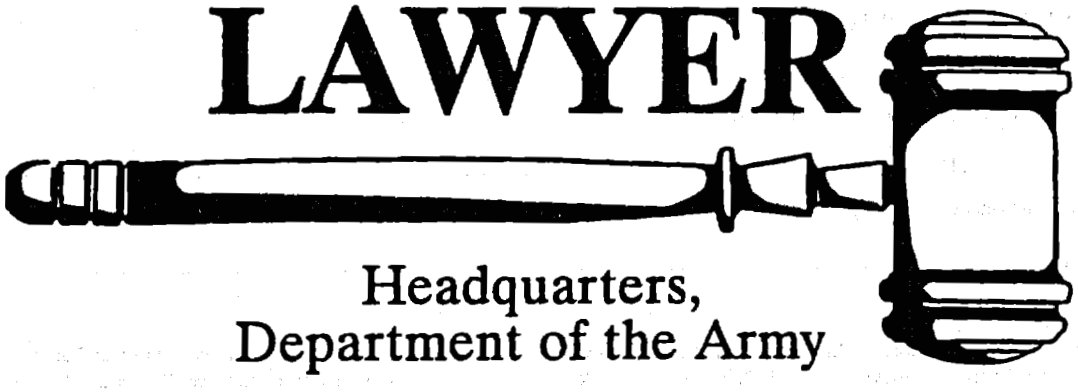
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-277
December 1995

Table of Contents

Articles

The Army Lawyer (ISSN 0364-1287)

Editor, Captain John B. Wells

Editorial Assistant, Charles J. Strong

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Microsoft Word, WordPerfect, Enable, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pennsylvania 15250, facsimile (202) 512-2233.

Address changes: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Army Legal Assistance: Update, Initiatives, and Future Challenges

Colonel Alfred F. Arquilla
Former Chief, Legal Assistance Division
Office of The Judge Advocate General, United States Army
Washington, D.C.

Lieutenant Colonel Linda K. Webster
Former Deputy Chief, Legal Assistance Division
Office of The Judge Advocate General, United States Army
Washington, D.C.

Ms. Juliet M. Dupuy
1995 Summer Intern, Legal Assistance Division
Office of The Judge Advocate General, United States Army
Washington, D.C.

Introduction[1]

The Legal Assistance Division, Office of The Judge Advocate General (OTJAG), is now the proponent for three Army regulations, all of which have been revised during the past two years. *Army Regulation 27-3, The Army Legal Assistance Program*,[2] which contains Army policy on legal assistance services, was revised in 1995 to update the complete 1992 revision of *Army Regulation 27-3*.[3] Also, *Army Regulation 27-55, Notarial Services*,[4] another legal assistance regulation, was completely revised in 1994, and contains Army policy on notarial services in the Army. Finally, *Army Regulation 608-99, Family Support, Child Custody, and Paternity*,[5] formerly a personnel regulation under The Adjutant General (TAG) as the proponent agency, was completely revised during 1994. *Army Regulation 608-99*, contains Army policy governing the financial support of family members, child custody, and paternity.

In addition to discussing the more significant changes made to these regulations, this article also addresses Army legal assistance statistics and surveys, joint legal assistance efforts, Army tax assistance services, some recent changes in the law and other regulations affecting legal assistance services, and future challenges for the Army legal assistance program.

Legal Assistance Statistics

Before looking at the future, it might be useful to examine Army legal assistance statistics collected over the past five calendar years by the Legal Assistance Division, OTJAG.[6] A lot of time and effort is devoted to collecting and reporting legal assistance data throughout the Army. However, prior to the 1992 revision of *Army Regulation 27-3*, the collected statistics were of little value. The 1992 revision of *Army Regulation 27-3* modified DA Form 4944-R, Report on Legal Assistance Services, to create a

---

[1] This article updates previous articles written on the Army legal assistance program, addresses the recent developments, and discusses the future challenges for the program. For previous articles, see Colonel Alfred F. Arquilla, *Family Support, Child Custody, and Paternity*, 112 MIL. LAW REV. 17 (1986) (discussing background and content of Army policies and regulations on financial support and paternity); Lieutenant Colonel Alfred F. Arquilla, *Changes in Army Policy on Financial Nonsupport and Parental Kidnapping*, ARMY LAW., June 1987, at 18; Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 3; and Colonel Alfred F. Arquilla, *The Survey of Soldiers on Legal Assistance*, ARMY LAW., June 1994, at 44 [hereinafter *Survey of Soldiers*].

[2] DEP'T. OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995) [hereinafter AR 27-3].

[3] *Id.* (30 Sept. 1992) [hereinafter AR 27-3 (1992)].

[4] DEP'T. OF ARMY, REG. 27-55, LEGAL SERVICES: NOTARIAL SERVICES (21 Jan. 1994) [hereinafter AR 27-55].

[5] DEP'T. OF ARMY, REG. 608-99, PERSONNEL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994) [hereinafter AR 608-99]. The regulation remains numbered in the 608 series of Army regulations, personal affairs, rather than the 27 series solely to ensure distribution of the regulation to Army commanders, who are responsible for enforcement of this regulation.

[6] No comprehensive set of Army legal assistance statistics prior to 1990 are available within the OTJAG. All that exists is just one file folder containing a few scattered reports for various years. Although the Army legal assistance program is now fifty-three years old, collecting, consolidating, and, most importantly, preserving legal assistance statistics has not been one of its hallmarks. What few statistics do exist are of questionable reliability. In any event, these statistics do not indicate any substantial change in the overall makeup of our client base (primarily lower enlisted) or case composition (primarily domestic relations, wills, and powers of attorney).

new procedure for recording legal assistance statistics that makes the information more meaningful.

Before the 1992 revision, the reports reflected the number of "visits" made by clients as opposed to the number of cases handled for clients; therefore, each time a client was assisted in a single matter, the statistics reflected an additional case. The more visits that clients had to make to get their legal problems resolved, the higher the number of total clients assisted, as well as the number of clients for those categories of cases. The only numbers from the old reports that presumably were not exaggerated by this practice were the personnel staffing statistics and document preparation statistics. Those numbers, therefore, are used in this article and are compared to similar data collected from the new reports.

Another problem with the old report was the category breakdown depicting the type of visit. For example, the old form combined adoption cases with child custody cases. The revised form separates adoption and child custody cases and provides data on the category of client assisted, type of case involved, and type of legal service provided. The new guidance provided in *Army Regulation 27-3*[7] facilitates the collection of more meaningful data that can be used to determine legal assistance training and automation requirements and the allocation of judge advocate resources to better meet client needs.

In addition to the statistics collected by OTJAG, the Army Personnel Survey Office (APSO), United States Army Research Institute for the Social Sciences (ARI), conducts the Survey of Military Personnel (SMP) and the Survey of Army Family Members (SFM). The questions asked in those surveys include questions submitted by OTJAG on the use of, and client satisfaction with, legal assistance services. Results from the 1994 survey were published in *The Army Lawyer*.[8] The results from the 1995 survey are included in this article with the meaningful data compiled from DA Forms 4944-R submitted throughout the Army over the past five calendar years.

Legal Assistance Personnel

Legal assistance personnel include all attorneys, paralegals, and administrative and clerical staff providing legal assistance on a full or part-time basis.[9] As of 1 July 1995, 1890 military and civilian attorneys were under the administrative supervision of The Judge Advocate General (TJAG).[10] Of these attorneys, 11.5% provided legal assistance on a full time basis.[11] Chart 1 below shows the number of full-time legal assistance attorneys and nonattorneys for the past five calendar years (1990-1994).[12]

LEGAL ASSISTANCE PERSONNEL

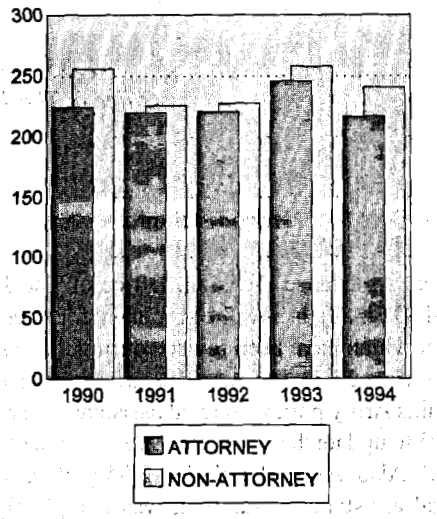


CHART 1

As Chart 1 shows, the number of attorneys providing full-time legal assistance ranged from 217 to 246 over this five year period. During the same period, between 226 and 256 nonattorneys provided full-time support to legal assistance attorneys.[13] One of the surprises in reviewing these statistics is the fact that the number of full-time legal assistance attorneys and nonattorneys has remained fairly constant despite the large

[7] AR 27-3, *supra* note 2, at 41.

[8] *Survey of Soldiers*, *supra* note 1.

[9] For the purpose of clarity, paralegals and administrative or clerical staff are referred to as nonattorneys hereinafter.

[10] Conversation with Mr. Roger Buckner, Personnel, Plans and Training Office, OTJAG. The figures show that, as of 1 July 1995, 314 civilian and 1576 military attorneys were under the administrative supervision of The Judge Advocate General.

[11] The compilation of the DA Form 4944-Rs submitted by Army commands worldwide showed that 54 civilian and 163 military attorneys providing full-time legal assistance at the end of calendar year 1994.

[12] The lack of a definition for "part-time" legal assistance attorneys or nonattorneys makes that statistic meaningless, so this information is not included in this article. To correct this problem, the following definition of "part-time" legal assistance personnel was added to *Army Regulation 27-3*, Appendix B, paragraph B-4a: "A person is a part-time legal assistance attorney, paralegal, or clerk if he or she on average performs legal assistance duties one or more hours per duty day, but less than on a full-time duty basis."

[13] These figures do not include Reserve personnel, nor, for the most part, the large number of United States Army Reserve and National Guard judge advocates and legal specialists who performed full-time legal assistance duties in an active duty or reserve status during the 1990-1991 Operations Desert Shield and Desert Storm.

downsizing of the Army and The Judge Advocate General's Corps during this period. This may be attributed to a gradual shifting of personnel from military justice to legal assistance duties as the number of courts-martial cases tried in the Army continues to decline.[14]

It is apparent, however, that the demand for legal assistance services has remained fairly constant although the number of eligible clients continues to decline. One reason for this is that legal assistance offices are able to handle more legal problems for clients as the number of eligible clients declines. Another reason is that the decline in eligible clients is not proportionate to the downsizing within the active Army because military retirees continue to be eligible for legal assistance services. Finally, as discussed later, more and more Air Force, and to a lesser extent, Navy active duty and retired service members and their families are seeking legal assistance services from Army legal offices.[15]

Document Preparation

Legal document preparation is an integral part of the services provided by legal assistance offices. Almost every type of case involves some form of document preparation. The legal documents most frequently prepared include powers of attorney, wills, Servicemen's Group Life Insurance (SGLI) forms, and separation agreements. Chart 2 below shows the number of wills and powers of attorney prepared over a five year period. The number of legal documents notarized by legal assistance attorneys and staff are also shown.

DOCUMENT PREPARATION

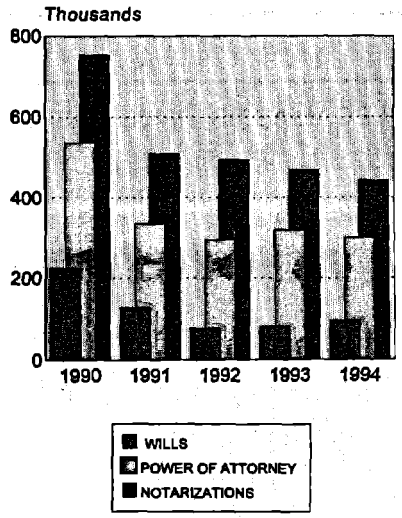


CHART 2

The substantially greater numbers of wills and powers of attorney prepared in 1990 reflect the mobilization and deployment for Operations Desert Shield/Storm. During that year, 537,505 powers of attorney and 224,965 wills were prepared, and 753,878 documents were notarized.

Chart 3 below provides a comparison of the number of wills, SGLI forms, and separation agreements prepared over the last two years.

DOCUMENT PREPARATION
1993-1994

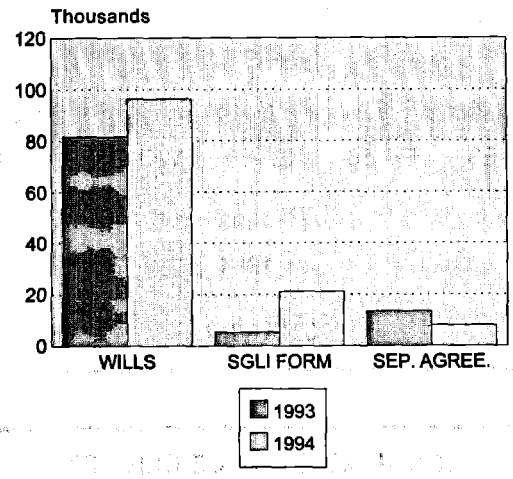


CHART 3

Legal Assistance Clients by Rank and Type of Client

Service members and their family members are eligible to receive legal assistance; however, as Charts 4 and 5 below show, substantially fewer family members use legal assistance than service members. Service members are our primary clients because many of them are provided wills and powers of attorney during readiness exercises and deployments. They also are more likely to be aware of the services offered by the legal assistance program, and to be referred to legal assistance by officers and noncommissioned officers in their chain of command. Service members are physically closer to the Army lawyers who serve them and, by virtue of their military service, encounter more military related legal problems than their family members. It is possible, however, that the comparatively smaller number of family members using legal assistance may also indicate a need to better inform family members of available legal assistance services.

[14] Mr. William S. Fulton, Jr., Clerk of Court, United States Army Court of Criminal Appeals, reports, based on estimated figures for fiscal year 1995, that the total number of general courts-martial and special courts-martial (both authorized or not authorized to adjudge a bad conduct discharge) declined forty percent over the past five years—from a total of 1855 trials during fiscal year 1991 to an estimated 1106 trials during fiscal year 1995. The combined general and special court-martial rate also declined from 2.3 trials per thousand soldiers during fiscal year 1991 to an estimated 2.1 trials per thousand soldiers during fiscal year 1995.

[15] As a result of the growing use of legal assistance services by nonArmy personnel, The Judge Advocate General has directed the Chief, Information Management Office, OTJAG, to develop an automated program for use by legal offices to break down the annual legal assistance statistics reported by the clients' military service affiliation.

LEGAL ASSISTANCE CLIENTS
SERVICE MEMBERS

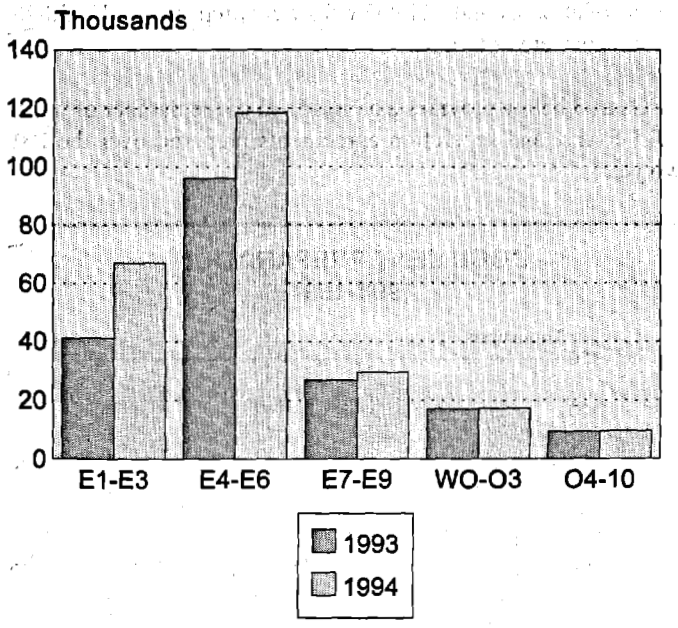


CHART 4

LEGAL ASSISTANCE CLIENTS
FAMILY MEMBERS

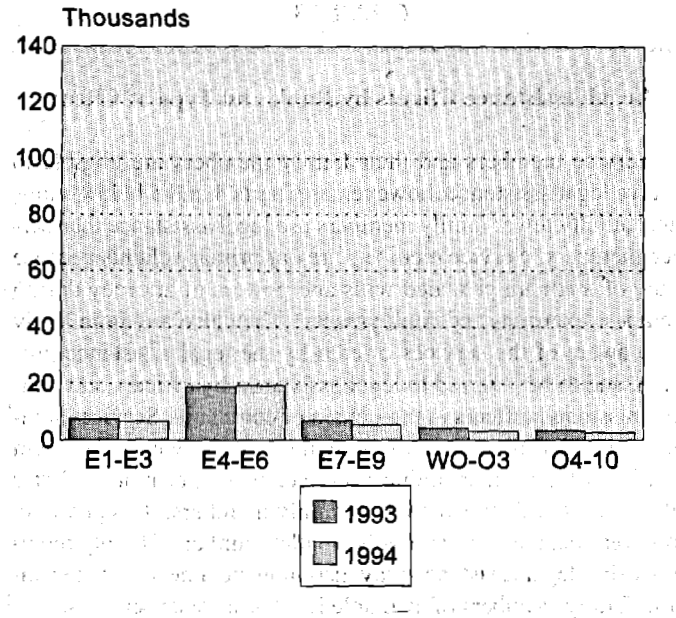


CHART 5

As Charts 4 and 5 indicate, the largest group of family members and service members using legal assistance in 1993 and 1994 were in the pay grade E4 through E6 (38,223 family members and 214,483 service members). These statistics reflect the greater number of E4 through E6s in the Army and the fact that they are generally of an age group more likely to have legal problems and require assistance.

Another interesting trend depicted by the charts is the overall increase in clients in 1994. All rank categories showed an increase in legal assistance use despite the continued military cutbacks. Family members showed a slight decrease in all categories, except those whose sponsors were in pay grades E-4 through E-6.

Legal Assistance by Type of Case

Charts 6 and 7 below break down the type of legal assistance cases handled by Army lawyers during 1993 and 1994, respectively. The charts reflect the numbers compiled from the second page of the DA Forms 4944-R submitted by Army commands worldwide. The charts reflect the ten major categories recorded by DA Forms 4944-R.

LEGAL ASSISTANCE CASES
1993

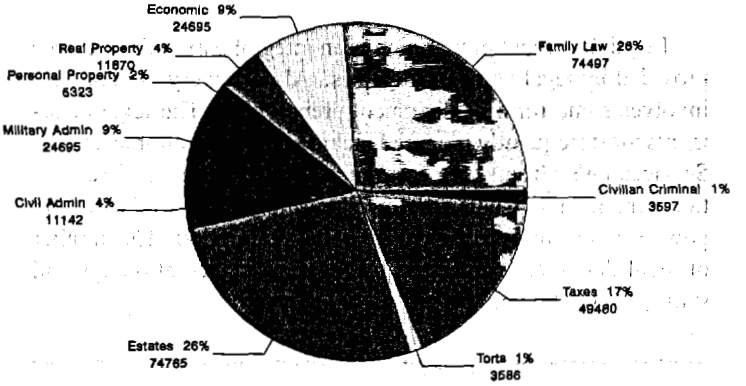


CHART 6

LEGAL ASSISTANCE CASES
1994

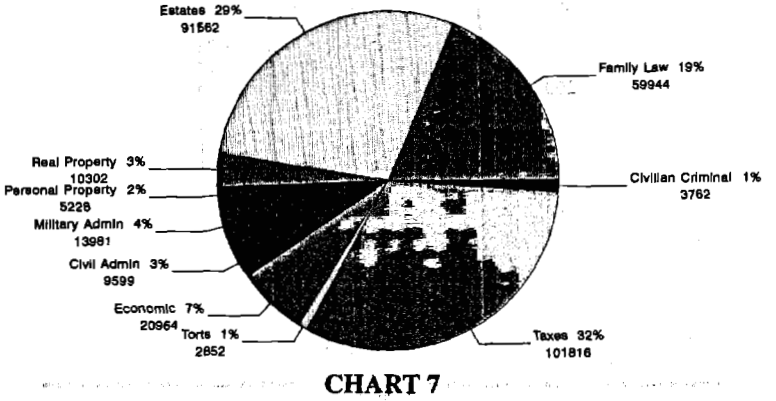


CHART 7

The number of cases reflected on these charts between years is less significant than the percentages noted because of the transition to the Legal Automated Army Wide System-Legal Assistance (LAAWS-LA) method of tabulating legal assistance cases began in 1993 following the 1992 revision of *Army Regulation 27-3*. The cases reported in any one year include only legal assis-

tance cases not previously reported in a prior year.[16] However, because all cases reported during 1993 were new cases to the new LAAWS-LA reporting system, the 1993 reported cases also included old cases from 1992 and earlier in which legal assistance services continued to be provided. The 1994 report included only cases that arose during 1994. The number of cases reported during 1995 and the following years will be more indicative of any trends that may develop in the number and type of cases reported.

Charts 6 and 7, however, reveal more accurately than in the past that estates (such as, wills, casualty assistance), family law, and taxes[17] are the three major areas of legal assistance practice in the Army. During 1994, these three areas constituted 80% of all legal assistance cases handled in the Army. Following far behind in fourth place are economic cases (such as, bankruptcy, debts), constituting only 7% of the legal assistance cases in 1994. The remaining 13% of legal assistance cases were split fairly evenly among military administrative, real property, civil administrative (such as, citizenship, name change), personal property, and torts.

As legal assistance attorneys well know, the number of cases handled in a particular area of the law does not necessarily reflect the amount of time and effort devoted by attorneys and staff. One might expect, at least in the Army, that much more time may be devoted to handling the needs and problems of a client in a typical family law case than in the usual estate case where often only a simple will is drafted and executed during the course of one or two visits. With more sophisticated automation programs, the Army soon will begin to record how much time is spent on handling each type of legal assistance case.[18]

Survey of Family Members

The 1995 Survey of Army family members included questions that measured Army spouses'[19] use of legal assistance and their satisfaction with legal assistance services. The survey, which was conducted in late 1994, drew samples from approximately 24% of married officers and 9% of married enlisted personnel.[20]

Unlike the 1994 survey of soldiers, ARI only allocated a limited number of questions on legal assistance services for inclusion in its survey of Army families. Nevertheless, the limited data obtained reflects favorably on the Army legal assistance program, and the Army lawyers and the staff members responsible for client services.

Army spouses were asked about their use and satisfaction with the Army legal assistance program. Of those surveyed, 38.9% answered that they "used" the Army legal assistance program during the last two years. Of those who used the legal assistance program, 78.9% indicated that they were either satisfied or very satisfied with the legal services they received.[21]

Army spouses were also surveyed as to their readiness to handle family responsibilities in the event their spouses were deployed or other emergency-type situations arose. Of those spouses surveyed, 72% answered that they held a power of attorney for their soldier spouse and 6.3% stated that someone else held a power of attorney for their soldier spouse. However, 49.5% of the spouses stated that they had the equivalent of two weeks pay on hand or in savings in case of an emergency. The absence of cash on hand foretells the type of legal problems that may arise when soldiers deploy or other emergencies arise.[22]

Finally, Army spouses were surveyed on whether they and their spouses had "current, up-to-date last wills and testaments." According to the survey, 67.2% of married soldiers, and 31.3% of their spouses have current, up-to-date wills. As indicated elsewhere in this article,[23] legal assistance will drafting efforts primarily should be targeted at married soldiers, particularly those with children.[24]

---

[16] AR 27-3 (1992), *supra* note 3, app. B-2a. A legal assistance case reported in one year is not counted as another legal assistance case in the following year even though the case remains open. Regardless of how many times the same legal services may be provided in the same case, the type of legal assistance services provided (such as, legal counseling, preparing correspondence or documents, making legal referrals) is reflected on the DA Form 4944-R each time a particular type of legal assistance service is provided.

[17] The increase in number of tax cases from 1993 to 1994 may be primarily attributed to a change in the 1994 LAAWS-LA program that recorded income tax assistance provided by Army lawyers, supporting staff, and volunteers in tax centers even though, in most instances, a DA Form 2465, Client Legal Assistance Record, was not prepared. *See* AR 27-3, *supra* note 2, app. B-2a(5).

[18] The goal is to count hours spent in each case throughout a staff judge advocate office, not just in legal assistance. The amount of time spent on all nonArmy legal cases and matters will also be reported.

[19] Of those spouses surveyed, 79.8% were in their first marriage; 18% were remarried following a divorce; 0.5% were remarried widows or widowers; 0.6% were "legally separated" from their soldier spouses; and 1.1% were in the midst of filing for divorce.

[20] The samples are randomly selected from the Standard Installation/Division Personnel System (SIDPERS) by using the final one or two digits of the sponsor's social security number. In this survey, 6787 of the spouses of officers selected for the sample completed the questionnaire and were included in the data file. Of the spouses of enlisted personnel sampled, 5709 completed the questionnaire and were included in the data file. The sampling error for each of the sponsors' rank groups varied from only + 1% to + 3%.

[21] This figure compares favorably with the responses obtained on a similar question regarding use of, and satisfaction with, the Army Claims Service. Of the spouses surveyed, 38.9% answered that they used the Army Claims Service during the last two years, and, of those who used it, 57.1% were satisfied or very satisfied with the claims services.

[22] For example, landlord-tenant, consumer debt, and financial support legal problems likely will occur in many families, even in the absence of an emergency, when no money is available to pay bills.

[23] *See infra* note 41 and accompanying text.

[24] The results of the 1991 ARI survey of Army families, when compared to the 1995 results of this survey, reveal almost identical percentages as to the number of married soldiers possessing up-to-date wills, powers of attorney, and two weeks pay on hand.

The Army legal assistance statistics compiled from the annual submission of the DA Forms 4944-R by Army installations, and the periodic surveys of soldiers and their family members, illustrate the accomplishments of Army legal assistance over the past several years. More importantly, this data provides a basis to chart the future direction of the Army legal assistance program.

Joint Legal Assistance Efforts

Smaller defense budgets dictate that Army judge advocates make more efficient use of their limited legal resources in meeting the competing demands for all legal services. As the United States Armed Forces continue to decrease in size, the continued growth and development of legal assistance services within the military will depend more and more on exploiting all available opportunities for joint cooperation. To this end, joint legal assistance offices should be developed where the military bases of different services are collocated. Also, computer software programs for producing legal assistance documents, such as wills and separation agreements, and for compiling client databases and legal assistance statistics, should be jointly procured or developed. Finally, efforts to expand joint legal assistance training should continue. In this regard, it is heartening to observe that the majority of students attending the biannual legal assistance courses at The Judge Advocate General's School, United States Army (TJAGSA), in Charlottesville, Virginia, are from military services other than the Army.

The Pentagon Legal Assistance Office

In an effort to conserve money, manpower, and space, a memorandum of agreement (MOA) was negotiated among the Departments of Army, Navy, and Air Force establishing the Pentagon Legal Assistance Office (PLAO) on 22 March 1994. The PLAO is a jointly operated office providing legal assistance primarily to active duty and retired military personnel and their families assigned for duty, or employed by the military, in the Pentagon and at nearby locations lacking on-site legal assistance services. The PLAO also provides all legal assistance services authorized by applicable military department regulations to all persons eligible for legal assistance under those regulations.

The governing MOA requires each of the participating departments to provide one judge advocate and one paralegal. The senior officer assigned, according to the MOA, is the PLAO officer-in-charge, but it is understood that the responsibility for filling the officer-in-charge position is to be rotated among the military departments on an annual basis. Two Air Force majors filled this position in succession until the summer of 1994 when an Army major took over. Although not required by the MOA, the Army has also assigned a noncommissioned officer to serve as the noncommissioned officer-in-charge of the PLAO.

The PLAO has been an unqualified success to date. It has also been a laboratory to share ideas among the military services on how best to provide legal assistance services to clients. All attorneys assigned to the PLAO found themselves providing assistance on separation agreements, which has primarily been an area that only Army lawyers handled, but lately, Navy lawyers have begun to handle as well.

