that "are deducted from the retired pay as a result of a waiver of retired pay required by law . . . to receive compensation under . . . Title 38."

⁴¹10 U.S.C.A. § 1408(a)(4)(C) (West Supp. 1992). Before Congress amended the USFSPA in 1986, the entire disability payment was subtracted from the calculation of "disposable retired pay." See 10 U.S.C. § 1408(a)(4) (1982), amended by Department of Defense Authorization Act, 1987, Pub. L. No. 99-661, § 644(a)(1), 100 Stat. 3817, 3887 (1986). Now, the calculation is based upon the higher of two separate calculations. For an excellent explanation of these calculations, see JA 274, *supra* note 10, app. C (explaining the calculation for a soldier who is medically retired at 16 years with a 30% disability and a base active duty salary of \$2000).

Stated simply, the first calculation multiplies the number of years of service by 2.5 (16 x 2.5 = 40). The result, expressed as a percentage, is multiplied by the monthly base pay. In this example, the calculation results in \$800 per month (40% x 2000 = \$800). The second calculation multiplies monthly base pay by the percentage of disability (2000 x 30% = \$600). The soldier receives the higher amount—in this case, \$800.

To determine "disposable retired pay," one must subtract the amount that would have been used in the second disability calculation (\$600) from the retiree's total disability pay (\$800). In the example described above, only \$200 actually would be considered "disposable retired pay."

⁴²Pub. L. No. 88-448, 78 Stat. 484 (1964) (codified as amended at scattered sections of titles 2, 5, 13, 15, 20, 22, 33, 36, 38, 42, and 50 U.S.C.).

⁴³See 5 U.S.C. § 5532 (1988). Under the Dual Compensation Act, a retiree may receive full pay from his or her current civil service position, but his or her retired pay must be reduced "to an annual rate equal to the first \$2,000 of the retired or retainer pay plus one-half of the remainder, if any." See *id.*

⁴⁴See 10 U.S.C.A. § 1408(a)(4) (West Supp. 1992).

⁴⁵*Moon v. Moon*, 795 S.W.2d 511 (E.D. Mo. 1990).

⁴⁶*Id.* at 514.

⁴⁷*Id.*

How can the former spouse of a military retiree solve the problems described above? An LAA should help the client to notify the divorce court of these problems. He or she also should look for alternatives to forestall the effects of this situation and should be prepared to discuss these options with the client.

One option is for the court to insert a clause in the judgment, allowing the court to reopen the case if the retiree attempts to hide assets from his or her former spouse. Although this approach could raise jurisdictional questions, it should discourage the retiree from attempting to frustrate the purpose of the property division.⁴⁸

A second alternative is to award more property to the retiree's former spouse to compensate for the retiree's expected reduction in retired pay. At least one jurisdiction has accepted this offset.⁴⁹ Courts in other jurisdictions, however, have refused to offset reduced retirement incomes, holding that the federal preemption doctrine prevented them from doing so.⁵⁰

The Supreme Court's decision in *Hisquierdo v. Hisquierdo*⁵¹ suggests that the latter view is correct. In dividing the Hisquierdos' marital property, a California court awarded Mrs. Hisquierdo an offset to compensate her for the loss of her interest in her husband's retirement benefits under the Railroad Retirement Act of 1974 (RRA).⁵² The Court reversed the award, stating that, because the RRA's benefits were not divisible, any offset would "upset the statutory balance and impair [the husband's] economic security just as surely as would a regular deduction from his benefit check."⁵³ One commentator later suggested that *Hisquierdo* prohibits an unequal division of assets only if the divorce court orders the

division to circumvent federal limitations on dividing benefits.⁵⁴ Nevertheless, *Hisquierdo* and subsequent state court decisions imply that seeking an offset may not be advisable.

A final option is to draft a clause awarding the retiree's former spouse portions of retired pay as alimony or child support, rather than a property settlement. *Mansell* apparently does not affect settlements for alimony or child support. The Supreme Court ruled in *Rose v. Rose*⁵⁵ that a divorce court may consider VA benefits in determining family support obligations.⁵⁶ The Supremacy Clause does not preclude state action under these circumstances because disability benefits are intended not only for veterans, but also for their families.⁵⁷ Congress also has expressed itself on this issue, enacting legislation that authorizes state courts to garnish a retiree's VA benefits to enforce family support orders.⁵⁸

Unfortunately, in some jurisdictions, state law does not recognize retired pay to be anything other than a property interest. Moreover, alimony or child support normally will terminate upon the occurrence of specific events, such as the supported spouse's remarriage or the emancipation of the supported child. The practitioner must examine state law carefully to see if this provision would be realistic.

Early Separation Incentives

Do *McCarty* or *Mansell* affect service members who take advantage of the early separation benefits generated by the 1992 National Defense Authorization Act (NDAA)?⁵⁹ Under these incentives, a service member who elects to leave active duty may select a voluntary separation incentive (VSI)—that is, a series of annual payments based upon years of service—or a lump-sum special separation benefit (SSB).⁶⁰ Both incen-

⁴⁸A discussion of the jurisdictional issues would exceed the scope of this article.

⁴⁹*Rothwell v. Rothwell*, 775 S.W.2d 888 (Tex. Ct. App. 1989).

⁵⁰*Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989); *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989).

⁵¹439 U.S. 572 (1979).

⁵²See generally 45 U.S.C. §§ 231-231s (1988).

⁵³*Hisquierdo*, 439 U.S. at 588.

⁵⁴TJAGSA Practice Note, *Mansell v. Mansell*, ARMY LAW., Jan. 1990, at 44, 45.

⁵⁵481 U.S. 619 (1987).

⁵⁶*Id.* at 634.

⁵⁷*Id.*

⁵⁸See 42 U.S.C. § 659 (1988).

⁵⁹National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, §§ 661-664, 105 Stat. 1290, 1394-99 (1991) (to be codified at 10 U.S.C. §§ 1174a-1175).

⁶⁰*Id.*

tives greatly exceed the benefit paid to a service member who is separated involuntarily.⁶¹ Although neither VSI, nor SSB, is a form of retired pay, LAAs undoubtedly will have to consider the application of the USFSPA to these benefits. How will a court view its ability to divide separation incentives—and how might it effect these divisions?

In *McCarty*, the Supreme Court essentially found that military retired pay is a personal entitlement of the military retiree.⁶² Accordingly, it held that a state court's attempts to divide retired pay as community property conflicted with the intent of Congress that this benefit should remain personal to the retiree.⁶³ Although *McCarty* dealt solely with retired pay, one could argue persuasively that a similar analysis should apply to VSI and SSB. Did Congress actually intend these separation incentives to be personal entitlements? Must a state court conclude that they are separate properties?

To determine whether state property division laws conflict with congressional intent regarding the federal separation scheme, the obvious starting point is the enabling legislation. The NDAA provides for a special separation benefits program.⁶⁴ It awards these benefits to service members without attempting to recognize the contributions of their spouses or families. Moreover, the NDAA states expressly that VSI payments are nontransferable.⁶⁵ An LAA representing a service member should argue that Congress intended these payments to remain the personal entitlement of the service member and that *McCarty* prohibits a court from dividing these assets.

The attorney for the spouse should respond that the benefits are proper subjects for property division. An examination of the NDAA's legislative history reveals that Congress enacted the legislation "because of [its] concern over the effect of strength reductions . . . on [service members] and their families."⁶⁶ Moreover, Congress specifically provided that a

VSI annuitant's family members may inherit his or her VSI payments upon the death of the annuitant.⁶⁷ This provision contrasts sharply with provisions governing retired pay, which invariably ceases upon the death of the retiree. Accordingly, one logically may conclude that separation incentives are more than the personal entitlements of service members and that *McCarty* would not preclude states courts from dividing these benefits in divorce settlements.

If *McCarty* does not bar state courts from dividing the new separation incentives, how are courts likely to view the divisions? To date, no appellate court has addressed this issue. Nevertheless, several community property states appear to have developed ready frameworks for analyses. For example, California courts have examined the divisibilities of severance pays in divorce settlements.⁶⁸ In *Kuzmiak v. Kuzmiak*, the husband was a twice-passed-over Air Force captain who had received a lump sum of \$30,000 in involuntary separation pay. At issue was whether this payment was compensation for past services or present compensation for loss of earnings. If characterized as compensation for past services, the payment would be community property. If characterized as present compensation for loss of future earnings, the payment would be separate property.⁶⁹

To answer this question, the court examined the congressional intent behind the separation statute. It concluded that the statute serves two purposes.⁷⁰ First, it helps a service member financially during his or her transition to private employment. Second, it compensates the individual for loss of future earnings. Accordingly, the court held that the severance pay was the separate property of the husband.⁷¹ The court, however, also noted that, because the husband had reenlisted after his separation as an officer, he soon would be entitled to receive retired pay at his enlisted rank. The separation statute required the federal government to recoup the

⁶¹ See *id.* Involuntary separation pay is limited to \$30,000, see 10 U.S.C. § 1174(d) (1988), but SSB could go as high as \$121,150 for a major with eighteen years' service, see U.S.C.A. § 1174a (b)(2) (West Supp. 1992). The latter calculation is based on the following formula: (15% of final base pay) x (12) x (number of years of service). A former service member's VSI payments are calculated as follows: (2.5% of final monthly base pay) x (12) x (number of years of service). See *id.* § 1175(e)(1). The annual payment "will be made for a period equal to the number of years that is equal to twice the number of years of service of the member." *Id.*

⁶² See *McCarty v. McCarty*, 453 U.S. 210, 228 (1981).

⁶³ *Id.* at 227.

⁶⁴ See generally Pub. L. No. 102-190, §§ 661-664, 105 Stat. at 1394-99 (1991).

⁶⁵ 10 U.S.C.A. § 1175(f) (West Supp. 1992). But see *id.* (providing that a former service member's VSI payments may be inherited).

⁶⁶ H.R. REP. NO. 311, 102d Cong., 1st Sess. 556 (1991), reprinted in 1991 U.S.C.C.A.N. 1042, 1112 (emphasis added).

⁶⁷ See 10 U.S.C.A. § 1175(f) (West Supp. 1992). No similar provisions exist for SSB payments.

⁶⁸ *Kuzmiak v. Kuzmiak*, 176 Cal. App. 3d 1152 (Ct. App. 1986), cert. denied, 479 U.S. 885 (1986).

⁶⁹ *Id.* at 1158.

⁷⁰ *Id.* at 1157.

⁷¹ *Id.*

\$30,000 Kuzmiak received as severance pay from any retirement benefits he eventually might receive. Consequently, the court ruled that Mrs. Kuzmiak retained an interest in her ex-husband's nonmatured longevity pension. It stated, "If a member reenlists after involuntary discharge and subsequently receives a longevity pension . . . the purposes of the separation pay have not been fulfilled . . . [Under these circumstances,] no reason for finding separation pay to be the member's separate property [exists]."⁷²

How will community property states approach division of the new separation incentives? The intent underlying the voluntary separation incentives seems similar to those underlying involuntary separation benefits—they ease a service member's transition into civilian life and compensate him or her for the loss of future earnings. Moreover, Congress hoped the incentives would provide service members with "fair[er] choice[s]" than facing involuntary separations.⁷³ Accordingly, VSI and SSB have all the earmarks of compensation for loss of future earnings. Under *Kuzmiak*, they could be considered separate property. An LAA, however, should advise a client seeking VSI or SSB that, if the client qualifies for retired pay after obtaining the incentive, the federal government may recoup the incentive and a community property state might consider part of the retired pay to be community property.⁷⁴ This warning may deter many soldiers from continuing their military careers in the Reserves.

Kuzmiak dealt with a lump-sum payment like SSB. How would the courts treat VSI annuities? Because the duration and the amounts of a service member's annual VSI payments derive from the annuitant's years of service,⁷⁵ VSI resembles a retirement package. Nevertheless, a court should find VSI to be a present compensation for the loss of future earnings—an approach similar to that adopted by the California Court of Appeals in *In re DeShurley*.⁷⁶ In *DeShurley*, the husband was entitled to receive a number of severance payments over several

years. The court looked at the nature of the payments, rather than the length of time over which they would be paid. Finding that the payments actually were intended to compensate the husband for a loss of future earnings, the court ruled that these payments were the husband's separate property.⁷⁷

Kuzmiak also dealt with the division of involuntary separation pay. What effect will the voluntary natures of the VSI and SSB elections have on divisions of community property? In *DeShurley*, the husband willingly chose to accept severance pay, rather than returning to his job and facing a possible later termination.⁷⁸ The court focused upon the absolute nature of the husband's right to receive severance pay. It found that, when an individual has taken a voluntary pay option only because the alternative prospects may have included a forced loss of work, the severance was not truly voluntary.⁷⁹

Like the separation pay option in *DeShurley*, VSI and SSB are not truly voluntary. Congress noted that the payments would give a "fair choice to personnel who would otherwise have no option but to face selection for involuntary separation, and to risk being separated at a point not of their own choosing."⁸⁰ Accordingly, under *DeShurley*, a divorce court should not characterize VSI or SSB payments as community property.

Would the result differ in an equitable distribution state? In those states, a court will examine the equities of the case to determine whether an asset should be considered marital property and—if so—who should receive it.⁸¹ Some courts already consider severance pay to be a marital asset. In *Brotman v. Brotman*,⁸² the Florida Court of Appeals noted that the principle of equitable distribution contemplates a fair division of the assets that both parties acquired during their marriage.⁸³ Accordingly, the court held that the severance pay that one spouse obtains during the marriage should be considered in

⁷²*Id.* at 1159.

⁷³H.R. REP. NO. 311, *supra* note 66, at 556, 1991 U.S.C.C.A.N. at 1112.

⁷⁴See *supra* text accompanying note 72.

⁷⁵See 10 U.S.C.A. § 1175(e)(1) (West Supp. 1992); *cf. supra* note 61.

⁷⁶207 Cal. App. 3d 992 (Ct. App. 1989).

⁷⁷*Id.* at 996.

⁷⁸*Id.* at 994.

⁷⁹*Id.* at 996.

⁸⁰H.R. REP. NO. 311, *supra* note 66, at 556, 1991 U.S.C.C.A.N. at 1112.

⁸¹See *supra* text accompanying note 2.

⁸²528 So. 2d 550 (Fla. Ct. App. 1988).

⁸³*Id.*

the property division.⁸⁴ Similarly, in *Dauner v. Dauner*,⁸⁵ the Kansas Court of Appeals held that a trial judge did not abuse his discretion when he included severance pay in his calculations of a parent's child support obligation.⁸⁶ These cases suggest that attorney advocacy typically will be the critical factor in a judge's decision on whether to divide VSI or SSB. If an attorney argues convincingly that a separation incentive must be divided to effect an equitable distribution, the court may be willing to include the incentive as a marital asset.

What is the bottom line for military practitioners? An LAA first must determine what the client wants from the property settlement. Can the parties agree to divide VSI or SSB payments, or do they want to fight over these assets? The LAA also must determine the law of the jurisdiction on this issue. In doing so, he or she should analogize VSI and SSB payments to severance pay. Finally, the LAA should advise the

client of the possible treatments of retired pay in community property states and of the risk that could arise if the soldier retires. Considering the substantial sums involved in VSI and SSB payments, these issues almost certainly will arise.

Conclusion

Legal assistance attorneys must be sensitive to the nuances of divorce settlements. The approaches suggested in this article reflect the decisions of courts in several states and may prevail as arguments in state divorce actions. At present, however, resolutions of these issues turn largely on advocacy. An LAA should advise clients of the possibilities and should await a response from the courts and Congress regarding the USFSPA.

⁸⁴*Id.* 766 P.2d 1297 (Kan. Ct. App. 1988).
⁸⁵766 P.2d 1297 (Kan. Ct. App. 1988).
⁸⁶*Id.*

Solid Waste Collection and Removal: A Messy Situation

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Introduction

Assume that you are a judge advocate assigned to Fort Arid—an Army installation with a military population of 10,000, situated entirely within the corporate limits of Sunspot, California. Despite its urban location, Fort Arid is a closed installation. It is surrounded by a high security fence, and guards at the gates restrict access to the post. The fort has a hospital, elementary and secondary schools, and its own police and fire departments. It receives no municipal services from Sunspot.

The current service contract for the collection and disposal of solid waste at Fort Arid will expire on 30 September 1993. The contracting officer recently issued an unrestricted invi-

tation for bids for a replacement contract. One day before the date set for receipt of bids, Ed's A-1 Trash Company (A-1) files a protest with the General Accounting Office (GAO). In this protest, it reveals that the Sunspot City Council, acting in accordance with Sunspot City Ordinance (SCO) 1.007, granted A-1 an exclusive municipal franchise for the collection and disposal of solid waste within Sunspot's corporate limits. This ordinance, enacted pursuant to California's solid waste management plan, prohibits occupants of the city from hiring any business other than the city's exclusive franchisee to collect and dispose of solid waste. A-1 maintains that this ordinance compels Fort Arid to use A-1's services. To support this assertion, it cites the Resources Conservation and Recovery Act (RCRA or Act),¹ placing particular emphasis on RCRA section 6001.²

¹Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

²*Id.* tit. II, § 6001, 90 Stat. at 2821 (codified as amended at 42 U.S.C. § 6961 (1988)).

The next day, the contracting officer receives and opens four bids. Maul-N-Haul, the incumbent contractor, is the low bidder, having bid \$200,000 for the base period and \$400,000 for two successive option years. A-1 is the high bidder. It bid \$550,000 for the base period and \$1.1 million for the option years. A-1 derived these bids from rates fixed by the Sunspot City Council. A-1's franchise agreement expressly requires it to charge these rates to all its customers.

The contracting officer comes to your office and asks you for advice. He wants to award the contract to the incumbent contractor. Maul-N-Haul not only is the low bidder, but also has provided Fort Arid with excellent service over the past three years. The installation never has dealt with A-1 and never has paid such high rates for waste removal.

The fact pattern described above is fictitious. Nevertheless, it is not atypical of the dilemmas that confront contracting officers who procure waste collection and disposal services for military installations. This article examines those dilemmas. It also discusses the interplay between the RCRA and various federal procurement statutes, regulations, and policies; reviews the legislative history of the RCRA; and describes opinions in which the GAO and the federal courts have addressed RCRA issues.

42 U.S.C. § 6961

The RCRA requires the United States to help state and local governments and interstate agencies to develop comprehensive solid waste management plans.³ These plans should improve methods of collecting, separating, and recovering solid waste and should ensure the safe disposal of nonrecoverable residues.⁴ The Act also directs federal activities to cooperate with state and regional waste management plans. The "federal facilities" section of the RCRA—codified at 42 U.S.C. § 6961—declares,

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . engaged in any activity resulting, or

which may result, in the disposal or management of solid or hazardous waste shall be subject to, and [shall] comply with, all Federal, State, interstate, and local requirements, both substantive and procedural, respecting control and abatement of solid waste . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.⁵

The GAO and the federal courts have struggled to determine whether an ordinance requiring residents to use an exclusive franchisee for solid waste collection and disposal is a "local requirement . . . respecting control and abatement of solid waste." They have adopted sharply differing views on this issue.