Also, all assigned attorneys decided that the commercial program used by the Navy and Air Force to draft wills was superior to the wills program used by the Army. As a result, the LAAWS-LA is used only to compile statistics, as required by the MOA. The data in support of these statistics primarily are entered by individual clients through use of a "user friendly" client operated computer located in the PLAO waiting room. Efforts to provide the program supporting this client operated computer to all Army legal assistance offices continue, but unfortunately this is not a high priority item on the list of JAG Corps automation goals.

Joint Service Committee on Legal Assistance

On 27 April 1995, the Staff Judge Advocate to the Commandant of the Marine Corps, the Chief Counsel of the Coast Guard, and the Judge Advocate Generals of the Army, Navy, and Air Force, formally established the Joint Service Committee on Legal Assistance (JSCLA). The chiefs of legal assistance for each of the military departments are appointed as members of this committee. Pursuant to the committee charter, the JSCLA will identify areas where joint efforts may improve the availability and quality of legal assistance to service members and their families on their personal legal problems and needs. The members of the JSCLA will also work closely together to develop and procure legal assistance software for drafting wills and other legal documents, and will encourage commands and installations closely located to each other to develop cooperative arrangements on the delivery of legal assistance services in their localities.

Although it is not envisioned that jointly operated legal assistance offices like the PLAO will be established at other military installations, greater communication and cooperation among collocated installations of different military departments could improve legal assistance services.

Joint Legal Assistance Study

The Army recently completed a thorough study examining Army legal assistance services provided to clients affiliated with other military departments. The study also looked at the extent to which soldiers and their families receive legal assistance services from nonArmy military installations. The study was designed to identify geographical sites where joint legal assistance offices or efforts will improve client services and make more efficient use of limited legal resources.

The study concluded that a large percentage of Army legal assistance clients include Air Force service members and their families, both active duty and retired. Thirty-nine of fifty-seven Army installations reported that over 5% of their clients were nonArmy clients and listed Air Force members, both active duty and retired, and their families as their primary nonArmy clients.

This study provided the impetus for the Army proposal to create the JSCLA, and to begin negotiations on the wording of its charter. The Army's initial proposal for the wording of the JSCLA

charter generally reflected Army legal assistance policy as stated in the 1992 publication of *Army Regulation 27-3*[25]—specifically, that no eligible legal assistance client seeking help should be turned away because of his or her military service or installation affiliation. Except for the Air Force, all the military departments, including the Coast Guard, agreed with the proposed wording. The Air Force disagreed based on the unique policies and methodology followed by the Air Force in providing legal assistance services.[26]

The Air Force views legal assistance as an extra duty for almost all lawyers assigned to Air Force legal offices. Although procedures vary from office to office, generally legal assistance is provided only one to three hours a day, two to three days per week. No full-time legal assistance attorneys are available.[27] Generally, Air Force legal assistance is limited to wills, powers of attorney, and notarial services. Although legal assistance on other matters varies from legal office to legal office and from attorney to attorney, the general scope of legal assistance services is significantly less than that provided by other military services. Finally, the Air Force generally restricts its legal assistance services to Air Force service members and their families only,[28] and often imposes additional limitations on providing legal assistance to its military retirees and their family members. Not surprisingly, a large number of Air Force service members, both active duty and retired, and their family members seek legal assistance from Army legal offices—often as a result of "referrals" from Air Force lawyers. Army legal offices have continued to provide legal assistance to Air Force and other service members,[29] although *Army Regulation 27-3* permits commanders to limit or deny legal assistance to nonArmy clients where it adversely affects the scope or quality of legal assistance provided to Army clients.

One Army staff judge advocate (SJA) reported that he discontinued help to Army clients on separation agreements because of the large number of nonArmy clients seeking assistance on separation agreements. Although *Army Regulation 27-3* then authorized limiting help on separation agreements to non Army clients in such cases,[30] this was not the local policy adopted to solve this problem. As a result of such reports, and the Army study, *Army Regulation 27-3* was modified to provide SJAs greater authority, and encouragement, to adopt local legal assistance policies that strive toward joint cooperation with the other military services, but without adversely affecting the quality and scope of legal assistance services to Army clients.[31]

To achieve consensus on the charter establishing the JSCLA, the Army and the other military services agreed to accommodate the Air Force in deleting the proposed nondiscrimination policy from the draft charter. With that change, the proposed charter was quickly signed by the TJAG or chief legal officer of each of the five military services. The first meeting of the JSCLA occurred on 21 July 1995, at which time all participants agreed that a joint approach in procuring legal assistance computer software needed to be adopted.

The JSCLA is an important first step in expanding joint cooperation in legal assistance. The joint legal assistance study helped identify similarities as well as differences among the various military services in providing legal assistance. The important thing is that the lines of communication among the military services have been opened. As a result of increased communication, legal assistance policies are changing in several important areas. The establishment of the PLAO, joint legal assistance training at TJAGSA, and possible joint efforts of collocated field offices are

---

[25] AR 27-3 (1992), *supra* note 3, para. 2-6b.

[26] *See* Deborah Suchenski, *Legal Assistance in the Air Force*, 5 THE LAMPLIGHTER 3 (1994) for a general overview of legal assistance in the Air Force. According to the author, who was the chief of the Air Force legal assistance program at the time, the Air Force classifies legal assistance not having a direct impact on the "effectiveness of command" or the "efficiency of readiness and deployment" as "non-mission-related legal assistance." This category of legal assistance is left to the discretion of Staff Judge Advocates and the availability of resources. The very name of this type of legal assistance is perhaps indicative of the low priority it generally receives—yet it includes, by definition, all legal assistance provided to those not assigned to the command, including Air Force retirees and all nonAir Force military personnel and their families, as well as much of the type of legal assistance work that Army lawyers routinely do for legal assistance clients, including Air Force clients (such as, family law matters, not just those involving deploying personnel and dependent child care issues).

[27] The Air Force recognizes the existence of only one full-time Air Force legal assistance attorney. This is the officer assigned for duty in the PLAO.

[28] Some Air Force legal offices deny legal assistance services to nonAir Force service members assigned within their command or to Air Force service members assigned to other Air Force installations.

[29] The unofficial but high level Air Force response to the Army's generosity in continuing to provide legal assistance to Air Force and other service members is that the Army policy only benefits those Air Force service members and their families who are stationed or reside near an Army installation and that a discontinuation of the Army policy would have no impact on most Air Force service members and their families.

[30] AR 27-3 (1992), *supra* note 3, para. 2-6b.

[31] AR 27-3, *supra* note 2, para. 2-6b. Army Staff Judge Advocates whose offices are within 100 miles of legal offices of another military service are directed to work with their counterparts in those legal offices to resolve any legal assistance problems because of differences in the scope of each other's legal assistance programs. Army Staff Judge Advocates may limit or deny legal assistance services to clients affiliated with the other military installations, or military departments, only if joint or cooperative efforts to resolve problems have failed. However, the scope of legal assistance services denied to eligible clients should be limited to that necessary to address the problem that is adversely affecting the quality or scope of Army legal assistance services. For example, if an inordinate number of Navy clients are seeking legal assistance on marital separation agreements from an Army legal assistance office because a nearby Navy base does not provide such assistance, then the Army legal assistance office may deny such assistance to all Navy personnel.

the top areas of concern. Also, the Navy, following the lead of the Army and the Marine Corps, is now encouraging its attorneys to prepare separation agreements, and both the Navy and the Air Force, following the Army's lead, are more active than ever before in providing tax assistance services to their service members. As the various military services' legal assistance policies change, each of the military services should be better prepared to capitalize on future opportunities for cooperation.

Tax Assistance Services

Electronic Tax Filing

The Army has had great success in providing free electronic filing of federal income tax returns. Assistance with the preparation of personal income tax returns has been one of the most popular services provided by Army legal assistance personnel to soldiers, retirees, and their family members. Chart 8 below indicates the trend in the increasing numbers of returns electronically filed from 1992 to 1995. The only year in which the number of returns electronically filed did not increase was 1993, but the number filed in that year was not a significant decrease from the previous year.

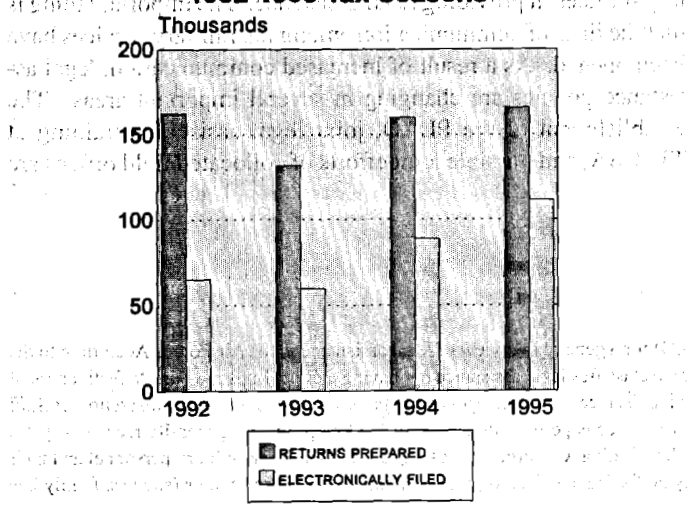


CHART 8

Although these numbers reflect only federal returns filed, some installations also offer electronic filing for state returns. Electronic filing for state income tax returns depends on several factors, most notably whether the state requires the filing of an income tax return and whether the state has approved the use of electronic filing for its tax returns. Therefore, this service is not available at all Army installations.

Interest by SJAs and commanders in the availability of electronic filing for the military community has increased dramatically over the last several years. Many commanders see this service as something "positive" provided to everyone. Additionally, no stigma attaches "going to JAG" for help on taxes because of the requirement for virtually all soldiers to file a federal income tax return regardless of rank or location. Many commanders regard this free service as part of the effort to enhance the morale of the military community.

The Legal Assistance Division, OTJAG, does not mandate that each legal assistance office provide electronic filing for income tax returns. This service, as well as other legal assistance services, is offered by legal assistance personnel according to available resources. For electronic filing, this most often means financial and personnel resources at the installation level. Without Department of the Army (DA) level funding to support electronic filing, each installation must purchase software.[32] Some installations found that the "tax program"[33] was the first to go when money became tight, especially if the money came directly out of the SJA office budget. Other installations found that the needed automation support to run the software programs was not available.

To make electronic filing software more available, the Legal Assistance Division began a concerted effort to explore the possibilities of an Army-wide contract for the software. After some investigation—and frustration—in this effort, an alternative solution was discovered: ask the Internal Revenue Service (IRS) to help the Army with this problem. The IRS is very interested in expanding the number of taxpayers who use electronic filing. Each year, the IRS assists the military services by providing Volunteer Income Tax Assistance (VITA) classes taught by IRS instructors throughout the United States and overseas.

The Army proposal originally presented to representatives of the IRS, was to have the IRS provide software for installations located outside the United States. In presenting this proposal, the Army was eventually joined by representatives from the Navy and Air Force Legal Assistance Divisions. The data compiled from the Army's After Action Report on Tax Assistance[34] was the most convincing evidence used to demonstrate the sincerity of the Army's efforts regarding its assistance to soldiers on elec-

[32] Most installations have dealt directly with a software vendor in negotiating the price and the features of the program. To improve its negotiating posture, the Judge Advocate for the United States Army Europe (USAREUR) decided to use a contract to provide electronic filing software packages to fourteen sites for the 1994 tax filing season. This contract included technical support, training presented in USAREUR by the vendor, telephonic support, and the software packages. This contract cost approximately $25,000.

[33] Tax assistance is one of several types of cases, like family law and estates, handled under the legal assistance program. It is not a separate program. *See* AR 27-3, *supra* note 2, para. 3-6i.

[34] *Id.* para. 5-4a.

tronic filing. This report, which reflected all annual statistics reported to the Legal Assistance Division by legal assistance offices providing income tax assistance, showed how many VITA classes were conducted, how many federal "paper" returns were filed, how many federal returns were filed electronically, and how many people were involved in the effort to provide this service. Ultimately, the IRS agreed to provide the software at no cost to the military services through a contract the IRS uses to provide software to IRS offices worldwide. Although the Navy and Air Force requested a limited number of copies for use at selected sites outside the United States, every Army legal assistance office outside the United States was given the opportunity to receive the free software package. Almost every office seized the opportunity.

With the expanded availability of the program, Army legal assistance offices filed more returns electronically than ever before as shown in Chart 8. The results of the 1995 tax filing season were provided to the IRS as part of an expanded Army proposal to furnish software packages worldwide to all military installations, both in and outside the United States for the 1996 tax filing season. After meetings involving IRS representatives from several departments and representatives from the Army, Navy, Air Force, and Marine Corps Legal Assistance Divisions, an agreement was reached for the IRS to furnish software packages to all the military services, including the Coast Guard. Military service representatives were given the opportunity to present contract requirements to the IRS to ensure that the special needs of the military tax assistors were met. One suggestion, which the IRS adopted, was to use a multi year contract to maintain continuity with a vendor for several years. This also helps personnel who transfer from one legal assistance office to another by having the same software available throughout the military. With this agreement, Army legal assistance offices worldwide were afforded the opportunity to participate in receiving the software free from the IRS. As before, almost every office requested the software.

At the time of the submission of this article for publication, the contract has not been signed, the bids have been received and are pending evaluation. Because of this initiative, many installations will be able to participate in electronic filing of federal tax returns without worrying about paying for the software.

Tax Forms

Many legal assistance offices face the annual problem of obtaining federal and state tax forms to serve the needs of their military community. For legal assistance offices located in the United States, the most frequently used system to obtain federal income tax forms is the Bank, Post Office, and Library Program (BPOL Program) offered by the IRS.[35] The BPOL Program has certain "plans" which have a predetermined number and variety of tax forms. One can supplement the plans by ordering other tax forms. The BPOL Program plans do not routinely include tax forms necessary for taxpayers who have lived outside the United States for part of the tax year and they must be ordered from the supplemental list.

In the past, legal assistance offices located outside the United States faced major problems in obtaining federal income tax forms in a timely manner and often used a variety of methods to get the forms.[36] Offices were supposed to use the system established by the Printing and Publications Command whereby a central point of contact in Korea, Europe, and Panama collected data from each office and submitted it to the responsible individual at the Printing and Publications Command for one Army order from the IRS. The order would be filled, transported to a warehouse in Baltimore, Maryland, and then sent by ship to warehouses in Korea, Europe, and Panama for distribution. This system did not work well according to users contacted by the Legal Assistance Division.[37]

To improve the distribution of federal tax forms to legal assistance offices located outside the United States, the Legal Assistance Division proposed that the IRS assist in developing a solution. In 1993, representatives from the IRS and the Legal Assistance Division held meetings to discuss this issue and arrive at a solution. Eventually, they agreed that the best solution would be to use a system in place within the IRS for embassies, State Department offices, and IRS offices located outside the United States.

This program, known appropriately enough as the "Embassy Program," provided that any office would receive any tax form requested on the order form via direct shipping from the supporting IRS service center in Richmond, Virginia. To enroll, a legal assistance office submitted an "original" order to the Legal Assistance Division to coordinate with the IRS to assign that office an account number and have its order entered into the IRS computer. Every September thereafter, an account package would be mailed to the address provided by that office containing the previous year's order, information on how to update the order, and a listing of tax forms from which to select. If for some reason no one in that office responded to the September notice, the office

---

[35] The IRS does not charge any fees to legal assistance offices enrolled in the BPOL Program. Contact the IRS at 1-800-829-2765 for more information about the BPOL Program.

[36] During a conversation with one of the installation tax officers in Korea in 1993, Lieutenant Colonel (then Major) Webster asked the tax officer how he got his federal tax forms. The reply was "any way and from any place I can." This tax officer used the Army system that was in place at that time to order federal tax forms for offices located outside the United States, the BPOL Program, and the direct order program from the IRS service center in California. Because United States military units in Korea used "APO-SF," indicating a California address, as part of their mailing address, the IRS service center processed the order for forms. Even with these multiple sources, the tax officer still had problems getting enough forms to serve the military community where he was located.

[37] During a conversation with several legal assistance attorneys at the USAREUR Tax Conference in 1993, Lieutenant Colonel (then Major) Webster asked them how the tax distribution system was working. The three attorneys present represented three different commands and none were happy with the way the system worked and complained that they routinely received forms late and often did not receive all of what they ordered.

automatically received the order used in the previous year. Unless notified directly, the IRS does not delete an office from this program without prior coordination with the Legal Assistance Division.

Another advantage of the Embassy Program is that the IRS can track shipments for a specific account. If an office has not received a shipment of IRS forms within the normal mailing time, someone from that office can send an inquiry to the IRS Richmond Service Center where a check of the computer records would show the status of the order. If the time from the shipment date to the inquiry is unreasonable, the service center will ship a replacement order for that office.

Ordering state tax forms for legal assistance offices is a separate issue not easily resolved. Some offices submit orders directly to each state's taxation department and hope that the orders are filled. Other offices order commercial publications containing state forms and photocopy each form as needed. Still others order the forms for the state in which they are located and any state in the immediate neighboring area if located near the border of that state. Finally, some offices buy commercial software packages containing some or all of the state forms and print the forms using the software program.

The way the IRS is organized is one of the reasons why the Legal Assistance Division could not set up a program similar to the Embassy Program for offices located in the United States. The IRS does not provide a central point of contact for VITA issues, electronic filing, and state tax issues in the United States. State tax issues, of course, are left to the individual states to handle. During meetings with IRS representatives in the late spring of 1995, the possibility of the IRS assisting with obtaining state income tax forms was discussed as part of the electronic filing program. The IRS agreed to explore this issue, although it probably will not be resolved in time for the 1996 tax filing season.

After Action Reports

Every year the Legal Assistance Division sends out a message about preparation of the Annual After-Action Report on Tax Assistance Services.[38] The message provides the format for the report, which reflects information about the numbers and types of returns filed and the personnel involved in providing tax assistance services.

These reports are not meant to match the numbers provided for tax assistance on the Report on Legal Assistance Services (DA Form 4944-R), which also is required to be submitted on an annual basis.[39] The After-Action Report focuses on those services provided during a specific time period and whether the legal assistance office is located in or outside the United States. It also reflects assistance provided by personnel other than attorneys.[40] The After-Action Reports, however, require that the returns be broken down into categories by the types of returns prepared and whether the return is a state or federal return. The information in Chart 9 below, which like Chart 8 is based on data from After-Action Reports, reflects the number of state income tax returns prepared from 1992 through 1995.

STATE TAX RETURNS
1992-1995 Tax Seasons

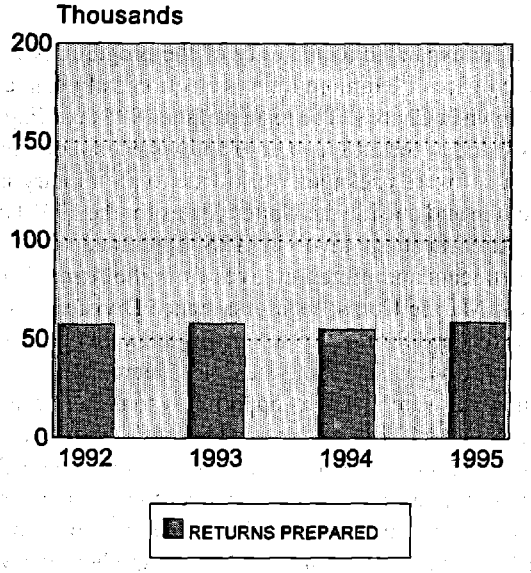


CHART 9

The After-Action Report provides very useful information to the Legal Assistance Division. This report reflects not only the amount of work done on behalf of eligible clients, but also the amount of effort by the entire military community in providing that assistance. The report also gives SJAs the opportunity to provide important feedback on such items as VITA classes, electronic filing software programs, and the effect, if any, of commercial tax preparers, located on and off the military installation, and on Army tax assistance services. Over the past several years, the data compiled from each report has been very useful during negotiations with the IRS on the number of VITA classes that should be held outside the United States and for obtaining electronic filing software throughout the Army.

[38] *See* AR 27-3, *supra* note 2, para. 5-4a.

[39] *Id.* para. 5-3.

[40] *Id.* para. 5-4a. However, in response to requests from Army legal assistance attorneys, the computer generated LAAWS-LA DA Form 4944-R has been modified to allow recording of tax center numbers for returns prepared and electronically filed. *See supra* note 24 and accompanying text.

Commercial Tax Preparers

Questions have arisen about the authority of installation commanders to impose conditions beyond those imposed by H&R Block's contract with Army—Air Force Exchange Service (AAFES). The legal authority to impose conditions on H&R Block beyond those in the contract with AAFES is questionable. Although the Legal Assistance Division encouraged an aggressive preventive law effort, installation legal assistance handouts should emphasize the positive aspects of Army tax assistance services instead of "blasting the competition." Legal assistance attorneys would never do this, at least not so openly, to lawyers in private practice with whom they arguably "compete."[41] Imposing appropriate rules on H&R Block should be part of the contract process. An installation commander who does not like the contract under which H&R Block operates on Army installations should notify AAFES *in a timely manner* that H&R Block is not going to be granted permission to operate on the installation—period. Doing this during the tax season, or trying to impose additional restrictions as a condition to operating on the installation, is not wise.

At the time of the submission of this article for publication, AAFES had no contract with H&R Block for the 1996 tax filing season. If a contract is not negotiated for the 1996 season, much of the guidance provided above would still apply to legal assistance preventive law efforts for off-post commercial tax preparers.

Of note, however, is the emergence of another commercial tax preparer already present on many installations—financial institutions, such as banks and credit unions. If they are involved in the tax preparation business, it is not under a contract with AAFES. Thus, no money generated by those businesses benefits the installations' morale, welfare, and recreation services like the AAFES contracts. Any legal assistance office located on an installation with financial institutions providing tax preparation services should include that information in the after-action report on tax assistance services and contact the Legal Assistance Division, OTJAG, about the operating rules for those institutions.

Related Legal Assistance Legislation

Military Powers of Attorney—10 U.S.C. §1044b

A power of attorney is a very useful legal document that allows a person to appoint another to act on his or her behalf about certain matters. Soldiers frequently use powers of attorney to authorize others, often their family members, to handle certain matters in their absence. The need for a power of attorney to handle even service related family tasks allows soldiers to protect their legal rights concerning their property and privacy, particularly when they are absent from home during training exercises, while mobilized or deployed, or while serving on unaccompanied tours. The power of attorney has a more direct relationship with readiness than perhaps any other legal assistance service.

During and following the 1991 Persian Gulf Conflict, legal assistance attorneys became aware that powers of attorney were not always honored because noncompliance with the technical provisions of some state and territorial laws. Puerto Rico was one of the more troublesome jurisdictions. This problem was once again identified in the 1992 Desert Storm Assessment Team Report.[42]

As a result of these problems, the Army Legal Assistance Division proposed federal legislation, that was later enacted, authorizing military powers of attorney.[43] This law exempts powers of attorney prepared on behalf of legal assistance clients "from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States."[44]

Following passage of this law, the chiefs of legal assistance for the five military services agreed to a common preamble to all powers of attorney prepared on behalf of legal assistance clients throughout the services. The preamble is designed to enhance the acceptance of military powers of attorney throughout the United States by providing a concisely worded description of the law's purpose on the face of each power of attorney. *Army Regulation 27-3* implements this agreement and contains the required wording of the preamble.[45]

Military Advance Medical Directives—10 U.S.C. §1044c

Advance medical directives (AMD), also known as directives to physicians, living wills, and health care proxies, allow individuals to control some aspects of their medical treatment, or to direct that it be withdrawn, even if death will occur. The AMDs address the legitimate fears of many individuals that, should they become seriously injured or terminally ill, they may be unable to communicate their wishes about last resort life saving techniques and extreme medical measures under modern medical technol-

---

[41] Most of the complaints against H&R Block were directed at the high interest "loans" H&R Block used to entice the unwary to immediately "cash in" on the tax refunds they anticipated would be forthcoming. For further discussion of this problem, see Alfred F. Arquilla, *Income Tax Assistance in the Army*, 4 THE LAMPLIGHTER 1 (1992).

[42] Office of The Judge Advocate General, United States Army, *Desert Storm Assessment Team Report* (22 Apr. 1992). This is a comprehensive report that covers all aspects of judge advocate operations provided during Operation Desert Shield and Operation Desert Storm.

[43] 10 U.S.C. § 1044b (1988).

[44] *Id.*

[45] AR 27-3, *supra* note 2, para. 3-7e(1).

ogy. The AMDs record an individual's wishes about such treatments, and may appoint a proxy if the patient is incapacitated to make decisions on issues that the patient did not anticipate and address in the AMD.

The Army Legal Assistance Division, OTJAG, proposed legislation to federally recognize any AMD prepared for eligible legal assistance clients notwithstanding state laws to the contrary. This proposed legislation is modeled after similar legislation on military powers of attorney.[46] The chiefs of legal assistance for each of the five military services agreed with the Army's legislative proposal, which was also endorsed by the American Bar Association (ABA) Standing Committee on Legal Assistance for Military Personnel (LAMP). The ABA House of Delegates formally endorsed the Army's legislative proposal in August 1994. At the time of the submission of this article for publication, this proposed legislation was pending before Congress as part of the National Defense Authorization Act for Fiscal Year 1996.[47]

---

[46] Lieutenant Colonel George L. Hancock, Jr., then the chief of the Administrative and Civil Law Division, TJAGSA, first proposed the concept and initial draft for this legislation.

[47] Following a series of discussions between Colonel Alfred Arquilla and staffers on the Senate Armed Service Committee in June and September 1995, the wording of the Army legislative proposal was modified before it was inserted in the Senate Bill, and again when it became part of the National Defense Authorization Act for Fiscal Year 1996. This legislation was passed by Congress and is expected to be approved by the President not later than 10 February 1996. The wording of this legislation is as follows:

§ S1002/H555. State Recognition of Military Advance Medical Directives

(a) Requirement For Recognition By States.

(1) Chapter 53 of title 10, United States Code, is amended by inserting after section 1044b the following new section:

§ 1044c. Advance medical directives of members and dependents: requirement for recognition by States.

(a) Instruments to be Given Legal Effect Without Regard to State Law. An advance medical directive executed by a person eligible for legal assistance:

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for advance medical directives under the laws of a state; and

(2) shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned.

(b) Advance Medical Directives. For purposes of this section, an advance medical directive is any written declaration that:

(1) sets forth directions regarding the provision, withdrawal, or withholding of life prolonging procedures, including hydration and sustenance, for the declarant whenever the declarant has a terminal physical condition or is in a persistent vegetative state; or

(2) authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making informed health care decisions.

(c) Statement to be Included.

(1) Under regulations prescribed by the secretary concerned, an advance medical directive prepared by an attorney authorized to provide legal assistance shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to an advance medical directive that does not include a statement described in that paragraph.

(d) States not Recognizing Advance Medical Directives. Subsection (a) does not make an advance medical directive enforceable in a State that does not otherwise recognize and enforce advance medical directives under the laws of the State.

(e) Definitions. In this section:

(1) The term 'state' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

(2) The term 'person eligible for legal assistance' means a person who is eligible for legal assistance under section 1044 of this title.

(3) The term 'legal assistance' means legal services authorized under section 1044 of this title.

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 1044b the following:

1044c. Military advance medical directives of members and dependents; requirement for recognition by States.

(b) Effective Date. Section 1044c of title 10, United States Code, shall take effect on the date of the enactment of this Act and shall apply to advance medical directives referred to in that section that are executed before, on, or after that date.

The Army Legal Assistance Division, in comments submitted to Senate staffers, indicated that the critical time as to eligibility for legal assistance is when the AMD is executed. The AMD should be given effect regardless of when the incapacity occurs. This argument carried the day. Also, the Army Legal Assistance Division pointed out that the coverage of the law should not be limited to AMDs prepared by legal assistance attorneys since many AMDs are prepared within the military by paralegals and clerical staff, not attorneys. The significant point is not "by whom" the AMD is prepared, but "for whom" it is prepared. Therefore, the statute should also encompass an AMD prepared for a service member by an attorney in private practice. The language appears to encompass all AMDs prepared for eligible legal assistance clients, regardless of who prepared them. However, if they are prepared "by an attorney authorized to provide legal assistance" (a phrase repeatedly used throughout *Army Regulation 27-3*), then the required statement of subsection c must be included in the AMD. Finally, the Army Legal Assistance Division argued that the definition of an eligible legal assistance client should not be limited to those clients who are eligible by virtue of 10 U.S.C. § 1044 alone, but should also include those who are eligible under various service regulations because many of the people for whom AMDs are prepared, such as military reservists and deploying civilian employees and defense contractors, are not included within the list of eligible clients under 10 U.S.C. § 1044. This argument failed, not because the Congressional intent was otherwise, but rather because the staffers did not view the language in the Act precluding its application to those authorized legal assistance pursuant to legal assistance regulations and instructions.

The Patient Self-Determination Act (PSDA)[48] requires medical facilities receiving Medicaid and Medicare funds to have procedures for handling patients' AMDs, and to inform patients about their rights to make AMDs under state laws. The PSDA left the sustance of the law to the states. The states have adopted different forms and procedural requirements, making it extremely difficult for military lawyers to prepare AMDs for legal assistance clients that will be effective in all jurisdictions. Unlike a testamentary will, an AMD is not governed by the law of the maker's domicile, rather, it is governed by the law of the state where the hospital is located and the AMD is used.

When an AMD prepared in one state is not honored by a hospital in another state, military families may be forced to endure the very pain and suffering they intended to avoid by preparing an AMD. It is important that service members, their spouses, and other persons eligible for military legal assistance be able to rely on their AMDs regardless of where they receive medical treatment.

Military personnel are not alone in this area, but the exigencies of military service greatly compound the problem for them. The problem of AMDs for military personnel is further complicated by the very nature of the military profession. Many military training activities are inherently dangerous. With the exception of police officers and fire fighters, no other category of public servant, as a matter of course, faces death or serious bodily injury as a fundamental part of daily service.

The legislation proposed by the Army, if enacted, will provide federal recognition of AMDs prepared for legal assistance clients, thereby eliminating the requirement for these clients to use the separate forms or formats required by various states. This legislation will allow legal assistance clients to obtain AMDs with the comfort of knowing that their directives, if needed, will be honored. It will also enhance the ability of military lawyers to address the legitimate concerns of their clients who wish to plan for such eventualities, especially during short notice military deployments involving potential hazardous duty. Finally, the proposed legislation will allow hospitals in any state, including military hospitals outside the United States, to honor a patient's wishes as declared in the military AMD.

Legal Assistance Regulations

Army Regulation 27-55, Notarial Services

Army Regulation 27-55 is a complete revision of the of a joint Army-Air Force regulation.[49] *Army Regulation 27-55* outlines the authority of all United States Army military and civilian personnel to administer oaths; to witness affidavits, sworn statements, depositions, and acknowledgments; and to provide other notarial services as part of their official duties. *Army Regulation 27-55* applies to members of the United States Army while serving on active duty, and to all members of the United States Army Reserve (USAR) and the Army National Guard (ARNG) when serving on active duty or performing inactive duty for training (IDT), and to all Department of Army (DA) civilian employees.[50]

The Judge Advocate General is responsible for all policies involving the administering of oaths and the provision of notarial services throughout the Army. The Chief, Legal Assistance Division, OTJAG, has authority to grant exceptions to this regulation.[51]

Army Regulation 27-55 recognizes that federal notarial authority is legally effective for all purposes without geographic limitations. In implementing this authority, *Army Regulation 27-55* preempts contrary state law.[52] *Army Regulation 27-55* also, for the first time, clearly establishes command and SJA control over, and delineates their responsibilities concerning, notaries acting under federal or state authority.[53]

Federal law provides authority for certain designated individuals in the Army to provide notarial services.[54] Army personnel providing notarial services under federal law are referred to as military notaries throughout *Army Regulation 27-55*.[55] This authority is separate from, and additional to, that authority provided

---

[48] 42 U.S.C. § 1395cc(f)(1) (1988).

[49] DEP'T OF AIR FORCE, REG. 110-6/DEP'T OF ARMY, REG. 27-55, AUTHORITY OF THE ARMED FORCES TO PERFORM NOTARIAL ACTS (18 June 1990) [hereinafter, AFR 110-6/AR 27-55]. Although joint efforts are encouraged whenever possible, efforts to revise *Air Force Regulation 110-6/Army Regulation 27-55* in a timely manner proved unsuccessful. This joint regulation was abolished for two reasons. First, the Air Force, which had taken the lead in revising this regulation, failed to produce a draft of the revision between 1991 and 1993. Secondly, by 1993, the Air Force decided to eliminate all Air Force regulations and replace them with Air Force instructions. The new Air Force format for instructions would not likely have been compatible with Army regulation requirements.

[50] AR 27-55, *supra* note 4, para. 1-1.

[51] *Id.* paras. 1-4a, 1-4b.

[52] *Id.* para. 2-1a.

[53] *Id.* paras. 1-4c, 1-4d.

[54] Title 10 U.S.C. §§ 502, 936, 1031 grant certain designated individuals authority to administer oaths in the performance of their duties and for military administration, including, but not limited to, military justice, legal assistance, and claims. Title 10 U.S.C. § 1044a, the most recent law implemented for the first time by *Army Regulation 27-55*, grants certain designated individuals general powers of a notary public and of a consel of the United States.

[55] AR 27-55, *supra* note 4, para. 2-1a(1).

by state or foreign law. Army personnel performing notarial services by virtue of state or foreign law are referred to as civil notaries throughout *Army Regulation 27-55*.[56]

There are two types of state laws providing notarial authority to Army personnel. The first type is by statute—without the need for a separately issued notarial commission. The laws of most states authorize certain members of the United States Armed Forces, by virtue of their military grade or position, to provide notarial services within the boundaries of those states.[57] The primary beneficiaries of these state laws usually are the United States Reserve and state national guard units located within the states, although these laws also generally apply to active military units within the states. *Army Regulation 27-55* only mentions these state laws in general terms. Nothing in *Army Regulation 27-55* limits the application of those laws to Army personnel in any way.

The second type of civil notaries recognized in *Army Regulation 27-55* are those who provide notarial services pursuant to state issued notarial commissions.[58] As revised, *Army Regulation 27-55* restates the federal prohibition[59] that bars commissioned officers serving on active duty under a call to duty in excess of one hundred and eighty days from accepting commissions as state notaries public.[60] Also, unlike the military instructions of other services, *Army Regulation 27-55* authorizes appropriated fund reimbursement for the cost of obtaining state notarial commissions and places some restrictions on who may use of state notarial commissions to perform official duties in the Army.

One of the goals in drafting *Army Regulation 27-55* was to make whatever restrictions that applied to military notaries consistent with civil notaries. At the time *Army Regulation 27-55* was being drafted, the Legal Assistance Division had a request from United States Army Europe to allow all NCOs, including corporals who were serving as NCOICs of small legal offices, to serve as military notaries. At that time, only soldiers in the grade E-5 and above could serve as military notaries.[61] At the same time that this request was pending, it was apparent at several Army installations within the United States that legal specialists of all grades were being authorized to obtain state-issued notarial commissions. Certainly, if it made sense to place grade restrictions on military notaries, it made equally good sense to place those same restrictions on civil notaries as well.

Those who possess notarial authority, civil or military, possess awesome power that, if put to the wrong use, could destroy lives and reputations, and empty the bank accounts and pockets of those who might be victimized. A single misuse of notarial authority could greatly discredit the Army and the JAG Corps. Therefore, the Army must ensure that all notaries receive adequate training and supervision so that they perform their notarial duties in strict compliance with the law and without interference from others.[62] However, even more importantly, is the need to ensure that lawyers supervise the many military and civil notaries who notarize, and often draft, the thousands of powers of attorney each year. All too often, these important documents are issued casually, if not carelessly, both in and outside the military.[63]

In light of the foregoing, the decision was made to limit military and civil notaries in the enlisted grades to NCOs, corporals and higher, and warrant officers "who are serving under the immediate supervision of a judge advocate or [DA] civilian attorney employee."[64] Military notaries also include all judge advocates, adjutants, and DA civilian attorney employees.[65] All DA civilian employees in the pay grade GS-4 or higher are authorized to become civil notaries in carrying out their official Army duties.[66] *Army Regulation 27-55* provides some flexibility as to

---

[56] *Id.* para. 2-b. *Army Regulation 27-55* does not specifically address foreign law in this area. However, the intent behind *Army Regulation 27-55* is to regulate, for example, the notarial authority a foreign national employee of the United States Army might use outside the United States in the performance of official Army duties where the employee's notarial authority is based on foreign law or a commission issued by a foreign government. This article will only address the effect of *Army Regulation 27-55* on state laws providing notarial authority to Army personnel.

[57] *Id.* para. 2-4.

[58] *Id.* para. 2-3.

[59] *Id.* para. 2-3a; 10 U.S.C. § 973b (1988).

[60] At the time *Army Regulation 27-55* was published, at least one Staff Judge Advocate had authorized his judge advocates to serve as state notaries public.

[61] AFR 110-6/AR 27-55, *supra* note 49, para. 1a(1)(g).

[62] The situation sometimes encountered is a superior noncommissioned officer or commissioned officer attempting to get a notary to notarize a signature on a document of an absent spouse. When such attempts are made it is extremely helpful to have an Army lawyer nearby to explain to the client why this cannot be done.

[63] *See* Mark E. Zumdahl, *Preventing Power-of-Attorney Abuses*, 83 ILL. BAR J. 537 (1995) (for a discussion of various means that may be employed in educating the principal and agent of a power of attorney, and avoiding agents with conflicts of interest).

[64] AR 27-55, *supra* note 4, paras. 2-2a, 2-3b.

[65] *Id.* para. 2-2a.

[66] *Id.* para. 2-3b.

the eligibility requirements for civil notaries. Staff judge advocates may request exceptions from the Chief, Legal Assistance Division, OTJAG, to authorize legal specialists who are not NCOs to apply for civil notarial commissions,[67] or to serve as military notaries, based on mission requirements and needs.[68]

Army Regulation 27-55 also provides military and civil notaries regulatory authority to refuse to perform any notarial act when circumstances would diminish the legal efficacy of the notarial act or otherwise violate *Army Regulation 27-55*. In effect, *Army Regulation 27-55* prohibits Army personnel from ordering a military or civil notary to notarize a document that the notary knows or believes to be false or that is unsigned or that is pre or post-dated.[69] Finally, the responsible commander or SJA may revoke or suspend the authority of those authorized to provide notarial services for failure to comply with *Army Regulation 27-55* or other notarial services laws.[70]

Army Regulation 608-99, Family Support, Child Custody, and Paternity

In the past, *Army Regulation 608-99* was always a personnel regulation. The Office of The Judge Advocate General assumed proponent responsibility for this regulation in May 1993 as a result of lengthy negotiations between the Chief, Legal Assistance Division, and the Deputy The Adjutant General (Deputy TAG) for the Army. The negotiated conditions governing the transfer of proponent responsibility from the personnel to the legal community are restated in detail in chapter 1 of *Army Regulation 608-99*.[71]

The Judge Advocate General decided to assume proponent responsibility for *Army Regulation 608-99* because of the importance of the regulation in the day-to-day work of legal assistance attorneys throughout the Army.[72] Also, as had been the case in the early 1980s, the TAG had twice failed to revise the existing version of *Army Regulation 608-99*.[73] On both occasions, the proposed revisions failed to survive OTJAG legal review. In short, TAG gave up trying and asked TJAG to take over responsibility for *Army Regulation 608-99*.

The newly revised *Army Regulation 608-99* strengthens Army policy over the most common cases handled by legal assistance attorneys in the family law area. The clear cut, unambiguous, and punitive requirements of this regulation save much time and effort on the part of commanders, legal assistance attorneys, SJAs, and inspector general (IG) personnel in responding to financial nonsupport complaints and paternity claims and child custody disputes.

Army Regulation 608-99 continues to require soldiers to obey court orders on paternity claims and financial support to family members.[74] The regulation requires soldiers to comply with an existing court order or with the financial support provisions of a written financial support agreement in the absence of a court order or with the financial support provisions of the regulation in the absence of a court order or agreement.[75] The regulation generally requires soldiers to pay an amount equal to their basic allowance for quarters at the with dependents rate to their family members.[76]

Army Regulation 608-99 generally continues prior Army policy about paternity claims. A male soldier may voluntarily provide financial support to a child born to him out of wedlock. He may also have had his paternity confirmed with a blood test, either voluntarily or in response to court order. He may also have formally or informally acknowledged the child as his own. Regardless of the soldier's past words or deeds, *Army Regulation*

---

[67] *Id.* para. 1-4b. The requests for exception have been few in number, but they have always been granted for legal specialists in the pay grade of E-4. The requests have been routinely denied for legal specialists below this pay grade.

[68] *Id.* para. 2-2. Although the use of military notaries within the active Army is restricted as a matter of legal assistance policy to those serving outside the United States, an exception was granted at one installation to authorize the use of military notaries where obtaining state issued civil notarial commissions was not possible. Because most people are not familiar with federal law providing notarial authority to military personnel, legal documents notarized by a civil notary are much less likely to be questioned.

[69] *Id.* para. 3-4.

[70] *Id.* para. 3-7a.

[71] AR 608-99, *supra* note 5, paras. 1-4a, 1-4c, 1-4d(2), 1-4g. The reasons for Staff Judge Advocates not assuming a larger enforcement role in *AR 608-99* cases are addressed in paragraph 1-4d(2). *Id.*

[72] *See* Alfred F. Arquilla, *Family Support, Child Custody, and Paternity, and Changes in Army Policy on Financial Nonsupport and Parental Kidnapping*, *supra* note 1 (discussion in this article as to Army financial support, paternity, and child custody policies, and the interest and involvement of legal assistance attorneys in these policies, still apply to the revised *Army Regulation 608-99*—the policies, and the reasons behind them, remain basically unchanged).

[73] DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (22 May 1987) [hereinafter, AR 608-99 (1987)]. The Commander, Community and Family Support Center, Alexandria, Virginia, had proponent responsibility for *Army Regulation 608-99* from January 1985 through March 1987. Before and after this period, TAG had proponent responsibility.

[74] AR 608-99, *supra* note 5, para. 2-5a(1).

[75] *Id.* para. 2-5a.

[76] *Id.* para. 2-6.

608-99 does not require him to provide financial support to a child born out of wedlock in the absence of a court order identifying him as the father and directing him to provide financial support.[77] The reason for what some may deem to be a harsh policy, at least from the child's perspective, is that the Army does not have the legal authority to make paternity determinations and order a soldier to support someone who may not be related to him. Such matters are best left to the civilian courts to resolve.

Army Regulation 608-99 continues to require soldiers to obey court orders on child custody. *Army Regulation 608-99* prohibits a soldier from wrongfully taking or detaining a child under the age of fourteen years from the child's lawful custodian.[78] The regulation defines a lawful custodian as one who has been granted physical custody of a child by court order.[79] A soldier who has joint custody of a child or who is authorized visitation with the child by court order may still be in violation of *Army Regulation 608-99* for wrongfully taking or detaining the child. *Army Regulation 608-99* does not prohibit a soldier from taking or detaining his or her own child from the child's other parent in situations where a court has granted "joint physical custody" to the parents, or where no court order on child custody exists.[80] As with paternity, the punitive provisions of *Army Regulation 608-99* do not apply to soldiers wrongfully taking or detaining a child age fourteen or older where no court order exists because the Army has adopted the policy that such cases are best left to the civilian courts to resolve.[81] *Army Regulation 608-99* no longer authorizes commanders to order soldiers to provide additional financial support beyond that required by *Army Regulation 608-99*. This provision[82] of the 1987 regulation was seldom used.

At the insistence of the Army IG, the rules regarding "support in kind" were broadened. Previously, *Army Regulation 608-99* allowed a soldier to meet his or her financial support obligation in other than a monthly cash payment only if the supported family member agreed.[83] The reason for this provision was that many soldiers, under previous versions of *Army Regulation 608-99*, avoided paying financial support to distant family members altogether by just paying off—or by just asserting that they were paying off—family debts. *Army Regulation 608-99* now authorizes a soldier in a situation with no court order or financial support agreement to credit payments made toward nongovernment housing expenses if the housing is then occupied by the supported family member.[84] The consent of the supported family member to this arrangement is not required. Housing expenses that can be credited toward the financial support requirements of *Army Regulation 608-99* are limited to rent payments or to payments made toward principal, interest, real estate taxes, and property insurance.[85]

The revised *Army Regulation 608-99* does not envision a change in the responsibilities or role of installation IGs regarding nonsupport, paternity, or child custody inquiries.[86] An IG's role is critical in many cases involving financial nonsupport inquiries for family members who are geographically separated from the soldiers responsible for their support. This is particularly true in cases where a commander, for whatever reason, does not respond—or responds improperly—to a family's pleas for help. In such instances, there is very little a legal assistance attorney can do, but IGs, given their mission in the Army, are usually successful in obtaining full compliance with Army regulations.

Army Regulation 27-3 discusses the IG's role in enforcing the requirements of *Army Regulation 608-99*. *Army Regulation 27-3* also indicates that legal assistance attorneys should first seek to resolve issues involving the interpretation of *Army Regulation 608-99* at the installation level before seeking assistance from the

---

[77] *Id.* para. 2-2.

[78] *Id.* para. 2-9a.

[79] *Id.* Glossary, I, Terms. The term "lawful custodian" also includes the mother of a child born out of wedlock, even in the absence of a court order. Therefore, a male soldier would violate this regulation if he unlawfully took or detained his child (under fourteen years of age) born out of wedlock in the absence of a court order granting him physical custody of the child, even if no court order on custody exists.

[80] *Id.* para. 2-9b, Glossary, I, Terms.

[81] *See supra* note 72 and the referenced article for a general discussion of the child custody policy considerations behind *Army Regulation 608-99*.

[82] AR 608-99 (1987), *supra* note 73, para. 2-10. The authority of a commander to order additional support was limited to situations where no court order or financial support agreement existed.

[83] *Id.* para. 2-8.

[84] AR 608-99, *supra* note 5, para. 2-7d.

[85] *Id.*

[86] AR 608-99 (1987), *supra* note 73, para. 2-11, as well as prior versions, briefly addressed the responsibilities of the Inspector General in the enforcement of *Army Regulation 608-99*. The initial draft of the current *Army Regulation 608-99* also contained a statement of the Inspector General's role and responsibilities. This statement, however, was deleted at the request of the Inspector General because the Inspector General responsibilities should be governed by its own regulation, DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (15 Mar. 1994) [hereinafter AR 20-1]. Nevertheless, when *Army Regulation 27-3* was revised in 1995, the Inspector General specifically requested amending paragraph 3-6 to mention the Inspector General's role in the enforcement of *Army Regulation 609-99*.

Legal Assistance Division, OTJAG. The pertinent provision provides as follows:

> In exceptional cases, after efforts to resolve *Army Regulation 608-99* matters with the responsible commander(s) have failed to produce the desired results, attorneys providing legal assistance may contact the appropriate command or installation inspector general, SJA, or other staff officer for help. Staff Judge Advocates may contact the proponent of *Army Regulation 608-99* . . . on legal issues involving the interpretation of *Army Regulation 608-99* that cannot be resolved locally . . . Inspector General assistance is provided on financial nonsupport cases pursuant to Army Regulation 20-1, paragraph 6-6a.[87]

As before, *Army Regulation 608-99* continues to be a punitive regulation with offenses punishable as a violation of a lawful general regulation under Article 92, Uniform Code of Military Justice.[88] Offenders are subject to the full range of statutory and regulatory sanctions, including trial by courts-martial and nonjudicial punishments.[89] Although there have been very few prosecutions involving *Army Regulation 608-99*, the punitive nature of the regulation, and the clear and unambiguous requirements of the regulation, have undoubtedly persuaded most soldiers, who might be tempted otherwise, that providing continuous financial support to their family members and obeying all court orders on financial support, child custody and paternity is the best path for those who value their Army careers.

Army Regulation 608-99 also requires all commanders and those on their staffs at every level, before recommending approval of requests for, or extensions of, military assignments outside the United States, to consider whether a soldier's assignment or continued assignment outside the United States will adversely affect the legal rights of others in pending or anticipated court actions against the soldier, or against the soldier's family members, or will result in a repeated or continuing violation of an existing state court order or *Army Regulation 608-99*. Most importantly, *Army Regulation 608-99* provides legal authority for terminating a soldier's military assignment outside the United States, consistent with other military requirements, when the assignment adversely affects the legal rights of others seeking to obtain financial support or child custody, or to establish paternity.[90] The assignment restrictions represent a strengthening of command, SJA, and other staff enforcement of *Army Regulation 608-99*. In this, as in other areas, *Army Regulation 608-99* is particularly effective with soldiers stationed outside the United States, many of whom, for all practical purposes, are beyond the service of process of state courts.[91]

Army Regulation 608-99, for the first time, gives commanders exercising summary courts-martial convening or field grade nonjudicial punishment authority limited power to release soldiers from certain requirements of the regulation.[92] This authority is limited to the following situations, which the appropriate commander, after obtaining legal advice from his or her legal advisor, must find to exist by a preponderance of the evidence:

a. Any *Army Regulation 608-99* requirement based on the order of a court without jurisdiction over the soldier.

b. Any BAQ financial support requirement of *Army Regulation 608-99*:

(1) Where a court having jurisdiction over the parties has issued one or more orders without a financial support requirement.

(2) As to a supported spouse whose income exceeds the military pay of the soldier.

(3) As to a supported spouse who has physically abused the soldier (if substantiated by a finding made by a family advocacy case management team, by a conviction, or by a court restraining order then in effect).

---

[87] AR 27-3, *supra* note 2, para. 3-6a(2). This policy of resolving *Army Regulation 608-99* issues at the local installation level as much as possible reflects the fact that the Legal Assistance Division, OTJAG, has a smaller staff than almost all Staff Judge Advocate offices and many installation legal assistance offices. For the same reason, *Army Regulation 608-99* provides that The Judge Advocate General's authority to approve exceptions under *Army Regulation 608-99* "will not be applied in individual cases to release soldiers or their family members from their obligations" under *Army Regulation 608-99*. AR 608-99, *supra* note 73, para. 2-10.

[88] 10 U.S.C. § 892 (1988).

[89] AR 608-99, *supra* note 5, paras. 1-6, 2-5, 2-9.

[90] *Id.* paras. 1-4c, 1-4d(5), 1-4e(8), 1-4f(7), 1-5e, 3-10b.

[91] In a case handled by the Legal Assistance Division, OTJAG, an Army major who had avoided resolution of a paternity claim by being assigned and reassigned for four continuous years in three different foreign countries, voluntarily submitted to the jurisdiction of a Midwestern state when he received orders, later rescinded, curtailing his third tour of duty overseas and reassigning him to the same city in which the mother of his child resided. The mother had been unable to obtain jurisdiction over the paternity claim in either his or her state of domicile, or in the state where the child was conceived. The Army took the position that the issue in such a case was not whether the parties could work out their differences regarding the paternity claim and the demand for past and future financial support, but whether the soldier would agree to submit to the jurisdiction of a state court to resolve this matter, or would the Army, in accordance with *Army Regulation 608-99*, assign him to a duty station within the United States so that a support order could be obtained. Until a state court assumed jurisdiction, the mother seeking to establish paternity or obtain financial support would be negotiating from a position of extreme weakness.

[92] AR 608-99, *supra* note 5, paras. 2-10; 1-11; Glossary, I, Terms.

(4) As to any supported family member who is in jail.

(5) As to any supported child in the custody of another who is not the child's lawful custodian.[93]

Army Regulation 608-99 establishes specific responsibilities for battalion commanders regarding soldiers involved in repeated or continuing violations of this regulation. When a second complaint is received, the soldier's immediate commander must forward the complaint to the battalion commander for action.[94] The purpose of this requirement is to ensure that unresolved complaints are not allowed to languish without action or appropriate action by an immediate commander, who perhaps may also be too sympathetic to the plight of the soldier concerned.

Chapter 4 of *Army Regulation 608-99* implements *Department of Defense Directive 5525.9*[95] (*DOD Directive*) which requires the military services to assist federal and state law enforcement and court officials regarding service members and Department of Defense employees and their family members outside the United States. *Army Regulation 608-99*, however, only implements this directive where the request for assistance is based on a court order arising from financial support, child custody and visitation, paternity, or related cases.[96] If a soldier or family member has been charged with, or convicted of, a felony, or has been held in contempt for failing to obey a court order, or required to show cause why he or she should not be held in contempt for failing to obey a court order, then *Army Regulation 608-99* requires the responsible general courts-martial convening authority (GCMCA) to take prompt action[97] in returning the soldier or family member to the United States or taking other measures to resolve the matter locally. The detailed provisions of *Army Regulation 608-99* are based on the language of the *DOD Directive*. The Chief, Legal Assistance Division, OTJAG, plays a large role in resolving these cases to the satisfaction of the courts or the law enforcement officials involved because these cases are closely monitored by the General Counsel, Office of the Secretary of Defense.[98]

Appendix B of *Army Regulation 608-99* contains numerous examples applying the requirements of the regulation.[99] Although this appendix was mistakenly entitled "Examples of paternity cases" by the editor, the examples cover most of the requirements of the first three chapters of *Army Regulation 608-99*.

Army Regulation 27-3, The Legal Assistance Program

The changes made to *Army Regulation 27-3*[100] are highlighted in the text with the new material underlined and the deleted material lined through.[101] As already discussed, *Army Regulation 27-3* provides new guidance to legal assistance attorneys on powers of attorney, and on the new policies on handling family law cases involving *Army Regulation 608-99*[102] and on those resulting from the joint legal assistance study.[103] As part of the emphasis on joint efforts between the services, *Army Regulation 27-3* eliminates most eligibility distinctions between soldiers and other service members for legal assistance services from Army legal offices. It also removes all eligibility distinctions between DOD and DA civilian employees within the United States for legal assistance services in conjunction with their acceptance of employment, or pending deployment, outside of the United States.[104]

As revised, *Army Regulation 27-3* mandates a minimum level of legal assistance throughout the Army. In the past, statutes and regulations have made the delivery of legal assistance services an optional program entirely dependent on the availability of per-

---

[93] *Id.* (glossary defines the terms court order, family member, financial support, income, lawful custodian, military pay, personal jurisdiction, preponderance of the evidence, and Staff Judge Advocate).

[94] *Id.* paras. 1-4e(5), 1-4f(6).

[95] DEP'T OF DEFENSE, DIR. 5525.9, COMPLIANCE OF DOD MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES WITH COURT ORDERS (27 Dec. 1988) [hereinafter DOD Dir. 5525.9].

[96] AR 608-99, *supra* note 5, para. 4-1a.

[97] *Id.* paras. 4-2, 4-4 (providing that a general courts-martial convening authority may request a delay not to exceed ninety days if the request for delay is made within thirty days of receiving the request for assistance).

[98] *Id.* para. 4-4.

[99] *Id.* app. B.

[100] AR 27-3, *supra* note 3 (publication of changes is designated as Change 1 (C1)).

[101] The United States Army Publications and Printing Command indicates that Change 1 to *Army Regulation 27-3* is the last change to an Army regulation that will highlight the change material with underlines and strike throughs.

[102] *See supra* note 80 and accompanying text.

[103] *See supra* note 23 and accompanying text.