Case History

The GAO first addressed this question in *Monterey City Disposal Service, Inc.*⁶ Monterey City Disposal Service (MCDS) held an exclusive franchise for the collection and disposal of solid waste in Monterey, California. It protested the federal government's issuance of competitive solicitations for waste collection services at the Naval Postgraduate School, the Presidio of Monterey, and Fort Ord.⁷ It also filed suit in the United States District Court for the Northern District of California,⁸ which eventually issued a preliminary injunction forbidding the Army and the Navy from awarding the contracts and asking the GAO to render an expedited decision.⁹

The GAO ruled that the Army and Navy had to use the services of the exclusive franchisee.¹⁰ Examining the legislative history of section 6961, it concluded that Congress enacted that provision to compel federal agencies to "comply not only with federal controls on the disposal of waste, but also with state and local controls as if they were private citizens."¹¹ The GAO rejected the Government's argument that federal law required it to obtain waste disposal services competitively. Instead, it found that section 6961 expressly

³42 U.S.C. § 6902(1) (1988).

⁴*See id.*

⁵*Id.* § 6961.

⁶64 Comp. Gen. 813 (1985).

⁷*See id.*

⁸*Parola v. Weinberger*, No. C-85-20303WAI (N.D. Cal. Sept. 12, 1986), *aff'd*, 848 F.2d 956 (9th Cir. 1988).

⁹*Id.* slip op. at 4.

¹⁰*Monterey City Disposal Serv., Inc.*, 64 Comp. Gen. at 813.

¹¹*Id.* at 813-14.

requires a federal agency to acquire these services from an exclusive franchisee if a local government has imposed this requirement.¹²

Deferring to this opinion, the district court granted MCDS's motion for summary judgment and enjoined the federal government from awarding garbage collection contracts for the installations at Monterey to anyone other than MCDS.¹³ Refusing to rule that the RCRA requires federal agencies to comply only with local waste disposal requirements, the court expressly rejected the Government's claim that federal agencies may contract for waste collection with any business that complies with local waste disposal requirements.¹⁴ The Government appealed this decision to the United States Court of Appeals for the Ninth Circuit.¹⁵ The Ninth Circuit's decision is discussed later in this article.¹⁶

The GAO next dealt with this issue in *Solano Garbage Co.*¹⁷ The Solano Garbage Company (Solano) was the exclusive waste control franchisee for Fairfield, California. It protested the Air Force's competitive solicitation for refuse collection and disposal services at Travis Air Force Base (Travis),¹⁸ an installation located entirely within Fairfield's city limits. The Air Force responded that, as a major federal facility, Travis should be treated as a separately incorporated municipality. Accordingly, it argued that Travis did not have to use the city's exclusive franchisee for refuse collection.¹⁹

To support its position, the Air Force pointed to 40 C.F.R. § 255.33, a provision of the Environmental Protection Agency (EPA) solid waste management guidelines.²⁰ These guidelines,²¹ issued under the EPA's general rule-making authority,²² provide criteria for identifying areas that share common solid

waste management problems and for organizing them into "appropriate units for planning regional solid waste management services."²³ The guidelines also comprise the EPA's procedures for assigning to specific governmental agencies the responsibilities for developing and implementing solid waste management plans.²⁴

The EPA promulgated section 255.33 under the authority of 42 U.S.C. § 6961. Section 255.33 declares, "Major Federal facilities and Native American Reservations should be treated for the purpose of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official."²⁵ The Air Force contended that Travis was a "major federal facility"—the legal equivalent of an incorporated municipality. Noting that California's solid waste management plan delegates the responsibility for refuse collection to local governments, the Air Force argued that the GAO should allow Travis to arrange for its own refuse collection.²⁶ The GAO agreed. Although it acknowledged that 42 U.S.C. § 6961 directs federal agencies to comply with local waste control and abatement requirements, the GAO observed,

[To] interpret this requirement as a mandate that any federal facility located within the city limits of a municipality [must] use that municipality's exclusive franchisee for refuse collection services [is unreasonable]. Rather, when by virtue of its size and function a facility actually is a separate military community, as Travis is in this case, . . . it should be regarded as a separate municipality that is entitled to contract for its own refuse collection services.²⁷

¹²*Id.* at 815. The GAO also concluded that 10 U.S.C. § 2304(c)(5) authorized this action. See *id.*

¹³*Parola*, No. C-85-20303WAI, slip op. at 10.

¹⁴*Id.* slip op. at 7-8.

¹⁵*Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988).

¹⁶See *infra* notes 37-38 and accompanying text.

¹⁷66 Comp. Gen. 237 (1987).

¹⁸*Id.*

¹⁹*Id.* at 240.

²⁰*Id.* at 241.

²¹40 C.F.R. pt. 255 (1991).

²²42 U.S.C. § 6912(a)(1) (1988).

²³40 C.F.R. § 255.1 (1991).

²⁴*Id.*

²⁵See *id.* § 255.33.

²⁶*Solano Garbage Co.*, 66 Comp. Gen. at 241.

²⁷*Id.*

The GAO ruled that 40 C.F.R. § 255.33 clearly evinced the EPA's intent to treat major federal facilities as though they were incorporated municipalities.²⁸ The GAO then distinguished *Solano Garbage Co.* from *Monterey City Disposal Service, Inc.*, finding that the facilities in the latter case "clearly [were] not major federal facilities."²⁹

Several United States district courts in California subsequently adopted the "major federal facility" exception to section 6961. In *Waste Management of North America, Inc. v. Weinberger*,³⁰ the plaintiff sued to prevent the continued performance of a competitively awarded contract for refuse collection and disposal services at the Marine Corps Air Station at El Toro, California.³¹ The court granted summary judgment for the Government after finding that the air station was a major federal facility under 40 C.F.R. § 255.33 and concluding that the station should be treated as an incorporated municipality under state and local environmental laws.³² In *Carmel Marina Corp. v. Carlucci*,³³ the exclusive franchisee for solid waste disposal and hauling in the cities of Marina and Seaside, California, sued to compel the Army to use its services at Fort Ord.³⁴ In granting the Government's motion for summary judgment, the court specifically adopted the rationale the GAO expressed in *Solano Garbage Co.* Finding that Fort Ord is a major federal facility, the court concluded that the RCRA did not require the installation to hire the exclusive franchisee.³⁵

As mentioned above, the Government appealed from *Parola v. Weinberger*,³⁶ in which the United States District Court for the Northern District of California granted summary judgment for Monterey City Disposal Service. The Ninth Circuit affirmed the lower court's decision.³⁷ The court ruled that the RCRA's legislative history clearly shows that "local

regulations requiring the use of an exclusive franchise are 'requirements' if these regulations are part of the state waste management plan."³⁸ The court declined to consider whether the EPA guidelines exempt major federal facilities from the requirements of the RCRA.

The Ninth Circuit's decision in *Parola* did not discourage the GAO from applying the major federal facility exemption in waste disposal cases. In *Oakland Scavenger Co.*,³⁹ an exclusive franchisee protested the Coast Guard's issuance of a competitive solicitation for refuse collection and disposal services.⁴⁰ The GAO responded,

[T]he agency's solicitation of competitive bids in violation of the local . . . franchise agreement is proper . . . if [the] Coast Guard [installation] qualifies as a "major federal facility" under EPA guidelines, since it would then be treated as though it were a separate municipality entitled to contract for its own refuse collection services.⁴¹

Explaining its reliance on this reasoning, the GAO added,

[Although] 42 U.S.C. § 6961 requires . . . federal agencies [to] comply with local requirements respecting the control and abatement of solid waste, we think it is unreasonable to interpret this requirement as a mandate [compelling] any federal facility located within the city limits of a municipality [to] use that municipality's exclusive franchisee for refuse collection services.⁴²

²⁸*Id.* at 242.

²⁹*Id.*

³⁰No. CV-87-4329-DT (C.D. Cal. Sept. 28, 1987), *aff'd on other grounds*, 862 F.2d 1393 (9th Cir. 1988).

³¹*Id.* slip op. at 1.

³²*Id.* slip op. at 4.

³³No. C-87-20789-WAI (N.D. Cal. Apr. 20, 1988).

³⁴*Id.* slip op. at 1.

³⁵*Id.* slip op. at 2.

³⁶*Parola v. Weinberger*, No. C-85-20303WAI (N.D. Cal. Sept. 12, 1986), *aff'd*, 848 F.2d 956 (9th Cir. 1988).

³⁷*See Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988).

³⁸*Id.* at 962. Remarking that "42 U.S.C. § 6943(a) requires state plans to 'provide for . . . any combination of practices' to dispose of solid waste in an environmentally sound manner," the court stated that the "Monterey [o]rdinance . . . fits within the statutory framework [of] California's solid waste management plan." *See id.*

³⁹B-236685, 19 Dec. 1989, 89-2 CPD ¶ 565.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* (emphasis added).

Ultimately, the GAO sustained the protest, but only because it found that the Coast Guard installation was not a major federal facility.⁴³ It subsequently applied this logic in several other cases involving the federal government's alleged violations of section 6961.⁴⁴

The courts next examined this issue in *Solano Garbage Co. v. Cheney*.⁴⁵ As described above, Solano, the holder of the exclusive franchise for garbage collection services in Fairfield, California, sought to enjoin the Air Force from awarding a waste collection contract to another contractor.⁴⁶ The United States District Court for the Eastern District of California denied Solano's motion for a preliminary injunction. It found that 40 C.F.R. § 255.33 "represented an appropriate exercise by [the] EPA of its statutory mandate to promulgate guidelines" and that those guidelines were part of the California state plan.⁴⁷ Apparently concluding that the only unresolved issue was whether Travis actually was a "major federal facility," the court referred this question to a federal magistrate.

The magistrate filed his proposed findings and recommendations on 31 July 1991. He found, *inter alia*, that the EPA Administrator lacked authority to promulgate regulations exempting a federal agency from municipal regulations to which it was subject under the RCRA.⁴⁸ The district court adopted these findings in full. It granted Solano's motion for summary judgment, declared the original solicitation illegal, permanently enjoined performance under the contract the Air Force had awarded pursuant to that solicitation, and permanently enjoined the federal government from awarding future

garbage collection contracts for Travis to anyone other than Fairfield's exclusive franchisee.⁴⁹

The court acknowledged that its ruling conflicted with two unpublished district court decisions.⁵⁰ It noted, however, that the magisterial findings upon which it relied embodied cogent analyses of the RCRA's statutory construction and legislative history that neither unpublished opinion contained.⁵¹ The court also remarked that the unpublished decisions predated the Ninth Circuit's decision in *Parola*, in "which [that court] established the ground rules for analyzing an exclusive franchise case under [the] RCRA."⁵²

The *Solano Garbage Co.* decision does not appear to have affected the GAO. In *Concord Disposal, Inc.*,⁵³ the GAO denied a protest in which an exclusive franchisee contested the Navy's competitive solicitation for waste collection services at a naval weapons station in Concord, California. Observing that the weapons station "operates essentially as a separate self-controlled military installation," the GAO ruled that the station was a major federal facility and, therefore, was exempt from Concord's exclusive franchise requirement.⁵⁴

Supremacy Concerns

The Armed Services Procurement Act⁵⁵ declares that the Department of Defense (DOD) should acquire "property and services . . . in the most timely, economic, and efficient manner" possible.⁵⁶ In our hypothetical situation, acquiring services from A-1 clearly is not economical. Under what authority does Sunspot presume to dictate the manner in which the Army conducts a federal procurement?

⁴³*Id.*

⁴⁴See, e.g., *Bay View Refuse Serv.*, B-241579.2, 16 Apr. 1991, 91-1 CPD ¶ 377; *Oakland Scavenger Co.*, B241577, B-241584, 13 Feb. 1991, 91-1 CPD ¶ 166; *Waste Management of N. Am., Inc.*, B-241067, 18 Jan. 1991, 91-1 CPD ¶ 59. See generally *infra* notes 53-54 and accompanying text.

⁴⁵779 F. Supp. 477 (E.D. Cal. 1991).

⁴⁶*Id.*

⁴⁷*Id.* at 480.

⁴⁸*Id.* at 481.

⁴⁹*Id.* at 483.

⁵⁰See *Carmel Marina Corp. v. Carlucci*, No. C-87-20789-WAI (N.D. Cal. Apr. 20, 1988); *Waste Management of N. Am., Inc. v. Weinberger*, No. CV-87-4329-DT (C.D. Cal. Sept. 28, 1987), *aff'd on other grounds*, 862 F.2d 1393 (9th Cir. 1988).

⁵¹*Solano Garbage Co.*, 779 F. Supp. at 481.

⁵²*Id.*

⁵³B-246441, B-246441.2, July 15, 1992, 1992 WL 174424.

⁵⁴*Id.* at *3. The GAO rejected the rationale adopted in *Solano Garbage Co.*, citing *Carmel Marina Corp. v. Carlucci* and *Waste Management of North America, Inc. v. Weinberger* as persuasive contrary authority. See *id.* (citing *Carmel Marina Corp. v. Carlucci*, No. C-87-20789-WAI (N.D. Cal. Apr. 20, 1988); *Waste Management of N. Am., Inc. v. Weinberger*, No. CV-87-4329-DT (C.D. Cal. Sept. 28, 1987), *aff'd on other grounds*, 862 F.2d 1393 (9th Cir. 1988)).

⁵⁵Pub. L. No. 80-413, 62 Stat. 21 (1948) (codified as amended at 10 U.S.C. §§ 2301-2330 (1988)).

⁵⁶10 U.S.C. § 2301 (1988).

The Supremacy Clause of the United States Constitution provides that the laws of the United States are the "supreme law of the land."⁵⁷ Accordingly, when a state law conflicts with a federal statute, the state law must give way.⁵⁸ Moreover, no state may regulate a federal agency unless Congress expressly subjects that agency to state or local regulation.⁵⁹

The RCRA plainly requires federal agencies to comply with local procedural and substantive requirements governing the abatement and control of solid waste. The Act's legislative history strongly suggests that the RCRA's drafters specifically intended to clarify that point.

The House⁶⁰ and Senate⁶¹ reports on the RCRA comment on the widespread controversy over the scope of a federal facility's responsibility to comply with state environmental laws. In particular, the reports discuss the Supreme Court's interpretation of section 118 of the Clean Air Act Amendments of 1970⁶² in *Hancock v. Train*⁶³ and section 313 of the Water Pollution Control Act Amendments of 1972⁶⁴ in *Environmental Protection Agency v. California*.⁶⁵ The statutes at issue provide that federal facilities must comply with state air and water pollution management requirements to the same extent as nonfederal facilities. The Court, however, emphasized in each case that federal facilities must comply only with substantive state requirements, not procedural requirements.⁶⁶

Initially, the House and the Senate took different approaches to resolving this controversy. Drafters of House Bill 14,496

feared that permitting the states to regulate solid waste disposal on federal installations would lead to the creation of fifty state plans and fifty independent enforcement agencies.⁶⁷ Preferring to create a uniform standard for federal facilities, the drafters proposed to allow the federal government to retain complete sovereign immunity over activities on its installations.⁶⁸ Accordingly, section 601(a) of House Bill 14,496 provided, "[T]he Administrator [must] promulgate regulations [that] shall apply to any property, facility, or activity of the United States in lieu of such property, facility, or activity being subject to state or local law relating to the management of discarded materials."⁶⁹

The Senate drafters adopted a completely different plan. In their view, "solid waste is a problem best dealt with by states and local governments."⁷⁰ Accordingly, they proposed to subject federal facilities to state and local regulation.⁷¹ The report on Senate Bill 2150 remarked that, if enacted, the bill would require "[a]ll federal agencies . . . to comply with State and local controls on solid waste . . . disposal as if they were a private citizen [sic]. This includes compliance with all substantive and procedural requirements . . ."⁷²

Seeking to avoid the need for a conference, the House amended House Bill 14,496. Discussing these amendments, Representative Joe Skubitz stated that "we have adopted some provisions contained in the Senate bill which were not included in the House measure [F]ederal facilities will

⁵⁷U.S. CONST. art. VI, § 2.

⁵⁸*United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1963).

⁵⁹*Hancock v. Train*, 426 U.S. 167, 179 (1976); *Mayo v. United States*, 319 U.S. 441, 447 (1943). The fundamental importance of the principles shielding federal activities from local regulation dictates that "an authorization of state regulation [may] be found only . . . to the extent that . . . 'specific congressional action' . . . makes this authorization 'clear and unambiguous.'" *Hancock*, 426 U.S. at 179. At least one court has applied this principle to the attempts of a municipal government to regulate federal activities. See *Parola v. Weinberger*, 848 F.2d 956, 960 (9th Cir. 1988).

⁶⁰H.R. REP. NO. 1491, 94th Cong., 2d Sess. 45 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6283.

⁶¹S. REP. NO. 988, 94th Cong., 2d Sess. 24 (1976).

⁶²42 U.S.C. § 7418 (1988).

⁶³426 U.S. 167 (1976).

⁶⁴33 U.S.C. § 1323 (1988).

⁶⁵426 U.S. 200 (1976).

⁶⁶See *Hancock*, 426 U.S. at 198-99; *Environmental Protection Agency v. California*, 426 U.S. at 228; see also H.R. REP. NO. 1491, *supra* note 60, at 45, 1976 U.S.C.C.A.N. at 6283-84; S. REP. NO. 988, *supra* note 61, at 23-24.

⁶⁷See H.R. REP. NO. 1491, *supra* note 60, at 47-51, 1976 U.S.C.C.A.N. at 6286-89.

⁶⁸See *id.*

⁶⁹H.R. 14,496, 94th Cong., 2d Sess. (1976) (emphasis added).

⁷⁰122 CONG. REC. 21,403 (1976).

⁷¹See S. 2150, 94th Cong., 2d Sess. § 233 (1976).

⁷²S. REP. NO. 988, *supra* note 61, at 24 (emphasis added).

be subject to State law and regulation."⁷³ Noting that the House had adopted this important amendment, the Senate then passed Senate Bill 2150.⁷⁴ In enacting the RCRA, Congress undoubtedly intended to eschew any distinction between substantive and procedural state waste control standards. The Act requires federal facilities to comply with all "[s]tate . . . and local requirements . . . respecting control and abatement of solid waste." Accordingly, if Sunspot's exclusive franchise ordinance is such a requirement, Fort Arid must comply with the ordinance. Unfortunately, neither the Act, nor its legislative history, sheds much light on what actually constitutes a "requirement."

Requirements

Only rarely have courts attempted to define the term "requirements." In two unreported decisions, *Waste Management of North America, Inc. v. Weinberger*⁷⁵ and *Carmel Marina Corp. v. Carlucci*,⁷⁶ federal district courts granted summary judgments for the United States after concluding that the "major federal facilities" exception under 40 C.F.R. § 255.33 exempted DOD activities from the dictates of local ordinances. In each decision, the court presumably found that the exclusive franchise ordinance at issue was a "local requirement" within the meaning of section 6961; otherwise, the court would not have relied on the major federal facilities exception. Neither decision, however, actually analyzed the issue. On the other hand, in two reported decisions—*Parola v. Weinberger*⁷⁷ and *Solano Garbage Co. v. Cheney*⁷⁸—the courts addressed this issue explicitly, supporting their decisions with detailed analyses.

In *Parola*, the Ninth Circuit held that an exclusive franchise ordinance is a requirement if it is part of a state waste management plan.⁷⁹ The court analyzed the legislative history of the

RCRA closely, commenting on Congress's concerns over federal facility compliance with procedural requirements following the Supreme Court's decisions in *Hancock* and *Environmental Protection Agency v. California*.⁸⁰ It stated,

The history of the federal compliance controversy instructs us that the meaning of "requirement" cannot . . . be limited to substantive environmental standards—effluent and emissions levels, and the like—but must also include the procedural means by which those standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspections.⁸¹

The court also emphasized Congress's concern about the problems associated with the division among multiple jurisdictions of responsibility for solid waste collection and disposal in a single metropolitan area.⁸² The court opined that, in enacting section 6961, Congress contemplated the need for "exclusive, or unitary, solid waste disposal systems . . . at the local level."⁸³ Finally, the Ninth Circuit distinguished *Parola* from *California v. Walters*,⁸⁴ in which it had ruled that section 6961 "did not waive sovereign immunity [from] state criminal sanctions designed to enforce compliance with state waste disposal standards, permits, and reporting duties."⁸⁵ The court observed that *Walters* held only that the means by which a state enforces standards, permits, and reporting duties are not "requirements" within the meaning of section 6961. Conversely, it noted that a state's "means of implementing" environmental standards—that is, its permit and reporting systems—"clearly [are] state requirements." The court opined that an exclusive garbage collection service requirement resembles a permit requirement more closely than it does a criminal sanction.⁸⁶

⁷³122 CONG. REC. 32,599 (1976).