[104] AR 27-3, *supra* note 2, para. 2-5a(6).

sonnel and other resources at each Army installation.[105] *Army Regulation 27-3* now requires all commanders having one or more attorneys, military or civilian, assigned to their staffs to provide legal assistance in conjunction with mobilization and deployment and, at the very minimum, to assist eligible legal assistance clients seeking help on legal problems or needs to find an Army lawyer, or a lawyer in private practice, who can assist them.[106] This change, for all practical purposes, only describes what conscientious Army lawyers have been doing. By requiring a minimum level of legal assistance throughout the Army, the program is now mandated by regulation, and hence a little safer from budget and personnel reductions in the future.[107]

Army Regulation 27-3 now authorizes Reserve Component judge advocates to earn retirement points for legal assistance work by combining periods of less than two hours in a single day with periods in other days to accumulate the two hours required for the award of a single retirement point.[108] This provision is the outcome of successful discussions over the past two years between the Legal Assistance Division, OTJAG, and the United States Army Reserve Personnel Center (ARPERCEN).[109]

The issue as to whether legal assistance is authorized for DOD contract personnel working outside the United States has arisen from time to time. When the 1992 publication of *Army Regulation 27-3* deliberately excluded them as being eligible for legal assistance services,[110] three separate memoranda requesting an exception to authorize legal assistance services for contract personnel were forwarded to the OTJAG. These exceptions pertained to contractors located in Kwajalein, Kuwait, and United States Army Europe. The two requests pertaining to Kwajalein and Kuwait were approved with limitations identical to the language now inserted in *Army Regulation 27-3*. Action on the United States Army Europe request was delayed pending publication of the revised *Army Regulation 27-3*. Under *Army Regulation 27-3*, legal assistance to DOD contractors outside the United States and to their family members who accompany them, if not prohibited by host nation authorities, is limited to notarial services, legal counseling, review and discussion of legal documents, the drafting of powers of attorney and AMDs, and assistance on retaining a lawyer in private practice to help them with these and other legal needs.[111]

Army Regulation 27-3 also implements a decision made on 11 February 1993 by then Army Chief of Staff General Gordon R. Sullivan to abolish "by-law" beneficiary designations under the SGLI program.[112] General Sullivan made this decision following a briefing by the Legal Assistance Division, OTJAG, which placed the initiative as an issue to be formally resolved as part of the Chief's Soldier Issue Forum.[113] *Army Regulation 27-3* now prohibits both "by-law" and "by-will" designations,[114] and requires Army lawyers to advise and assist soldiers on filling out their Veterans Administration (VA) Forms SGLV-8286, Servicemen's Group Life Insurance Election and Certificate.[115] *Army Regula-*

---

[105] *See* 10 U.S.C. § 1044 (1988); AR 27-3 (1992), *supra* note 3, para. 1-4f. The statute makes legal assistance with the DOD "[s]ubject to the availability of legal staff resources." *Army Regulation 27-3* (1992) only required commanders to establish a legal assistance program in their command if "one or more attorneys . . . assigned to their staffs or under their commands who are providing legal assistance on either a full or part-time basis as part of their duty or job description."

[106] AR 27-3, *supra* note 2, para. 1-4f(1) (underlined—because of a printing error, another subparagraph (1), not underlined, should have been renumbered as (2)). *See also Id.* para. 1-4g (2), which requires Staff Judge Advocates to provide the same minimum legal assistance services even if a full or part-time legal assistance attorney is not available. Referring legal assistance clients to those who can assist them is one of the most important services provided under the Army legal assistance program. *Id.* para. 3-7h, 3-7i.

[107] Every time there are reductions within the Army, at the headquarters and installation level, those responsible for various programs are asked to respond whether what is being done is required by law, DOD instruction or Army regulation, or voluntarily undertaken. The Army legal assistance program is now required by Army regulation.

[108] AR 27-3, *supra* note 2, para. 2-2b(4).

[109] The day-to-day legal assistance work performed by Reserve judge advocates, for example, providing advice to clients or talking to Army lawyers over the telephone, seldom ever exceeds two hours in any one day.

[110] See AR 27-3 (1992), *supra* note 3, para. 2-5a(9); Alfred F. Arquilla, *The New Legal Assistance Regulation*, *supra* note 1, at 15.

[111] AR 27-3, *supra* note 2, para. 2-5a(7).

[112] *Id.* para 3-6b(1).

[113] Earlier, in January 1993, the American Bar Association LAMP Committee adopted a resolution to abolish "by-law" designations throughout the military. This resolution was adopted by the American Bar Association House of Delegates in August 1993. Eventually, the Navy and Marine Corps followed the Army's lead in abolishing "by-law" beneficiary designations. The tragic consequences that sometimes arose from "by-law" designations became apparent following the 1985 crash of a DC-8 aircraft at Gander, Newfoundland, Canada, in which 248 soldiers were killed, and then again, in the 1991 Persian Gulf War in which 213 soldiers died. *See* Alfred F. Arquilla, *Servicemen's group Life Insurance (SGLI)*, 4 THE LAMPLIGHTER 3 (Winter 1992); Jim Tice, *Earmarking insurance benefits: Naming beneficiaries recipe for prevention of costly lawsuits*, ARMY TIMES, December 7, 1992, at 24.

[114] "By-will" designations are prohibited on the basis that passing insurance proceeds through a will may subject the proceeds to the claims of creditors from which, by law, they are otherwise exempt. Also, "by-will" designation may necessitate probate of a will. Although these disadvantages may also accompany a designation made via a testamentary trust, unlike a testamentary trust, there are no off-setting advantages.

[115] *See* DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE INSURANCE (20 Oct. 1994) [hereinafter AR 600-8-1]. Because a service member may elect up to $200,000 in life insurance coverage under the SGLI program, for many service members, their insurance proceeds far exceed the value of property conveyed by will.

tion 27-3 also contains detailed guidance on the various ways in which beneficiaries may be designated on the VA Form SGLV 8286, giving the advantages and disadvantages of each particular method.[116] Finally, *Army Regulation 27-3* prohibits the use of "home made" SGLI forms or continuation forms unless specifically approved by the proponent of *Army Regulation 600-8-1*.[117]

On a related readiness issue, *Army Regulation 27-3* also, for the first time, provides criteria for prioritizing the drafting and execution of wills during mobilizations and deployments.[118] Like the prohibition of "by-law" SGLI beneficiary designations, these requirements are the result of another Operation Desert Shield/Storm lesson learned. Of the two hundred and thirteen soldiers who died in the Persian Gulf, only the survivors of six soldiers found it necessary to introduce their wills in probate proceedings.[119] Equally apparent is the fact that way too much emphasis is placed on the need for every soldier to have a will.[120] This emphasis may benefit the JAG Corps in that it reinforces the need for lawyers in preparing soldiers for mobilization and deployment and is a service that can be easily tabulated—often in large and impressive numbers. However, the overemphasis on wills (and the desire to generate numbers) means that Army lawyers spend most of their time during mobilization and deployment doing wills for the soldiers who need them least, while oversimplifying or deferring until later the more complicated wills for those with children or complicated family situations, or not doing them at all for those with substantial property who may be referred to lawyers in private practice for assistance. Secondly, this means that insufficient attention is paid to the myriad of other legal problems and needs that adversely affect soldier readiness and morale. Areas that might benefit from greater attention include helping mobilizing and deploying soldiers with ongoing child care and custody problems, pending divorces and other legal actions, current legal problems with existing leases and purchase contracts, and SGLI and other life insurance beneficiary designations.

Army Regulation 27-3 provides that during mobilization and deployment, legal assistance resources should be allocated based on need, and that the absence of a will does not make a soldier nondeployable.[121] The regulation cautions that the need for a routine will must be weighed against the needs of other soldiers for other legal services, such as resolving ongoing consumer law problems.[122] As to prioritizing wills, *Army Regulation 27-3* provides the following:

> When legal resources are limited, the priority for drafting and executing wills should be given to service members to whom the following applies:
>
> (1) those who have a minor child;
>
> (2) those whose primary beneficiary is a minor;
>
> (3) those whose net estate (excluding insurance, jointly-owned property, and other nonprobate property) is valued at more than $10,000 (or higher dollar limit if applicable law allows small estate administration for estates of lessor amounts); or
>
> (4) those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will.[123]

Army Regulation 27-3 also modifies the previous guidance on the eligibility of clients for in-court representation by expanding eligibility for this legal service to all service members, and by relaxing the financial test for determining "financial hardship." The latter is accomplished by eliminating any reference to the financial hardship test that may be used by the state or local government adjoining a particular Army installation.[124]

---

[116] AR 27-3, *supra* note 2, app. C. At the request of the Legal Assistance Division, OTJAG, almost identical guidance was placed in *Army Regulation 600-8-1*. See AR 600-8-1, *supra* note 115, para. 11-30. The methods addressed in both regulations include beneficiary designations by name, by relationship, by the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act, by testamentary trust, and by *inter vivos* trust.

[117] As a practical matter, no such form is going to be approved. The Veterans Administration (VA) is the proponent agency of the SGLV-8286, and the Army is not going to authorize substitute or continuation forms without VA approval. The VA officials endorse the use of "by-law" designations and simple one page forms because this enhances smooth administration of the SGLI program (continuation forms get lost), regardless of what may have been the true wishes of the deceased service member.

[118] AR 27-3, *supra* note 2, para. 3-7g(3).

[119] This information was obtained during 1991 by members of the Legal Assistance Task Force—Desert Storm/Demobilization, who contacted the survivors of each soldier who died in the Persian Gulf War to ensure that they were afforded legal assistance services.

[120] The emphasis for every soldier to have a will generates frequent public affairs announcements on the Armed Forces Radio and Television and other media, that, in an effort to be overly simple, are usually misleading about the benefits of a will.

[121] AR 27-3, *supra* note 2, para. 3-6b(2)(b).

[122] *Id.*

[123] *Id.* This criteria was coordinated with the legal assistance instructors at The Judge Advocate Genera's School, United States Army. The response of some commands during the staffing of the draft revision of *Army Regulation 27-3* was that the state specific criteria on small estates and the laws of intestate succession are not readily ascertainable. State specific laws can be readily accessed in the Martindale Hubble Law Digest.

[124] *Id.* para. 3-7g(3).

For the first time, *Army Regulation 27-3* provides guidance on detailing Army lawyers who provide legal assistance under the Victim/Witness Assistance Program.[125] *Army Regulation 27-3* clarifies that help rendered as a victim/witness liaison is outside the scope of the legal assistance program, and that the attorney-client privilege does not apply to communications between a victim-witness liaison and the victims and witnesses being served under the Victim/Witness Assistance Program. Although there is no inherent conflict of interests in serving as both a legal assistance attorney and a victim witness liaison, there is a conflict of interests when the same person is both a client and a victim and/or witness.[126]

Army Regulation 27-3 also clarifies that providing legal services to persons on private and government employment issues, such as hiring and firing decisions, other adverse personnel actions, discrimination complaints and workers' compensation are outside the scope of the legal assistance program[127] However, as a change from past legal assistance policy, *Army Regulation 27-3* now authorizes legal assistance on tax matters relating to an eligible client's business activities as a family child care (FCC) provider.[128] The policy reason behind this change is that FCC providers, although engaged private business activities and which has traditionally been outside the scope of legal assistance, are heavily regulated by the Army in performing work on Army installations in the very important work of providing child care for soldiers and their families. Also, for the most part, FCC providers are the spouses of soldiers and are eligible for legal assistance and generally file joint income tax returns with their soldier spouses.

Finally, in an effort to further encourage the resolution of conflict of interest cases with minimum expense or inconvenience to clients, a change to *Army Regulation 27-3* indicates that referring such clients to other lawyers should not be considered as a last resort."[129] This option, with proper precautions, may be utilized more in the future as the draw down makes legal assistance referrals to lawyers assigned to the United States Army Trial Defense Service (USATDS) or within the Reserve components less viable options than in the past.

The Army Chief of Staff Award for Excellence in Legal Assistance

The Army Chief of Staff Award for Excellence in Legal Assistance is an annual award designed to recognize those legal assistance offices providing the highest level of services to eligible clients. The application process is managed entirely by the Legal Assistance Division. The award application is usually sent out to Army legal offices in late spring or early summer. The award application is due to the Legal Assistance Division by 7 March of the following year. The application process is voluntary, with no requirement for any office to apply for the award.[130]

The award is based on legal assistance activities and initiatives during the calendar year. No set "quota" for the number of winners or the size of categories in which an office must participate have been established. This award should not be confused with the Army Communities of Excellence Program (ACOE), which is run separately by an ACOE office at the Department of the Army. For the Chief of Staff Award, offices of similar size are compared against each other, but there is no limit to the number of offices of a certain type or size that are eligible to win the award.

Because the award is given annually, applications are compared on that basis. In other words, just because an office won the award in one year does not mean that the same office will win the award the following year. Legal assistance attorneys and support staffs are continually finding innovative ways to assist clients, and what was excellent one year may be the norm for the following year because other offices are doing the same thing. For example, during the evaluation of applications for calendar year 1994, several installations reported as an initiative for 1994 the provision of walk-in hours for powers of attorney and notarial services. Obviously, the first year this is done would be an initiative; however, the succeeding years should not reflect this as an initiative unless one can show an improvement in how the services were provided. For example, by expanding the hours these services were provided by adding two nights a week to accommodate clients who could not come to the office during the duty

---

[125] *Id.* para. 3-8b(5); DEP'T. OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 18 (8 Aug. 1994) (I01, 16 Dec. 1994).

[126] AR 27-3, *supra* note 2, para. 3-8b(5). For example, advising a legal assistance client to fully cooperate as a witness in a pending court-martial may be against the client's best interests.

[127] *Id.* para. 3-8a(4). For example, the United States Army should not be involved in initiating legal action against a service station owner who terminates, perhaps unjustly, the employment of a soldier's spouse. Assisting DOD civilian employees on certain government related problems, such as reports of survey, is specifically authorized by *Army Regulation 27-3*. *Id.* para. 3-6g. Assistance on government employment related matters not listed should be on an exceptional basis. *Id.* paras. 1-4g(2)(c); 1-5.

[128] *Id.* paras. 3-6I; 3-8a(2); DEP'T OF ARMY, REG. 608-10, PERSONAL AFFAIRS: CHILD DEVELOPMENT SERVICES, ch. 6 (12 Feb. 1990) (I01, 30 Dec. 1994).

[129] AR 27-3, *supra* note 2, para. 4-9c. The words "as a last resort" were deleted in a sentence that indicates that supervising lawyers may resolve conflict-of-interest cases by referring clients elsewhere within the same legal office. This change makes this provision consistent with *Army Regulation 27-3*, paragraph 3-7h, which indicates that referring a client to another lawyer is appropriate, with the first preference to refer the client to another lawyer within the same legal office.

[130] The high interest and keen competition for this annual award provides one of the most effective methods for advancing legal assistance program objectives; such as, training, automation, and preventive law initiatives. It also helps ensures full compliance with Army legal assistance regulations. A detailed questionnaire developed in 1991 that is updated annually notifies legal assistance attorneys about important objectives of the program.

day. The lesson here is to strive for improvement every year rather than relying on what was good enough in the past to win the award.

Former Spouse Payments from Retired Pay

The Uniform Services Former Spouses' Protection Act[131] (FSPA) recognizes the right of state courts to order the distribution of military retired pay to a spouse or former spouse incident to a final decree of divorce, dissolution, annulment, or separation, and provides a method for enforcing these orders. While a state court may award a portion of a service member's retired pay to a spouse married to the member for only a short period of time, the FSPA does not authorize enforcement of the order through the Defense Finance and Accounting Service (DFAS) unless the parties were married to each other for at least ten years during which the member performed at least ten years of creditable military service, in addition to other requirements.

For legal assistance attorneys and lawyers in private practice, the problem with the FSPA in application was how to determine, during the course of negotiations with the other spouse, or in a petition before a court, the appropriate percentage of military retired pay that should go to the civilian spouse on divorce. With members who were already divorced, calculating this percentage was a matter of simple arithmetic. The problem arose with determining the appropriate percentage for a member still on active duty; particularly when, as in most cases, it was not known when the member would retire and at what rank.[132]

The problem for calculating this percentage for members still on active duty when they got divorced was exacerbated by DFAS's refusal, based on policy concerns and a strict reading of the statute, to refuse to honor for direct payment any court decree that did not divide military retired pay as fraction of disposable retired pay at the retired grade.[133] The DFAS policy made negotiating a fair division of military retired pay on behalf of an active duty service member exceedingly difficult when a civilian spouse was insisting on a direct payment from DFAS on his or her share of the member's retired pay. The inflexibility of DFAS on this issue also made it difficult for the civilian spouse who desired direct payment but feared that the courts might force a division based on a formula that would not be honored for direct payment by DFAS.

In light of the foregoing concerns raised by both the Army legal assistance attorneys and the civilian bar, the Legal Assistance Division, OTJAG, formally requested DFAS officials to change its policy. As a result, the DFAS officials agreed to honor divorce decrees that ordered direct payment to former spouses based on a division of a service member's military retired pay on the pay grade stated in the decree or, in its absence, the pay grade upon retirement. The DFAS also agreed to honor the following formula[134] for service members who obtain divorces prior to retirement:

$$\text{50\% (or percent provided in the decree)} \times \frac{\text{Number of Months Married During Creditable Service toward Military Retirement}}{\text{Number of Months of Creditable Service toward Military Retirement (inserted by DFAS upon retirement)}} \times \text{Retired pay of service member at retired grade or grade stated in decree} = \text{Former spouse's dollar share of the member's retired-pay upon retirement}$$

This change will benefit both service members and their spouses by allowing divorcing couples greater flexibility on negotiating favorable terms during property settlement negotiations. The DFAS began honoring this formula in early 1995, even before the proposed policy change was published in the *Federal Register* for public comment.

Future Challenges

The highest calling for a lawyer is to help another in legal difficulty. Legal assistance attorneys respond to that calling by helping those, who like themselves, are serving their country. Most of our clients are young, and many are often thousands of miles away from family or friends on whom they might otherwise seek counsel or guidance in their day-to-day lives. Our clients frequently have only a high school education and, like most people their age and older, are unfamiliar with the intricacies of the laws that affect their daily lives. They also usually lack the money to hire a lawyer when they get in legal trouble, and some even lack the sophistication, when legal problems arise, to recognize them as such, or to seek the free legal help available to them from the Army.

In helping soldiers and their families with their personal legal problems and needs, Army legal assistance attorneys eliminate many of the major and minor distractions that might otherwise adversely affect their morale and readiness to deploy. Army legal assistance attorneys also improve their quality of life, particu-

---

[131] 10 U.S.C. § 1408 (1988).

[132] For example assume a major retires from active duty and divorces his wife to whom he was married during fifteen years of the twenty years he served on active duty. The wife, under the laws of most states, would argue that she was entitled to 37.5%, 50% x 15/20, of her husband's military retired pay. But how does one calculate the percentage of retired pay to go to the wife if the member still on active duty divorces after twenty, fifteen, or ten years of military service, and at what rank is the military retired pay calculated?

[133] The statute also allowed a dollar amount in a divorce decree to be honored, but a dollar amount seldom would ever be inserted in a divorce decree because of inflationary concerns. Also, a decree that provided for a dollar amount augmented each year by changes in a consumer price or other index would not be honored for direct payment by the DFAS.

[134] The provision authorizing this type of formula to be honored by DFAS will be inserted in the revision of *DOD Financial Management Regulation* (Volume 7, Part B). 32 C.F.R. § 63 (1995).

larly if, through preventive law measures, we are able to keep them out of legal difficulty in the first place. All this effort helps the Army recruit and retain a quality force.

Most judge advocates serve as legal assistance attorneys during their initial tour of duty in the Army. For the many judge advocates without prior military experience, it is an excellent way for them to learn about soldiers and the Army we serve. Also, because they are new lawyers, who have recently graduated from law school, they will likely be familiar with at least the terminology regarding many legal assistance practice areas like estate planning, family law and consumer law.

The major challenges facing the Army legal assistance program include the following. First, our leaders within the JAG Corps, from SJAs on up, must do more, by word and deed, to improve the stature of legal assistance attorneys in the Army. Because legal assistance is often an initial duty assignment for judge advocates, this duty assignment is often viewed by Army lawyers as lacking the prestige attached to other legal assignments, such as military justice.[135] This is a leadership problem. Nothing can do more to dampen the enthusiasm of legal assistance attorneys than to hear their supervisors tell them that they must first prove themselves in legal assistance before they can "move on" to "more important duties" in the office, such as military justice.

Denigrating the importance of legal assistance not only reflects poor leadership, but also is an approach to supervision that is based on a false premise. The general high quality and exceptional capabilities of judge advocates throughout the Army does not vary among the different fields of the law in which they practice, either at the installation level, or at higher headquarters. Also, given the attorney-client privilege and the nature and volume of the work involved, legal assistance attorneys are more on their own, and not as closely supervised as other judge advocates of their grade performing duties elsewhere in the Army. Finally, the potential for a legal oversight or mistake to do legal harm to another, or to cause an embarrassment to the Army or the JAG Corps is as much, if not greater, in legal assistance as in other areas of the law in which judge advocates practice.

A second challenge facing our JAG Corps leadership is putting more experienced officers in charge of legal assistance offices. The relative inexperience of our junior legal assistance practitioners coupled with the increasingly sophisticated nature of legal assistance practice emphasizes that management of legal assistance is a critical function. Despite this fact, first or second term officers are routinely assigned as chiefs of legal assistance offices, even in larger offices. This trend is at least in part a reflection of the perception that only the newest judge advocates can work in legal assistance without negatively affecting their careers. The JAG Corps leadership must recognize the significant management challenges associated with legal assistance practice not only by assigning some of the best and most experienced managers to legal assistance, but by rewarding those who excel with ratings consistent with their contributions. There is no reason why our best senior captains and majors should not seek the demanding and exciting leadership and management challenges found in legal assistance.

A third challenge facing the JAG Corps leadership at all levels is to heighten awareness in the Army that legal assistance is not only essential in maintaining readiness and high morale, but it is also an important Army quality-of-life and family program. All too often within the DOD and the Army, legal assistance is omitted from surveys, statistics, or articles on the Army's quality-of-life and family programs. The primary cause of this oversight is our failure as lawyers to publicize the legal assistance program and the services it provides, as well as its initiatives and accomplishments.[136] We must ensure that, before surveys and articles are done, legal assistance is included.[137]

Finally, not unrelated to the foregoing challenges, is our continuing inability to provide the lack of priority and resources devoted to providing up-to-date, state-of-the-art automation equipment to legal assistance attorneys and staff. As previously discussed, there is a need for joint cooperation in this area. Unless an all-service commitment to developing and fielding software "in house" can be fostered in the very near term, the Army should seriously consider joining sister service initiatives and purchase integrated legal assistance software from a commercial source. Any decision to retain this function "in house" must include an expanded commitment of manpower to both programming and substantive updating functions. While the former has been an ongoing although somewhat problem-plagued effort, the latter has been handled on a largely ad hoc basis with no formal proponency

---

[135] This problem is not peculiar to the Army. The American Bar Association, through its LAMP Committee, has done much to address this problem throughout the military by endorsing legal assistance related legislation, sponsoring legal assistance continuing education programs on military installations throughout the United States, and by periodically presenting awards for excellence in legal assistance to deserving lawyers and Staff Judge Advocate offices.

[136] Within the Pentagon, it is surprising how many Army general and other senior officers are not aware of the legal assistance program or the services it provides. Part of the problem is the very name of the program itself. Many officers and enlisted personnel consider any help they get from a lawyer to be "legal assistance." They are not likely to distinguish "legal assistance" from the legal services and advice they receive on filing a household-goods-damage claim or in taking an adverse personnel action against a subordinate. Like medical care from doctors, lawyers provide "legal assistance" in numerous ways. However, given the fifty-three year tradition of the legal assistance program and the different approaches to legal assistance among the military services, it is not likely that a consensus could ever be reached on a more descriptive name for the program, such as "military family legal services" or "military legal aid."

[137] A major part of the problem here, in addition to the "name confusion" mentioned above, legal assistance is not a family program separately funded by Congress like medical care and the family advocacy program or by nonappropriated funds like childcare, and morale, welfare, and recreation programs.

assigned to ensure that programs are current.[138] Of course, even if the Army purchased the latest in integrated legal software, this would be meaningless unless legal assistance attorneys throughout the Army were also provided the modern computer hardware to handle this software.

Patients in an Army hospital expect that the doctors treating them will have the latest and best in medical technology and research facilities to treat their ailments. Indeed, military patients demand nothing less—and they get it. As a result of patient demand and expectations, and undoubtedly a certain amount of skill, commitment, and leadership on the part of the Army medical community, Army hospitals are generally equipped with the latest in medical technology. We might ask ourselves why so many judge advocates, with a far, far smaller budget, are still stuck with antiquated word processing programs and computer equipment. In the Army legal assistance program, we will have to move out of the 1980s in legal assistance computer hardware and software before we move into the twenty-first century.

Regardless of the demands, the legal assistance program will continue to prosper—as it has for the past fifty-three years—because of the exceptional quality and dedication of the Army lawyers, paralegals, legal specialists, and others providing legal assistance services throughout the Army. Their strong commitment in providing expansive and high quality legal assistance services truly sets the Army program apart from those of the other military services. The challenges discussed in this article, and others that may arise in the future, will be met. This fifty-three year old program has a proud history of accomplishment and will continue to be the model for the other military services to emulate.

[138] Colonel Mark Sullivan, a judge advocate in the United States Army Reserve, after years of effort, developed a first class marital separation agreement for the LAAWS-LA program in 1993. Unfortunately, the database program being used within LAAWS-LA at that time, which was supposed to be the program by which all legal assistance programs were to be assembled in the future, proved to be inadequate despite a significant effort from information management and legal assistance personnel. The LAAWS-LA program also failed to produce wills in an acceptable manner. Colonel Mark Sullivan also developed a will format for Louisiana wills, which was never incorporated in the LAAWS-LA program. As a result, efforts to complete work on developing a will format for Puerto Rico wills were halted.

Divided We Stand: Counterintelligence Coordination Within the Intelligence Community of the United States

Lieutenant Colonel David M. Crane
Professor, Chair International and Operational Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

The Dilemma: The Aldrich Ames Case

What's this about? You've got the wrong guy.[1]

Aldrich H. Ames
21 February 1994

Aldrich Hazen Ames was arrested for espionage on President's Day, 21 February 1994.[2] His wife was also arrested minutes later in their home.[3] An employee of the Central Intelligence Agency (CIA) for over thirty-one years, Aldrich Ames worked as an agent for the former Soviet Union and Russia since the summer of 1985[4]. Over nine years, Ames's espionage activities resulted in the execution of ten recruited agents for the United States and the compromise of over one hundred intelligence operations.[5] One of the agents executed was Dimitri Polykov, code name TOPHAT, the most important Soviet ever recruited by the CIA.[6]

[1] JAMES ADAMS, SELL OUT, ALDRICH AMES AND THE CORRUPTION OF THE CIA 3 (1995) [hereinafter SELL OUT]. David Wise, in his book *Nightmover* states that Ames said: "Espionage, me? I hear what you are saying, but you've got to be kidding." DAVID WISE, NIGHTMOVER 3 (1995) [hereinafter NIGHTMOVER].

[2] Bill Miller & Michael Isikoff, *CIA Officer Charged with Selling Secrets*, WASH. POST, Feb. 23, 1994, at A1, A12.

[3] *Id.* A1.

[4] SENATE SELECT COMM. ON INTELLIGENCE, AN ASSESSMENT OF THE ALDRICH H. AMES ESPIONAGE CASE AND ITS IMPLICATIONS FOR UNITED STATES INTELLIGENCE, 104th Cong., 3d Sess. 1 (1994) [hereinafter SSCI REPORT]. See also UNCLASSIFIED REPORT OF THE CIA INSPECTOR GENERAL 1 (undated) (copy in author's files) [hereinafter CIA INSPECTOR GENERAL REPORT].

[5] Douglas Waller & Evan Thomas, *The Old Boys' Club Fights for Its Existence*, NEWSWEEK, Oct. 14, 1994, at 33. *See also* SSCI REPORT, *supra* note 4, News Release, Preface (wherein the Chairman of the Senate Select Committee on Intelligence states that "the Committee's report on the Ames case paints a picture which will come as a shock to most Americans"). In his book *Nightmover*, David Wise reports that federal prosecutors released the names of eleven agents betrayed by Aldrich Ames and apparently six were executed: GTMILLION, Lieutenant Colonel Gennady Smetanin; GTFITNESS, Gennady Grigorievich Varenik; GTWEIGH, Leonid Polyshuk; GTCOWL, Sergei Vorontsov; GTJOGGER, Lieutenant Colonel Vladimir M. Piguzov; GTBEEP, General Dimitri Fedorovich Polykov ("Top Hat"). NIGHTMOVER, *supra* note 1, at 266.

[6] SELL OUT, *supra* note 1, at 10 (known as GTBEEP by the CIA). Jeanne Vertefuille of the CIA is quoted as saying, "It was a bad day for us when we lost him [GTBEEP or TOPHAT]." NIGHTMOVER, *supra* note 1, at 271.

The son of a CIA employee, Aldrich Ames was born in River Falls, Wisconsin, on 26 May 1941.[7] He began working for the CIA in June of 1962 as a clerk.[8] Ames spent most of his career within the Directorate of Operations (DO), the CIA's clandestine service.[9] The most important division within the DO was the Soviet/East European Division (SE Division).[10] The SE Division was responsible for the recruitment and management of agents within the Soviet Union and the Kremlin.[11] It was in the SE Division that Aldrich Ames worked.

As a CIA employee, Ames's career was scarred with performance and financial problems as well as decades long alcohol abuse.[12] In the field and at CIA headquarters, Ames was shuffled from job to job.[13] Little attention or corrective action was taken during his entire career.[14] Ames's evaluation reports highlight an employee who was inattentive to security, who slept on the job (mainly from alcohol abuse), and who was derelict in filing required reports from agent recruiting to accounting for government funds.[15] A review of his personnel file shows that not one corrective or rehabilitative personnel action was ever taken.[16] Even after leaving highly classified documents on a subway in New York, Ames's superiors only gave him an oral reprimand and told him "not to do it again."[17]

By turning over thousands of classified documents to the Soviets, Ames managed to shut down any effective intelligence gathering within the Soviet Union and Russia for almost a decade.[18] Coupled with the espionage of the Walker family spy ring and another CIA employee, Edward Lee Howard, the United States intelligence community provided the national command authority little human intelligence about the Soviet Union or Russia.[19] The results were potentially devastating to the national security of the United States.[20]

How could Aldrich Ames have operated for so long within an agency known for its extensive security precautions? Why wasn't he caught earlier? Even the Soviets were surprised that Ames operated within the CIA for so long. In the short term, the conflicting missions of the CIA and the Federal Bureau of Investigation (FBI) resulted in an ineffective initial investigation, and in the long term, the reason for the delay in the detection of Ames was due to a history of mistrust between the FBI and the CIA.

---

[7] SSCI REPORT, *supra* note 1, at 6. According to the CIA Inspector General Report, Carleton S. Ames, the father of Aldrich Ames, came to work for the CIA's Directorate of Operations (DO) in 1952. An alcoholic, he had a mediocre career in the DO and retired in 1967 at the age of 62. He died five year later of cancer. *See* CIA INSPECTOR GENERAL REPORT, *supra* note 4, Transcript at 4.

[8] SSCI REPORT, *supra* note 1, at 7.

[9] SELL OUT, *supra* note 1, at 13.

[10] *Id.*

[11] *Id.* at 11.

[12] SSCI REPORT, *supra* note 1, at 91. The *SSCI Report* characterizes Ames career thus:

> From the outset of his career at the CIA, Ames demonstrated serious suitability problems which, over the years, should have led his supervisors to reassess his continued employment. These problems included drunkenness, disregard for security regulations, and sloppiness towards administrative requirements. In the years immediately before he began to commit espionage and during the rest of his career, his supervisors were aware of his personal and professional deficiencies, but did not make his problems part of his official record, nor act effectively to correct them. Despite his recognized unsuitability, there is little evidence that his assignments, activities, or access to sensitive information were in any way limited as a result.

Id.

[13] *Id.*

[14] CIA INSPECTOR GENERAL REPORT, *supra* note 4, Summary at 6.

[15] SSCI REPORT, *supra* note 4, at 93.

[16] *Id.* at 91-96.

[17] *Id.* at 93.

[18] *Id.* at 2 (News Release, which accompanied the SSCI Report).

[19] SELL OUT, *supra* note 1, at 187.

[20] Pete Early, *Interview with the Spy Master*, THE WASH. POST MAGAZINE, Apr. 23, 1995, at 22. In an interview with *The Washington Post Magazine*, Boris Solomatin, a handler for John Walker, a convicted spy for the Soviets, states: "As far as military strategic information is concerned—specifically information about the main component of the United States atomic triad, the submarines with atomic rockets—yes he was the most important [Soviet spy]." *Id.*

The CIA and FBI Conflict

It is true that the spy was found, but the course to that conclusion could have been much more rapid and direct.[21]

Frederick P. Hitz
CIA, Inspector General

Aldrich Ames began his work as a paid Soviet spy in the summer of 1985.[22] How he initiated contact with the Soviet Union was simple and direct; he walked through the front door of the Soviet Embassy, four blocks from the White House.[23] Ames walked up to the receptionist and asked to speak to Sergey Chuvakhin, a KGB contact, and handed over an envelope addressed to the Soviet ambassador.[24] The envelope contained the names of two Russians working for the CIA and an explanation of who Ames was.[25] Ames asked for $50,000.00 in cash.[26] Thus began Ames's relationship with the KGB and the Russian SVD that lasted for nine years.

In 1985 and 1986, officials within the CIA and the FBI began to realize that someone was giving information to the Soviets about agents and CIA operations within the Soviet Union and counterintelligence operations within the United States,[27] which was a major counterintelligence problem and concern. Sources throughout the world began to be recalled to the Soviet Union and executed.[28] Initially, it was thought that the defection in September 1985 of Edward Lee Howard, a former CIA employee, was the cause.[29] Counterintelligence investigations revealed, however, that not all the compromises could be linked to Howard.[30]

CIA officials realized that there might be another human leak.[31] To counter the information flow to the Soviets, the SE Division further compartmentalized its Soviet operations to an area called "the back room." Only a few people had access, one was Aldrich Ames.[32]

In late 1985, the CIA began an investigation in earnest.[33] This "molehunt" would continue on and off, with varying intensity, until Ames was arrested in 1994.[34] In the Fall of 1986, a special task force (STF) within the counterintelligence staff was set up to determine the exact cause of the continuing compromises.[35] Analytic in nature, the STF's efforts were parallel to those of the FBI, which was trying to determine whether it too had been penetrated by a mole.[36] These two uncoordinated investigations waned in the late 1980s.[37]

---

[21] CIA INSPECTOR GENERAL REPORT, *supra* note 4, at 2 (general comments made by CIA Inspector General).

[22] SSCI REPORT, supra note 4, at 19. As the *Senate Select Committee Intelligence Report* states: "With his considerable knowledge of Soviet operations and experience in clandestine operations, Aldrich Ames conceived of a plan to obtain money from the Soviets without being detected by the CIA or the FBI." *Id.*

[23] *Id. See also* SELL OUT, *supra* note 1, at 75.

[24] SSCI REPORT, *supra* note 4, at 20.

[25] *Id.* Ames thought disclosing the names of those Soviets working for the CIA would help establish his *bona fides*. CIA INSPECTOR GENERAL REPORT, *supra* note 4, Transcript at 16.

[26] SSCI REPORT, *supra* note 4, at 20. The total amount paid to John Walker, Jr., over seventeen years was $750,000.00. *Id.* (interview with John Walker, Jr.'s handler, Boris Solomatin). Historically, the KGB are very cheap in their financial arrangements with their agents. Giving Ames $50,000.00 right up front shows how important the KGB felt he was.

[27] *Id.* at 23.

[28] *Id.* at 24.

[29] *Id.* at 23. The *Senate Select Committee Intelligence Report* cites the Yurchencko Chronology, 86-1637(A), which states: "The CIA began to focus on Howard as the source of these compromises in August 1985 when a high-level KGB defector, Vitaly Yurchenko, told CIA he had seen cables in 1984 which identified a former CIA employee named 'Robert' as a KGB source. Soon afterward, as a result of the debriefings of Yurchenko, the CIA determined that 'Robert' was, in fact, Edward Lee Howard." *Id.*

[30] *Id.* at 25. The transcripts of the *CIA Inspector General Report* reveal, as one CIA officer stated, "they [the Soviets] were wrapping up our cases with reckless abandon." CIA INSPECTOR GENERAL REPORT, *supra* note 4, Transcript at 74.

[31] SSCI REPORT, *supra* note 4, at 26. *See also* CIA INSPECTOR GENERAL REPORT, *supra* note 4, Transcript at 22.

[32] CIA INSPECTOR GENERAL REPORT, *supra* note 4, Transcript at 21-22 (the CIA called them "draconian measures").

[33] *Id.* Summary at 2 (unclassified memorandum).

[34] *Id.* Jeanne Vertefuille, a CIA counterintelligence agent, worked at trying to find the mole for years, and her work was considered key in building the case against Aldrich Ames. *See* NIGHTMOVER, *supra* note 1, at 171.

[35] *See* CIA INSPECTOR GENERAL REPORT, *supra* note 4, Summary at 2.

[36] *Id.*

[37] *Id.* The Unclassified Memorandum states: "The FBI task force ended, and the CIA STF [special task force] effort diminished significantly in 1988 as its participants became caught up in the creation of the Counterintelligence Center (CIC). Between 1988 and 1990, the CIA molehunt came to a low ebb as the officers involved concentrated on other CI [counterintelligence] matters that were believed to have higher priority." *Id.*

During this time, Ames was posted in Rome where he continued to pass information to his KGB and SVD handlers.[38] His lifestyle was already changing. When he returned to CIA headquarters in 1989, he paid cash for a home that was valued at over a half a million dollars.[39] A CIA counterintelligence officer did a financial inquiry, but the resulting revelations about this and other cash transactions were not considered significant.[40]

In 1990, a routine background investigation revealed Ames's continued lavish spending habits.[41] This information was not revealed to the polygraph examiner who tested Ames as part of that background investigation.[42] The result of the investigation revealed no indications of deception. The background investigation ended in April of 1991.[43]

As the routine investigation of Ames was ending, another was beginning. This time the CIA and the FBI began a hunt for the mole in earnest.[44] In April of 1991, the CIA, realizing that it had been penetrated, asked for the FBI's help.[45] Two of the FBI's best counterintelligence agents were dispatched to CIA headquarters in Langley, Virginia.[46] Operation Skylight had begun.[47] Later that year, the FBI initiated Operation Play Actor, the criminal investigation against the mole.[48] By 1992, the list of suspects had been narrowed to forty.[49] Aldrich Ames was one of the suspects, and the two investigations, one counterintelligence, the other criminal, began to close in on the mole.[50] Ames began to move to the top of the list.[51] His lifestyle and drinking habits caused the FBI to look at him closely.[52] As the FBI reviewed Ames's background, they realized that at the times he met certain Soviet contacts on official business, a corresponding deposit of money in Ames's bank accounts occurred.[53]

Aldrich Ames soon became the primary suspect. On 12 May 1993, a new criminal investigation was opened on Ames, code named Nightmover.[54] The FBI now had complete jurisdiction over the matter.[55] Permission was given to conduct electronic

---

[38] SSCI REPORT, *supra* note 4, at 35-42.

[39] *Id.* at 41. By this time the KGB had provided Ames with 1.8 million dollars, and the KGB had already set aside or budgeted for $900,000 more. *Id.*

[40] *Id.* at 3.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 69-71. The Office of Security report is fairly comprehensive. It highlights some areas of concern such as: "Ames was assigned to CIC under a cloud . . . concerns about handling of a particular agent . . . concerns about his judgement . . . another of Ames's coworkers said he didn't think Ames was a spy, but would not be surprised if that someday came to light . . . he did not trust Ames as a colleague . . . reported that he understood Ames paid cash for his house, a purchase well into the $500,000 range . . . stressed that Ames made no attempt to conceal his wealth and observed that Ames had new cars and relied on household help." *Id.* "Moreover, the CIA security officer who assessed the results of the reinvestigation determined that it 'had no CI [counterintelligence] implications'." *Id.* at 204. Ames also stated that if the Agency had interviewed him about his spending in the context of a reinvestigation, he would not have been terribly alarmed. *Id.* at 152. He prepared himself for the possibility that he would be asked about his finances. Ames attempted to account for the cash purchase of his Arlington home by having a gift letter prepared and notarized making it appear to have been a gift from his mother-in-law. He states that at some point someone would learn that he had purchased the house for cash, and it was reasonable to expect that someone would ask him about the source of his wealth. But no one ever did. *Id.*

[44] *Id.* at 102.

[45] Brian Duffy, *The Cold War's Last Spy*, NEWSWEEK, Mar. 6, 1995, at 51.

[46] *Id.* These mole hunters were named Jim Holt and Jim Milburn, known in the FBI collectively as "Jim squared."

[47] *Id.* This was a joint inquiry by the FBI and CIA.

[48] *Id.* at 51. *See also* SSCI REPORT, *supra* note 4, at 103.

[49] SSCI REPORT, *supra* note 4, at 103.

[50] Duffy, *supra* note 45, at 51.

[51] *Id.*

[52] *Id.* at 52. *See also* CIA INSPECTOR GENERAL REPORT, *supra* note 4, Undated Memorandum para. 46.

[53] Duffy, *supra* note 45, at 52. *See also* CIA INSPECTOR GENERAL REPORT, *supra* note 4, Undated Memorandum para. 46.

[54] Duffy, *supra* note 45, at 51. *See also* SELL OUT, *supra* note 1, at 214. For an excellent narrative of the criminal investigation of Aldrich Ames, see David Wise's book *Nightmover*. NIGHTMOVER, *supra* note 1.

[55] Duffy, *supra* note 45, at 51.

and physical surveillance on the Ames family, revealing further evidence that Ames was the mole, and that his wife, Rosario, was assisting him.[56] On 21 February 1994, the FBI took them both into custody.[57] Ames pled guilty as did his wife.[58] Ames received a life sentence, Rosario, five years.[59] The questions started soon after the arrest. How could this have happened?[60] Why was the FBI not brought in earlier by the CIA? To find answers to these questions, the search must start fifty-one years ago, in 1945.

The Historical Perspective

Oh, Mr. President, do not let so great an achievement suffer from any taint of legality![61]

Philander C. Knox, U.S.Attorney General
Comment to President Theodore Roosevelt
on the occasion of his "acquiring" the
Panama Canal Zone, 8 November 1903

For its first century, intelligence operations conducted by the United States were haphazard at best.[62] Driven by crisis and the personality of the President of the United States, counterintelligence centered mainly on ensuring that military secrets did not end up in enemy hands.[63] George Washington stated early on in the Revolutionary War that "There is one evil that I dread . . . and that is their spies . . . I think it a matter of some importance to prevent them from obtaining intelligence of our situation"[64]

Legislation governing counterintelligence activities did not exist.[65] Until the passage of the National Security Act and the formation of the CIA in 1947, regulatory direction of counterintelligence activities was found generally within the Executive branch. Congress responded to domestic and international national security concerns by giving great deference to the President—a tradition that was to continue into the 1970s.[66]

Initially called negative intelligence during World War I, the War Department did not create a professional counterintelligence corps until 1942.[67] After World War I, the Department of Justice had the Bureau of Investigation, the forerunner of the FBI, compiling intelligence against alleged communist radicals.[68] The new

---

[56] CIA INSPECTOR GENERAL REPORT, *supra* note 4, at 65, 121. The *Senate Select Committee on Intelligence Report* states that: "According to FBI officials, the telephone intercepts of conversations between Rosario and Rick Ames indicate that Rosario was a supportive conspirator encouraging the crimes of her husband in order to allow her to continue to enjoy the financial benefits." SSCI REPORT, *supra* note 4, at 58.

[57] SSCI REPORT, *supra* note 4, at 84. On the morning of the arrest of Aldrich Ames, the arresting FBI agents found on his desk a calendar that noted three life instructions: "Remember the 3 Rs: Respect for self; respect for others; responsibility for all your actions." Duffy, *supra* note 45, at 54.

[58] SELL OUT, *supra* note 1, at 236. *See also* Bill Miller & Walter Pincus, *Rosario Ames Gets 5-Year Term in Spy Case*, WASH. POST, Oct. 22, 1994, A8. Ames declared at his guilty plea:

> These spy wars are a sideshow, which have no real impact on our significant security interests over the years. As an intelligence officer with more than thirty years experience, I do not believe that our nation's interests have been noticeably damaged by my acts, or for that matter, those of the Soviet Union or Russia noticeably aided. I had come to believe that the espionage business, as carried out by the CIA and a few other American agencies, was and is a self serving sham, carried out by careerist bureaucrats who have managed to deceive several generations of American policy makers and the public about both the necessity and the value of their own work.

Id. Prosecutors remarked on Ames's comments: "These are crimes which caused people to die, as surely as if the defendant pulled the trigger. They died because Rick Ames wasn't making enough money from the CIA and wanted to live in a half million dollar house and drive a Jaguar." *See Id.*

[59] *Sell Out*, *supra* note 1, at 237-38; Miller & Pincus, *supra* note 58, A8.

[60] Ames states that the primary motivating factor for his decision to commit espionage was his desperation regarding financial indebtedness he incurred at the time of his separation from his first wife, their divorce settlement and his cohabitation with Rosario. Miller & Pincus, *supra* note 58, A8.

[61] CHRISTOPHER ANDREW, FOR THE PRESIDENT'S EYES ONLY 27 (1995). Elihu Root was also present at the meeting where President Roosevelt was considering a legal justification of his action in acquiring of the Panama Canal Zone from Colombia, November 18, 1903. When asked by President Roosevelt whether he had answered the charges, Root said to him: "You certainly have, Mr. President. You have shown that you were accused of seduction and you have conclusively proved that you were guilty of rape." See, PHILIP C. JESSUP, ELIHU ROOT 382-83 (1938).

[62] G.J.A. O'TOOLE, HONORABLE TREACHERY 4 (1991).

[63] ANDREW, *supra* note 62, at 3.

[64] The Papers of George Washington, *in* 3REVOLUTIONARY WAR SERIES 528-59 (Philander D. Chase ed., 1985).

[65] O'TOOLE, *supra* note 62, at 315.

[66] THE FEDERALIST No. 64 (John Jay), *in* THE FEDERALIST PAPERS 392-93 (Clinton Rossiter ed., 1961) (John Jay notes: "It seldom happens in the negotiation of treaties of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery . . . that although the president must in forming them [treaties] act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."). Senator Daniel K. Inouye discussed the deference towards intelligence operations given the Executive by the Congress: "I recall when we came to classified programs, we would all look over at Richard Russell, the Chairman of the Armed Services Committee, and he would say, 'I have discussed this matter with the appropriate officials and I have found everything is in order'. . . but no one ever told us what was in order." Leslie H. Gelb, *Overseeing of CIA by Congress Has Produced Decade of Support*, N.Y. TIMES, July 7, 1986, A1.

[67] JOHN PATRICK FINNEGAN, MILITARY INTELLIGENCE 30 (1992).

[68] O'TOOLE, *supra* note 62, at 315.

Radical Division was headed by a young lawyer, J. Edgar Hoover, an expert on dangerous aliens. Hoover began building dossiers on United States citizens and radical organizations.[69] Later renamed the General Intelligence Division (GID), the GID reviewed radical publications and recruited paid informants within these organizations to report on their activities.[70]

The War Department stopped conducting domestic surveillance of alleged radicals after disclosure that the Army was using military intelligence reservists to conduct unofficial intelligence gathering against United States citizens.[71] During this time, the United States Attorney General Harlan Fiske Stone abolished the GID.[72] Stone told the new director of the Bureau of Investigation, J. Edgar Hoover, to "[l]imit the bureau's activities] strictly to investigations of violations of the law, under my direction or under the direction of an Assistant Attorney General regularly conducting the work of the Department of Justice."[73]

Throughout the 1920s and early 1930s, the focus of counterintelligence remained on communist infiltration of the union movement and in countering alleged Soviet intelligence gathering.[74] This was conducted by the only nonmilitary counterintelligence organization remaining in the United States government, the Department of State.[75] United States Army counterintelligence units assisted tactical units in Panama, Hawaii, and the Philippines.[76] In 1932, members of the Army's Counter Intelligence Police (CIP) assisted the Chief of Staff of the Army, General Douglas MacArthur, by providing counterintelligence assessments of the participants in the Bonus Army march on Washington.[77] In 1934, the CIP was reduced to fifteen agents.[78]

In 1929, Herbert O. Yardley, the former head of the government's clandestine code breaking unit MI-8, made allegations in his book *The Black Chamber*, which caused the dissolution of MI-8[79] and signaled the decline in influence and importance of military intelligence until World War II.[80] Henry L. Stimson, the Secretary of State at the time, was heard to remark as he signed the order abolishing MI-8, "Gentlemen do not read each others' mail."[81]

During World War II, President Franklin D. Roosevelt created the Office of Strategic Service.[82] He gave its director, Major General William Donovan, the mission to provide strategic intelligence to the allies and to the President.[83] The United States intelligence community was fragmented and largely under suspicion by President Roosevelt.[84] Only in the area of signals intelligence did he have any trust.[85] From late 1940, the War Department provided him with daily summaries of Japanese dip-

---

[69] *Id.*

[70] *Id.*

[71] *Id.* at 319. A Lieutenant Long directed local county sheriffs near Vancouver Barracks, Washington, to turn over any information on local labor organizations "on behalf of the Intelligence Service of the Army" and this caused quite an uproar in the papers and the labor unions nationwide. Secretary of War John W. Weeks relieved Lieutenant Long of duty and directed that intelligence officers were prohibited from collecting any domestic intelligence. *See* BRUCE W. BIDWELL, HISTORY OF THE MILITARY INTELLIGENCE DIVISION 277-79 (1986).

[72] O'TOOLE, *supra* note 62, at 319.

[73] RICHARD G. POWERS, SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 147 (1987).

[74] O'TOOLE, *supra* note 62, at 326.

[75] *Id.*

[76] FINNEGAN, *supra* note 67, at 50.

[77] *Id.*

[78] *Id.*

[79] DAVID KAHN, THE CODEBREAKERS: THE STORY OF SECRET WRITING 355 (1967).

[80] FINNEGAN, *supra* note 67, at 50. *See also* O'TOOLE, *supra* note 62, at 337.

[81] O'TOOLE, *supra* note 62, at 337. O'Toole states: "The quotation is cherished by writers of popular intelligence history as a consummate example of dangerous naivete on the part of a public person regarding the propriety of intelligence operations and is usually incorrectly attributed to Stimson as of the time he closed the Cipher Bureau in 1929." *Id.* n. 30 (O'Toole cites no reference for this assertion).

[82] ANDREW, *supra* note 61, at 131.

[83] *Id.* President Roosevelt's relationship with Donovan started at Columbia Law School, class of 1907. Prior to World War II, President Roosevelt used his old law school friend, Donovan, now a prominent New York attorney, to provide him with intelligence from time to time unofficially. *See generally* ANTHONY CAVE BROWN, THE LAST HERO: WILD BILL DONOVAN (1984).

[84] ANDREW, *supra* note 61, at 111.

[85] *Id.*

lomatic messages.[86] Code named "Magic," the decryption divisions provided important intelligence to the United States throughout the war.[87]

The United States Army created the Army Counter Intelligence Corps (CIC) in 1942, which provided information on foreign and domestic agents.[88] Criticism of the CIC concerning some of its domestic activities involving Eleanor Roosevelt, the wife of the President, caused the CIC to be merged into the short lived Security Intelligence Corps.[89] However, concern about an alleged Japanese fifth column of saboteurs in the United States caused President Roosevelt to sign Executive Order 9066 on 19 February 1942.[90] This order directed the internment of thousands of Japanese Americans for the rest of the war.[91] The concern by the United States government about foreign agents conducting sabotage remained until the unconditional surrender of the Japanese on 15 August 1945.[92]

Personality clashes, mistrust, and rivalry between the various service intelligence components and the intelligence branches of the other agencies remained a problem throughout the war.[93] Even though President Roosevelt had established the Office of Coordinator of Information (OCI) in 1941, intelligence and counterintelligence remained largely uncoordinated.[94] The OCI was originally headed by Colonel William Donovan.[95] Personality conflicts and presidential frustration caused President Roosevelt to banish Donovan to the new position of Director of the Office of Strategic Services (OSS). Roosevelt said when considering what to do with Donovan, "he was thinking of putting [Donovan] on some nice, quiet isolated island, where he could have a scrap with some Japs every morning before breakfast."[96] Even the Secretaries of War and Navy had little confidence in their respective intelligence components.[97] The main problem was organization and coordination.

Towards the end of the war, Donovan had been campaigning for the development of a central organization to collect and coordinate intelligence and report this information directly to the President.[98] Donovan saw the Soviet Union as the threat in the post war world.[99] Roosevelt died on 12 April 1945, having made no decision on the organization of the intelligence community in the post war world.[100]

Two key aspects to the evolution of counterintelligence within the United States after World War II led to the lack of coordination between the CIA and the FBI in the Aldrich Ames case. The first is the creation of the CIA in the mid 1940s, and the second is the atmosphere of distrust created within the CIA by the James Jesus Angleton investigation. The birth of the CIA was a difficult one. Born in an atmosphere of great stress and mistrust, the CIA had a shaky beginning. Many of the difficulties were personality driven. Strong individual wills created a set of circumstances that would, over time, result in the tragedy of the Ames case.

As World War II ended, Harry S. Truman was President of the United States. A former haberdasher, he had only been Vice Presi-

---

[86] *Id.* The name "Magic" comes from the decrypts of the Japanese diplomatic code, and the name given the people who broke the code using a new cipher machine code named Purple. The cryptographers where known as "magicians," hence Magic. *See* EDWIN T. LAYTON, AND I WAS THERE 81 (1987).

[87] *Id.*

[88] FINNEGAN, *supra* note 67, at 68.

[89] Apparently the CIC had bugged the room of Mrs. Roosevelt at the Blackstone Hotel in Chicago. The CIC agents listening to the tapes erroneously told the FBI that Mrs. Roosevelt and her travel companion, Sergeant Joe Lash, were having sexual intercourse. This fiasco and others almost caused the disbanding of the CIC and the Office of Naval Intelligence (ONI). *See* CURT GENTRY, J. EDGAR HOOVER 304-06 (1991).

[90] TED MORGAN, FDR: A BIOGRAPHY 625-29 (1986).

[91] ANDREW, *supra* note 61, at 128.

[92] *See generally* MORGAN, *supra* note 90.

[93] ANDREW, *supra* note 61, at 99.

[94] *Id.* at 100.

[95] *Id.* Donovan accepted only on three conditions: (1) that he would report only to President Roosevelt, (2) that his secret funds would be available, and (3) that all the departments of the government would be instructed to give him what he wanted.

[96] *Id.* at 130-31.

[97] Stimson Diary, Nov. 9, 1943.

[98] "Knox and I agreed that our two intelligence services are pretty bum." THOMAS F. TROY, DONOVAN AND THE CIA app. M (1981).

[99] ANDREW, *supra* note 61, at 145.