⁷⁴*Id.* at 33,817.

⁷⁵No. CV-87-4329-DT (C.D. Cal. Sept. 28, 1987), *aff'd on other grounds*, 862 F.2d 1393 (9th Cir. 1988).

⁷⁶No. C-87-20789-WAI (N.D. Cal. Apr. 20, 1988).

⁷⁷848 F.2d 956 (9th Cir. 1988).

⁷⁸779 F. Supp. 477 (E.D. Cal. 1991).

⁷⁹*Parola*, 862 F.2d at 962.

⁸⁰*Id.*

⁸¹*Id.* at 961.

⁸²*Id.* (noting that divisions of authority often produce unnecessary legal barriers to effective enforcement of environmental standards).

⁸³*Id.*

⁸⁴751 F.2d 977 (9th Cir. 1984).

⁸⁵*Id.* at 978.

⁸⁶*Parola*, 862 F.2d at 962 n.3.

In *Solano Garbage Co. v. Cheney*,⁸⁷ a federal district court recognized *Parola* as controlling authority in its examination of an exclusive franchise case under the RCRA. In adopting the findings and recommendations of a federal magistrate,⁸⁸ the court acknowledged that local regulations requiring the use of an exclusive garbage franchisee are RCRA "requirements [when] such regulations are part of the state waste management plan."⁸⁹

Federal courts have examined the scope of the RCRA's waiver of federal sovereign immunity in several other contexts, including criminal sanctions,⁹⁰ civil penalties,⁹¹ taxes,⁹² and damages.⁹³ As a general rule, the courts have construed the waiver narrowly.⁹⁴ With regard to civil penalties, the Supreme Court recently stated in *Department of Energy v. Ohio*,

Ohio and its *amici* stress the statutory objection of federal facilities to "all . . . requirements," which they would have us read as an explicit and unambiguous waiver of federal sovereign immunity from punitive fines. We, however, agree with the Tenth Circuit that "all . . . requirements" can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures.⁹⁵

The concept that "requirements" refers to substantive standards and the means for implementing those standards is not new. In *Florida Department of Environmental Regulation v. Silvex Corp.*,⁹⁶ a federal district court considered whether a Florida statute imposing strict liability for hazardous waste releases was a "requirement" within the meaning of section 6961. After examining the legislative history of the RCRA and case law interpreting other federal environmental statutes containing similar waiver language, the court concluded that judges and legislators alike had equated "requirements" with state objective regulations—that is, state pollution standards or limitations, compliance schedules, emission standards, and control requirements.⁹⁷ In *Colorado v. Department of the Army*,⁹⁸ another district court held that state regulations satisfy the term "requirements" used in section 6961 if they set forth "sufficiently specific and precise standards, subject to uniform application."⁹⁹ Similarly, in *New York Department of Environmental Conservation v. Department of Energy*,¹⁰⁰ the court held that the "requirements" mentioned in the RCRA relate only to the pollution standards a state might impose as part of its environmental programs.¹⁰¹

Arguably, an exclusive franchise ordinance does not meet this test. Congress enacted the RCRA to protect human health and the environment and to conserve valuable material and energy resources.¹⁰² A municipality will not promote this objective by forcing a federal agency to use the services of a particular trash collector if *any* collector that the federal

⁸⁷779 F. Supp. 477 (E.D. Cal. 1991).

⁸⁸See *supra* text accompanying note 48.

⁸⁹*Solano Garbage Co.*, 779 F. Supp. at 481.

⁹⁰See, e.g., *Walters*, 751 F.2d at 977.

⁹¹See, e.g., *Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992); *Mitzelfelt v. Department of the Air Force*, 903 F.2d 1293 (10th Cir. 1990); *United States v. Washington*, 872 F.2d 874 (9th Cir. 1989); *Maine v. Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988); *Meyer v. United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986).

⁹²See, e.g., *New York Dep't of Env'tl Conservation v. Department of Energy*, 772 F. Supp. 91 (N.D.N.Y. 1991).

⁹³See, e.g., *Smalls v. Environmental Protection Agency*, 683 F. Supp. 120 (E.D. Pa. 1988); *Florida Dep't of Env'tl Regulation v. Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985).

⁹⁴*Maine v. Department of the Navy*, 702 F. Supp. at 330; *Ohio v. Department of Energy*, 689 F. Supp. 760, 765 (S.D. Ohio 1988), *aff'd in part*, 904 F.2d 1059 (6th Cir. 1990), *rev'd and remanded*, 112 S. Ct. 1627 (1992).

⁹⁵*Department of Energy v. Ohio*, 112 S. Ct. at 1639-40 (quoting *Mitzelfelt*, 903 F.2d. at 1295).

⁹⁶*Silvex Corp.*, 606 F. Supp. at 163.

⁹⁷*Id.*

⁹⁸*Colorado*, 707 F. Supp. 1562 (D. Colo. 1989).

⁹⁹*Id.* at 1572.

¹⁰⁰772 F. Supp. 91 (N.D.N.Y. 1991).

¹⁰¹*Id.* at 97.

¹⁰²42 U.S.C. § 6902 (1988).

agency might choose competitively would have to comply with federal, state, and local solid waste management requirements. Accordingly, one might contend that an exclusive use requirement is not a substantive standard. In essence, this argument presumes that, in enacting the RCRA, Congress was concerned only with ensuring federal compliance with substantive standards, not the method by which federal agencies comply.

A federal court probably would not find this argument persuasive. Most courts addressing this issue would give the word "requirements" its usual and ordinary meaning. In that sense, SCO 1.007, which mandates the use of an exclusive hauler, is a requirement. Moreover, Congress clearly wished to avoid the problems that can arise when multiple jurisdictions share responsibility for solid waste collection and disposal within a single metropolitan area.¹⁰³ Accordingly, an argument that Congress was not concerned with the manner of federal compliance with environmental laws is unconvincing. Finally, in the few cases in which courts have addressed this question directly, the federal government has advanced similar arguments without success.

40 C.F.R. § 255.33

Assuming *arguendo* that an exclusive franchise ordinance is a "requirement" within the meaning of section 6961, one must determine whether 40 C.F.R. § 255.33 exempts major federal facilities from complying with the ordinance. Considered in light of previous GAO decisions, the facts provided in the hypothetical scenario suggest that the GAO would find Fort Arid to be a major federal facility. For the following reasons, however, it should conclude that 40 C.F.R. § 255.33 neither excuses, nor was intended to excuse, "major federal facilities" from the requirements of 42 U.S.C. § 6961.

In pertinent part, 40 C.F.R. § 255.33 provides, "Major Federal facilities and Native American Reservations should be treated for the purposes of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official."¹⁰⁴ The guidelines to which this provision refers appear in 40 C.F.R. part 255. The EPA promulgated these guidelines pursuant to a federal statute that directs the EPA to "identif[y] . . . areas [that] have common solid waste man-

agement problems and are appropriate units for planning regional solid waste management services."¹⁰⁵ The EPA evidently promulgated part 255 to help the states to develop regional solid waste management plans.

The EPA also designed its guidelines to help states to identify which agencies will carry out specific tasks.¹⁰⁶ Section 4006 of the RCRA¹⁰⁷ requires state officials and "appropriate elected officials of local governments" to determine which state, regional, or local agencies will regulate solid waste management activities under the state plan.¹⁰⁸ The EPA promulgated part 255 to help states to establish consultation processes that state and local officials could use in identifying regions for solid waste management programs and agencies to implement the state management plan.

In this context, the EPA guidelines require a state government to treat "major federal facilities" as if they were incorporated municipalities. The EPA evidently felt that the states should involve major federal facilities in these processes. Accordingly, it promulgated 40 C.F.R. § 255.33 to give each director or administrator of a major federal facility the status of "a locally elected official."

Section 255.33 must not be read in a vacuum. The EPA promulgated this provision to assist states to develop and implement state or regional solid waste management plans. Moreover, the legislative history of the RCRA and the Act itself reveal that Congress expected federal facilities to comply with state and local substantive and procedural requirements respecting control and abatement of solid waste. To assert that the EPA intended to provide federal facilities with a means to avoid complying with this federally mandated solid waste management process is ludicrous.

That the EPA has the authority to create such an exception for major federal facilities is equally doubtful. The pertinent federal statute allows exceptions to its general requirements only under extremely limited circumstances. It provides, "The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he [or she] determines it to be in the paramount interest of the United States to do so."¹⁰⁹ The statute authorizes no other exemption.¹¹⁰

¹⁰³H.R. REP. NO. 1491, *supra* note 60, at 76, 1976 U.S.C.C.A.N. at 6315.

¹⁰⁴40 C.F.R. § 255.33 (1991) (emphasis added).

¹⁰⁵See 42 U.S.C. § 6942(a) (1988).

¹⁰⁶See 40 C.F.R. § 255.1 (1991).

¹⁰⁷Pub. L. No. 94-580, tit. II, § 4006, 90 Stat. 2795, 2816-17 (1976) (codified as amended at 42 U.S.C. § 6946 (1988)).

¹⁰⁸See 42 U.S.C. § 6942(b) (1988).

¹⁰⁹See *id.* § 6961 (emphasis added).

¹¹⁰*Solano Garbage Co. v. Cheney*, 779 F. Supp. 477, 482 (E.D. Cal. 1991).

Fort Arid does not operate a solid waste management facility as that term is defined in the RCRA.¹¹¹ Rather, it is a facility engaged in an "activity resulting, or which may result, in the disposal or management of solid waste."¹¹² Consequently, the President has no authority to exempt Fort Arid from the requirements of SCO 1.007.¹¹³

The foregoing analysis suggests strongly that 40 C.F.R. § 255.33 cannot exempt a major federal facility from the obligation to comply with 42 U.S.C. § 6961. In future decisions, the GAO should reverse its current position and reject the major federal facilities exemption.

Competition Requirements

You now have informed the contracting officer at Fort Arid that, in your opinion, the installation must comply with SCO 1.007. The contracting officer then asks how he can comply with the ordinance without violating the federal statutory competition requirement.

The Competition in Contracting Act (CICA)¹¹⁴ generally requires federal agencies to procure property or services competitively.¹¹⁵ The head of an agency may use noncompetitive procedures only under certain limited circumstances.¹¹⁶ For example, an agency may use noncompetitive procedures when the property or service it seeks to acquire is available only from one responsible source and no other property or service will satisfy the agency's needs.¹¹⁷ Agencies often use this "sole source" exception to justify the acquisition of services from local franchised utilities.¹¹⁸ Although a federal agency is

not required as a matter of law to use a local franchised utility,¹¹⁹ the monopoly the local franchisee enjoys often will discourage competition for a federal contract. The competitor of a franchised utility almost never will be able to install the plant and equipment required to serve a single federal customer, provide service at competitive rates, and still make a profit.

Under certain circumstances, solid waste collection and disposal may be considered a utility service.¹²⁰ Only rarely, however, will a solid waste collector suffer the same disadvantages as a power company or telephone service when faced with a government-imposed monopoly. The relatively low capital investment required to provide the service often will allow independent garbage collectors to compete with an exclusive hauler, particularly at large military installations. Consequently, a federal agency normally cannot rely on the sole source exception to justify the noncompetitive award of a solid waste disposal contract.

The CICA does not require competition if another statute expressly authorizes or requires a federal facility to procure goods or services from a specified source.¹²¹ For example, DOD activities may not purchase electricity in any manner that is inconsistent with state law.¹²² This prohibition extends to buying power from sources other than state-designated electric utility franchises or from providers outside of service territories established pursuant to state law.¹²³ Arguably, the RCRA similarly requires facilities to procure services from specified sources. If so, the Fort Arid contracting officer could award the waste collection and removal contract to A-1 without violating the CICA.

¹¹¹The RCRA provides,

The term "solid waste management facility" includes—(A) any resource recovery system or component thereof, (B) any system, program, or facility for resource conservation, and (C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, . . . whether such facility is associated with facilities generating such wastes or otherwise.

See 42 U.S.C. § 6903(29) (1988).

¹¹²See *id.* § 6961.

¹¹³See *Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1048 (D.P.R. 1981).

¹¹⁴Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified in scattered sections of titles 10, 31, 40, and 41 U.S.C.).

¹¹⁵10 U.S.C. § 2301(a)(1) (1988).

¹¹⁶*Id.* § 2304(c).

¹¹⁷*Id.* § 2304(c)(1); see also GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 6.302-1 (25 Nov. 1991) [hereinafter FAR].

¹¹⁸FAR, *supra* note 117, at 6.302-1(b)(3).

¹¹⁹DEF'T OF DEFENSE, ARMED SERVICES PROCUREMENT REG. SUPP. 5, para. 55-103.2(a) (1 Oct. 1974) [hereinafter ASPR SUPP. 5].

¹²⁰FAR, *supra* note 117, at 8.301; see also ASPR SUPP. 5, *supra* note 119, para. 55-101.1.

¹²¹10 U.S.C. § 2304(c)(5) (1988); see also FAR 6.302-5.

¹²²H.R.J. Res. 375, Pub. L. No. 100-202, § 8093, 101 Stat. 1329-1, 1329-79 (1987).

¹²³See *id.* But see *West River Elec. Ass'n v. Black Hills Power & Light Co.*, 918 F.2d 713 (8th Cir. 1990).

Cost Impact

Any determination that a federal agency must comply with a local ordinance mandating the use of an exclusive hauler has obvious cost implications. The increased costs are particularly difficult to accept during a period of reduced military funding. The Government specifically raised this concern in its arguments before the GAO in *Monterey City Disposal Service, Inc.* The GAO responded that it might have shared the Government's concern had the Government represented the actual cost differential accurately.¹²⁴ The GAO also noted that MCDS's rates were nondiscriminatory, remarking that these rates were dictated by the MCDS's franchise agreement with the city and that they were no higher than the rates MCDS charged its other customers.¹²⁵ The GAO concluded that the rates were reasonable because they were subject to local government regulation and judicial review.¹²⁶

The DOD could attempt to alleviate the cost impacts of exclusive use requirements by persuading Congress to enact legislation allowing the DOD to acquire waste collection and disposal services competitively. This effort, however, almost certainly would fail. State and local governments would lobby vigorously against the passage of this legislation. Moreover, Congress has shown no sign that it would deviate from its position that federal agencies must comply with state and local controls on solid waste disposal to the same extent as private citizens.

¹²⁴ *Monterey City Disposal Serv., Inc.*, 64 Comp. Gen. 813, 815 (1985).

¹²⁵ *Id.*

¹²⁶ *Id.* The GAO's decision comports with DOD policy on acquiring utility services. The DOD normally complies with the policies and decisions of local regulatory bodies on matters such as rates if the rates in question are subject to judicial appeal through normal channels. ASPR SUPP. 5, *supra* note 119, para. 55-103.2(a).

Alternatively, DOD officials could take advantage of a military installation's status as a major federal facility under 40 C.F.R. § 255.33 to involve themselves in the state and regional waste management planning process. They then could seek to change existing plans by persuading local authorities to allow the installation to acquire waste control and disposal services competitively. State and local solid waste planners, however, probably would not approve such a measure unless they understood the needs and concerns of military installations and were convinced that the DOD and the state share a common objective—protecting human health and the environment.

Conclusion

Local ordinances mandating the use of an exclusive franchisee for the collection and disposal of solid waste apparently are "requirements," as that term is used in RCRA. Moreover, the EPA solid waste management guidelines do not exempt a major federal facility from complying with local regulations. Accordingly, a military installation must comply with an ordinance requiring it to use the services of an exclusive franchisee, unless Congress amends the RCRA or state officials promulgate an exception for federal facilities in their state waste management plan.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Note

UCMJ Article 121:

Friendly Borrowing Can Evolve into Criminal Taking

In *United States v. Jones*,¹ the Court of Military Appeals examined the conviction for wrongful appropriation of a

soldier who failed to return a borrowed automobile at an agreed-upon time. The accused argued that his guilty plea was improvident. The court disagreed, holding that the accused's admissions had established the requisite *mens rea* to support the plea.

Private Jones, a soldier assigned to the personnel control facility (PCF) at Fort Ord, California, was awaiting transfer to

¹ 35 M.J. 143 (C.M.A. 1992).

Fort Sill, Oklahoma, where he was to be placed on involuntary excess leave. He obtained a pass to move some personal belongings that he had stored at a friend's house in the nearby town of Salinas.² To move his property, Jones borrowed another soldier's car. Jones and the owner of the car were friends, and the owner had allowed Jones to use the car before.³

When Jones took the car, he promised to return it later that day. Nevertheless, when the time came to return the car, he failed to do so. Finding that he still had things that he needed to move, he decided to keep the vehicle a while longer. Jones repeatedly attempted to contact the owner to let him know that Jones still needed to use the car.⁴ Unfortunately, the owner never received the messages Jones left with the unit charge of quarters. When Jones failed to return the car at the agreed-upon time, the owner became worried. The next morning, he reported the car as stolen.

By this time, Jones was absent without leave. Despondent over his personal problems, as well as his approaching release from active duty, he had checked into a nearby hotel without returning to the PCF. The following day, Jones was apprehended by Salinas police.⁵

Jones pleaded guilty to charges of absence without leave and wrongful appropriation of the automobile. Responding to the military judge's questions at the providence inquiry, he acknowledged that he had agreed to return the vehicle at an appointed time and that he had kept it past that time without the owner's permission. Eventually, Jones also stated that he had intended to keep the car only temporarily and agreed that, by keeping the car, he had deprived the owner of its use and benefit. During sentencing, the owner testified that he would not have reported the vehicle as stolen if he had talked with Jones. Jones also asserted in an unsworn statement that his

extended borrowing of the car had not been motivated by bad intentions, adding that he believed that the owner would have allowed Jones to keep the car longer if he had received Jones's messages.⁶

In deciding against Jones, the Court of Military Appeals made four specific findings. First, the court held that the existence of a "friendly relationship" between Jones and the car's owner "did not itself preclude findings of guilty to wrongful appropriation."⁷ Second, the court found that Jones's unilateral decision to extend the loan period "did not somehow render his actions not wrongful."⁸ In the court's view, Jones "deliberately breached" his agreement with his friend.⁹ Jones's "[i]neffective notice of this trespass only exacerbated its wrongfulness."¹⁰ Third, Jones's guilty plea admissions "established the requisite *mens rea* for the crime of wrongful appropriation."¹¹ Finally, the owner's sentencing testimony—which the court termed "post-offense speculation"—was "totally irrelevant to [Jones's] guilt."¹² Significantly, the court observed that Jones could have contested the charge on an implied-consent theory, had Jones not established in his guilty plea that he had committed an offense.¹³ The court emphasized that, because Jones had deprived the Government of the opportunity to rebut the implied consent defense when he entered the guilty plea, he could not raise the defense at sentencing.¹⁴

In his dissent, Judge Wiss pointed out that the Government must establish that an accused has committed a criminal taking before the accused may be found guilty of a wrongful appropriation. The "mere borrowing of an article of property without the prior consent of the owner" does not amount to a violation of Uniform Code of Military Justice (UCMJ) article 121.¹⁵ Judge Wiss opined that Jones's case reflected the same "communication breakdown" that existed in *United States v.*

²*Id.* at 144.

³*Id.* at 145.

⁴*Id.* at 144.

⁵*Id.* at 145.

⁶*Id.* at 145.

⁷*Id.* at 146 (citing *United States v. Johnson*, 17 M.J. 73 (C.M.A. 1983)).

⁸*Id.* (citing *United States v. Norris*, 8 C.M.R. 36 (1953)).

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 147 (citing *United States v. Hayes*, 25 C.M.R. 131 (1958)).

*Harville*¹⁶—a case in which the Court of Military Appeals found the evidence insufficient to sustain the appellant's conviction for wrongful appropriation.¹⁷ Judge Wiss concluded that, "if this [communication breakdown], as a matter of law, is criminal intent, then most of America belongs behind bars."¹⁸

The clear message from the Court of Military Appeals is that an accused's admissions in a guilty plea will establish the requisite criminal intent when the Government has alleged that a borrowing was wrongful. Unless the owner of the property expressly authorized the borrower to retain possession of the property indefinitely, the borrower risks violating UCMJ article 121 by failing to return the property on time. Even if this interpretation actually does not reflect the intentions underlying article 121, *Jones* reveals that an accused who declines to contest the Government's allegations and fails to argue that the facts and circumstances of his or her case prove the existence of implied consent cannot later attack the sufficiency of the evidence leading to his or her conviction. If an accused can raise a plausible defense of implied consent, a trial defense counsel should advise the accused to contest the allegation on the merits, rather than simply argue at sentencing that the owner probably would have allowed the continued use of the property. Captain Turney.

Clerk of Court Notes

Court-Martial Processing Times

The table below shows the Army-wide average processing times for general courts-martial and bad-conduct discharge (BCD) special courts-martial for the fourth quarter of fiscal year (FY) 1992.

General Courts-Martial

	FY 1992/4th Qtr
Records received by Clerk of Court	271
Days from charging or restraint to sentence	57
Days from sentence to action	69
Days from action to dispatch	9
Days from dispatch to receipt by the Clerk	12

BCD Special Courts-Martial

FY 1992/4th Qtr

Records received by Clerk of Court	63
Days from charging or restraint to sentence	45
Days from sentence to action	63
Days from action to dispatch	5
Days from dispatch to receipt by the Clerk	7

Posttrial Processing Times

Increase Thirty-Seven Percent in Two Years

Court-martial processing time data for general courts-martial and BCD special courts-martial in FY 1992 reveal a sixteen-percent increase in posttrial processing times over the FY 1991 averages. This brings to thirty-seven percent the overall increase in processing times since FY 1990.

Pretrial processing times also increased. Processing times in FY 1992 were twenty percent longer than processing times in FY 1991 and thirty percent longer than processing times in FY 1990.

The increase in posttrial processing times was reflected in the many cases in which staff judge advocate's offices allowed three months or more to elapse from the conclusions of trials before providing the Army Court of Military Review with records of trial. In mid-October 1992, the records of trial for ninety-five general courts-martial and twenty-three BCD special courts-martial had not reached the Army appellate judiciary within ninety days after the cases had been tried. More than one-quarter of those cases had been tried more than six months earlier. By the time you read this note, measures will have been taken to reduce this deplorable backlog and to prevent its recurrence.

General Courts-Martial

	FY 1990	FY 1991	FY 1992
Records received by Clerk of Court	1558	1114	1156
Days from charging or restraint until sentence	43	46	53
Days from sentence to action	52	62	72
Days from action to dispatch	6	7	9
Days en route to the Clerk	9	10	11

¹⁶14 M.J. 270 (C.M.A. 1982).

¹⁷Judge Wiss explained that, in *Harville*, the accused testified in a contested case that he had believed that he had continuing permission to use his friend's car and that he had left her a note informing her of this continued use. *Jones*, 35 M.J. at 147. Like the car owner in *Jones's* case, *Harville's* friend never received this information and reported her car as missing. *See id.*

¹⁸*Id.* at 148.

BCD Special Courts-Martial

	FY 1990	FY 1991	FY 1992
Records received by Clerk of Court	458	350	316
Days from charging or restraint until sentence	30	33	42
Days from sentence to action	45	53	61
Days from action to dispatch	5	6	6
Days en route to the Clerk	9	9	8

Help for the Military Justice Section

Members of the Office of the Clerk of Court have noted an apparent increase in the number of basic mistakes being made in the posttrial processings of courts-martial whose records are received for appellate review. More often than not, a mistake will stem from the preparing office's unfamiliarity with the Rules for Courts-Martial¹⁹ or *Army Regulation 27-10*.²⁰ Unfortunately, any mistakes in compiling records of trial, drafting actions for a convening authority, or composing initial

¹⁹See MANUAL FOR COURTS-MARTIAL, United States, pt. II (1984).

²⁰See DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (22 Dec. 1989).

and supplementary promulgating orders that a trial counsel fails to correct before dispatching the record to the Clerk of Court necessarily must engage the attentions of appellate counsel and the Army Court of Military Review. This slows the appellate process for everyone and wastes precious judicial resources.

Although we can suggest no adequate substitute for reading the *Manual for Courts-Martial* and knowing the governing regulations, we have prepared a handbook entitled "The Clerk of Court's Notes on Post-Trial Administrative Processing of Courts-Martial," that should answer many questions. Copies were issued to staff judge advocates attending the 1992 Judge Advocate General Annual Continuing Legal Education Conference at The Judge Advocate General's School in October 1992. If your staff judge advocate did not attend that program, or—for shame—has not shared a copy of the handbook with your military justice section, call your usual contact in the Clerk of Court's Office to receive a copy by mail. If you do not have a usual contact at the Clerk's Office, you either do not need help or you need it more than you know. Just in case, call DSN 289-1638 or (703) 756-1638.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Note

Military Court Rejects "Usable Quantity" Requirement

In *United States v. Birbeck*,¹ the Air Force Court of Military Review affirmed the appellant's conviction for wrongful possession of cocaine. In doing so, the court rejected the appellant's argument that, to be convicted for wrongful possession under Uniform Code of Military Justice (UCMJ) article 112a,²

an accused must have possessed a "usable quantity"³ of a controlled substance.

Courts in a number of states recognize the usable quantity doctrine as a defense to wrongful possession of controlled substances.⁴ Two considerations support the application of this doctrine. First, a state legislature typically will prohibit controlled substances to curtail their adverse effects on society. Therefore, legislators arguably never intend to prohibit con-

¹35 M.J. 519 (A.F.C.M.R. 1992).

²UCMJ art. 112a (1988).

³A usable quantity of narcotics is an amount that is sufficient to produce the desired physiological effect. *United States v. Jeffers*, 524 F.2d 253 (7th Cir. 1975).

⁴See *State v. Murphy*, 570 P.2d 1070 (Ariz. 1977); *Harbison v. State*, 790 S.W.2d 146 (Ark. 1990); *People v. Leal*, 413 P.2d 665 (Cal. 1966); *Pelham v. State*, 298 S.W.2d 171 (Tex. Crim. App. 1957).

controlled substances in amounts that could not produce harmful effects. Second, in some instances, possession of a minute quantity of a controlled substance may be insufficient to imply knowing and intentional possession of the substance.⁵ Nevertheless, as the Air Force court pointed out in *Birbeck*, "the 'usable quantity' principle is not recognized in the United States district courts or in courts-martial."⁶

Senior Airman Billy R. Birbeck was involved in a traffic accident while driving his car on a highway near Travis Air Force Base, California. A city policeman who responded to the scene asked Birbeck to produce his driver's license. As Birbeck did so, he accidentally pulled a small paper "bindle" out of his wallet.⁷ The officer, "an experienced policeman, recognized the bindle as an item normally used for the carrying of illicit drugs."⁸ He asked Birbeck to let him see it. Upon examining the bindle, he discovered that it contained a small quantity of cocaine. The officer quickly apprehended Birbeck. A subsequent test by the Army's drug testing laboratory confirmed that the substance in the bindle was cocaine. Birbeck then was tried and convicted by a general court-martial for one specification of wrongful possession of cocaine.⁹

On appeal, Birbeck argued that, because he had been arrested in California, his case should have been governed by the substantive law of California. He then contended that the amount of cocaine in the bindle at the time of his arrest was merely residue—not a usable quantity of the drug. Finally, Birbeck pointed out that cocaine possession is illegal in California only if the possessor has a usable amount of the controlled substance.¹⁰

The Air Force court rejected Birbeck's claim that California law was outcome-determinative. The court correctly observed

that federal law governed the outcome of the case.¹¹ The court then set forth a lengthy list of prior decisions in which military and federal civilian courts have rejected the usable quantity principle.¹²

Defense counsel should not interpret *Birbeck* to be an absolute prohibition on the use of the usable quantity doctrine as a defense. Under the right circumstances, a defense counsel still could use this theory to benefit a client. For example, if an accused were prosecuted under UCMJ article 134¹³ for possession of a controlled substance in violation of an assimilated state statute and that state recognized the usable quantity doctrine, then the doctrine would provide a valid defense.¹⁴ Moreover, the defense still may use the logical argument that an infinitesimal amount of cocaine found in the accused's possession cannot prove beyond a reasonable doubt that the accused knew of the presence of the substance.¹⁵ Major Hunter.

Contract Law Note

GSBCA Adopts GAO Review Factors for "In-Scope" Modifications

The General Services Board of Contract Appeals (GSBCA) recently adopted the General Accounting Office's (GAO's) review criteria for contract modifications. The GSBCA's adoption of these criteria should help contracting officers by clarifying the process of determining whether a proposed modification is within the scope of a contract.

⁵*Jeffers*, 524 F.2d at 256.

⁶*Birbeck*, 35 M.J. at 521.

⁷A "bindle" is a small folded paper container, normally oblong, that frequently is used to conceal illicit drugs.

⁸*Birbeck*, 35 M.J. at 520.

⁹*Id.* at 520-21.

¹⁰*Id.* at 521.

¹¹*See id.* (citing *United States v. Blackston*, 940 F.2d 877 (3d Cir. 1991); *United States v. McNeese*, 901 F.2d 585 (7th Cir. 1990); *United States v. Jeffers*, 524 F.2d 253 (7th Cir. 1975); *United States v. Alvarez*, 27 C.M.R. 98 (C.M.A. 1958); *United States v. Nabors*, 27 C.M.R. 101 (C.M.A. 1958); *United States v. Gardner*, 29 M.J. 673, 675 (A.F.C.M.R. 1989); *United States v. Bennett*, 3 M.J. 903 (A.C.M.R. 1977); *United States v. Burns*, 37 C.M.R. 942 (A.F.B.R. 1967)).

¹³UCMJ art. 134 (1988).

¹⁴In pertinent part, the Assimilative Crimes Act provides:

Whoever within or upon any of the places now existing or hereinafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable if committed or omitted within the jurisdiction of the State . . . shall be guilty of a like offense and subject to a like punishment.

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

¹⁵*See Gardner*, 29 M.J. at 675.

The Competition in Contracting Act (CICA)¹⁶ requires a federal agency to use "full and open competition" when conducting a procurement for property or services.¹⁷ This requirement is subject only to limited exceptions.¹⁸

The competition requirement does not apply to a contract modification that is within the scope of an existing agreement.¹⁹ The government, however, may not avoid the CICA by ordering a modification that exceeds the scope of the original contract.²⁰ With the ever-tightening defense budget, one reasonably may expect government contractors to scrutinize any contract modification that will increase an existing contract price. Contractors undoubtedly will demand opportunities to bid on any new work that the government may procure.

Because the GAO considers contract modifications to be acts of contract administration, it generally will not consider a protest against a modification.²¹ Nevertheless, the GAO will consider a protest alleging that a modification exceeds the scope of the original contract and that the subject of the modification should be procured competitively.²² The GAO has exercised this jurisdiction for many years, and has enunciated specific review criteria that must be used to determine whether a modification is proper.²³

The GSBCA recently adopted the GAO's review criteria after deciding to hear protests against a proposed "out of scope" modification of an automatic data processing equipment contract.²⁴ In *Wittel, Inc.*,²⁵ the General Services Administration (GSA) modified its FTS2000 contract with American Tele-

phone & Telegraph Communications, Inc., (AT&T) to require the contractor to provide a new service called T-3.²⁶ The GSA claimed that T-3 service merely improved the T-1 service that AT&T already was providing. *Wittel, Inc.*, and an intervenor, MCI Telecommunications Corp. (MCI), protested, asserting that the T-3 service was an independent, severable service that exceeded the scope of the original contract. They argued that the GSA should have obtained the additional service through competitive procedures. The GSBCA agreed with the protesters.

In reaching its decision, the Board applied the four basic factors that the GAO used to analyze alleged "out-of-scope" changes in *Neil R. Gross & Co.*²⁷ It examined the degrees of change in the pricing of the service, the delivery schedule for the service, and the type of service the contractor would have to perform. It then considered whether the bidders and the incumbent contractor reasonably could have expected the changed work to be within the scope of the contract during the original competition.²⁸

According to the GSBCA, determinations that proposed modifications are, or are not, within the scopes of contracts are always "fact driven."²⁹ In the instant case, the Board found that the degree of change in the pricing of the service was significant, not only in amount—\$100 million—but also in method. The GSBCA remarked that the GSA and AT&T based the price change, not on the increased cost of performing the new T-3 service instead of the T-1 service, but on market prices for the T-3 service.³⁰ This approach revealed an

¹⁶41 U.S.C. § 253 (1988).

¹⁷*Id.* § 253(a)(1).

¹⁸*Id.*; see, e.g., *id.* § 253(b), (c), (g).

¹⁹GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 6.001(c) (Apr. 1, 1984) [hereinafter FAR]; see also *id.* at 43.201, 52.243-1 to 52.243-5 (authorizing contracting officers to make changes within the general scopes of government contracts).

²⁰See *Avtron Mfg., Inc.*, B-229972, May 16, 1988, 67 Comp. Gen. 404, 88-1 CPD ¶ 458; accord *Businessland, Inc.*, GSBCA No. 8586-P, 86-3 BCA ¶ 19,268.

²¹4 C.F.R. § 21.3(m)(1) (1992).

²²*Neil R. Gross & Co.*, B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212.

²³*Id.*; see also *American Air Filter Co.*, B-188408, Feb. 16, 1978, 57 Comp. Gen. 285, 78-1 CPD ¶ 136.

²⁴*Wittel, Inc.*, GSBCA No. 11857-P, 1992 BPD ¶ 201. The GSA probably will appeal this decision, basing this appeal not on the methodology the GSBCA applied, but on the conclusions it reached. See *AT&T Offers Alternative to T3 Lines*, GOV'T COMPUTER NEWS, Nov. 23, 1992, at 8.

²⁵*Wittel, Inc.*, GSBCA No. 11857-P, 1992 BPD ¶ 201.

²⁶T-3 is a dedicated telephone service that can send data and voice signals through fiber-optic cable at 45 million bits per second. *Id.* 1992 BPD ¶ 201, at 2.

²⁷*Neil R. Gross & Co.*, B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212.

²⁸*Wittel, Inc.*, GSBCA No. 11857-P, 1992 BPD ¶ 201, at 14.

²⁹*Id.*

³⁰*Id.* 1992 BPD ¶ 201, at 15.

apparent agreement between AT&T and the GSA that the T-3 service would provide work that the T-1 service could not provide. More significantly, the GSBGA found that the bidders on the original contract could not have reasonably believed that T-3 work was within the scope of work because the agency specifically rejected proposals to provide T-3 service when the original contract was established.³¹

Although the GSBGA has used a similar analysis to review contract modifications in other protests,³² its decision in *Wiltel, Inc.* marks the first time that the Board has stated specifically that it would apply the same analysis as the GAO uses. The current consensus between the GAO and the GSBGA suggests that agency counsel should use this analysis whenever they advise their contracting clients about modifications or new procurements. Major Melvin.

International Law Note

The Role of the Military in Emerging Democracies

From 21 September to 26 September 1992, the European Community hosted a precedent-setting conference for the emerging democracies of Central and Eastern Europe. The Judge Advocate General's School's Center for Law and Military Operations (CLAMO) participated actively in the conference, presenting classes and hosting panel discussions. The Army War College and the Air Force and Naval Justice Schools also delivered presentations. The conference truly was a joint-service effort.

The theme of the conference was "The Role of the Military in a Democratic Society." Participating countries included the Baltic states of Lithuania, Latvia, and Estonia; the Central European states of Poland, Czechoslovakia, and Hungary; and the Balkan states of Bulgaria, Romania, and Albania. Each country sent two representatives—one a military officer and the other a civilian adviser to the country's ministry of defense. Active duty judge advocates attending the conference included Hungary's Judge Advocate General.

The first several days of the conference were designed to give the representatives a working knowledge of how the United States Armed Forces fit into the American system of government. Classes were given on the legal basis for our military, the civilian control of the military, and the rule of law within the constitutional system. Briefers then explained the specific role of lawyers in the American military, discussing the military-legislative relations system, the military justice system, and military personnel law.

To bring the instruction home to the participants, the United States briefers then described the United States Armed Forces' International Military Education Training (IMET) program and the new concept of "Extended IMET" (EIMET). Extended

IMET is a new program that permits United States military instructors to train civilian officials of foreign governments under certain circumstances. Under the original IMET programs, American military instructors could train only foreign military personnel. Not surprisingly, a number of Eastern and Central European representatives were interested in pursuing EIMET opportunities. The adoption of EIMET also has special significance for United States judge advocates—they now may be called on, not only to review programs of instruction, but also to travel to foreign countries to present the instruction themselves.

The representatives' genuine interest in the ongoing conference and in future interchanges became apparent when they were asked to describe the benefits they hoped to obtain from the conference. The senior participant from Albania set the tone for many of the statements that were to follow. He said, "Prior to the revolution, we had no military lawyers in the army. We do not know what a 'legal adviser' is because we have not had any in the past. We have nothing to begin with and are grateful for your help."

In the second part of the conference, the representatives travelled to the German Ministry of Defense in Bonn. The Germans made two presentations: one explaining the German legal system, and the other describing the cooperation between the German Ministry of Defense and the armed forces of Germany's North Atlantic Treaty Organization (NATO) allies. The visit to Bonn reemphasized the multilateral nature of the conference and of the future relations between East and West. The United States undoubtedly will play a major role in helping the "emerging democracies" develop, but several other countries in the NATO alliance also have vested interests in seeing the reforms of the fledgling democracies succeed. Moreover, although all the Western nations recognize the merits of democracy, market economies, freedom, security, and the rule of law, the means of achieving and maintaining these objectives will vary from country to country.

Discussing possible agendas for future meetings was interesting because these discussions offered insights into how the representatives of each nation saw their nation fitting into the Europe of the future. Several representatives of the Balkan states opined that morally and politically persuasive organizations, such as the Conference on Security and Cooperation in Europe, would be the best vehicles for achieving security throughout Europe. Representatives from the Central European states invariably named NATO as the best means for achieving security, evidently because they recognized the alliance's "enforcement" capability. Perhaps the most interesting response, however, was a statement by one of the Lithuanian representatives. When asked which organization he felt we should look to for future dialogue, he said,

We need time for the political situation to solidify. You speak of civilian control—well, we must wait and see which direction

³¹*Id.*

³²MCI Telecommunications Corp., GSBGA No. 10450-P, 90-2 BCA ¶ 22,735, 1990 BPD ¶ 55.

the political leaders will take us. It is not clear which countries we will organize with to form defense arrangements. So, first, we just need time to let things settle.