[100] *Id.*

dent for three months when he assumed leadership of the free world.[101] A straightforward man, President Truman was confronted early on by the dissolution of the OSS.[102] Its mission had been important in gathering strategic intelligence and running covert operations behind German and Japanese lines. The OSS had performed well,[103] however, with the end of the war it became irrelevant. Realizing this, Truman abolished the OSS on 20 September 1945, despite urgent requests by Donovan to reorganize the OSS as an agency with a mission to provide intelligence to the President in a central and coordinated fashion.[104] Truman also trimmed back FBI operations but never considered abolishing the FBI.[105]

The evolution of the Cold War and allegations of penetrations by Soviet agents into the various federal agencies caused President Truman to reconsider the need for a centralized intelligence agency.[106] The President needed information on Soviet attempts to expand in various parts of the world and needed to be able to coordinate intelligence, counterintelligence, and covert operations worldwide.[107] In 1947, President Truman signed into law the National Security Act, which created both the Department of Defense and the CIA.[108] This act charged the CIA with the mission of conducting intelligence and counterintelligence activities overseas and providing the President with information he needed to carry out his constitutional duties in the national security arena.[109] President Truman was uncomfortable with this type of organization and ensured that the CIA had no police or subpoena power.[110] His fear of an American gestapo was evident.[111]

J. Edgar Hoover, the head of the FBI, was not comfortable with the creation of the CIA, an agency that he felt challenged the FBI's enormous power and influence within the federal government.[112] He would not be an enthusiastic supporter of this newly created agency, and his attitude influenced a generation of FBI agents. The military services also felt threatened by the CIA and jealously guarded any intelligence they received, preferring not to pass it along to the new Director of Central Intelligence (DCI). For securuty purposes, they felt the DCI did not have the need to know.[113] President Truman described the first DCI, Rear Admiral Roscoe H. Hillenkoetter, as a friendly and modest lightweight.[114] Thus, from the beginning, the CIA's mission was compromised because it was characterized by Presidential mistrust and lack of cooperation with other intelligence agencies.

Counterintelligence gained importance and emphasis as the Cold War progressed and the threat of communist world domination became all too real. The CIA and the FBI challenged each other throughout the McCarthy era, the development of the nuclear bomb by the Soviet Union, the "space race," the expansion of Soviet influence, and the Korean and Vietnam Wars. The fear of possible penetrations by the Soviets into the intelligence community was perceived to be a real possibility. In the CIA, this fear manifested itself in a search for a mole by the head of counterintelligence within the CIA, James Jesus Angleton.[115]

James Angleton was a legend within the intelligence community.[116] A former member of the OSS, Angleton had been head of

---

[101] *Id.* at 149. On the day that President Truman was sworn in, he was briefed on the two biggest secrets of World War II—the atomic bomb and Ultra. *Id.*

[102] *Id.* at 157. A damning report by the President's military aide declared "it may have been the most expensive and wasteful agency in government," but he did admit that there were certain aspects of the OSS that were outstanding. *Id.*

[103] *See generally* THE OSS ASSESSMENT OF MEN: SELECTION OF PERSONNEL FOR THE OFFICE OF STRATEGIC SERVICES (1948) (Parks is probably the person who put the idea of a centralized intelligence agency being an American Gestapo before President Truman).

[104] ANDREW, *supra* note 61, at 160; O'TOOLE, *supra* note 62, at 426 (O'Toole states that "Truman's [order] did not completely liquidate the OSS; rather it dismembered it, annihilating some of its components while scattering the rest.").

[105] TROY, *supra* note 98, at 267 (1981).

[106] O'TOOLE, *supra* note 62, at 427.

[107] *Id.* The President thought infiltration by the communists in the American government was "a lot of baloney." DAVID MCCULLOUGH, TRUMAN 551-53 (1992).

[108] ANDREW, *supra* note 61, at 169; O'TOOLE, *supra* note 62, at 431.

[109] ANDREW, *supra* note 61, at 170.

[110] TROY, *supra* note 98, at 471-72.

[111] O'TOOLE, *supra* note 62, at 431.

[112] ANDREW, *supra* note 61, at 164.

[113] CENTRAL INTELLIGENCE AGENCY, THE CIA UNDER HARRY TRUMAN 337 (1994).).

[114] ANDREW, *supra* note 61, at 170.

[115] WORKING GROUP ON INTELLIGENCE REFORM PAPERS, MYTHS SURROUNDING JAMES ANGLETON: LESSONS FOR AMERICAN COUNTERINTELLIGENCE (1994) [hereinafter WORKING GROUP ON INTELLIGENCE REFORM].

[116] WILLIAM HOOD, MYTHS SURROUNDING JAMES ANGLETON 1 (1994), printed in WORKING GROUP ON INTELLIGENCE REFORM, *supra* note 115.

counterintelligence within the CIA since 1954, and he would hold the post for over twenty years.[117] His concern of a perceived mole within the CIA began in the 1960s and developed into a paranoia which threatened to bring down the very agency he was sworn to serve and protect.[118]

A Soviet agent and plant, Anatoli Golitsin, suggested to Angleton that there might be a mole in the agency.[119] This possibility was reinforced by the spectacular defection of British agent Kim Philby.[120] Earlier on, Philby and Angleton had become close friends when Philby was station chief in Washington for the British Secret Intelligence Service (SIS).[121] Philby's treachery devastated Angleton. Golitsin's suggestion of a mole now became all too believable.[122] This concern was enhanced by a Soviet defector who Golitsin stated was in reality a false defector.[123] With Nikita Khrushchev's threat that "we will bury you" ringing in his ears, Angleton began a decade long search for the mole.

His paranoid hunt for the mole would end the careers of thousands of CIA employees and threaten many more.[124] The counterintelligence section was considered the most important division within the CIA, but after Angleton's investigations, this section was tainted and a generation of CIA agents distrusted anyone working in counterintelligence.[125] This distrust hampered counterintelligence personnel with their investigations.[126] This distrust also created an atmosphere that allowed Ames to move freely about the CIA delivering thousands of classified documents to the Soviets with little concern that he would be caught.

Angleton was removed from federal service after he falsely accused William Colby, the future DCI, of possibly being a communist.[127] As DCI, Colby fired Angleton on learning that Angleton had been running a series of illegal intelligence operations against Vietnam war protesters and that his hunt for a mole had paralyzed the ability to recruit sources in the Soviet Union.[128] Angleton left federal service convinced that a mole continued to operate within the CIA.[129] He also left an agency that was distrustful of itself and thus open to abuse.

The Statutory Framework

With this historical perspective in mind, it is important to review the statutory framework in place then and now before discussing the Presidential and Congressional attempts to resolve the coordination problems between the various federal counterintelligence agencies. The statutory basis for the conduct of counterintelligence within the United States begins with the National Security Act (NSA) of 1947. The NSA established the current national security structure of the United States.[130] The NSA sought to create a coordinated intelligence community headed by a Director of Central Intelligence.[131] A central tenet of the NSA is to "provide for the establishment of integrated policies and proce-

---

[117] WORKING GROUP ON INTELLIGENCE REFORM, *supra* note 115, at i, Introduction. *See also* SELL OUT, *supra* note 1, at 37.

[118] SELL OUT, *supra* note 1, at 37.

[119] *Id.*

[120] *Id.* at 38.

[121] *Id.*

[122] *Id.* (However, a friend of Angleton's suggested that the idea that Angleton could not make friends was "nonsense,"). HOOD, *supra* note 116, at 19.

[123] TOM MANGOLD, COLD WARRIOR: JAMES JESUS ANGLETON, THE CIAs MASTER SPY HUNTER ch.12 (1991). *See also* SELL OUT, *supra* note 1, at 39.

[124] SELL OUT, *supra* note 1, at 39.

[125] *Id.* at 40.

[126] *Id.* at 36.

[127] *Id.* at 41.

[128] *See generally* MANGOLD, *supra* note 123, chs. 21-22; DAVID WISE, MOLEHUNT: THE SECRET SEARCH FOR TRAITORS THAT SHATTERED THE CIA chs. 15-16 (1992).

[129] SELL OUT, *supra* note 1, at 41. As the author states: "There was a determination on the part of everyone at the Agency that this [molehunting by Angleton] should never, ever happen again." *Id.*

[130] 50 U.S.C. § 401 (1988). The preamble declares:

> AN ACT To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the *coordination* of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security.

Id. (emphasis added).

[131] Id. § 102, (1) There is hereby established a Central Intelligence Agency; (2) There shall be a Director of Central Intelligence who shall be appointed by the President, by and with the advice and consent of Senate.

dures for the departments, agencies, and functions of the government relating to the national security."[132] The NSA defines counterintelligence as "information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities."[133] References in the NSA to "intelligence related to the national security" does *not* mean the counterintelligence activities of the FBI, except "to the extent provided for in procedures agreed to by the Director of Central Intelligence and the Attorney General, or otherwise as expressly provided for in this title."[134]

The Central Intelligence Act of 1949 was enacted to provide for the administration of the CIA.[135] Section 17 of this Act establishes the Office of the Inspector General with the mission of conducting independent inquiries, investigations, and audits within the CIA regarding allegations of improprieties.[136] The Inspector General is charged with keeping the Director of the CIA and the Intelligence Committees fully and currently informed of any "problems or deficiencies"[137] and is accountable to Congress.[138] Importantly, the Director of the CIA is charged to report to the Attorney General any violations of federal law by an employee of the CIA that is revealed during an investigation, inquiry, or allegations and complaints by and to the Inspector General.[139]

The Intelligence Oversight Act (IOA) of 1980 ensures that the President keeps the intelligence committees fully and currently informed of "the intelligence activities of the United States."[140] The IOA was a direct result of the findings and recommendations of several commissions and investigative committees created in the mid 1970s to examine abuses of authority by the United States intelligence community.[141]

Executive Order 12333 (EO 12333) was signed by President Reagan on 4 December 1981.[142] It establishes the importance of United States intelligence activities and operations to the overall national security of the United States.[143] The EO 12333 also lays out the duties and responsibilities of all agencies and activities within the intelligence community, including counterintelligence coordination.[144]

The order directs the CIA to coordinate with the FBI all collection of intelligence and counterintelligence information within the United States.[145] The EO 12333 leaves the details of the coordination of the procedures to the DCI and the Attorney General.[146] In turn, EO 12333 assigns the mission of conducting counterintelligence and the proper coordination of other agency counterintelligence activities to the FBI.[147] Counterintelligence activities conducted by the FBI outside the United States must be coordinated with the CIA.[148]

---

[132] *Supra* note 130 (Preamble to the National Security Act of 1947).

[133] 50 U.S.C. § 401a(3) (1988).

[134] *Id.* § 401a(5).

[135] 50 U.S.C. § 403a declares: "AN ACT To provide for the administration of the Central Intelligence Agency, established pursuant to section 102, National Security Act of 1947, and for other purposes.".

[136] *Id.* § 403q.

[137] *Id.* § 403q(a)(4).

[138] *Id.* § 403q(a)(1) ("appropriately accountable to Congress").

[139] *Id.* § 403q(b)(5) declares: "In accordance with section 535 of title 28, United States Code, the Director shall report to the Attorney General any information, allegation, or complaint received from the Inspector General, relating to violations of Federal criminal law involving any officer or employee of the Agency, consistent with such guidelines as may be issued by the Attorney General pursuant to subsection (b)(2) of such section. A copy of all such reports shall be furnished to the Inspector General."

[140] *Id.* § 413. Title V—Accountability for Intelligence Activities. The term "intelligence committees" means the Select Committee on Intelligence of the Senate (hereinafter when used separately the Senate Select Committee on Intelligence and the Permanent Select Committee on Intelligence of the House of Representatives.

[141] The incredible allegations of the Seymour Hersch article galvanized the American people and caused years worth of investigation, recrimination, and reform culminating in the Intelligence Oversight Act of 1980, the creation of the Intelligence Committees, and Executive Order 12333 signed by President Reagan in 1981. Seymour Hersch, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, A1.

[142] Exec. Order No. 12,333, 46 C.F.R. 59941 (1981).

[143] *Id.* "All reasonable and lawful means must be used to ensure that the United States will receive the best intelligence available."

[144] *Id.* (Part 1—Goals, Direction, Duties and Responsibilities with Respect to the National Intelligence Effort).

[145] *Id.* para. 1.8.

[146] *Id.* para. 1.8(c).

[147] *Id.* "Conduct counterintelligence activities outside the United States and, without assuming or performing any internal security functions, conduct counterintelligence activities within the United States in coordination with the FBI as required by procedures agreed upon the Director of Central Intelligence and the Attorney General."

[148] *Id.*

The Resolutions

President William Clinton began working on a resolution of the counterintelligence coordination problem shortly after the arrest of Ames. President Clinton directed a review of all counterintelligence activities within the federal government. This review caused the executive branch to restructure counterintelligence and agency coordination. On 4 May 1994, a little over two months after the arrest of Aldrich and Rosario Ames, President Clinton issued Presidential Decision Directive 24, an order addressing United States counterintelligence effectiveness.[149]

The Intelligence Committees developed a plan to resolve the coordination problem. The committees used the legislative vehicle of the annual intelligence authorization act.[150] This legislation was signed into law by President Clinton on 14 October 1994. Additionally, the Intelligence Committees continued to investigate the Ames case and its implications. The Senate Select Committee issued a report on 1 November 1994 entitled *An Assessment of the Aldrich H. Ames Espionage Case and Implications for United States Intelligence*. Within the report are numerous recommendations on improving counterintelligence coordination. These conclusions and recommendations were unanimously endorsed by all seventeen committee members. The House of Representatives Permanent Select Committee on Intelligence also issued a report that closely follows the Senate's report.

Presidential Decision Directive 24

President Clinton proclaims to the intelligence community in Presidential Decision Directive 24 (PDD 24) that "recent events at home and abroad make clear that [there are] numerous threats to our national interests . . . it is critical that the United States maintain a highly effective and coordinated counterintelligence capability."[151] The President wanted to foster effective coordination among the agencies within the government that have counterintelligence missions.[152] Mindful of EO 12333, President Clinton declared in PDD 24 that the National Security Counsel (NSC) is the "highest Executive Branch entity that provides review of, guidance for and direction to the conduct of . . . counterintelligence policies and programs."[153] Consistent with EO 12333, the President directed the creation of a structure for counterintelligence, and under the auspices of the NSC, the development of a coordinated and integrated counterintelligence structure.[154] In issuing PDD 24, the President hoped that "this new structure will ensure that all relevant departments and agencies have a full and free exchange of information necessary to achieve maximum effectiveness of the United States counterintelligence effort, consistent with United States law."[155]

President Clinton directed two initiatives in PDD 24 to achieve a more open counterintelligence structure throughout the executive branch. The first deals with national counterintelligence policy coordination and the second addresses counterintelligence integration and cooperation. The PDD 24 established the National Counterintelligence Policy Board (Policy Board)[156] to report to the Assistant to the President for National Security Affairs (National Security Advisor).[157] The Policy Board has representatives from several federal agencies to, include the CIA, FBI, the Departments of Defense, State, and Justice, as well as "a Military Department CI component."[158]

The DCI appoints the chairman of the Policy Board[159] for a two year rotation among the CIA, FBI, and the Department of Defense (DOD).[160] The Policy Board's mission is to "consider, develop, and recommend for implementation . . . policy and planning directives for United States counterintelligence."[161] The Policy Board is also charged with developing legislation and ex-

---

[149] Presidential Decision Directive 24, U.S. Counterintelligence Effectiveness, WEEKLY COMP. PRES. DOC. (May 3, 1994) [hereinafter PDD 24].

[150] The Intelligence Authorization Act for Fiscal Year 1995, 103 P.L. 359, 108 Stat. 3423.

[151] PDD 24, *supra* note 149, opening para. (unnumbered).

[152] *Id.*

[153] *Id.* third unnumbered para.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 2 (entitled, "National Counterintelligence Policy Coordination").

[157] *Id.* para. 1.

[158] *Id.* para. 2.

[159] *Id.* para. 3.

[160] *Id.*

[161] *Id.* para. 4.

ecutive orders, where appropriate, and coordinating the development and drafting of interagency agreements on counterintelligence matters.[162]

The National Counterintelligence Operations Board (NCO Board) also was established by PDD 24.[163] Under the auspices of the Policy Board, the NCO Board focuses on the operational aspects of counterintelligence and is charged with resolving potential conflicts concerning counterintelligence operations or investigations.[164] The chairman is appointed for two years by the chairman of the Policy Board.[165]

Regarding counterintelligence integration and cooperation, the Policy Board had ninety days to establish a National Counterintelligence Center (Center).[166] Initially, an FBI agent with a counterintelligence background will serve as its director, and a counterintelligence operative from the DOD will serve as its deputy.[167] These two positions will be for a term of four years and then rotated every two years among the FBI, the DOD, and the CIA.[168]

The Center will be the CIA's counterintelligence component under the DCI, coordinating all counterintelligence operations overseas.[169] It is important to note that the chief of this component will be headed by a senior executive from the FBI.[170] In turn, CIA counterintelligence officers will work permanently in the FBI's National Security Division.[171] The Policy Board also must monitor government wide counterintelligence programs and report to the National Security Advisor annually on the effectiveness of counterintelligence coordination.[172]

The Intelligence Authorization Act for Fiscal Year 1995

Historically, legislation having an impact on intelligence operations usually is a result of a real or perceived problem by Congress. This can be seen in the National Security Act of 1947 at the beginning of the Cold War, the Intelligence Oversight Act of 1980 because of the allegations of abuse by the United States Intelligence Community in the 1960s and early 1970s, and now with the Aldrich Ames case and concerns about counterintelligence coordination.[173] The Intelligence Authorization Act (IAA) for 1995 has numerous provisions that impact on intelligence operations in general and counterintelligence specifically.[174] Section 811 of the IAA addresses counterintelligence activities[175] and reinforces executive branch concern about counterintelligence policy, coordination, and investigations.[176]

Congress directed the executive branch to establish a National Counterintelligence Policy Board (NC Policy Board).[177] The NC Policy Board has a similar function to the Policy Board created by President Clinton six months prior.[178] Such key words and phrases as "develop policy and procedures regarding counterintelligence," "resolving conflicts," and "coordination of counterintelligence" are found throughout Section 811, echoing the provisions in PDD 24.[179]

---

[162] *Id.*

[163] *Id.* para. 5.

[164] *Id.*

[165] *Id.*

[166] *Id.* (entitled "Counterintelligence Integration and Cooperation").

[167] *Id.* para. 2.

[168] *Id.*

[169] *Id.* para. 4.

[170] *Id.* para. 6.

[171] *Id.* para. 7.

[172] *Id.* para. 8.

[173] *See generally* O'TOOLE, *supra* note 62.

[174] The Act declares: "To authorize appropriations for fiscal year 1995 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes."

[175] P.L. 103-359 (Oct. 14, 1994).

[176] *Id.* § 811 consists of three paragraphs covering the establishment of a counterintelligence policy board, its functions, and coordination of counterintelligence matters with the FBI.

[177] *Id.* § 811(a).

[178] *Id.* §§ 811(a), (b). *Compare with* PDD 24, *supra* note 149, para. 4.

[179] 8 U.S.C. §§ 811(a), (b).

Section 811 of the IAA reflects Congressional intent that the FBI be the lead agency in all counterintelligence investigations.[180] All executive agencies must report to the FBI all allegations of unauthorized disclosure of classified material to a foreign power.[181] The FBI then has unlimited access to all personnel and agency files when investigating the allegations in any federal agency.[182] The FBI must keep the agency in question informed as to the status of the investigation.[183] For reasons of national security, the President may waive the requirement of notification of a disclosure of classified information to the FBI or of an investigation by the FBI to a federal agency.[184] The President must notify Congress through the Intelligence Committees that he waived the notification requirement within thirty days of the waiver and explain why the national security waiver was invoked.[185] The basis for the waiver may be delayed for reasons of national security.[186] It appears clear that the basis for the waiver also must be reported at an appropriate time.

Section 811 of the IAA also directs the Director of the FBI to report to the Intelligence Committees and the Judiciary Committees of each house annually as to any reports of unauthorized disclosure of classified information within the executive branch.[187] This report must be coordinated through the CIA and the DOD before it is forwarded to Congress.[188]

An additional section of the IAA bears noting. Title IX of the IAA establishes the Commission on the Roles and Capabilities of the United States Intelligence Community (Commission).[189] Armed with a broad charter, this commission will look at roles and missions of the intelligence community; for example, whether the roles and missions of the intelligence community should be broadened beyond the traditional missions, what functions should each organization have to include capabilities, whether there is proper coordination of intelligence operations, and whether counterintelligence policies and practices are adequate, among other provisions.[190] The Commission is composed of seventeen members, nine from the executive branch and eight from the legislative branch.[191] The Commission must make its final report and recommendations to the President and the intelligence committees not later than 1 March 1996.[192]

The Congressional Reports

We owe it to the American people and the thousands of dedicated CIA employees to correct these problems so that the CIA can continue to perform its many missions which are vital to the security of the country.

Senator John W. Warner
Vice Chairman
Senate Select Committee on Intelligence
1 November 1994[193]

The reports by the two intelligence committees reflect heightened Congressional interest and concern regarding the intelligence community and counterintelligence coordination and investigations over the Ames case. Each committee was convened to investigate what went wrong and to determine any lessons learned by "the tragedy" of the Ames case.[194] The committees found es-

---

[180] *Id.* § 811(c).

[181] *Id.* § 811(c)(1)(A).

[182] *Id.* § 811(c)(1)(C).

[183] *Id.* § 811(c)(2).

[184] *Id.* § 811(c)(3).

[185] *Id.*

[186] *Id.*

[187] *Id.* § 811(c)(4).

[188] *Id.*

[189] P.L. 103-359 (Oct. 14, 1994) (Title IX has nine sections).

[190] *Id.* § 903 (Duties of the Commission).

[191] *Id.* § 902(a). *See also* Walter Pincus, *Politics Marks Intelligence Study Panel*, WASH. POST, Nov. 1, 1994, at A4. Les Aspin, a former Congressman and Secretary of Defense died of a massive stroke on 21 May 1995 shortly after this article was completed. *See* David E. Rosenbaum, *Les Aspin is Dead: Former Secretary of Defense was 56*, N.Y. TIMES, May 22, 1995, *

[192] 9 U.S.C. § 904(c) (1988).

[193] News Release from the Senate Select Committee on Intelligence, Tuesday, 1 November 1994 (released with the SSCI REPORT, *supra* note 4) [hereinafter News Release].

[194] *Id.*

sentially "a bureaucracy which was excessively tolerant of serious personal and professional misconduct among its employees, where security was lax and ineffective . . . [w]e found a system and a culture unwilling and unable to face, assess and investigate the catastrophic blow Ames had dealt to the core of its operations."[195] The Senate Select Committee on Intelligence concluded "there was gross negligence—both individually and institutionally—in creating and perpetuating the environment in which Ames was able to carry out his espionage activities for nine years without detection."[196]

The intelligence committees each made recommendations. The Senate committee made twenty-three; the House committee made nine. The House committee made a statement that it would introduce legislation in the 104th Congress to make reporting to Congress regarding counterintelligence investigations a semiannual event. The House committee also recommends that CIA security personnel who specialize in espionage cases take the FBI counterintelligence course.[197] The Senate committee was far more specific in its recommendations and shows the deep concern the Ames case caused Congress and their lack of confidence in the ability of the CIA leadership to deal with the crisis. The DCI, James Woolsey, resigned a month after the intelligence committees issued their reports.[198]

Reflections

When sorrows come, they come not single spies, but in battalions.[199]

William Shakespeare
Hamlet

President Clinton accepted James Woolsey's resignation with regret.[200] The President praised the DCI Woolsey as a "staunch advocate of maintaining an intelligence capability that is second to none."[201] Yet, Woolsey had never been part of the team, the inner circle.[202] The relationship between the two men had been strained due in large part to the Ames case, particularly in Woolsey's perceived lack of control over his agency.[203] The history of relations between a DCI and a President ebbs and flows based on the comfort level regarding intelligence matters.[204] The comfort level was low in this case prior to Woolsey's resignation. Interestingly, despite the gathering storm over the Ames case and the reports from the intelligence committees, the actual resignation took President Clinton by surprise.[205]

With the confirmation of John M. Deutch as the new DCI, the intelligence community, particularly the CIA, is braced for

[195] *Id.*

[196] *Id.*

[197] *Id.* (Recommendation 7).

[198] Walter Pincus, *Woolsey Resigns From CIA After Troubled Tenure*, WASH. POST, Dec. 30, 1994, A1.

[199] WILLIAM SHAKESPEARE, HAMLET act 4, sc. 5.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] Walter Pincus, *Panel Presses Clinton, CIA to Close Gap*, WASH. POST, Dec. 3, 1994, A11.

[204] ANDREW, *supra* note 61, at 3.

[205] Pincus, *supra* note 198, at A1.

change.[206] Mr. Deutch pledged in his confirmation hearings before the Senate that he would "sweep away a generation of cold warriors . . . all the way down to the bare bones [at the CIA]."[207] On 3 May 1995, shortly after the committee voted for confirmation, Hugh E. Price, the Chief of the Directorate of Operations, the CIA's clandestine service, announced his immediate retirement.[208] On 9 May 9 1995, the Senate unanimously confirmed Mr. Deutch as the new DCI.[209]

The time appears right for change. The end of the Cold War caught the CIA unprepared. Born in the Cold War and tested over time in numerous intelligence operations worldwide, the CIA needs to refocus and prepare for the 21st Century.[210] The resolutions issued by the President and the intelligence committees are the beginning of that change. But are they the correct beginning? Can institutional mistrust and competition be erased by fiat?

The PDD 24 highlights presidential interest and concern over the conduct of counterintelligence activities. President Clinton's directive establishing the Policy Board will help in the coordination of counterintelligence activities at the macro level, but at the micro level, the agents involved are the individuals who will change how counterintelligence operations are conducted. This will take time. The framework is in place to begin correcting what is really systemic—almost socially ingrained—within the intelligence community as a whole.

Likewise, Section 811 of the IAA buttresses the program the President has put in place, yet it cannot do away with the historical rift between the two agencies. The provision does go a long way toward ensuring that the FBI is brought in early should there be allegations of release of classified materials. It is important to remember that EO 12333 already has placed responsibility for coordination and investigation in a proper context. Simple in its direction, any agency willing to coordinate would only have to follow this directive.

Additionally, the very nature of the intelligence business causes an immediate conflict regarding security and justice. In the intelligence business, sometimes national security and the lives of operatives preclude notice. Section 811 of the IAA recognizes this and allows the President, not the head of the agencies, to waive the justice aspects of a counterintelligence case. The provision also recognizes certain Constitutional prerogatives of the President but balances the concerns of the American people, through Congress, by requiring a reported reason for the waiver to the intelligence committees within thirty days.

The understanding that proper coordination of counterintelligence investigations is essential will start an evaluation process resulting in straightforward rules for all of the intelligence community to follow. The Commission that is currently looking at the intelligence community certainly will provide further guidance above and beyond those directed already by the President and Congress. Before these guidelines work, however, the very psyche of the agencies involved needs mending. This will take time, but the process has begun.

Conclusion

Hope deferred maketh the heart sick.

Proverbs, 13:12

Counterintelligence coordination is an essential aspect of preserving and protecting the national security of the United States. It is a key to any proper intelligence operation and the resolution of internal security and criminal concerns. The CIA and the FBI each play an important role in any counterintelligence investigation. The Ames case illustrates their important roles, and how a lack of coordination, for whatever reason, allowed a spy to operate unimpeded for nine years. Ironically, when the two agencies began to work together, the investigation resulted in an airtight criminal case against Ames and his wife Rosario.

History shows that the CIA and the FBI have not coordinated their counterintelligence activities. Systemic and institutional mistrust over decades of intelligence operations during the Cold War still exist. The PDD 24 has started a process of correctional and organizational modification to ensure that counterintelligence operations are coordinated as a matter of executive direction. The PDD 24, however, does little to do away with potentially harmful jurisdiction and interagency competition between the CIA and the FBI. The IAA mirrors PDD 24 and overlays further congressional fiats directing that each of the agencies cooperate and coordinate their counterintelligence activities. Neither the PDD 24 nor the IAA can legislate an end to a historical enmity.

Splitting the jurisdictional responsibilities between the agencies was a mistake in 1947, and it remains so today. Counterin-

---

[206] R. Jeffrey Smith, *Deutsch Vows to Clean Out Top of CIA*, WASH. POST, Apr. 27, 1995, A16.

[207] Tim Weiner, *Nominee for CIA Vows to Clear Out Cold War Culture*, N.Y. TIMES, Apr. 27, 1995, A16. *See also* Evan Thomas, *Cleaning up the Company*, NEWSWEEK, June 12, 1995, 34.

[208] Walter Pincus, *CIA Operations Chief to Retire at Week's End*, WASH. POST, May 3, 1995, A3.