The last day of the conference was intended to show the representatives first-hand how the American military justice system works. They traveled to the Mannheim Law Center, where they saw a staff judge advocate's office, a courtroom, and—most important—the people who make the system work. They received briefings from military judges, several battalion commanders, and the branch office officer in charge. They also spoke with several soldiers who worked at the office. Next, the representatives traveled to the Coleman Confinement Facility, where they toured the prison and ate lunch in the prisoners' mess hall. Somewhat amazed at the prison conditions, one participant asked "How do the regular soldiers live?" This question prompted a spur-of-the-moment visit to a troop barracks to permit the representatives to compare the ordinary living quarters of United States soldiers with the confinement facility and with their own troops' billets. One representative described the contrast as "fantasy land." He also explained that, for the Baltic states, the greatest problem involving military units has centered on the Russians. Russian soldiers have been extremely slow to leave the Baltic region because virtually all of the Russians want to stay there. When they finally depart, the troops leave nothing of value behind. The representative claimed that many Russian soldiers actually have vandalized the facilities in which they once lived and worked, breaking toilets, windows, and sinks.

Another significant problem for the new independent states is that they have no money with which to pay their soldiers, repair troop billets, or attract new recruits. In many emerging democracies, the military cannot build all-volunteer forces, but must rely on poorly-motivated conscripts.

Overall, the conference was a huge success. Every representative spoke highly of the substance of the conference, as well as the format and social aspects of the meetings. The primary lesson taken from the conference was that a strong need exists for liaison between the nations of Eastern and Central Europe and the West, especially during these "formative" times for the new democracies. An idea implanted now may find its way quite easily into a constitution, a presidential directive, or a national regulation and may reap enormous benefits in the years to come. Each of these countries is reaching out, looking for examples on which to base its new governmental authority. If the United States offers no suggestions, these emerging democracies will look to other countries and other systems for guidance.

The Center for Law and Military Operations is seeking ways to offer assistance to countries on the road to democracy. Seek ways to interact with the world around you and—when you do—send an after-action report or a summary to the CLAMO for distribution to the field. Major Warner.

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-ADA-LA, Charlottesville, VA 22903-1781.

Tax Notes

Electronic Filing of Tax Returns

According to the Internal Revenue Service (IRS), electronic tax filing promotes faster and more accurate return processing. The IRS usually mails a refund within three weeks after receiving the return. A taxpayer can receive his or her refund even faster by electing to have the refund electronically deposited into a savings or checking account.

A legal assistance office that desires to file tax returns electronically must submit a *Form 8633*³³ to the IRS service center for the state in which the office is located. For example, an office located in Maryland would send its application to the IRS Andover Service Center in Massachusetts. An office that previously has participated in electronic tax filing does not have to submit a new *Form 8633* unless information contained in the original application has changed. Nevertheless, even a minor change, such as a change of area code, will necessitate the submission of a new application.

The IRS has published a handbook that may help LAAs to deal with electronic tax filing problems.³⁴ Revenue Procedure 91-69,³⁵ which governs electronic filing and describes the obligations of participants in the electronic tax filing program, is reprinted in this handbook.

The IRS has modified *Form 8453*,³⁶ the individual income tax declaration for taxpayers filing electronically, by adding a statement to the taxpayer's declaration in part III. This state-

³³Internal Revenue Serv., Form 8633, Application to Participate in the Electronic Filing Program (1992).

³⁴See INTERNAL REVENUE SERV., PUB. 1345, HANDBOOK FOR ELECTRONIC FILERS OF INDIVIDUAL INCOME TAX RETURNS (1992).

³⁵Rev. Proc. 91-69, 1991-52 IR.B. 18.

³⁶Internal Revenue Serv., Form 8453, Individual Income Tax Declaration for Electronic Filing (1992).

ment authorizes the IRS to disclose to the electronic return originator (ERO) the reason for a refund delay. The IRS has warned that the first acknowledgment files in January 1993 may take forty-eight hours to process. After the IRS ensures that the electronic filing system is functioning properly, the processing times for acknowledgments should decrease. The IRS also has warned that refund delays may occur if the name and social security number that a taxpayer records on his or her return do not match information provided by the Social Security Administration. Because of the increase in the electronic filings of fraudulent returns, the IRS suggests that an ERO obtain two forms of identification from a taxpayer before transmitting his or her electronic return. An ERO easily can verify a taxpayer's identity because the taxpayer must validate the information on the return and sign the *Form 8453* before the return is transmitted. Although this problem is not as widespread in legal assistance offices as it is in the civilian community, the IRS encourages all EROs to use verification procedures to safeguard against tax fraud. Major Webster.

Mortgage Interest Deduction

Many military homeowners itemize their tax deductions because their mortgage interest deductions exceed their standard deductions. A taxpayer's mortgage interest deduction is based on the amount the mortgage lender reports on the taxpayer's mortgage interest statement.³⁷ What happens when a financial institution charges the homeowner too much interest on a mortgage, then refunds the overcharge in a later tax year? The taxpayer probably will have to report the refund in the year in which he or she receives the refund.

The IRS recently ruled that a taxpayer who overpaid mortgage interest on an adjustable rate mortgage (ARM) could

deduct the interest in full in the year in which it was paid.³⁸ The IRS noted that the taxpayer had relied in good faith on the financial institution's computation of the interest. When filing his 1990 tax return, the taxpayer claimed \$10,000 as qualified residence interest.³⁹ After the taxpayer filed this return, the financial institution discovered that it had overcharged the taxpayer \$700 on the interest due on the ARM. It paid him \$750—an amount representing a refund of the \$700 overcharge and accumulated interest of fifty dollars. The taxpayer reported the \$750 payment as part of his gross income for 1991.

The Internal Revenue Code (IRC) allows a taxpayer to deduct qualified residence interest.⁴⁰ Generally, the deduction is limited to the actual amount of the taxpayer's liability.⁴¹ When the taxpayer pays a liability in good faith, however, the IRS will allow a deduction in the tax year of the payment if the taxpayer chooses to itemize it—even if the payment later is found to be erroneous.⁴² Having paid the interest in response to the financial institution's determination, the taxpayer in the instant case could deduct the full payment reported on his mortgage interest statement, although that payment actually exceeded the taxpayer's mortgage liability for 1990.

When the taxpayer filed his 1991 return, he reported the financial institution's overcharge and the interest it earned as part of his 1991 gross income. Although the fifty dollars in accumulated interest certainly had to be included in the taxpayer's gross income,⁴³ the need to report the full amount of the overcharge as income depended on whether the taxpayer received a tax benefit when he deducted the overpayment in 1990.⁴⁴ The amount of an interest overcharge reimbursement that is included in gross income is the smaller of the amount the taxpayer recovered, or the amount by which the taxpayer's itemized deductions in the year of the interest overcharge

³⁷ See Internal Revenue Serv., Form 1098, Mortgage Interest Statement (1992).

³⁸ See Revenue Ruling 92-91, 1992 I.R.B. 44. Significantly, the ARM qualified at all times as either acquisition indebtedness or home equity indebtedness with respect to a qualified residence of the taxpayer. Accordingly, all the interest the taxpayer paid on the ARM was qualified residence interest. See I.R.C. § 163(h)(3)(A) (Maxwell Macmillan 1992) (defining qualified residence interest as interest that has been paid or has accrued on acquisition indebtedness or home equity indebtedness with respect to any qualified residence of the taxpayer).

³⁹ The taxpayer's total itemized deductions for 1990 were \$15,000 (including \$10,000 in mortgage interest). The taxpayer could have taken a standard deduction of \$5450.

⁴⁰ See I.R.C. § 163(h)(3) (Maxwell Macmillan 1992).

⁴¹ See *Kenyon Instrument Co. v. Commissioner*, 16 T.C. 732 (1951).

⁴² See *Baltimore Transfer Co. v. Commissioner*, 8 T.C. 1 (1947).

⁴³ I.R.C. § 61(a)(4) (Maxwell Macmillan 1992).

⁴⁴ See Rev. Rul. 92-91, 1992 I.R.B. at 44; see also I.R.C. § 111 (Maxwell Macmillan 1992). The IRS noted that IRC section 111 partially codifies

the tax benefit rule, which generally requires the inclusion in income of amounts that were deducted by a taxpayer in a prior tax year to the extent those amounts generated a tax benefit to the taxpayer through a reduction in the amount of tax liability in the prior tax year. See generally *Estate of Block v. Commissioner*, 39 B.T.A. 338 (1939), *aff'd sub nom. Union Trust Co. v. Commissioner*, 111 F.2d 60 (7th Cir.), *cert. denied*, 311 U.S. 658 (1940). The tax benefit rule is applied when a subsequent event occurs which is fundamentally inconsistent with the premise on which an earlier deduction was based. The purpose of the rule is to achieve rough transactional parity within the framework of a tax system requiring annual calculations. See *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983), 1983-1 C.B. 50.

Rev. Rul. 92-91, 1992 I.R.B. at 44.

exceeded the standard deduction.⁴⁵ In this case, the taxpayer received a \$700 reimbursement in 1991 that was attributable to his 1990 mortgage interest deduction. His reimbursement of \$700 was less than \$9550—the amount by which the taxpayer's total itemized deductions in 1990 exceeded the standard deduction that he could have claimed. Accordingly, the taxpayer properly included the \$700 reimbursement in his 1991 gross income.⁴⁶ Major Hancock.

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.⁴⁷ Under that program,⁴⁸ a soldier who "initiated"⁴⁹ the adoption of a child between 1 October 1987 and 30 September 1990 could claim reimbursement of up to \$2000 for necessary adoption expenses.⁵⁰ A soldier who adopted more than one child could recover up to \$2000 per adoption, up to a maximum of \$5000 per calendar year.⁵¹ The test program expired at the end of fiscal year 1990. Consequently, 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 1993⁵² reinstated this program permanently for adoptions completed after 4 December 1992.⁵³ 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"⁵⁴ 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.⁵⁵ Any money a soldier receives under the program is taxable to the soldier as income.

To allow soldiers to recover qualified adoption costs for adoptions finalized between the expiration of the test program and the enactment of the permanent program, Congress enacted section 652 of the National Defense Authorization Act for Fiscal Year 1993.⁵⁶ Under this provision, soldiers have until 29 October 1993 to apply for reimbursement of expenses incurred between 1 October 1991 and 4 December 1992.⁵⁷

Legal assistance attorneys must alert soldiers to several significant limitations to the permanent program. A soldier may claim qualifying expenses only for the adoption of a child under the age of eighteen.⁵⁸ The travel expenses the soldier, or his or her spouse, incurs in completing the adoption cannot be reimbursed⁵⁹ and no payments of any kind are permitted before an adoption becomes final.⁶⁰ Finally, the expenses a soldier incurs by arranging a private adoption are not reim-

⁴⁵ See Rev. Rul. 92-91, 1992 L.R.B. at 44; see also L.R.C. § 111 (Maxwell Macmillan 1992).

⁴⁶ See Rev. Rul. 92-91, 1992 L.R.B. at 44. The IRS indicated that the tax treatment of the overcharge would have been the same even if the financial institution had credited the overage against the outstanding principal on the homeowner's mortgage. See *id.*

⁴⁷ Pub. L. No. 100-180, § 638, 101 Stat. 1019, 1106-08 (1987).

⁴⁸ See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 662, 103 Stat. 1352, 1465 (1989).

⁴⁹ 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.

⁵⁰ Pub. L. No. 100-180, § 638(c), 101 Stat. 1019, 1107 (1987).

⁵¹ *Id.*

⁵² Pub. L. No. 102-190, § 651, 105 Stat. 1290, 1385 (1991) (codified at 10 U.S.C.A. § 1052 (West Supp. 1992)).

⁵³ Although the program is supposed to be permanent, the House conference report calls for the GAO 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).

⁵⁴ 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).

⁵⁵ *Id.* § 1052(e).

⁵⁶ Pub. L. No. 102-484, § 652, 106 Stat. 2315, 2426

⁵⁷ *Id.* § 652(b), 106 Stat. at 2426.

⁵⁸ 10 U.S.C.A. § 1052(a) (West Supp. 1992).

⁵⁹ *Id.* § 1052(g)(1)(A).

⁶⁰ *Id.* § 1052(c).

bursable. The program will reimburse only the "reasonable and necessary expenses"⁶¹ a service member incurs in obtaining an adoption through a state or local agency, or through a non-profit 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, a soldier's commander must certify the soldier's claim for reimbursement. The soldier then must submit the claim to the local personnel office. After reviewing and certifying the claim, the personnel office will forward it to the Defense Finance and Accounting Service center in Cleveland, Ohio, for payment. The local office will not process or pay the claim.

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

Consumer Law Note

Billwatch—Senate Bill 316: Garnishment of Federal Pay

A note previously published in *The Army Lawyer*⁶² alerted LAAs to pending Senate Bill 316, which—if enacted—would allow courts to garnish federal wages in the same manner as

they now garnish nonfederal wages. On 24 September 1992, the Senate passed the bill without adopting any exceptions for military personnel.⁶³ Major Hostetter.

Survivor Benefits Note

Survivor Benefits: Recent Statutory Changes

On 29 October 1992, President Bush signed the Veterans' Benefits Act of 1992 (VBA).⁶⁴ The VBA significantly changes certain survivor benefits. The affected benefits include Dependency and Indemnity Compensation (DIC), Servicemen's Group Life Insurance (SGLI), Veteran's Group Life Insurance (VGLI), and Service Disabled Veterans' Insurance (SDVI).⁶⁵

The VBA has changed the method of calculating DIC payments to the surviving spouses of soldiers who have died on active duty, replacing payments based on the deceased's rank with flat monthly payments of \$750.⁶⁶ The surviving spouses of medically retired veterans will receive \$935.⁶⁷ The VBA also increased DIC payments made on behalf of a surviving child under the age of eighteen.⁶⁸

The VBA increased the amount of insurance available through SGLI. Effective 1 December 1992,⁶⁹ upon affirmative application, a soldier may increase his or her SGLI coverage to a maximum of \$200,000.⁷⁰ Because SGLI proceeds may be included in the decedent's gross taxable estate,⁷¹ this

⁶¹ See *id.* § 1052(g); *supra* note 54.

⁶² TJAGSA Practice Note, *Billwatch—House Bill 643 and Senate Bill 316: Garnishment of Federal Pay*, ARMY LAWYER, June 1992, at 48.

⁶³ 138 Cong. Rec. S14961-02 (daily ed. Sept. 24, 1992); see 1992 WL 237433.

⁶⁴ Pub. L. No. 102-568, 106 Stat. ____.

⁶⁵ In addition to changing the benefits listed in this note, the Veterans' Benefits Act amends statutory provisions governing Veteran's Mortgage Life Insurance; the Montgomery GI Bill; vocational rehabilitation and pension programs; job counseling, training, and placement services for veterans; and other veterans' programs. See *id.* §§ 204, 300-320, 400-405, 500-506, 600-606, 106 Stat. at ____.

⁶⁶ *Id.* §§ 101-104, 106 Stat. at _____. Under the previous plan, DIC payments ranged from \$616 per month for the surviving spouse of a private (E-1) to \$1580 per month for the surviving spouse of a general (O-10). See 38 U.S.C.A. § 1311(a) (West Supp. 1992). All payments to surviving spouses of soldiers who die after 31 December 1992 will be calculated under the new law. See Pub. L. No. 102-568, § 102, 106 Stat. at ____.

⁶⁷ See Pub. L. No. 102-568, § 102(a)(2), 106 Stat. at _____. The surviving spouse of a veteran who dies before 1 January 1993 will receive "compensation . . . based on the pay grade of such veteran . . . if that amount is greater than the total amount determined with respect to that veteran under paragraphs (1) and (2) [of section 102(a)]." See *id.* § 102(a)(3), 106 Stat. at ____.

⁶⁸ Before 1 January 1993, surviving children under the age of 18 received \$71 each per month. See 38 U.S.C.A. § 1311 (West Supp. 1992). That amount increased to \$100 on 1 January 1993, and will increase again to \$150 on 1 October 1993 and to \$200 on 1 October 1994. See Pub. L. No. 102-568, § 102(b), 106 Stat. at _____. Other aspects of the DIC entitlement, such as benefits payable to children between the ages of 18 and 23, were not affected by the new legislation. See 38 U.S.C.A. §§ 1300-1323 (West Supp. 1992), for further details on the DIC program.

⁶⁹ Pub. L. No. 102-568, § 205, 106 Stat. at ____.

⁷⁰ *Id.* § 201, 106 Stat. at ____.

⁷¹ Life insurance proceeds generally are includable in the gross taxable estate if the decedent was maintaining incidents of ownership—such as the right to change beneficiaries—in the policy when he or she died. See I.R.C. § 2033 (Maxwell Macmillan 1992). Although the payment of SGLI benefits "made to, or on account of, a beneficiary shall be exempt from taxation," 38 U.S.C.A. § 1970(g) (West 1991), this exemption extends only to income taxes—not to estate taxes. See *United States Trust Co. v. Helvering*, 307 U.S. 57 (1939) (interpreting a similar tax exemption provision in another government life insurance program).

change will increase the number of military personnel with estates subject to federal estate taxation, thereby multiplying the number of soldiers with complex will drafting and estate planning problems.⁷²

Maximum VGLI coverage also is increasing to \$200,000.⁷³ Moreover, VGLI has become *renewable* group term insurance. Policyholders no longer have to leave the VGLI program after five years, but may participate in the program indefinitely.⁷⁴

⁷²The current unified tax credit of \$192,800 protects the first \$600,000 of every estate from federal taxation. See I.R.C. §§ 2001, 2010 (Maxwell Macmillan 1992).

⁷³Pub. L. No. 102-568, § 202, 106 Stat. at ____.

⁷⁴*Id.*

⁷⁵38 U.S.C.A. § 1922 (West Supp. 1992).

⁷⁶*Id.*

⁷⁷For more detailed discussions of this issue, see TIAGSA Practice Note, *The Impact of Medical Retirement on Survivor Benefits*, ARMY LAW., Oct. 1992, at 43; Memorandum, Deputy Assistant Judge Advocate General, Dep't of Navy, subject: Retirement of Terminally-III Servicemembers (5 Mar. 1991).

⁷⁸Pub. L. No. 102-568, § 203, 106 Stat. at ____.

The SDVI program makes life insurance available to medically retired veterans who otherwise would be uninsurable.⁷⁵ Only these retirees are eligible for SDVI.⁷⁶ The availability of SDVI is an important factor that an LAA must consider when helping a terminally ill or injured soldier to decide whether to accept medical retirement or to die on active duty.⁷⁷ The new legislation doubles the available SDVI coverage, increasing it to \$20,000.⁷⁸ Major Peterson.

Claims Report

United States Army Claims Service

Household Goods Recovery Notes

Digests of Recent Comptroller General and GAO Decisions

Carrier recovery continues to be a vital part of the claims system. Diligent carrier recovery efforts may make the difference between paying soldiers' claims and running out of claims funds. Claims personnel at field offices can enhance carrier recovery efforts by familiarizing themselves with the responses of the Comptroller General and the General Accounting Office (GAO) to issues that carriers have raised on appeal. The Claims Service has compiled a digest of Comptroller General and GAO decisions to help its recovery branch to respond effectively to carrier appeals of offset actions. We hope that this digest also will assist field offices in their recovery efforts. The Claims Service will continue to publish regular updates as decisions are received. Colonel Bush.