[209] R. Jeffrey Smith, *Deutch Is Confirmed Without Senate Dissent*, WASH. POST, May 9, 1995, A6. Deutch is quoted as saying: "I think there is going to be a period of building morale and . . . a style about working . . . which you might characterize as a change in culture." *Id.*

[210] *See* Tim Weiner, *New CIA Chief Wants to Revamp U.S. Spying Overseas*, N.Y. TIMES, July 3, 1995, A14. *See also* Pat Cooper & Jeff Erlich, *Commanders to Get More Tactical Data from CIA*, ARMY TIMES, July 10, 1995, 26.

telligence should be given to one of the agencies. The Commission for the Study of the Role of Intelligence in the Post Cold War Era needs to consider placing jurisdiction over all counterintelligence operations in one agency. That agency should be the FBI. Both the intelligence and criminal aspects of a counterintelligence investigation would then fall within an agency that could organizationally ensure proper coordination with any agency involved in the investigation. The national security of the United States deserves nothing less.

I think that we still need to have somewhere a small espionage service . . . on a short string.

Aldrich Ames
Convicted Spy

Federal Representation of National Guard Members[1] in Civil Litigation[2]

Major Michael E. Smith, United States Army
Student, 44th Graduate Course
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

Federal representation of National Guard members sued in state and federal courts is one of the most complex and contentious areas of civil litigation. The Department of Justice (DOJ) rules regarding federal representation are amorphous at best. Although federal representation of National Guard members is generally presumed, representation decisions are made on a case-by-case basis, sometimes resulting in inconsistent decisions. This article examines the factors that the DOJ considers in determining whether to grant federal representation of National Guard members.

When service members on active duty are sued for some action taken in the performance of their duties, their status as federal employees is not questioned. Normally, the only remaining determination that must be made prior to receiving DOJ representation is whether the active duty service member was acting within the scope of employment, which removes the service member from the litigation by the substitution of the United States as the defendant.[3] In contrast, National Guard members can be both federal and state employees while performing duties, which complicates the federal representation decision and scope of employment determination. To understand how National Guard representation decisions are made, one must understand the nature of the National Guard.[4]

The National Guard

The National Guard as the Militia

"The National Guard is the modern Militia reserved to the States" by the Militia Clauses of the Constitution.[5] The militia includes all able-bodied males between the ages of seventeen and forty-five, with some exceptions,[6] who are, or have declared the intention of becoming, citizens of the United States, as well as female citizens who are commissioned officers of the National Guard.[7] The militia is divided into two classes: (1) the organized militia, which consists of the National Guard and the Naval Mili-

---

[1] Although this article is based on experiences with the Army National Guard, the same principles would apply to Air National Guard members.

[2] This article grew out of a joint project between the Litigation Division, Office of The Judge Advocate General, United States Army and the National Guard Bureau. The author wishes to acknowledge the invaluable contributions during the initial development of the project made by Major Rickey Watson, United States Army, Office of The Judge Advocate General, Washington, D.C.

[3] 28 C.F.R. § 50.15 also states that the individual requesting representation cannot be facing federal criminal charges at the time and that representation is in the best interests of the United States. However, these two criteria are normally not an issue when the defendant is an active duty service member.

[4] For a good discussion of the history and purpose of the National Guard, *see* Steven B. Rich, *The Army National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service"*, ARMY LAW., June 1994, at 35; Perpich v. Department of Defense, 496 U.S. 334 (1990).

[5] *See generally* Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940); Maryland v. United States, 381 U.S. 41, 46, *vacated and modified on other grounds*, 382 U.S. 159 (1965).

[6] *See* 10 U.S.C.A. § 312 (1992).

[7] *Id.* § 311(a).

tia; and (2) the unorganized militia, which includes all other members of the militia.[8]

The Army and Air Army National Guard are "that part of the organized militia of the several States and Territories . . . that:

(A) is a land [air] force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution;

(C) is organized, armed and equipped wholly or partly at Federal expense; and

(D) is federally recognized."[9]

Although states are not required to maintain National Guard units, every state, in addition to the District of Columbia, Puerto Rico, and certain territories, has a National Guard.[10]

The National Guard as a Reserve Component of the United States Armed Forces

Congress has exercised its extensive constitutional powers over matters of national defense by establishing the armed forces of the United States, which consists of the Army, Navy, Air Force, Marine Corps, and Coast Guard.[11] Each of these services has a Reserve Component[12] to provide trained military units to supplement the United States Armed Forces "in time of war or national emergency and at such times as the national security requires."[13] The Reserve Components of the Army are the Army National Guard of the United States (ARNGUS)[14] and the Army Reserve.[15] The Reserve Components of the Air Force are the Air National Guard of the United States[16] and the Air Force Reserve.[17] The Army and Air National Guard of the United States, collectively the National Guard of the United States (NGUS), are part of the "Ready Reserve,"[18] units whose availability for active duty are most relied upon.[19]

The NGUS receives all of its funding from Congress and forms an integral part of the total armed forces of the United States. To become a member of the NGUS, a person must enlist in, and be federally recognized[20] as a member of, the National Guard of a particular state.[21] Since 1933, all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the NGUS.[22] Under this "dual enlistment" system, guardsmen, when not on active duty in the NGUS, are state employees of their respective state National Guard units.[23] When on active duty as NGUS members, however, guardsmen are relieved of duty in their state National Guard units and are federal employees.[24]

---

[8] *Id.* § 311(b).

[9] 10 U.S.C.S. §§ 101(c)(2), (4) (Law. Co-op. Supp. 1993); 32 U.S.C.S. §§ 101(4), (6) (Law. Co-op. Supp. 1994).

[10] The daily operations of National Guard units are controlled by the states, but those units are armed and funded by the federal government in accordance with federal regulations. Illinois Army National Guard v. Federal Labor Relations Authority, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

[11] 10 U.S.C.S. § 101(a)(4) (Law. Co-op. Supp. 1993); 32 U.S.C.S. § 101(2) (Law. Co-op. Supp. 1993).

[12] 10 U.S.C.A. § 261 (1992).

[13] *Id.* § 262.

[14] *Id.* § 261(a)(1). The Army National Guard of the United States is defined by statute as "the Reserve Component [s] of the Army all of whose members are members of the Army National Guard." 10 U.S.C.S. § 101(c)(3) (Law. Co-op. Supp. 1993); 32 U.S.C.S. § 101(5) (Law. Co-op. Supp. 1994).

[15] 10 U.S.C.A. § 261(a)(2) (1992).

[16] *Id.* § 261(a)(5).

[17] *Id.* § 261(a)(6).

[18] *Id.* § 269(b).

[19] *Id.* §§ 268(a), 673; 10 U.S.C.S. § 672 (Law. Co-op. Supp. 1993).

[20] "Federal Recognition means acknowledgment by the federal government that the persons appointed by the state to the Guard meet the prescribed federal standards for their particular service grade." Penagaricano v. Llenza, 747 F.2d 55, 56 (1st Cir. 1984), *overruled on other grounds*, Wright v. Park, 5 F.3d 586 (1st Cir. 1993).

[21] 10 U.S.C.S. § 591(a) (Law. Co-op. Supp. 1993); 10 U.S.C.A. §§ 3261, 8261 (West Supp. 1994).

[22] Perpich v. Department of Defense, 496 U.S. at 345; 32 U.S.C.S. § 301 (Law. Co-op. Supp. 1994).

[23] 10 U.S.C.A. §§ 3079, 8079 (1992).

[24] 32 U.S.C.S. § 325 (Law. Co-op. Supp. 1994). As a Reserve Component of the armed forces, the National Guard of the United States (NGUS) is ordinarily not on active duty. The NGUS may be ordered to active duty by federal authorities in a variety of circumstances. Congress, for example may order the NGUS to active duty and "retain [it] as long as so needed" whenever Congress determines that "more units . . . are needed for the national security than are in the regular components of the ground and air forces." 10 U.S.C.A. § 263 (1992). Similarly, upon declaration of national emergency by the President or by Congress, NGUS units may be ordered to active duty. *See* 10 U.S.C. §§ 672, 673, 673(b) (1994).

Federal Authority over the National Guard

Two clauses of article I, section 8, of the Constitution grant Congress extensive power over the Militia. The first of these clauses, clause 15, gives Congress the power to "provide for calling forth the Militia" for three specific purposes: (1) to execute the Laws of the Union, (2) to suppress insurrections, and (3) to repel invasions.[25] The second clause, clause 16, grants Congress the power:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.*[26]

Congress has exercised this authority to organize, arm, and discipline the National Guard. In general, the organization and composition of the National Guard are required to be the same as those prescribed for the United States Army and Air Force.[27] Congress has set forth eligibility criteria for membership in the National Guard[28] and has required those who qualify for service to take an oath to support and defend the Constitution of the United States and the constitutions of their own states and to obey orders of the President[29] and their respective governors.[30] Further, Congress requires each National Guard unit to assemble for drill instruction at least forty-eight times per year and to participate in annual fifteen day training camps.[31]

Although Congress is responsible for organizing, arming, and disciplining the National Guard, the authority for training remains with the states. All members of the ARNGUS are members of a state Army National Guard. Neither the ARNGUS nor any Federal entity has authority to grant entry into, or dismissal from, a state guard unit, a wholly state organization.[32]

Federal Representation of National Guard Members

National Guard personnel, like other public servants, sometimes are sued for activities undertaken in the performance of their duties. A major concern of any National Guard member named as a defendant is whether the DOJ or the attorney general of their home state will provide legal representation. This question is more complex for National Guard personnel because of their unique federal/state dual status. This article summarizes the issues and generally describes the criteria applied in determining whether the National Guard Bureau and the Army Litigation Division will recommend DOJ representation in particular cases.

The first issue concerns the *capacity* of the individual defendant.[33] This issue is important because it impacts on whether federal representation must be requested by the individual.

Official Capacity

"When a [federal] government employee is sued in an official capacity for declaratory, injunctive or other forms of equitable relief, the real defendant is the United States."[34] This includes members of the National Guard in a title 10 status.[35] No formal request for DOJ representation is required when it is clear from the complaint that the National Guard member is being sued solely in an official capacity and only equitable relief is sought.[36] The defendant need only request representation by sending a copy of the complaint and summons, along with copies of the orders plac-

---

[25] U.S. CONST., art. 1, § 8, cl. 15.

[26] *Id.* cl. 16 [emphasis added].

[27] 32 U.S.C.A. § 104(b) (1987).

[28] *Id.* § 313 (West Supp. 1992).

[29] The President may call the militia, the National Guard, of any state into federal service when civil unrest in that state is such that it has become "[i]mpracticable to enforce the laws of the United States . . . by the ordinary course of judicial proceedings" or "when there is an insurrection in another State against its government." 10 U.S.C.A. §§ 331, 332 (1992).

[30] *Id.* §§ 304 (West Supp. 1992), 312 (1987).

[31] 32 U.S.C.S. § 502 (Law. Co-op. Supp. 1994).

[32] The United States may, however, condition federal recognition of a state guard unit, and the federal funding that accompanies such recognition, on the state's adherence to military standards or regulations authorized by Congress. *See* 32 U.S.C.A. § 108 (1987). The constitutional authority for federal oversight of the National Guard is found in the United States Constitution, article I, section 8, clauses 15 (congressional authority to call forth the militia) and 16 (congressional authority to organize, arm, and discipline the militia).

[33] The concepts of "capacity" and "scope of employment" are closely related. Any individually-sued defendant, whether a state or federal actor, who is determined to be acting outside of official duties (capacity or scope of employment), will not be entitled to either federal or state representation.

[34] *See* 28 C.F.R. § 50.15(a) (1993).

[35] Serving on active duty pursuant to federal orders issued under "Title 10" of the United States Code.

[36] 28 C.F.R. § 50.15(a) (1993).

ing him or her in a federal status, to the National Guard Bureau, Washington, D.C.[37]

Individual Capacity

When current or former federal employees are sued in their individual capacity, the DOJ provides representation when "the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the attorney general or his designee determines that providing representation would otherwise be in the interest of the United States."[38] As a matter of practice, the employee is given the benefit of the doubt that he or she was: (1) acting within the scope of duties and (2) acting in the best interest of the United States. If this test is met, the DOJ will grant representation. If the evidence reveals otherwise, then the DOJ will discontinue representation.[39]

Capacity Unclear

If the complaint is properly drafted, the caption will list each individual defendant and identify in what capacity he or she is being sued.[40] Many times, especially with pro se plaintiffs, it is not possible to determine, from the face of the complaint, in what capacity the National Guard member is being sued. In these circumstances, a careful reading of the factual allegations contained in the complaint will help make the determination. Normally, the suit will be considered against the individual as a representative of the government if the actions complained of were taken in the actor's official capacity. On the other hand, the defendant is probably being sued in an individual capacity if the plaintiff alleges personal and improper involvement by the defendant. If the issue is unclear from a reading of the complaint, reference to the administrative record will usually clarify the actor's involvement.

How the defendant was served is another factor to consider. For example, if only the National Guard unit is served, then no personal judgment could properly be entered against the individual,[41] and one may reasonably conclude the individual was being sued only in his or her official capacity. However, this issue should be discussed thoroughly with Litigation Division, Office of The Judge Advocate General,[42] prior to reaching such a conclusion.

The status of the defendant is the next issue that must be addressed. Under the dual enlistment system established by Congress, National Guard personnel are members of two distinct organizations—the National Guard of the individual state (the organized militia) and the NGUS as a Reserve Component of the United States Armed Forces.[43] Law suits may involve actions taken by National Guard personnel in either a state or federal status, depending on their status at the time the act was performed. A National Guard member may be in service under title 10, U.S.C., as a National Guard technician or as an active guard/reserve (AGR) or as a traditional guard member or as the Adjutant General.

Title 10 Service

This category includes National Guard Bureau personnel, United States Property & Fiscal Officers in every state,[44] and any other person serving a tour of duty pursuant to orders under title 10, U.S.C. Any member of the other groups discussed below can be placed in this status; however, the typical National Guard member rarely serves in a title 10 status.[45] National Guard members serving in a title 10 status pursuant to valid orders are federal employees and, if all 28 Code of Federal Regulations section 50.15 criteria are met, they are entitled to federal representation in law suits.

National Guard Technicians

In the National Guard Technicians Act of 1968, codified as chapter 7, 32 U.S.C., Congress conferred the status of federal civilian employees on technicians employed by state National Guard units.[46] National Guard technicians are also required to be military members of the state National Guard, and if they lose this membership, they must be separated from their technician employment.[47] Except for one weekend per month and two weeks

---

[37] DEP'T OF THE ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, para. 4-4 (19 Sept. 1994) [hereinafter AR 27-40].

[38] 28 C.F.R. § 50.15(a) (1993).

[39] *Id.* § 50.15(a)(12)&(b).

[40] For example, "Colonel James Jones, in his official capacity; Sergeant Dave Smith, in his individual capacity."

[41] Pennoyer v. Neff, 95 U.S. 714 (1877).

[42] *See generally* AR 27-40, *supra* note 37, ch. 4.

[43] *See* 32 U.S.C.A. §§ 101(5), (7), (11) (1987); 10 U.S.C.S. §§ 101(c)(1)-(3), 672 (Law. Co-op. Supp. 1993).

[44] 32 U.S.C.A. § 708 (West Supp. 1992).

[45] *See* Perpich v. Department of Defense, 496 U.S. at 345; 32 U.S.C.S. § 301 (Law. Co-op. Supp. 1994).

[46] *See* 32 U.S.C.A. § 709(d) (West Supp. 1992).

[47] *See* TECHNICIAN PERSONNEL REGULATIONS 715, para. 2-1 (*Technician Personnel Regulations* are the Army National Guard supplements to Title 5 U.S.C., which governs federal civilian employees.) [hereinafter TPR 715].

in the summer when they are performing military duty, National Guard technicians serve as federal civilian employees.

Technician Personnel Regulations (TPRs) govern National Guard technicians.[48] The TRPs are promulgated by the National Guard Bureau and largely parallel Office of Personnel Management (OPM) regulations dealing with other federal employees. Misconduct or poor performance as a civilian is addressed under these TPRs, rather than under military regulations.[49] An important consequence of this system is that a supervisor of technicians is considered a federal employee for purposes of representation whenever the challenged actions involve the technician status of the employees. This rule applies to the entire technician supervisory chain, to include the adjutant general (AG), when acting as an administrator of National Guard technicians. This is true even though the AG's actions are considered taken under the color of state law for purposes of certain federal statutes.[50] Provided the National Guard member defendant is acting as a National Guard technician or in the technician employee's supervisory chain, the National Guard member is considered a federal employee for purposes of federal representation.

Active Guard and Reserve

National Guard members may serve in a full time military status under the Active Guard and Reserve (AGR) program.[51] The governor of a state orders them to full time military status, but they are paid by federal money appropriated for that purpose. All AGR personnel, although governed by federal regulations, are not federal employees.[52] Therefore, their actions are normally considered state action, and federal representation is not granted.[53]

Traditional National Guard Members

This category includes several types of duty authorized by 32 U.S.C., to include inactive duty for training and annual training. As with AGR personnel, traditional National Guard members are called to duty by the Governor of a state and are paid with federal funds. This is the most common type of National Guard duty. These individuals also are normally considered state actors and are represented by the state attorney general.[54]

The Adjutant General

The Adjutant General is a state officer, paid from state funds except when performing traditional National Guard duty. Accordingly, the Adjutant General will usually receive federal representation only when acting as administrator of the National Guard Technician program.[55]

The Nature of the Action

Suits against National Guard personnel in any status can involve several substantive areas: torts, civilian personnel issues, and military personnel issues. The nature of the action is significant in determining whether federal representation will be granted.

Torts

Suits against National Guard members often involve common law torts such as automobile accidents or constitutional torts such as due process violations. The United States is generally substituted as the defendant in cases involving common law torts committed within the scope of employment. On the other hand, representation in cases involving constitutional torts is more complex and requires a case-by-case analysis.

The Federal Tort Claims Act (FTCA)[56] provides that federal employees have absolute immunity from liability for claims resulting in personal injury, death, or property loss or damage arising from the negligent act or omission of any employee of the government acting within the scope of employment. For the pur-

---

[48] *Id.*

[49] Conversely, misconduct or poor performance as a military member must be dealt with under Army National Guard or Army regulations or the state code of military justice. If the misconduct affects both the civilian and military positions, either the *Technician Personnel Regulations* or the military regulations may be used. The consequences this could have for representation will be addressed later. *Id.* ch. 2 (the only authorized disciplinary actions against National Guard technicians are suspension, change to lower grade, and removal).

[50] *See generally* 42 U.S.C.A. § 1983 (West Supp. 1994) and similar provisions. *See also* Johnson v. Orr, 780 F.2d 386 (3rd Cir. 1986); NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980); Rowe v. Tennessee, 609 F.2d 259 (6th Cir. 1979).

[51] *See* 32 U.S.C.A. § 502(f) (West Supp. 1992).

[52] *See* 10 U.S.C.S. §§ 101(d)(1) (Law. Co-op. Supp. 1993), 101(12) (Law. Co-op. Supp. 1994) (AGR personnel are not on active duty).

[53] For a good discussion of the status of Active Guard and Reserve personnel, *see* United States, ex rel. Karr v. Castle, 746 F. Supp. 1231, 1237 n. 4 (D.Del. 1990), and Thomas Frank England, *The Active Guard/Reserve Program: A New Military Personnel Status*, 106 MIL. L. REV. 1 (1984).

[54] Another category of National Guard status is "state active duty." While in a state active duty status, National Guard members perform duties solely in a state capacity and perform missions such as disaster relief or riot control. In certain situations, such as counterdrug activities, the state may receive funding for state active duty from the federal government. 32 U.S.C. § 112 (1988).

[55] *See* Costner v. Oklahoma Army National Guard , 833 F.2d 905, 907 (10th Cir. 1987).

[56] 28 U.S.C.A. § 2671 (West Supp. 1994).

poses of the FTCA, federal employees include "members of the National Guard while engaged in training or duty under section 316, 502, 504, or 505 of title 32" as well as National Guard technicians.[57] Thus, the United States is normally substituted as the defendant in FTCA cases, dismissing the National Guard member from the litigation.[58]

Civilian Personnel Actions

National Guard members may be sued for personnel actions taken against National Guard technicians. Supervisors taking action against National Guard technicians are considered federal employees and are normally entitled to federal representation.[59] Some exceptions to this general rule are addressed below.

Neither National Guard technicians nor their supervisors are entitled to representation when the conduct in question does not reasonably appear to have been performed within the scope of employment with the federal government.[60] For example, no federal representation is granted when a supervisor has engaged in sexual harassment because the underlying acts involved in sexual harassment are patently outside the scope of federal employment.

Similarly, federal representation is denied where the National Guard member faces criminal charges for the actions complained of in the civil suit. However, federal representation may be granted if the criminal charges are ultimately dismissed. National Guard personnel in this situation should determine whether state representation is available.

Finally, National Guard technician supervisors will not be considered to have acted within the scope of their federal employment if action is taken under their state military authority. For example, the same individual routinely is a senior military officer and a senior technician supervisor. If this individual directs an investigation of a subordinate technician under the TPRs, these actions will be deemed performed within the scope of employment with the federal government. However, if the supervisor orders an investigation under *Army Regulation 15-6, Boards, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers (AR 15-6)*,[61] or some similar military authority, the individual may be viewed as acting in his or her capacity as a member of the state National Guard, not as a federal employee. In such cases, the DOJ will normally deny extending federal representation unless the National Guard member can identify a significant federal interest in the case.[62] If no federal interest is identified, the request for representation is evaluated under the rules governing military personnel actions.

Most civilian technicians perform the same job in both their National Guard role and their full time technician role, and many times their supervisor is the same person for both roles. Normally, the technician wears a military uniform while performing both duties. If the National Guard unit wishes to eliminate a technician who is performing poorly, it is often difficult to distinguish between the individual's performance as a traditional guardsman and as a technician.

For example, Chief Warrant Officer 2 (CW2) Smith is a civilian helicopter repairman technician. He fulfills his traditional National Guard mission one weekend a month and two weeks in the summer doing the same job. CW2 Smith develops sloppy work habits and begins missing some of his weekend drills. Lieutenant Colonel Jones supervises CW2 Smith in both his civilian technician capacity and his National Guard capacity. Lieutenant Colonel Jones counsels CW2 Smith in writing regarding both his work habits during the week and his sporadic attendance for his weekend duty. The counseling goes unheeded, and Lieutenant Colonel Jones decides to eliminate CW2 Smith.

At this point, Lieutenant Colonel Jones has two options. The quickest way to eliminate CW2 Smith is to appoint an investigating officer under *AR 15-6* and use the results of this investigation to discharge CW2 Smith from the National Guard.[63] In such a case, CW2 Smith will lose his civilian technician job.[64] Lieutenant Colonel Jones could choose to eliminate CW2 Smith from his civilian technician position using the TPRs. If Lieutenant Colonel Jones chooses the first method, and CW2 Smith subsequently sues for wrongful discharge, Lieutenant Colonel Jones most likely will be denied federal representation because the removal of CW2

---

[57] *Id.*

[58] Unlike the prohibition on actions against individual members of the National Guard, the Federal Tort Claims Act does not immunize states from liability for torts committed by members of the National Guard while engaged in training under 32 U.S.C. §§ 316, 502-05 (1988). United States v. Hawaii, 832 F.2d 1116, 1118 (9th Cir. 1987), *aff'g* Lee v. Yee, 643 F. Supp. 593 (D. Haw. 1986).

[59] *See* Costner v. Oklahoma Army National Guard , 833 F.2d 905, 907 (10th Cir. 1987).

[60] 28 C.F.R. 50.15(b)(1) (1994).

[61] DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988).

[62] *See* 28 C.F.R. § 50.15(a) (1993).

[63] *See generally* DEP'T OF ARMY, NATL GUARD BUREAU REG. 635-100, * , ch. 6 (7 June 1989); TPR 715, *supra* note 47. The subsequent loss of the technician position leads to a point of contention between National Guard members and the DOJ. When a National Guard technician is discharged from his or her National Guard position, the TAG must take additional steps of severing the individual from their technician position. National Guard members argue that the TAG is therefore acting the role as administrator of the technician program and is therefore taking federal action. The DOJ argues that the primary reason for eliminating the individual was a military decision and therefore state action.

[64] *See* 32 U.S.C. § 709(b), (e)(1) (1982); TPR 715, *supra* note 47, para. 2-1.

Smith from the state National Guard is a state action. If, however, Lieutenant Colonel Jones eliminates CW2 Smith using only the TPRs, he will receive federal representation because he was administering the National Guard technician program. This scenario is played out every day in state National Guard units all over the country. It is the duty of the legal advisors in each state to advise the commanders of this dilemma and the possible ramifications of their decision to choose one method of eliminating a particular soldier over the other method.

Military Personnel Actions

A substantial number of requests for representation received by the National Guard Bureau involve defendants who have taken actions as state military officers. The National Guard Bureau and the Army Litigation Division rarely recommend federal representation for these individuals because their acts are considered state action by law. This is true even where the actions taken were governed or required by federal regulations. A number of reported cases support this position.[65]

Several requests for representation processed through the National Guard Bureau[66] in the last two years involved plaintiffs challenging only the actions of local National Guard officials taken under authority of federal regulations but not challenging the regulations themselves. These cases have involved dismissals from the AGR program, selective retention board results, and other actions taken pursuant to federal regulations. In nearly every case, the DOJ has denied federal representation. In those rare situations where federal representation was granted, substantial federal interests were implicated.

The determination of when federal interests are implicated is made on a case-by-case basis. Representation in such cases is authorized under title 28 U.S.C. § 517[67] and implemented in 28 *Code of Federal Regulation* § 50.15. Sometimes, the named defendants do not fall clearly within a category of federal employees who are entitled to federal representation. Other times, the individuals clearly are state actors, but a federal interest appears to be involved. Under these circumstances, the National Guard Bureau and the Army Litigation Division will examine the following factors to determine whether to recommend federal representation to the DOJ.

Factors Favoring Federal Representation

(1) The decision in the case will likely establish a precedent affecting the policies and practices of the Army, the National Guard Bureau, or the Department of Defense. This would include situations where National Guard or Army regulations are held unconstitutional;[68] where plaintiffs attempt to expand federal law beyond its current application to the military or National Guard;[69] or where federal programs are challenged.[70]

(2) The relief requested could be granted only by a federal official or agency, or would expend itself against the federal treasury.

(3) The decision in the case could materially affect the military readiness of the National Guard.

Factors Favoring State Representation

(1) The decision in the case will likely establish precedent affecting the policies and practices of the state. For example, suits arising from the appointment, enlistment, promotion, or separation of members of the National Guard.

(2) The relief requested can be granted by the state without reliance on federal authority or the expenditure of federal funds.

(3) The acts or omissions complained of are required by state law or regulation, or result from an exercise of discretion conferred by state law or regulation.

---

[65] *See* Knutson v. Wisconsin Air Army National Guard , 995 F.2d 765 (7th Cir. 1993) (Active Guard and Reserve challenging dismissal from his full time position); Gilliam v. Miller, 973 F.2d 760 (9th Cir. 1992) (technician challenging dismissal from his military position in the Oregon National Guard based on the United States Army Weight Control Program); Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983) (technician challenging dismissal from his military position based on misconduct); Gant v. Binder, 596 F. Supp. 757 (D. Neb. 1984) (Active Guard and Reserve nonselected for continuation); Zitser v. Walsh, 352 F. Supp. 438 (D. Conn. 1972) (dismissal from a state officer candidate school program for failure to meet federal standards--a mandatory action).

[66] Office of the Judge Advocate General, United States Army, Litigation Branch, ATTN: NGB-JAT, Room 2E425, 2500 Army Pentagon, Washington, D.C. 20310-2500.

[67] The United States Attorney General has the authority to "attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

[68] *See* Karr v. Castle, 768 F. Supp. 1087 (D. Del. 1981).