Digests of Decisions

1. *Compromise Offers.* The Comptroller General has held that a compromise offer that an agency submits to a carrier to settle a loss or damage claim binds the agency only if the carrier actually accepts the offer. If the carrier rejects the offer, the agency may deduct the full value of the claim from the sum due to the carrier, even if this offset exceeds the amount of the proposed compromise. *American World Forwarders, Inc.*, B-247770, July 17, 1992.

2. *Department of Defense (DD) Form 1840/1840R.*

a. *Damage Description.* An agency can provide a carrier with adequate notice of loss or damage by promptly dispatching a *DD Form 1840R*, even if this form does not contain the specific or detailed exceptions that the agency later includes with the *DD Form 1843* claim that it submits to the carrier. See Z-2862589 (32), Aug. 31, 1992; Z-2167657, Aug. 14, 1985.

b. **Dispatch Versus Postmark Date.** The dispatch date on the *DD Form 1840R*—not the postmark date—is the controlling date for determining whether notification was timely. See *National Forwarding Co.*, B-238982, June 22, 1990; Z-223409-33, July 30, 1992.

c. **Errors.** Finding that a shipper's listing of "83" instead of "283" on a *DD Form 1840R* was an easy and understandable error, the GAO held that the carrier received timely notice of the damage. See Z-2862118-06, Aug. 3, 1992.

d. **Notice and Later Discovered Loss or Damage.** The *Joint Military-Industry Memorandum of Understanding on Loss and Damage* provides that a carrier must accept written documentation advising the carrier of later discovered losses or damages as evidence overcoming the presumption of correctness of the delivery receipt, if the agency dispatches this documentation no later than seventy-five days after the carrier has completed delivery. Similarly, the GAO found in one decision that a carrier received adequate notice, despite the shipper's failure to note the full extent of the damage on the *DD Form 1840R*, when the carrier received the entire claim—including the *DD Form 1843*, the *DD Form 1844*, and the repair estimate—within the seventy-five-day notification period. See Z-2867179, July 21, 1992; see also Z-2862118-06, Aug. 3, 1992 (although the shipper signed the receipt for delivery of an item, the agency's postdelivery notice to the carrier overcame the presumption of the delivery receipt's correctness).

3. Depreciation.

a. **Items in Storage.** The GAO adheres to the rule that depreciation is not charged against goods while they are stored. See *National Forwarding Co.*, B-238982, June 22, 1990; Z-2609168-53, Aug. 31, 1992; Z-2609168-40, Aug. 27, 1992; Z-2862806-18, July 14, 1992.

b. **Items Less than Six Months Old.** No depreciation is charged on an item less than six months old, unless it is an object that depreciates rapidly, such as an article of clothing. See Z-2862806-17, Aug. 24, 1992.

c. **Allowance List Depreciation Guide Versus the Joint Military-Industry Depreciation Guide.** The GAO will use the *Joint Military-Industry Depreciation Guide* if a carrier disputes the claims office's depreciation assessment. See Z-223409-27, July 21, 1992.

4. **Disputes of Fact Between Agency and Carrier.** The GAO normally will accept an agency's determination of fact, as noted in the written record, unless the carrier can show by a preponderance of the evidence that the determination is erroneous. When a carrier claims that a claim reflects preexisting damage (PED), rather than new damage, the GAO generally will uphold the agency's determination if the agency conducted its own inspection and verified the existence of the

damage and the carrier did not inspect. See Z-2862118 (4), Aug. 31, 1992; Z-2862118-06, Aug. 3, 1992; Z-2865948 (4), July 30, 1992.

5. **Freight Charges.** An agency denied a carrier's demand for freight charges after the shipper discovered that the carrier had damaged a chest and a book in the shipment. The agency denied the freight charges because the repair costs for the damaged items exceeded their replacement costs. The Comptroller General, however, ruled that a carrier is entitled to receive freight charges for transporting household goods (HHG) unless the goods are "destroyed" in transit. An item is "destroyed" only if it no longer exists in the form in which the shipper tendered it to the carrier, is damaged beyond repair or renewal, or is useless for the purpose for which it was intended. In the instant case, the chest and book did not meet the Comptroller General's definition of "destroyed," even though they could not be repaired for less than their replacement costs. See *Aalmode Transp. Corp.*, B-231357, Jan. 15, 1991.

6. **Inherent Vice.** In one appeal, a carrier argued that it was not liable for corrosive damage to a brass clock in a sealed carton because corrosion was an "inherent vice" of the brass. The GAO held that the "inherent vice" exception did not apply because the carrier had failed to show that the operation of natural laws actually had caused the damage. See Z-2609168-40, Aug. 27, 1992.

7. **Inspection Rights.** A carrier argued that a shipper had denied it its inspection rights by cleaning a sofa, couch, and love seat before the carrier could inspect those items. The shipper and the agency claimed that all three items had been soiled and spotted when the carrier delivered them. The GAO found for the agency, noting that the carrier's inability to inspect the damage had resulted more from the shipper's misunderstanding of the carrier's inspection rights than from an intentional denial of those rights. See Z-2861971 (4), July 14, 1992.

Practice Tip. When responding to a carrier's allegation that its inspection rights were denied, tailor your response to address the specific basis for the carrier's allegation. A carrier may argue that the shipper prevented it from inspecting the damaged items, that the items were repaired or cleaned before the inspection, or that the claims office failed to consider the inspection report in its adjudication.

8. **Insurance.** The government is not limited to recovering the amount paid to the shipper. A federal agency also may enter an offset against the carrier on behalf of the private insurers that paid the shipper's claim. See *Fogarty Van Lines*, B-235558.6, July 5, 1991; *Ensign Van Lines*, B-224827.4, Nov. 21, 1990; Z-2609168 (53), Aug. 31, 1992.

9. *Internal Damage.* The GAO generally will not find a carrier liable for "internal damage" to an item if no evidence suggests that the carrier damaged the item through mishandling, or if the problem otherwise appears unrelated to the move. The GAO does not believe that an agency reasonably may expect a carrier to document the operating condition of each item at tender. See, e.g., Z-2609168-40, Aug. 27, 1992; Z-2862118-05, Aug. 6, 1992; Z-2862118-04, July 30, 1992. The GAO will treat the cleaning and oiling of clocks as routine maintenance incident to ownership—not as repairs to PED performed incident to the repair of damage inflicted during the shipment. See Z-2862118-05, Aug. 6, 1992.

Practice Tip. When responding to a carrier's allegation of "internal damage," search through the files and the chronology sheet for any indication of external damage to the item or the carton in which it was packed, and for any statements or notations by the shipper about the circumstances surrounding the packing or delivery of the item. Note the age of the item and check the repair estimate for any explanation of how the damage occurred. If you believe that the evidence in the file is insufficient to support a determination of rough handling or external damage, contact the estimator to obtain more specifics about the nature of the damage. You should not feel limited by the lack of evidence in the file.

10. Inventory.

a. *Description of Items on Inventory.* Paragraphs 54a and 54c of the *Tender of Service* require a carrier to prepare an accurate and legible descriptive inventory of the HHG in a shipment. A carrier occasionally will allege that the item listed on the inventory is of lower or different quality than the item claimed. If a carrier does so, refer to the *Tender of Service*, which requires the carrier to ensure that the inventory accurately describes each item. You also should check the file for evidence of the value of the item.

b. *High-Value Items.* A shipper need not specify on the inventory that an item is "high-value." See Z-2865948 (4), July 30, 1992.

11. Missing Items.

a. *Items Missing from Sealed Cartons.* The GAO has held repeatedly that a carrier is not relieved of liability for missing items merely because it delivered the carton in which the items were packed in the same sealed condition that it was in when the carrier received the items. The carrier must show that the items were not removed from their carton while the carton was in the carrier's possession. See *Aalmode Transp. Corp.*, B-240350, Dec. 18, 1990; *Paul Arpin Van Lines*, B-213784, May 22, 1984; Z-2609168 (53), Aug. 31, 1992; Z-2867640, Aug. 8, 1992; Z-2609168-63, July 16, 1992.

b. *Missing Accessories, Parts, and Attachments.* A carrier can be held liable for missing parts and accessories that the shipper has not listed separately on the inventory, such as nuts

and bolts for metal racks or shelves, hoses and accessories for a vacuum cleaner, the lid for a trash can, or assembly hardware for a tea cart. The GAO maintains that these accessories and parts are essential for the uses of the devices to which they attach and that a shipper ordinarily would tender these items together. See Z-2862118-04, July 30, 1992; Z-2609168-63, July 16, 1992.

c. *Missing Items Not Listed on the Origin Inventory.* The GAO has held repeatedly that a shipper need not list an item of his or her HHG specifically on the inventory for the carrier to be held liable for the item's loss. The carrier may be held liable if other circumstances establish that the shipper actually tendered the item to the carrier and the carrier lost it in shipment. An agency can meet this requirement by showing that the inventory lists a tendered item with which one reasonably would believe that the missing item was packed—for example, a waterpick packed with "bathroom items," a camera packed with "storage closet items," a basket packed with "games," a plaque packed with books (because a plaque is flat, like a book), a vacuum cleaner brush packed with the vacuum, a video cassette recorder and computer programs packed with cartons labeled "tapes" and "miscellaneous," and framed pictures packed with "dried flowers" (because both are decorative items). See *Cartwright Van Lines*, B-241850.2, Oct. 21, 1991; *Fogarty Van Lines*, B-235558.4, Mar. 19, 1991; *Valdez Transfer, Inc.*, B-197911.8, Nov. 16, 1989; Z-2862118-05, Aug. 6, 1992; Z-2867496, July 27, 1992. Similarly, the agency can meet the requirement if the shipper describes in express detail circumstances surrounding the packing and tender of the missing item. See Z-2862118.05, Aug. 6, 1992.

Practice Tip. The GAO appears to be flexible in finding carrier liability for items missing from cartons that contained similar items. When responding to a carrier on this issue, consider the features that the missing item has in common with the other items in the carton in which the missing item was packed.

d. *Missing Items Picked Up from Nontemporary Storage (NTS).* The GAO has held that the delivering carrier must inspect all prepacked goods to ascertain the contents, and the condition of the contents, of the shipment. See Z-2862806-18, July 14, 1992. If the delivering carrier does not prepare a rider, the loss or damage is presumed to have occurred in the hands of the last bailee. In one case, a carrier failed to prepare a rider when it picked up a shipment from a storage facility because the cartons were sealed and the carrier saw no evidence of tampering. The GAO held the carrier liable for several items the shipper later discovered were missing from the cartons. See Z-2867640, Aug. 8, 1992; accord *Paul Arpin Van Lines*, B-213784, May 22, 1984.

Practice Tip. Under some circumstances, assuming that the delivering carrier did not cause the damage may seem logical—for example, when an item has suffered exten-

sive mildew damage, evidently because it was stored in a damp warehouse for a prolonged period, and the delivering carrier had the shipment for only a few days. Nevertheless, the Armed Forces' agreement with the carrier industry specifies that a delivering carrier must inspect the HHG and prepare a rider or accept the consequences of its failure to inspect. Many carriers consciously decide not to inspect for economic reasons; they do not wish to spend work hours on inspections. Under these circumstances, they should not be relieved of liability because claims personnel feel intuitively that the carriers could not have caused the damage. A carrier that fails to inspect and prepare a rider knowingly accepts the risk of liability.

12. **Preexisting Damage:** A carrier will not be relieved of liability by alleging PED if the record shows that (1) the damage was listed properly on the *DD Form 1840* or *DD Form 1840R*; (2) the damage supporting the claim is new or is more severe than the damage to the item before tender; (3) the form was dispatched promptly; and (4) the agency inspected the shipment to verify the damage. The agency's determination is even more convincing if the carrier failed to inspect the item or to submit its own estimates. See *Continental Van Lines*, B-215559, Oct. 23, 1984; Z-2862806-17, Aug. 24, 1992; Z-2862118-10, July 13, 1992; Z-223409-40, July 13, 1992.

a. **Items Pulled from NTS.** A delivering carrier that discovers substantial PED to items in a shipment when it pulls the shipment from NTS has an incentive to inspect the goods after delivery to ensure that it will not be held liable for the PED. See Z-2862118-06, Aug. 3, 1992.

b. **New Damage.** The GAO will find a carrier liable, and will allow the full cost of repair, if the damage listed at delivery differs from the damage listed on the inventory. This is especially true when an item suffered extensive damage, the carrier received timely notice of the damage, and the carrier did not submit estimates or furnish an inspection report. See Z-223409-40, July 13, 1992.

c. **Repair.** The carrier is liable for the full cost of repairs, even if some PED incidentally is repaired in the process. See *Interstate Van Lines*, B-197911.2, Sept. 9, 1988; Z-2862118-06, Aug. 3, 1992.

13. **Repair and Replacement Estimates.** The GAO will accept an agency's administrative determinations of fair market value and reasonable repair costs unless the carrier presents competent evidence that the costs are unreasonable in comparison with the local market price of the repair service or the value of the damaged item. See *Beach Van & Storage*, B-234877, Dec. 11, 1989; Z-2862118, Aug. 31, 1992; Z-2867005, July 24, 1992; Z-2861971 (4), July 14, 1992.

a. **Additional Repair.** A shipper filed an amended claim for an additional \$300 for repair to a chair. The shipper provided

a new estimate to support this amendment, explaining that the repairman had discovered structural damage to the chair when he began the repair. The carrier responded that the repairman would have noticed the structural problem if it actually had existed when he prepared the first estimate. The GAO held for the agency, finding that the carrier had not presented competent evidence showing that the agency's estimate was unreasonable. See *Beach Van & Storage*, B-234877, Dec. 11, 1989; Z-2866671-13, July 13, 1992.

b. **Reasonableness of Replacement Costs.** A carrier argued that the amount allowed for the missing piece of a nine-piece sectional sofa group should be reduced to reflect the value of the "going out of business" purchase price of the unit, rather than the unit's current replacement price. The GAO found for the agency, holding that the carrier did not present evidence showing that the replacement cost was excessive. See Z-2729037-61, Aug. 27, 1992. In another case, the carrier argued that an item's replacement cost was significantly higher than its original cost and that paying the shipper a sum equal to the higher cost unfairly enriched the shipper. The carrier offered to pay an amount based on the item's depreciated original cost. The GAO disagreed. It held that depreciations should be deducted from an item's replacement cost—not its original cost. See Z-2867005, July 24, 1992.

Practice Tip. Carriers often cogently point out the lack of substantiation in claims files for the replacement values of items over \$100. You always should attempt to verify the amount claimed by contacting local stores, checking store catalogs, or calling the manufacturers of the lost or damaged items. You can do this easily with brand items, especially audio-video items. This step will save the government the time and expense of responding to a carrier's appeal.

c. **Timeliness of Estimates.** The GAO upheld an agency's reliance on a repair estimate prepared for a damaged table nine months after the carrier delivered the table. Finding that the damage described on the repair estimate was more serious than the damage listed on the rider and the inventory, the GAO concluded that this additional damage could not have been inflicted under normal domestic conditions during that period. The GAO also noted that the carrier did not submit an estimate refuting the shipper's estimate. See Z-2862118-06, Aug. 3, 1992.

Practice Tip. Consider using the argument described above when a carrier complains that an item sustained damage between the time of delivery and the time of repair.

14. **Underoffset (Agency Error):** An agency can ask the GAO to charge the carrier for an item that the agency erroneously failed to offset. See Z-223409-33, July 30, 1992.

Captain Dillenseger.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office

Labor Relations Notes

Home Addresses—FPM Letter 711-164

On 17 September 1992, the Office of Personnel Management (OPM) issued *Federal Personnel Manual (FPM) Letter 711-164*.¹ In this letter, the OPM opined that the list of routine uses recently published in the *Federal Register*² permits a federal agency to disclose information from personnel records in its custody to a labor union "when [this information is] relevant and necessary to [the union's] duties of exclusive representation."³ Information is "relevant" if it "bears a traceable, logical and significant connection to the purpose to be served."⁴ It is "necessary" if "no adequate alternative means or sources for satisfying the union's information needs exist."⁵

The following guidelines for the release of home addresses and other types of information appear in *FPM Letter 711-164*:

Home Addresses:

Usually, the union will state that it seeks employee home addresses . . . to contact bargaining unit members at a location other than the worksite. However, the routine use does not establish a per se rule that home addresses of employees are available to their exclusive bargaining representatives upon request. By its terms, disclosure must be "necessary" for representation purposes.

If adequate alternative means exist for communicating with bargaining unit employees, disclosure of home addresses is not "necessary," and the routine use does not apply.

In examining whether adequate alternative means exist for contacting bargaining unit members, the agency should first determine whether *any* alternative means exist. There are a variety of recognized

alternatives, such as union bulletin boards, desk drops, delivery via an agency mail distribution system, meetings, or hand-billing in non-work areas frequented by employees. If alternative means exist, the agency must then evaluate their *adequacy*. An alternative means will usually be adequate if it permits information from the union to be available to bargaining unit employees. However, if an employee spends most of his or her time away from the workplace and, thus, is not reachable by the union through any existing alternative means of communication, release of [his or her] home address to a union representative may be permitted.

Other Types of Information:

Unions will often cite a generalized need for information about agency actions with respect to individual employees. For example, the union may ask for a list of employees who have been counseled or disciplined within a specific timeframe, stating that it needs the information in order to consider whether or not to file a grievance. Agencies must apply a two-step analysis in determining whether the requested information is releasable. First, the union must show that the information is "relevant" to carrying out its representational obligations. For example, a dispute may not be grievable under the parties' collective bargaining agreement and, if that is the case, information pertaining to it is not "relevant."

Second, if the agency determines that the information is "relevant," it must also determine that the information [actually] is . . . "necessary." The union must show that it has a particularized need for the information in a form that identifies specific individuals,

¹ FPM Letter 711-164, Acting Director, Office of Personnel Management, subject: Guidance for Agencies in Disclosing Information to Labor Organizations Certified as Exclusive Representatives Under 5 U.S.C. Chapter 71 (Sept. 17, 1992).

² 57 Fed. Reg. 154 (1992).

³ FPM Letter 711-164, *supra* note 1, at 1.

⁴ *Id.* at 2. The OPM also stated that "a recognized union's access to information from Privacy Act systems of records is not unconditional." *See id.*

⁵ *Id.*

and that its information needs cannot be satisfied through less intrusive means, such as by releasing records with personally-identifying information deleted.⁶

Mr. Meisel.

Sexual Preference Protection Negotiable

At present, neither sexual preference, nor sexual orientation, is a protected category under 5 C.F.R. part 1614⁷ or *Army Regulation 690-600*.⁸ Last year, however, the Federal Labor Relations Authority (FLRA) declared negotiable a proposal prohibiting discrimination based on sexual preference or orientation.⁹ The FLRA concluded that the absence of any law requiring an agency to refrain from discrimination based on sexual preference or orientation does not mean that the agency cannot agree to refrain from such discrimination. In *Department of Housing & Urban Development v. Federal Labor Relations Authority*,¹⁰ the Court of Appeals for the District of Columbia Circuit affirmed the FLRA's negotiability determination.

In its arguments before the court of appeals, the Department of Housing and Urban Development (HUD) contended that the provision was inconsistent with existing federal law. The HUD claimed that the provision would expand the appeal rights of probationary employees, allowing them to use grievance procedures to allege discrimination based on sexual orientation. Significantly, the Court of Appeals expressly declined to address this issue when it upheld the FLRA decision, having found that the HUD failed to raise that argument when it appeared before the FLRA. Mr. Meisel.

Retroactive Application of Collective Bargaining Agreement Provisions Is Negotiable

During negotiations on a collective bargaining agreement (CBA), an exclusive representative advanced a proposal stating, "This agreement will be effective [from] 10 Dec. '91 and will remain in effect until superseded by renegotiation of formal contract."¹¹ The agency rejected the proposal.¹² In its arguments before the FLRA, the union explained that the provision making the CBA retroactive would not take effect until after the agency head had reviewed the CBA pursuant to 5 U.S.C. § 7114(c).¹³ The FLRA held that a proposal to make CBA provisions retroactive upon the agency head's approval of the CBA is negotiable if the proposal otherwise comports with applicable laws, rules, and regulations.¹⁴ Mr. Meisel.

Equal Employment Opportunity Notes

Ninth Circuit Applies Civil Rights Act of 1991 Retroactively

In *Davis v. City & County of San Francisco*,¹⁵ municipal and county authorities appealed from a federal district court's award of expert witness's fees to the plaintiff in a case that was pending litigation when the Civil Rights Act of 1991¹⁶ entered into effect. Splitting with the courts of appeals for the Fifth, Sixth, Seventh, Eighth, Eleventh, and District of Columbia Circuits,¹⁷ the Ninth Circuit Court of Appeals ruled that the Act applies retroactively to litigation that was pending when the Act became law. The Army, however, continues to adhere to the Equal Employment Opportunity Commission's (EEOC's) position that the Act should be applied only prospectively.¹⁸ Mr. Meisel.

⁶*Id.* at 2-3.

⁷See 29 C.F.R. §§ 1614.101 to .607 (1992).

⁸DEP'T OF ARMY, REG. 690-600, CIVILIAN PERSONNEL: EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS (15 Sept. 1989).

⁹American Fed'n of Gov't Employees Nat'l Council of Hous. & Urban Dev. Locals, 39 F.L.R.A. 396 (1991). The proposal provided, in pertinent part, that "although not covered by Federal statute or EEOC regulation, Management and Union agree that no discrimination will be tolerated on the basis of sexual preference and/or orientation." See *id.* at 399.

¹⁰964 F.2d 1 (D.C. Cir. 1992).

¹¹See National Ass'n of Gov't Employees Local R14-52, 45 F.L.R.A. 910, 915 (1992).

¹²*Id.* at 910.

¹³*Id.* at 916.

¹⁴See *id.* at 917.

¹⁵976 F.2d 1536 (9th Cir. 1992).

¹⁶See Pub. L. No. 102-166, 105 Stat. 1071.

¹⁷*Baynes v. American Tel. & Tel. Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992).

¹⁸See Notice No. 915.002, Office of the General Counsel, Equal Employment Opportunity Comm'n, subject: Guidance on Application of Damage Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991).

**Loss of Security Clearance Because of Alcohol
and Drug Abuse Does Not Require Transfer
as a Reasonable Accommodation**

In *Guillot v. Department of the Navy*,¹⁹ the Court of Appeals for the Fourth Circuit ruled that the Navy did not subject a former employee to handicap discrimination when it removed him for losing his security clearance. Guillot, a ten-year Navy employee, lost his SCI access because he failed to disclose his alcohol and cocaine addictions on his clearance forms. The Navy then removed Guillot from federal service because he lacked the proper clearance for his position. Guillot appealed his termination, alleging that the Navy had terminated him because of his alleged handicaps of alcoholism and cocaine addiction. He claimed that the Navy should have transferred him to a position that did not require an SCI access. The Merit Systems Protection Board (MSPB), the EEOC, a federal district court, and the Fourth Circuit upheld the Navy's action.²⁰ Each noted that, under the Supreme Court's decision in *Department of Navy v. Egan*,²¹ a security clearance determination is not subject to MSPB or judicial review for alleged violations of section 501 of the Rehabilitation Act.²²

At this point, the question for labor counselors is what effect—if any—the EEOC's new regulations²³ will have on similar cases in the future. In pertinent part, these regulations provide that, when a federal employee becomes unable to perform the essential functions of his or her position because of a handicap, the employing agency must reassign the employee to a "funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation."²⁴ If such a position does not exist, or if transferring the employee to an appropriate position would impose an undue hardship on the agency, the agency must offer to reassign the employee to a vacant position at the highest available grade below the employee's current grade.²⁵ These obligations exist independently of any provision of the Rehabilitation Act.

Must an agency reassign an employee after revoking his or her security clearance? The new regulations apparently would not change the holding in *Guillot*, even though they impose an affirmative obligation on an agency to reassign handicapped individuals. When an agency removes a handicapped employee for losing his or her security clearance, this decision is based not on the employee's handicap, but on his or her lack of qualification to retain his or her position. Under *Egan*, the EEOC has no authority to review the merits of a qualification determination—in this case, the decision whether the employee is entitled to keep a security clearance. Accordingly, the new regulations should not oblige an Army activity to reassign an employee who loses his or her clearance. Mr. Meisel.

Civilian Personnel Law Notes

**Deduction of Outside Earnings Is a
Failure to Comply with an Interim Relief Order**

In *Mascarenas v. Department of Defense*,²⁶ an MSPB administrative judge (AJ) entered an interim relief order directing an agency to reinstate the appellant pending the outcome of the agency's petition for review. The agency declined to reinstate the appellant after deciding that his "return and presence would be unduly disruptive" to the workplace.²⁷ Instead, it placed the appellant on administrative leave, informing him that the agency would not pay him until he submitted information about his remuneration from other sources. Once the appellant revealed his outside income, his pay would resume, reduced by an amount equal to the appellant's income from outside employment.

The MSPB dismissed the agency's petition for review for failure to comply with interim relief regulations.²⁸ It noted that neither the applicable federal statute, nor MSPB regulations, provide for the deduction the agency sought to impose.²⁹ Mr. Meisel.

¹⁹970 F.2d 1320 (4th Cir. 1992).

²⁰See *id.* at 1323.

²¹484 U.S. 518 (1988).

²²See *Guillot*, 970 F.2d at 1323; see also 29 U.S.C. § 791(b) (1988).

²³See generally 29 C.F.R. §§ 1614.101 to .607 (1992).

²⁴*Id.* § 1614.203(g).

²⁵*Id.*

²⁶54 M.S.P.R. 303 (1992).

²⁷See *id.* at 307. See generally 5 U.S.C.A. § 7701(b)(2)(A)(ii)(II) (West Supp. 1992) (permitting agency to decline to reinstate employee pursuant to interim relief order to avoid undue disruption to the workplace).

²⁸*Mascarenas*, 54 M.S.P.R. at 308-09.

²⁹See 5 U.S.C.A. § 7701(b)(2) (West Supp. 1992); see also 5 C.F.R. §§ 1201.111(c), 1201.115(b) (1991).

Attorneys' Fees: Mitigation Isn't Always Winning!

A recent MSPB decision should remind labor counselors that an initial decision mitigating an agency action does *not* entitle an appellant automatically to attorneys' fees. An appellant before the MSPB is entitled to recover attorneys' fees if the following conditions arise: (1) he or she prevailed on the merits of the appeal; (2) the interest of justice warrants the award of attorneys' fees; and (3) the requested amount is reasonable and was incurred in the course of an attorney-client relationship.³⁰

In *Hutchcraft v. Department of Transportation*,³¹ the MSPB held that a successful appellant is not entitled to attorneys' fees when the AJ departs from precedent to rule that the appellant's removal was not required. Although it noted that the interest of justice generally will warrant an award of attorneys' fees when an AJ mitigates an appellant's penalty, the MSPB stressed that, in the instant case, the appellant did not show that the agency knew or should have known that removal was unreasonable. Consequently, the MSPB held that an award of attorneys' fees was not needed to promote the interest of justice. Mr. Meisel.

Practice Pointer

General Schedule Employees Are NOT Eligible for Environmental Differential Pay

In two recent settlement negotiations involving asbestos exposure, unions attempted to include general schedule (GS) employees with wage grade (WG) workers in determining environmental differential pay (EDP). In the first case, the union flatly asserted that a recent adverse arbitration decision obliged management to provide both GS and WG employees with EDP as compensation for asbestos exposure. General schedule employees, however, are *not* eligible for EDP or hazardous duty pay (HDP) for exposure to asbestos. This case

demonstrates that labor counselors should be extremely careful when working on EDP settlement agreements to ensure that GS employees are not included with WG workers.³²

In the second case, the union adopted a more subtle approach. A local union representative incorporated into a grievance settlement a clause that had been drafted by the national union. This clause stated,

Both parties recognize that current government regulations do not provide a legal basis for payment of hazardous duty pay for asbestos exposure to general schedule employees. If future law or regulations allow retroactive pay adjustment of general schedule employees, the union reserves the right to present the claims for the payment of general schedule employees listed at enclosure 2, based on the same terms as are being applied to the wage board employees.

This language centers around HDP—not EDP. Nevertheless, an agency should not agree to such a settlement. The pay that the government provides to a WG worker as compensation for his or her exposure to asbestos usually will reflect a level and duration of exposure that GS employees never experience. A GS employee should not receive the same compensation for hazardous duty as a WG worker if the GS employee is not exposed to the same degree of risk. Furthermore, an agency has no reason to extend its liability beyond the level required by current law. Doing so could create unforeseen future complications, such as Back Pay Act³³ interest on the retroactive payments owed by the government. Ms. Kettleon.

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your equal employment opportunity officer.

³⁰ See generally 5 C.F.R. § 1201.37(a) (1991); *Allen v. United States Postal Serv.*, 2 M.S.P.R. 420, 427 (1980).

³¹ 55 M.S.P.R. 138 (1992).

³² See *American Fed'n of Gov't Employees*, 18 F.L.R.A. 899 (1985); see also OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL, SUPP. 532-1, PAY ADMINISTRATION, para. S8-7 (Feb. 6, 1992).

³³ See generally Back Pay Act of 1966, Pub. L. No. 89-380, 80 Stat. 94.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

The Army Management Staff College

The Commandant, Army Management Staff College (AMSC) has selected one Army civilian attorney to attend

AMSC Class 93-1—the first AMSC class to be taught at the newly renovated facilities at Fort Belvoir, Virginia. The attorney selected is:

Wilsie Y. Minor, GS-13,
Headquarters, United States Army Personnel Command
Alexandria, Virginia

One of 186 civilians in a class of 200 students, Ms. Minor is the ninth Army civilian attorney selected to attend AMSC since the Personnel, Plans, and Training Office (PPTO) first solicited civilian attorneys to apply in the autumn of 1989.

Army Management Staff College is a fourteen-week resident course, in which Army leaders are trained in functional relationships, philosophies, and systems relevant to

the sustaining base environment. It provides civilian personnel with training analogous to instruction at the military intermediate service school level.

The Judge Advocate General encourages civilian attorneys to include AMSC as an integral part of their individual development plans. Local civilian personnel offices are responsible for providing civilian attorneys with applications and instructions. Interested personnel also may obtain information from PPTO about the next available AMSC class by contacting Mr. Roger Buckner at DSN: 225-1356 or comm'l (703) 695-1356.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The case summary presented here describes a civilian court's decision on a matter addressed in the *Army Rules of Professional Conduct for Lawyers*.¹ The note that follows uses several actual situations to focus on the nature of the lawyer-client relationship. These items are offered for Army lawyers to consider as they ponder difficult issues of professional discretion. Lieutenant Colonel Fegley.

Case Summary

Army Rule 1.2 (Scope of Representation) *Army Rule 1.1 (Competence)*

A lawyer shall abide by a client's decision whether to testify unless the lawyer knows that the testimony is perjurious.

In 1986, Buddy Nichols was tried for robbing a convenience store. Evidence linking him to the robbery was weak—the prosecution could produce only a questionable

eyewitness identification. Moreover, a defense witness, Donald Hannah, testified that he and another person—not the defendant—robbed the store. During the trial, Nichols and his defense counsel argued over Nichols's decision to testify. The attorney asserted that Nichols's case would be damaged if the jury learned of Nichols's felony record and serious drug problem.² He evidently was not concerned that Nichols would commit perjury to avoid disclosing his criminal record.³ The attorney then informed Nichols that he would seek to withdraw if Nichols insisted on testifying. Nichols ultimately declined to testify and was convicted. Because this was his fourth felony conviction, he was sentenced to life in prison without parole.

In a habeas corpus proceeding, a federal district court determined that Nichols chose not to testify because he feared losing counsel in the middle of his trial.⁴ The court concluded that the defense counsel had violated Nichols's right to testify and that Nichols had received ineffective assistance of counsel.⁵

The Court of Appeals for the Eleventh Circuit agreed.⁶ A defendant's fundamental right to testify on his or her own

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

²See *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992).

³See *id.* at 1553 n.7.

⁴*Nichols v. Butler*, No. 88-H-215-N (M.D. Ala. 1988), *aff'd*, 953 F.2d 1550 (11th Cir. 1992).

⁵*Id.*

⁶See *Nichols*, 953 F.2d at 1554.

behalf is personal and cannot be waived by the trial court or the defense counsel. Under *Strickland v. Washington*,⁷ the defense counsel's performance was both defective and prejudicial to the defendant. A defense counsel must protect a criminal defendant's right to testify by advising the defendant of his or her right to testify or to remain silent and of the implications of each option. In advising the defendant about this choice, the attorney must stress that the defendant ultimately must decide whether he or she will testify.

The court of appeals held that coercing a client into waiving his or her fundamental right to testify "goes beyond the proper bounds of advocacy."⁸ It found that, by doing so, Nichols's defense attorney ceased to function as "counsel" as guaranteed by the Sixth Amendment.⁹ The court noted that the testimony of a criminal defendant at his or her own trial is "unique and inherently significant."¹⁰ This was a close case. Had Nichols testified, he could have presented his own version of events, supported by Hannah's exculpatory testimony, and the jury could have weighed his credibility against that of the Government witness. The court of appeals found a reasonable probability that, but for the defense counsel's unprofessional conduct, the results in Nichols's trial would have been different.¹¹ Lieutenant Colonel Fegley.

Avoiding Misperceptions About The Existence of a Lawyer-Client Relationship

Several recent situations referred to the Standards of Conduct Office's Professional Responsibility Branch reveal that lay persons often are aware of the special status afforded the lawyer-client relationship, but frequently do not understand when a lawyer-client relationship actually is formed. Some lay persons assume that almost any time they converse with attorneys, they have entered into lawyer-client relationships and that the contents of their communications are privileged, or the attorneys thereafter are obliged to act on their behalfs.

An illustrative situation involved a lawyer supervising a section in a staff judge advocate's office and a legal clerk within his section. After noticing that the clerk seemed preoccupied and that his work performance had fallen off, the lawyer asked his subordinate if he was experiencing any problems that the lawyer could help to correct. The clerk initially was reluctant to talk to the lawyer, who was not a

legal assistance attorney (LAA) or a defense counsel. He spoke to the lawyer only after the lawyer agreed to "try to hold the information in a confidential manner just as [the attorney would] with . . . any other subordinate with a personal problem." The clerk concluded that he had a lawyer-client relationship with his supervisor. During their conversation, the clerk disclosed some improper conduct. When the lawyer subsequently related the substance of the conversation to the office noncommissioned officer-in-charge, the clerk complained that the attorney had violated the confidence afforded by their lawyer-client relationship.

Another well-known example is the case in which a retired officer was prosecuted for violating postemployment conflict of interest statutes. When the judge advocates who had briefed the retired officer on postemployment restrictions were called to testify against him, he objected on the ground that his discussions with them were protected by the lawyer-client privilege. To support his position, he testified that he had sought out the attorneys specifically to obtain legal advice and that the attorneys actually had interpreted the law for him. He also noted that he had filled out a "legal assistance record" card that stated that everything on the form would be confidential. The card described the retired officer as a "client" and the judge advocates as "[his] lawyers." The retired officer also testified that he did not expect the attorneys to use information that he had revealed in the interview after he left their office.

The attorneys—who functioned not only as LAAs, but also as standards of conduct counselors—had answered the officer's questions and had explained and interpreted statutes for him. They testified that they had begun their briefing with a statement that they represented the government and that they could explain statutory provisions to the officer, but that they could not represent him in any way. The district court concluded that the attorneys had been acting on behalf of the government and that they never formed attorney-client relationships with the retired officer.¹² The Court of Appeals for the Eleventh Circuit, however, disagreed, finding that the retired officer's communications to the attorneys were privileged.¹³

A third scenario arose when two soldiers pulled aside their command legal advisor and asked to speak to him in confidence. They then informed him of a perceived war crime that

⁷466 U.S. 668 (1984).

⁸*Nichols*, 953 F.2d at 1553.

⁹*Id.*

¹⁰*Id.* (citing *Green v. United States*, 365 U.S. 301, 304 (1961)).

¹¹*Id.* at 1554.

¹²*United States v. Schaltenbrand*, No. CR89-11-MAC-WDO, (M.D. Ga. 1989), *rev'd in part*, 930 F.2d 1554 (11th Cir.), *cert. denied*, 112 S. Ct. 640 (1991).

¹³*United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir.), *cert. denied*, 112 S. Ct. 640 (1991).

allegedly had been committed by their commander. The judge advocate reported the offense. When the commander learned that the two soldiers had originated the report, he immediately confronted them. They later complained that the attorney had violated the attorney-client privilege.

A final example concerns a specialist in the National Guard who was upset because he believed that his unit was failing to help him to enroll in a military school he wanted to attend. He wrote to the state Adjutant General's legal advisor, setting forth his problems with his unit, as well as several personal legal problems. In response, the attorney politely explained that, because of his responsibilities as legal advisor to the state's senior National Guard officer, he was not in a position to assist the soldier. In a lengthy letter, replete with references to legal authorities espousing the constitutional right to assistance of counsel, the soldier complained to the Standards of Conduct Office that "his" attorney was not doing an adequate job of representing *his* interests.

A common thread running through each of these situations is the client's perception—reasonable or unreasonable—that he had established a lawyer-client relationship with a judge advocate. As a general rule, principles of agency and contract law determine the point at which a lawyer-client relationship is established. The relationship essentially begins "when the client acknowledges the lawyer's capacity to act in his [or her] behalf and the lawyer agrees to act for the benefit of the client."¹⁴ For those of us who practice law in government service, however, the picture is not so clear. Service members quickly learn that, for the first times in their lives, they have easy access to free legal services. Because clients are entitled to legal services, attorneys have little or no say on when—or with whom—they will enter into a lawyer-client relationship. Moreover, commanders, staff members, and soldiers regularly interact with lawyers. Regardless of their duty positions, military lawyers rotate through jobs frequently. Consequently, soldiers often have difficulties distinguishing defense counsel and LAAs from prosecution, administrative law, operational law, and claims attorneys. Some soldiers may not appreciate these distinctions at all. To many soldiers, a lawyer

is a lawyer. When a soldier speaks to a lawyer, that lawyer becomes "the soldier's attorney." Compounding the difficulty of this situation, a line of decisions has adopted a subjective test that focuses on the client's belief to determine whether a lawyer-client relationship exists.¹⁵

Rule 1.13 of the *Army Rules of Professional Conduct for Lawyers*¹⁶ emphasizes that Army lawyers represent the Department of the Army, except when they are assigned to provide defense services or legal assistance to individuals. Army lawyers are cautioned not to form lawyer-client relationships unless specifically assigned or authorized to do so.¹⁷ The confidentiality afforded by the lawyer-client relationship ordinarily benefits the Army—except when an attorney is performing a defense or legal assistance function.

As an Army lawyer, how can you avoid a professional conduct complaint by an individual who erroneously believes that he or she is your client? The best way to do so is to practice law defensively. When individuals request "off-the-record" or "confidential" conversations, make sure that they do not intend to discuss matters with you as their attorney. Inform them that your conversations will not be protected by the lawyer-client privilege because of your status as an attorney for the Army. Explain to subordinates that, even though you are an attorney, your conversations with them will be solely in your capacity as their supervisor—not as their attorney. When asked for advice, suggest that the requestor might feel more comfortable speaking to someone with whom he or she can talk in confidence, protected by the lawyer-client privilege, or with someone in a position to pursue the would-be client's interests.

Numerous court cases and law review articles have addressed the formation of the lawyer-client relationship. We cannot expect lay persons to understand a concept that is not settled fully even in the legal community. As lawyers, we must be proactive and must ensure that those who seek our advice understand their relationships with us and do not act under false impressions. Lieutenant Colonel Fegley.

¹⁴ AMERICAN BAR ASSOCIATION, LAWYERS' MAN. ON PROF. CONDUCT 31:101 (BNA 1989).

¹⁵*Id.* at 31:103.

¹⁶See AR 27-26, *supra* note 1, rule 1.13.

¹⁷An Army attorney lacking authorization to perform legal assistance or trial defense duties must inform any individual who asks the attorney for legal advice that no attorney-client relationship shall exist between the soldier and the attorney. See *id.* rule 1.13(b).

Regimental News From the Desk of the Sergeant Major

Sergeant Major John A. Nicolai

Army Law Placement Service

On 15 January 1992, The Judge Advocate General established the Army Lawyer Placement Service to support the

Army Career Alumni Program (ACAP) during the downsizing of the Army. Initially, the program was offered only to judge advocates and legal administrators. Effective August 1992, however, enlisted personnel were included in the program and

its name was changed to the Army Law Placement Service (ALPS). In its present form, ALPS is intended to help eligible enlisted soldiers, judge advocates, and warrant officers to identify, prepare for, and obtain professional employment in the civilian sector in business and in local, state, and federal governments.

Enlisted soldiers may use ALPS if they have an approved retirement, are denied reenlistment, or are separated involuntarily based solely on downsizing criteria. The service will provide job search information, helping eligible individuals to identify employment prospects and to prepare for employment interviews.

Our own experiences, and those of the Reserve Officers Association, the National Law Placement Association, and the *Army Times*, show that finding a new career position typically takes a minimum of six to eighteen months. Timing, luck, and considerable effort are prerequisites to successful placement. The most successful job hunters start working on their resumes, *Standard Forms 171*, and networking at least twelve months before leaving active duty.

An eligible individual who desires ALPS assistance should prepare a resume. He or she also should complete a *Standard Form 171* if he or she is interested in federal employment. The applicant then should report the following information to ALPS:

- his or her employment availability date;
- his or her interest in state or federal employment;

- his or her geographic employment preference;
- his or her legal specialty skills, such as claims, legal assistance, administration, or criminal law;
- his or her unique qualifications, such as proficiency in a foreign language, prior service experience, or nonlegal technical skills; and
- his or her special family needs, such as proximity to a military medical center or availability of special services.

This service does not replace ACAP. Eligible service members should enroll in ACAP before applying to ALPS. Individuals interested in ALPS are encouraged to contact Master Sergeant Greg Powell of the Army Law Placement Service, Personnel, Plans, and Training Office, Office of The Judge Advocate General. He can be reached at DSN 225-8366/1353, (703) 695-8366/1353, or (800) 528-7122.

All members of the Judge Advocate General's Corps are requested to assist in this effort during the difficult transition process. Anyone with information about potential positions in the civilian sector is encouraged to contact ALPS. Now is the time for us to provide to one another the special service that we, as a Corps, have provided so abundantly to the rest of the Army.

Notes from the Field

The Effects of Foreign Military Service on United States Citizenship: A Response to *Assisting Soldiers in Immigration Matters*

In an article appearing in the April 1992 issue of *The Army Lawyer*, Captain Samuel Bettwy described the many immigration concerns that affect soldiers.¹ Captain Bettwy's article

was informative and articulate. Unfortunately, parts of his analysis of expatriation, which appeared in one of the final sections of the article,² were incorrect.

Captain Bettwy essentially defined expatriation as a *punishment* imposed upon an individual who has committed a statutorily defined expatriating act.³ This characterization is incorrect. The statutory authority Captain Bettwy gave for

¹ Samuel Bettwy, *Assisting Soldiers in Immigration Matters*, ARMY LAWYER, Apr. 1992, at 3.

² See *id.* at 17-18 ("Expatriation").

³ *Id.* at 17.

this proposition does not identify expatriation as a punishment.⁴ Moreover, the Supreme Court has ruled that the Eighth Amendment bars the federal government from punishing an individual by stripping him or her of American citizenship.⁵

Captain Bettwy offered no authority for his assertion that "[e]xpatriation occurs automatically . . . [and] does not have to be adjudged."⁶ The relevant statute actually assigns a burden of proof regarding the citizen's state of mind, evidently presupposing an adjudication before loss of citizenship.⁷ The Immigration and Naturalization Act (INA) presumes only that an act of expatriation was undertaken *willingly*; it does not relieve the government of its burden of proving that the citizen specifically intended the act to be a relinquishment of citizenship.⁸

Captain Bettwy interpreted 8 U.S.C. § 1481 as placing the burden of proof on the accused expatriate to show that no expatriating act took place or that the act did not embrace an intent to renounce citizenship.⁹ The statute, however, clearly states that "the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence."¹⁰ The usual claim of loss of citizenship, at least in the context in which Captain Bettwy has discussed it, would be raised, not by the accused expatriate,

but by the government. Accordingly, the Government would bear the burden of proof in an expatriation adjudication.¹¹

Captain Bettwy stated, "Congress has identified a United States citizen's voluntary service in a foreign army as an act of expatriation. The Supreme Court has upheld the constitutionality of this legislation."¹² On the contrary, enlisting in a foreign army does not strip an American of citizenship, as Supreme Court decisions, as well as congressional acts since 1967, clearly show.

The modern law of expatriation begins with the Nationality Act of 1940.¹³ That act provided for loss of citizenship as a consequence of naturalization in a foreign state, service in the armed forces or government of a foreign power, voting in a foreign election, commission of treason, or desertion from the Armed Forces of the United States.¹⁴ To this list, the Expatriation Act of 1954¹⁵ added participation in a rebellion or insurrection, engaging in seditious conspiracy, and advocating the violent overthrow of the government.¹⁶

At first, the Supreme Court found these statutes constitutional. In *Perez v. Brownell*,¹⁷ for example, it upheld the government's revocation of an individual's American citizenship for voting in a foreign election.¹⁸ The Court, however,

⁴See 8 U.S.C.A. § 1481 (West Supp. 1992). In pertinent part, the statute provides, "A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality." *Id.* § 1481(a).

⁵*Trop v. Dulles*, 356 U. S. 86, 101 (1957). "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." *Perkins v. Elg*, 307 U.S. 325, 334 (1939). See generally *FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES* 269 (1904); The President's Comm'n on Law Enforcement and Admin. of Justice, *The Collateral Consequences of a Criminal Conviction*, 23 *VAND. L. REV.* 929, 968 (1970) [hereinafter *Collateral Consequences*]; J.P. Jones, Comment, *Limiting Congressional Denationalization After Afroyim*, 17 *SAN DIEGO L. REV.* 121, 136 (1979).

⁶Bettwy, *supra* note 1, at 17.

⁷8 U.S.C.A. § 1481(b) (West Supp. 1992) ("Whenever the loss of United States nationality is put in issue in any action or proceeding . . . the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence").

⁸*Id.* ("Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily").

⁹Bettwy, *supra* note 1, at 17.

¹⁰8 U.S.C.A. § 1481(b) (West Supp. 1992); see *supra* note 7.

¹¹See *Vance v. Terrazas*, 444 U.S. 252 (1980).

¹²Bettwy, *supra* note 1, at 17 (citations omitted).

¹³See Pub. L. No. 76-853, §§ 401-410, 54 Stat. 1137, 1168-71, reenacted as the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 349-354, 66 Stat. 163, 267-72.

¹⁴See Nationality Act of 1940 § 401, 54 Stat. at 1168; see also Immigration and Nationality Act of 1952 § 349, 66 Stat. at 267.

¹⁵Pub. L. No. 83-772, 68 Stat. 1146.

¹⁶*Id.* § 2, 68 Stat. at 1146.

¹⁷356 U.S. 44 (1958).

¹⁸In *Perez*, an native-born American moved to Mexico as a child. He resided there for almost 30 years, voting in Mexican political elections and failing to register for the United States military draft. The *Perez* Court rationalized Congress's authority to revoke citizenship for voting in a foreign election by stating, "The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose." *Id.* at 60.

subsequently limited Congress's power to denationalize citizens, first in *Trop v. Dulles*,¹⁹ in which the Court ruled that Congress could not take away citizenship as a punishment, and then in *Afroyim v. Rusk*,²⁰ in which the Court ruled that the government could terminate citizenship only with the concurrence of the citizen. In the latter case, the Court expressly overruled *Perez*, finding that simply voting in a foreign election does not amount to an acceptance of expatriation.²¹ Finally, in *Vance v. Terrazas*,²² the Court held that specific intent to renounce citizenship must accompany one of the acts enumerated by statute. Without evidence of that specific intent, proof that an individual committed any of the enumerated acts is insufficient to effect expatriation.

To support his contrary view, Captain Bettwy cited *Marks v. Esperdy*,²³ the latest case in which the Court has addressed the citizenship consequences of foreign military service. *Esperdy*, however, derived primarily from *Perez* and therefore is of doubtful validity. Moreover, *Esperdy* does not account for the specific intent requirement the Court developed in *Afroyim* and *Terrazas*.

Congress has endorsed the Supreme Court's view that specific intent is a prerequisite to expatriation. According to the current version of the INA, a citizen of the United States loses his or her nationality by performing certain "expatriating" acts—among them, entering, or serving in, a foreign army that is engaged in hostilities against the United States²⁴—if the citizen does so *with the intention of relinquishing nationality*.²⁵

The INA clearly provides that, to relinquish nationality, a citizen must satisfy two requirements. First, the citizen must intend to divest himself or herself of United States citizenship. Second, he or she somehow must communicate that he or she has relinquished that citizenship. Congress has provided a list

of actions that can send this message. Mere performance of one of these acts, however, does not prove the requisite intent. For instance, an American may enlist in a foreign army without intending to surrender American citizenship. Standing alone, this act is not enough to terminate his or her citizenship.²⁶ The Government also must prove that when the citizen enlisted, he or she wanted to terminate his or her American nationality.

An American who wishes to relinquish his or her citizenship can signal this intent by performing one of the actions enumerated in the INA. This action, however, not always will signal an individual's intent to expatriate. Service in a foreign army is not enough to cost an American his or her citizenship unless convincing evidence shows that the citizen intended to relinquish this status. Mr. Sohn.²⁷

The Second Annual Robinson O. Everett Award

The United States Court of Military Appeals and the Military Justice Committee of the Federal Bar Association will sponsor the second annual Robinson O. Everett Award for Excellence in Legal Writing. All authors in the field of military justice are eligible to contribute—their pieces need not be articles intended for publication. Any writing submitted to the Court of Military Appeals by the deadline will be considered.

Entries must be received by Mr. James S. Richardson, United States Court of Military Appeals, 450 "E" Street NW, Washington, D.C. 20442, no later than March 31, 1993. No submissions will be returned. The winner will be announced at the Annual Judicial Conference of the Court of Military Appeals, which will be held on May 13 and 14, 1993.

¹⁹356 U.S. 86, 101 (1957). While serving as a private in the United States Army in French Morocco, Trop, a native-born American, escaped from a stockade in which he had been confined for breach of discipline. *Id.* at 87. He willingly surrendered the following day. *Id.*

²⁰387 U.S. 253 (1967). In *Afroyim*, a naturalized American went to Israel and voted in an election for the Israeli legislature. *Id.* at 254.

²¹*Id.* at 268.

²²444 U.S. 252 (1980).

²³377 U.S. 214 (1964).

²⁴8 U.S.C.A. § 1481(a)(3) (West Supp. 1992). "[E]ntering, or serving in, the armed forces of a foreign state [is an expatriating act] if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or noncommissioned officer . . ." *Id.*

²⁵8 U.S.C.A. § 1481(a) (West Supp. 1992). The House Judiciary Committee reported that the changes to the INA requiring "voluntary intent" to relinquish United States citizenship were made to conform the INA to *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981). See H.R. REP. NO. 907, 99th Cong., 2d Sess. 34 (1986).

²⁶Although Congress is not prohibited from proscribing various acts, it may not treat the commission of an illegal act as grounds for expatriation. "As a general rule, . . . United States citizens convicted of criminal offenses retain their citizenship . . ." *Collateral Consequences*, *supra* note 5, at 966; see, e.g., *Trop v. Dulles*, 356 U.S. 86 (1957).

²⁷Jeremy Sohn is a third-year law student at the T.C. Williams School of Law, University of Richmond, Richmond, Virginia.

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

1993

- 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).
- 5-8 April: Reserve Component Judge Advocate Annual CLE Workshop (5F-F56).
- 12-16 April: 117th Senior Officers' Legal Orientation (5F-F1).
- 12-16 April: 15th Operational Law Seminar (5F-F47).
- 19-23 April: 4th Law for Legal NCOs Course (512-71D/E/20/30).
- 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

March 1993

- 1-2: GWU, Preparing Government Contract Claims, Washington, D.C.

1-5: GWU, Cost-Reimbursement Contracting, Washington, D.C.

2: MICLE, Corporate Restructurings and Recapitalizations, Novi, MI

6-13: NELI, Employment Law Briefing, Vail, CO

7-10: NCDA, Evidence for Prosecutors, Orlando, FL

8: GWU, Government Contract Compliance, Washington, D.C.

10-12: GWU, Federal Procurement of Architect and Engineer Services, Washington, D.C.

11: MICLE, Corporate Restructurings and Recapitalizations, Grand Rapids, MI

14-18: Prosecuting Drug Cases, Colorado Springs, CO

15-18: GWU, Source Selection Workshop, Washington, D.C.

15-19: GWU, Construction Contracting, Las Vegas, NV

16: MICLE, The DNR, Emerging Standards Under Act 307, Grand Rapids, MI

16: GWU, Contract Award Protests: GAO, San Francisco, CA

17: GWU, Contract Award Protests: GSBGA, San Francisco, CA

18: MICLE, The DNR, Emerging Standards Under Act 307, Troy, MI

18-19: LRP, Trends and Developments in Pennsylvania Public Employment, Hershey, PA

24-26: ALIABA, Pension, Profit-Sharing, Welfare, and Other..., San Francisco, CA

27-3 Apr: NELI, Employment Law Briefing, St. Petersburg, FL

28-1 Apr: NCDA, Prosecution of Violent Crime, San Francisco, CA

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

Jurisdiction

Colorado	Any time within three-year period
Delaware	31 July biennially
**Florida	Every three years, on an individualized filing date
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 triennially
**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	31 January biennially
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; triennially thereafter
**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

Reporting Month

For addresses and detailed information, see the July 1992 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 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, Defense Switched Network (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 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).
- AD A256322 Legal Assistance: Deployment Guide/JA-272(92)

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- 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). **2. Regulations and Pamphlets**

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

Labor Law

*AD A256772 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, & Literature

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

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 73-1	Test and Evaluation Policy	15 Oct 92
AR 135-9	Army National Guard and Army Reserve Participation in Joint Service Reserve Component Facility Boards	18 Sep 92
AR 135-382	Reserve Component Military Intelligence Units and Personnel (s/s AR 140-192 (Apr. 1980))	19 Oct 92
AR 195-5	Evidence Procedures	28 Aug 92
AR 420-41	Acquisition and Sale of Utilities Services, Interim Change I01	30 Sep 92
AR 570-2	Manpower Requirements Criteria	15 May 92
AR 600-8-14	Identification Cards, Tags, and Badges (s/s AR 640-3 (Aug. 1984))	15 Jul 92
AR 600-8-104	Military Personnel Information Management/Records	27 Apr 92
AR 670-1	Wear and Appearance of Army Uniforms and Insignia	1 Sep 92
AR 930-4	Army Emergency Relief	4 Sep 92
Cir. 635-1	Separation Pay	1 Aug 92
Cir. 690-92-1	Criminal History Background Checks on Individuals in Child Care Services	1 Nov 92
Pam. 25-30	Index of Army Publications and Blank Forms	1 Oct 92
Pam. 415-3	Economic Analysis: Description and Methods	10 Aug 92
UPDATE 24	Message Address Directory	30 Sep 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 [pkz 110.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:\pkz 110.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:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After 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>
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.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1992
505-2.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1992
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
93CLASS.ASC	July 1992	FY 1993 TJAGSA class schedule (ASCII).
93CLASS.EN	July 1992	FY 1993 TJAGSA class schedule (ENABLE 2.15).
93CRS.ASC	July 1992	FY 1993 TJAGSA course schedule (ASCII).
93CRS.EN	July 1992	FY 1993 TJAGSA course schedule (ENABLE 2.15).
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.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
BBS-POL.ZIP	December 1992	Draft letters of LAAWS BBS operating procedures
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies
DEPLOY.EXE	December 1992	Exerpts from the Legal Assistance Deployment Guide (JA 274)—These documents were created in Word Perfect 4.0 and zipped into an executable file. Once downloaded, copy them to hard drive and type "deploy."
FISCALBK.ZIP	November 1990	Fiscal Law Deskbook (Nov. 1990)
FSO_201.ZIP	October 1992	Update of FSO Automation Program. Download to hard disk, unzip to floppy disk, then enter A:\NSTALLA or B:\NSTALLB.
JA200A.ZIP	August 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	August 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	October 1992	Law of Federal Employment
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235-92.ZIP	August 1992	Government Information Practices (July 1992). Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Pamphlet
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

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
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
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
JA281.ZIP	November 1992	AR 15-6 Investigations
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
JA4221.ZIP	May 1992	Operational Law Handbook, vol. 1
JA4222.ZIP	May 1992	Operational Law Handbook, vol.2
JA509.ZIP	October 1992	Contract Claims Litigation, and Remedies Deskbook (Sept. 1992).

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
V1YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 1 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
V2YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 2 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
V3YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 3 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
YIR89.ZIP	January 1990	1989 Contract Law Year in Review

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 Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, 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 "crankc(lee)" for PROFS.

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. 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 DSN 934-7115, 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 libraries directly at the addresses provided below.

1. Major H. Kemp Vye, State of Delaware, Department of Military Affairs, Headquarters, Delaware National Guard, First Regiment Road, Wilmington, DE 19808-2191; DSN 440-7069 or (302) 324-7069.

Courts-Martial Reports, vols. 16-19, 21-22, 35, and index for vols. 1-50

2. Staff Judge Advocate, United States Army Strategic Defense Command, P.O. Box 1500, Huntsville, AL 35807; DSN 645-4520 or (205) 955-4520.

Federal Reporter, vols. 1-300
Federal Supplement, vols. 1-245
Federal Practice Digest (75 vols.)
Digest of Opinions

6. Erratum

Domicile of Military Personnel for Voting and Taxation, an article printed in the September 1992 issue of *The Army Lawyer*, was written by Captain Albert Veldhuyzen and Commander Samuel F. Wright. The heading for this article incorrectly stated that Captain Veldhuyzen's first name was Gilbert.

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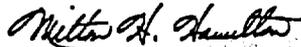
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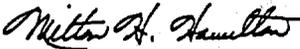
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