[69] For example, The Age Discrimination in Employment Act (29 U.S.C.A. §§ 621-34 (1993)) or Title VII (42 U.S.C.A. § 2000e (West Supp. Pam. 1994)), neither of which apply to military members. *See* Frey v. State of California, 982 F.2d 399 (9th Cir. 1993); Costner v. Oklahoma National Guard, 833 F.2d 905 (10th Cir. 1987).

[70] For example, the United States Army urinalysis program or weight control program.

When the only potential basis for federal representation is the alleged "interests of the United States," the administrative record must establish those interests. The administrative record includes the litigation report, the request for representation and supporting declarations, and *all* other documents relating to the plaintiff's case. One of the most important set of documents routinely missing from the administrative record are the military orders of all parties.

The Army's procedures for requesting federal representation are contained in *Army Regulation 27-40, Legal Services: Litigation*, paragraph 4-4,[71] which implements 28 *Code of Federal Regulation* sections 50.15(a)(1) and (2) and provides a sample format for a declaration regarding scope of employment and the request for federal representation. This sample request should be viewed as a starting point, not as a final product. The request should be as detailed as possible. At a minimum, it should include the status of the defendant, his or her position in the National Guard, a detailed description of his or her duties, and the specific actions taken in the plaintiff's case.[72] The facts in the request for representation must be supported by the administrative record. It is crucial that the defendant move quickly. Under *Federal Rule of Civil Procedure* 12(a), an individually named defendant has twenty days to respond to a complaint.[73] Arrangements should be made for state or private representation while the request is being processed.

If it is determined that a request should be submitted, the request, declaration, and documentation should be promptly forwarded to the NGB.[74] From there, it will be forwarded to the Army Litigation Division for processing to the DOJ with a recommendation for approval or denial of representation.[75] This recommendation will include a recommendation from the National Guard Bureau, regardless of whether the National Guard Bureau agrees or disagrees with the Army Litigation Division. The DOJ is ultimately responsible for making the "scope" and "interest" determinations after considering the recommendations from the Army Litigation Division and the NGB. The decision is not subject to judicial review.[76]

Department of Justice representation is neither automatic nor compulsory. If federal representation is not granted, National Guard members acting within the scope of their official duties are normally represented by state officials, usually the attorney general. Also, National Guard members are free to retain private counsel of their choice at their own expense.

Payment of Judgments

If a judgment is returned against a National Guard member in his or her *official capacity*, the judgment is against the United States and will be paid out of the resources of the United States.[77] If a judgment is returned against the National Guard member in his or her *individual capacity*, he or she will be personally liable. However, such an individual may apply for indemnification.[78]

Conclusion

In this article, I have attempted to outline the legal analysis used in every case by the National Guard Bureau, the Army Litigation Division, and the Department of Justice in evaluating requests for federal representation. Considerations such as who shall bear the cost of legal representation, the state or the federal government, should not play a part in the determination. While it is sometimes tempting to allow financial and political concerns to invade the process, the decision makers in the National Guard, the Army, and the Department of Justice must always rise above them and determine representation on the facts and the law.

---

[71] DEP'T OF THE ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (8 Aug. 1994).

[72] *Supra* note 37, AR 27-40, para. 4-4a(6) states:

> In cases involving National Guard personnel, address also the following: whether the defendant was acting in a State (title 32) or Federal (title 10) capacity during relevant periods (include orders); if the defendant was acting under State authority, is it nevertheless in the interest of the United States to represent the individual; any impact on policies or practices of DA [Department of the Army], the National Guard Bureau, or DOD [Department of Defense]; whether the relief requested can be granted only by a Federal officer or agency; and, whether Federal law or regulation required actions by State officials.

[73] In emergency situations, the Department of Justice may initiate conditional representation after a telephone request from the Litigation Division, Office of The Judge Advocate General. 28 C.F.R. § 50.15(a)(1) (1993); *supra* note 37, AR 27-40, para. 4-4a.(1).

[74] National Guard Bureau, ATTN: NGB-JAT, Room 2E425, 2500 Army Pentagon, Washington, D.C. 20310-2500.

[75] If the Litigation Division, Office of The Judge Advocate General, United States Army, concludes that representation is "clearly unwarranted," it can deny representation without forwarding the request to the Department of Justice. 28 C.F.R. § 50.15(a)(1) (1993). This authority is rarely exercised.

[76] *See* Falkowski v. Equal Employment Opportunity Commission, 764 F.2d 907 (D.C. Cir. 1985), *cert. denied*, 478 U.S. 1014 (1986). The representation determination should not be confused with certification and substitution decisions in a Federal Tort Claims Act action, which are reviewable at the behest of the employee. 28 U.S.C. § 2679(d)(3) (1988).

[77] 31 U.S.C.A. § 1304 (1992).

[78] 28 C.F.R. § 50.15(a)(8)(iii) (1993).

Neither Man nor Beast: The National Guard Technician, Modern Day Military Minotaur

Major Michael J. Davidson, United States Army Reserve
Assistant United States Attorney, District of Arizona
Department of Justice
Phoenix, Arizona

Major Steve Walters, United States Army
Student, 44th Graduate Course
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

National Guard technicians occupy a unique position in the federal personnel system, maintaining a dual status as civilians and soldiers while serving in a hybrid state/federal organization.[1] A technician's duties and responsibilities often "correspond directly to those of other civilian employees, yet they arise in a distinctly military context, implicating significant military concerns."[2] This unusual status complicates and confuses otherwise settled principles of federal personnel law.

The purpose of this article is to explain the dual role of the technician as both National Guardsmen and as civilian federal employees and to consider several likely causes of action that a technician, in a federal civilian or state National Guard capacity, may use when challenging a personnel action in federal court.[3]

The Role and Status of the National Guard

The National Guard traces its roots to the colonial militia.[4] At the time of the American Revolution, the militia was a largely untrained local defense force composed of most able-bodied men.[5] Although the militia was involved in numerous engagements during the war, it performed poorly and was the object of constant criticism.[6]

In the summer of 1787, delegates to the Constitutional Convention sought to balance the common concern that a standing army threatened individual liberty and state sovereignty against the realization that reliance on a body of poorly trained soldiers would not adequately provide for common defense.[7] At the time of the Constitutional Convention, danger threatened the new nation from all directions. The British maintained forces in Canada and portions of the West; the Spanish occupied Florida; the French controlled Louisiana and the Mississippi River area; and hostile Indians and internal insurrections threatened numerous states.[8]

As a compromise, the delegates to the Constitutional Convention authorized Congress to raise and support a standing army and to organize a militia.[9] However, Congress did not establish a militia until it passed the Militia Act of 1792. This legislation required every able-bodied man between the ages of eighteen and

---

[1] The role of the National Guard "does not fit neatly within the scope of either state or national concerns; historically the [National] Guard has been, and today remains, something of a hybrid." New Jersey Air Nat'l Guard v. Federal Labor Relations Authority, 677 F.2d 276, 278-79 (3rd Cir. 1982), *cert. denied, sub nom.* Government Employees v. New Jersey Air Nat'l Guard, 459 U.S. 988 (1982). *See also* National Guard Technicians Act of 1968, P.L. 90-486, H.R. No. 1823, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 3318, 3323 (codified at 32 U.S.C. § 709 (1995)).

[2] New Jersey Air Nat'l Guard v. Federal Labor Relations, 677 F.2d at 279.

[3] This article focuses on National Guard technicians and not Reserve Component technicians, whose rights and conditions of employment differ from National Guard technicians.

[4] E. Roy Hawkins, *The Justiciability of Claims Brought By National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service*, 125 MIL. L. REV. 99, 102 (1989).

[5] Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 182 (1940).

[6] William S. Fields & David Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 31 (1992); Weiner, *supra* note 5, at 182-83. George Washington opined: To place any dependence upon Militia, is, assuredly, resting upon a broken staff. If I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter. Fields & Hardy, *supra*, at 31.

[7] Perpich v. Department of Defense, 496 U.S. 334, 340 (1990).

[8] Fields & Hardy, *supra* note 6, at 32.

[9] *Perpich*, 496 U.S. at 340.

forty-five to arm himself and join the militia but imposed no requirements for drill or muster.[10] Largely ignored for over a century, the Militia Act of 1792 was finally repealed in 1901.[11]

Two years later, Congress passed the Dick Act, which provided for an organized militia, the National Guard, and a reserve or unorganized militia.[12] The Dick Act authorized federal funding and regular United States Army instructors for the National Guard and organized the National Guard so that it conformed to the regular United States Army.[13] In 1908, Congress enacted legislation permitting use of the organized militia "either within or without the territory of the United States."[14]

In 1912, the United States Army planned to use the National Guard in operations south of the Mexican border. In response, the United States Attorney General opined that extraterritorial use of the organized militia was unconstitutional, violating the Militia Clauses.[15] Prompted in part by the conflict in Europe, Congress responded to the United States Attorney General's opinion by passing the National Defense Authorization Act of 1916, which federalized the National Guard.[16] National Guard soldiers were required to take a dual oath, to obey both the President and their respective state governors.[17] This system permitted the President to discharge guardsmen from the militia and bring them individually into federal service.[18]

In 1933, Congress expanded federal control over the National Guard by making it a reserve component of the regular United States Army and designating it as the National Guard of the United States.[19] As a reserve component of the United States Army, the National Guard of the United States was organized and administered under the Constitution's army clause, permitting the federal government to order the National Guard into federal service.[20] Additionally, the National Guard continued to serve in its militia capacity, organized under the Constitution's militia clause, and was available only for limited military duties in defense of the states.[21] Consequently, the National Guard assumed a "dual status, and every Guardsman is a reservist as well as a militiaman."[22]

Although the federal government exercised increased control over the National Guard, the authority to order National Guard units to active duty was limited to periods of national emergency.[23] In 1956, Congress authorized calling National Guard units to federal service for "active duty or active duty for training without any emergency requirement, but provided that such orders could not be issued without gubernatorial consent."[24] In 1986, after the

---

[10] *Id.* at 334; Weiner, *supra* note 5, at 187. The legislation failed to ensure uniformity of weapon caliber, failed to dictate national drill standards, and failed to provide a penalty for failing to comply with the law. Fields & Hardy, *supra* note 6, at 41.

[11] *Perpich*, 496 U.S. at 341. In that same year, President Theodore Roosevelt declared in his first annual message to Congress, "Our militia law is obsolete and worthless." *Id.* n.10.

[12] *Id.* at 342; *see also* Dukakis v. Department of Defense, 686 F. Supp. 30, 33 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

[13] *Perpich*, 496 U.S. at 342; *Dukakis*, 686 F. Supp. at 33.

[14] *Perpich*, 496 U.S. at 342.

[15] *Id.* at 343; *Dukakis*, 686 F. Supp. at 34. The Attorney General's opinion concurred with an opinion rendered by The Judge Advocate General of the Army. Weiner, *supra* note 5, at 198.

[16] *Perpich*, 496 U.S. at 343; *Dukakis*, 686 F. Supp. at 34; Weiner, *supra* note 5, at 199.

[17] *Dukakis*, 686 F. Supp. at 34.

[18] *Id.* at 34. Additionally, this legislation provided for limited federal control over National Guard officer appointments by establishing qualifications and providing for federal recognition. *Id.* "Federal recognition means that an officer in the national guard must meet the same standards as officers on federal active duty." Yount v. United States, 23 Cl. Ct. 372, 375 n.3 (1991). However, drafting individual members of the Guard into the Army during World War One "virtually destroyed the Guard as an effective organization. The draft terminated the members' status as militiamen, and the statute did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army." *Perpich*, 496 U.S. at 345.

[19] *Dukakis*, 686 F. Supp. at 34 (citing Weiner, *supra* note 5, at 208) (eliminating the "Militia" from the War Department organization, replacing it with the National Guard Bureau).

[20] Weiner, *supra* note 5, at 208.

[21] *Id.* at 208. When not in federal service, the National Guard "is still militia, and this is so despite its federal pay, its federally owned equipment and the necessity for federal recognition of its officers." *Id.* at 210.

[22] *Id.* at 208.

[23] Perpich v. Department of Defense, 496 U.S. 334, 346 (1990).

[24] *Id.*

governors of California and Maine refused to permit their National Guard units to participate in training missions in Central America, Congress restricted the ability of governors to object to such missions.[25]

Since 1970, the National Guard has been a part of the Total Forces Concept, which the Department of Defense and the Joint Chiefs of Staff use to determine the total number of military personnel required to meet various military commitments.[26] Accordingly, the National Guard is an integral part of the United States military readiness program.[27]

The National Guard Technician

Congress has authorized the use of National Guard technicians since the National Defense Act of 1916.[28] Previously defined as "caretakers and clerks" with duties limited to maintenance of National Guard supplies and equipment,[29] technicians gradually expanded their role "to provide support in the administration and training of the National Guard military organization and for the day-to-day maintenance and repair of equipment which cannot be accomplished during normal military training periods."[30]

Prior to 1968, all technicians, except those in the District of Columbia, were state employees paid with federal funds; approximately ninety-five percent of the technicians held dual status as members of the National Guard.[31] In the National Guard Technicians Act of 1968, Congress converted technicians to federal employee status to provide them a uniform system of federal salaries, retirement, fringe benefits, and to clarify their status under to the Federal Tort Claims Act (FTCA).[32] Further, this legislation sought to recognize both the military and state characteristics of the National Guard by providing administrative authority to the states over the technicians.[33]

In *Perpich v. Department of Defense*,[34] the Supreme Court noted that National Guard personnel "must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time."[35] Similarly, Congress intended that National Guard technicians wear one of three different hats at any given moment.[36] First, National Guard technicians wear a civilian hat as federal civilian employees.[37] Specifically, technicians are "excepted service" civil servants employed under 32 United States Code (U.S.C.) § 709.[38]

---

[25] *Id.* In 1986, Congress passed the Montgomery Amendment, which provided that a governor could not refuse to permit National Guard units to be called to active duty "because of any objection to the location, purpose, type, or schedule of such active duty." *Id.* at 336-37 (citing the Montgomery Amendment, enacted as § 522, National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 522, 100 Stat. 3871). In 1990, the United States Supreme Court upheld the constitutionality of the Montgomery Amendment. *Id.* at 355.

[26] Bruton v. Schnipke, 404 F. Supp. 1032, 1034 (E.D. Mich. 1975); Hawkins, *supra* note 4, at 104.

[27] Hawkins, *supra* note 4, at 104; *see* Gilligan v. Morgan, 413 U.S. 1, 7 (1972) ("The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war.").

[28] H.R. 92-411, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1401 (codified in 1956 in 32 U.S.C.).

[29] National Guard Technicians Act of 1968, Pub. L. No. 90-486, *reprinted in* 1968 U.S.C.C.A.N. 3318, 3323.

[30] H.R. 92-411, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1401; *see also* National Guard Technicians Act of 1968, Pub. L. No. 90-486, *reprinted in* 1968 U.S.C.C.A.N. 3318, 3323 ("duties presently extend beyond the concept of the permanent law regarding the maintenance of equipment and involve such Guard functions as training, employment in State headquarters, air defense, military support for civil defense, and aircraft operations."); William Matthews, *Plan To Cut Technicians Seen Threat to Readiness*, ARMY TIMES, Sept. 19, 1994, at 23 (technicians "maintain planes, helicopters and tanks, manage training programs, run armories and keep records for the National Guard and the reserves.").

[31] H.R. 92-411, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1401; *see also* National Guard Technicians Act of 1968, Pub. L. No. 90-486, *reprinted in* 1968 U.S.C.C.A.N. 3318, 3319 ("technicians, now numbering about 42,000, are full-time civilian employees of the National Guard whose salaries are paid in full by the Federal Government . . . .[a]bout 95 percent of the technicians are required to hold concurrent National Guard membership as a condition for their civilian employment.").

[32] National Guard Technicians Act of 1968, Pub. L. No. 90-486, *reprinted in* 1968 U.S.C.C.A.N. 3318, 3319, 3320; *see* H.R. 92-411, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1401.

[33] National Guard Technicians Act of 1968, Pub. L. No. 90-486, *reprinted in* 1968 U.S.C.C.A.N. 3318, 3319.

[34] 496 U.S. 334 (1990).

[35] *Id.* at 348; *see* Spence v. Holesinger, 693 F. Supp. 703, 708 (C.D. Ill. 1988) (Air National Guard).

[36] "The concept of the technician program is that the technicians will serve concurrently in three different ways: (a) perform full-time civilian work in their units; (b) perform military training and duty in their units; and (c) be available to enter active Federal service at any time their units are called." National Guard Technicians Act Of 1968, Pub. L. No. 90-486, *reprinted in* 1968 U.S.C.C.A.N. 3318, 3319.

[37] Lopez v. Louisiana Nat'l Guard, 733 F. Supp. 1059, 1065 (E.D. La. 1990) ("Civilian employees working for the Louisiana National Guard as technicians . . . are considered federal employees."); *see also* Title 32 U.S.C.A. § 709(d) ("A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force and an employee of the United States.").

[38] 32 U.S.C.A. § 709(d) (West Supp. 1995) (outside the competitive service); Booth v. United States, 990 F.2d 617, 618 (Fed. Cir. 1993) ("excepted service technician").

Second, as a condition precedent to the civilian position, the technician must separately obtain and maintain military membership in a state National Guard.[39] Section 709(a) of the FTCA provides that individuals "may be employed as technicians only '[u]nder regulations prescribed by the Secretary of the [relevant military branch]'"[40] Each technician "shall, while so employed, be a member of the National Guard and hold the military grade specified by the secretary concerned for that position."[41] A technician must maintain membership in the National Guard or be terminated from the civilian technician position.[42]

Third, the technician wears a "federal hat" as a member of either the Army National Guard of the United States or the Air National Guard of the United States, which are Reserve Components of the United States Army and Air Force.[43] Because they are, respectively, components of the United States Army and United States Air Force, the Army and Air National Guard of the United States are part of the "Armed Forces" of the United States.[44]

State adjutant generals administer the National Guard Technician Act.[45] Although normally state officers, when administering the National Guard Technician Act, they are considered agents of the federal government.[46] The courts reason that the National Guard Technician Act "conferred *federal* status on civilian technicians while granting administrative authority to *state* officials, headed in each state by the state adjutant general."[47] Although the adjutant general is a state officer, this state status does not preclude the adjutant general from being a federal agent while administering federal civilian personnel.[48]

Civil Suits Against the United States

It is axiomatic that the United States, as a sovereign, is absolutely immune from suit unless it has waived its immunity.[49] This waiver of sovereign immunity must be clear and unequivocal[50] and is a jurisdictional prerequisite to maintaining a lawsuit.[51] Principles of sovereign immunity apply if the lawsuit is directed against the United States, its agencies or instrumentalities, its officers sued in their official capacities,[52] or "if the judgment sought would expend itself on the public treasury or domain."[53]

---

[39] 32 U.S.C.A. § 709(b) (West Supp. 1995); *see also* Gilliam v. Miller, 973 F.2d 760, 761 (9th Cir. 1992); Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992).

[40] Wright v. Park, 5 F.3d 586, 588 (1st Cir. 1993).

[41] 32 U.S.C.A. § 709(b) (West Supp. 1995); *see also Wright*, 5 F.3d at 588.

[42] 32 U.S.C. § 709(e)(1) (Supp. 1995); *see also* Tennessee v. Dunlap, 426 U.S. 312, 313 (1976); Gilliam v. Miller, 973 F.2d 760, 761 (9th Cir. 1992) ("must terminate"); *Wood*, 968 F.2d at 739; Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1005 n.1 (8th Cir. 1989); Uhl v. Swanstrom, 876 F. Supp. 1545, 1553 (N.D. Iowa 1995); Bates v. State of Wis., 823 F. Supp. 633, 634 (E.D. Wis. 1993) (*shall* be promptly separated); Spence v. Holesinger, 693 F. Supp. 703, 708 (C.D. Ill. 1988) (Air National Guard).

[43] 10 U.S.C.A. §§ 101(c)(3), (c)(5) (West 1995).

[44] *Id.* § 101(a)(4).

[45] 10 U.S.C. § 709(c) (Supp. 1995); *see also* Sebra v. Neville, 801 F.2d 1135, 1138 (9th Cir. 1986) ("The authority to employ and to administer National Guard technicians is vested in the adjutant general of each state.") (citations omitted); Chaudoin v. Atkinson, 494 F.2d 1323, 1327 (3d Cir. 1974) ("the adjutant general is charged with employing and administering the technicians authorized by the Act.").

[46] Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905, 907 (10th Cir. 1987); *see also* Gilliam v. Miller, 973 F.2d 760, 762 (9th Cir. 1992); NeSmith v. Fulton, 615 F.2d 196, 199 (5th Cir. 1980) (the adjutant general is a federal agent in administering the technicians); *Chaudoin*, 494 F.2d at 1329 ("Adjutant General of Delaware is an agency or an agent of the United States.").

[47] *Costner*, 833 F.2d at 907 (citing *NeSmith*, 615 F.2d at 199).

[48] *Id.*

[49] Library of Congress v. Shaw, 478 U.S. 310, 315 (1986); Lehman v. Nakshian, 453 U.S. 156, 160 (1981); Kanemoto v. Reno, 41 F.3d 641, 644 (Fed. Cir. 1994) (Federal question jurisdiction under 28 U.S.C. § 1331 is not a waiver of sovereign immunity); Cominotto v. United States, 802 F.2d 1127, 1129 (9th Cir. 1986); *see also* Jaffee v. United States, 592 F.2d 712, 717 n.10 (3d Cir.) ("bars equitable as well as legal remedies against the United States"), *cert. denied*, 441 U.S. 961 (1979).

[50] *Lehman*, 453 U.S. at 160 ("'unequivocally expressed'") (citation omitted); Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998, 1008-1009 (D. Idaho 1992) (citations omitted); *see also* Wisher v. Coverdell, 782 F. Supp. 703, 710 (D. Mass. 1992) ("must be unequivocally expressed and not implied."); *see* Smith v. O.P.M., 778 F.2d 258, 261 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986) ("a remedy against the sovereign is not to be implied.").

[51] United States v. Mitchell, 463 U.S. 206, 212 (1983) ("prerequisite for jurisdiction."); Broussard v. United States, 989 F.2d 171, 177 (5th Cir. 1993); Study v. United States, 782 F. Supp. 1293, 1298 (S.D. Ind. 1991) ("prerequisite to the federal court's exercise of jurisdiction."). Because sovereign immunity is a jurisdictional issue, the United States cannot waive it and may raise it for the first time on appeal. *In re* Univ. Med. Ctr., 973 F.2d 1065, 1085 (3d Cir. 1992).

[52] Generally, a suit against an agency of the United States is considered a suit against the United States. Reeves v. United States Dep't of Treasury, 809 F. Supp. 92, 94 (N.D. Ga. 1992); *see also* Navy, Marshall & Gordon, P.C. v. United States Int'l Dev.-Cooperation Agency, 557 F. Supp. 484, 487 (D.C. Cir. 1983) (the United States, its agencies and instrumentalities).

[53] Merrill Lynch v. Jacks, 960 F.2d 911, 913 (10th Cir. 1992) (citation omitted).

Courts construe all sovereign immunity waivers narrowly in favor of the sovereign.[54] The party suing the United States bears the burden of demonstrating the waiver of sovereign immunity.[55] Several statutes provide potential avenues of relief to National Guard technicians. However, whether a National Guard technician may maintain a civil suit against the United States often depends on the particular "hat" that the technician is wearing when suffering the challenged adverse action.

Significantly, when a court determines the reviewability of a challenged personnel action, the military characteristics predominate if the technician's military and civilian roles become inextricably intertwined.[56] Accordingly, the reviewing court should consider the technician to be wearing a military hat. Further, technicians, who are terminated from their civilian technician positions because of loss of state National Guard rank or membership, may not collaterally attack the underlying cause of that termination through 32 U.S.C. § 709(e)(3).[57]

The National Guard Technician Act

Title 32 U.S.C. § 709 contains neither an express nor an implied waiver of sovereign immunity to law suits brought by National Guard technicians. Indeed, in § 709(e)(5) Congress has expressly limited a technician's right of appeal to "the adjutant general of the jurisdiction concerned."[58] Accordingly, this statute fails to provide a legal avenue of redress in federal court for a technician to challenge an adverse personnel action.

Federal Anti-Discrimination Laws

Three federal anti-discrimination statutes—the Civil Rights Act of 1964 (Title VII),[59] the Age Discrimination in Employment Act (ADEA),[60] and the Rehabilitation Act of 1973[61]—provide the exclusive remedies to a federal civilian employee for claims of employment discrimination.[62] A technician who suffers an adverse personnel action, allegedly motivated by discrimination while serving in a civilian capacity, may maintain suit against the United States or its military agencies.[63] However, because these statutes do not apply to uniformed military personnel—state or federal—a technician may not challenge an allegedly discriminatory adverse personnel action taken against him in his military capacity even if the adverse action affects his civilian technician position.[64]

The Civil Rights Act of 1964

All federal circuit courts have held that Title VII does not apply to uniformed members of the Armed Forces of the United States.[65] The United States Court of Appeals for the Eighth Circuit (Eighth Circuit) was the first appellate court to address the issue in *Johnson v. Alexander*.[66]

---

[54] United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992) ("'construed strictly in favor of the sovereign . . . and not enlarge[d] . . . beyond what the language [of the statute] requires.'") (citation omitted); Study v. United States, 782 F. Supp. 1293, 1298 (S.D. Ind. 1991).

[55] Booth v. United States, 990 F.2d 617, 619 (Fed. Cir. 1993); Cominotto v. United States, 802 F.2d 1127, 1129 (9th Cir. 1986).

[56] Wright v. Park, 5 F.3d 586, 589 (1st Cir. 1993).

[57] Tennessee v. Dunlap, 426 U.S. 312 (1976); Gilliam v. Miller, 973 F.2d 760, 762-3 (9th Cir. 1992). The relevant portion of the statute provides: "(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned." 32 U.S.C. § 709(e)(3) (Supp. 1995).

[58] 32 U.S.C. § 709(e)(5) (Supp. 1995).

[59] 42 U.S.C. §§ 1971 to 2000e (1988).

[60] 29 U.S.C. §§ 621 to 634 (1988).

[61] *Id.* §§ 701 to 794.

[62] Brown v. General Services Administration, 425 U.S. 820, 835 (1976) (Title VII provides the exclusive remedy); Johnson v. U.S. Postal Serv., 861 F.2d 1475, 1477 (10th Cir. 1988) (Rehabilitation Act is the exclusive remedy for handicap discrimination); Boyd v. United States Postal Serv., 752 F.2d 410, 413 (9th Cir. 1985) (Rehabilitation Act); Dodson v. United States Army Fin. & Accounting Ctr., 636 F. Supp. 894, 895 (S.D. Ind. 1986) ("the ADEA is the exclusive remedy for a federal employee who claims age discrimination"); Giles v. EEOC, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981) (ADEA and Rehabilitation Act). Title VII prohibits discrimination based on race, color, religion, sex and national origin. 42 U.S.C. § 2000e-2e(a),(b) (1988). The ADEA prohibits ageist discrimination. 29 U.S.C. §§ 621 to 634 (1988). The Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap. 29 U.S.C. § 794a (1988).

[63] Lopez v. Louisiana Nat'l Guard, 733 F. Supp. 1059, 1065-66 & n.14 (E.D. La. 1990) (citations omitted); *see* Mier v. Owens, 1995 WL 341777, *1 (9th Cir. 1995) ("Title VII applies to Guard Technicians except when they challenge personnel actions integrally related to the military's unique structure."); Hunter v. Stetson, 444 F. Supp. 238, 239 n.1 (E.D.N.Y. 1977) (exclusive remedy for civilian technician).

[64] *But cf. Hunter*, 444 F. Supp. at 240 (allowing technician to maintain Title VII suit because of court perception that civilian employer was exploiting dual status as plaintiff's military and civilian superior).

[65] *Mier*, 1995 WL 341777 at *1 ("Title VII does not protect military personnel."); Doe v. Garrett, 903 F.2d 1455, 1461 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991) (Naval Reserve); Roper v. Department of Army, 832 F.2d 247, 248 (2d Cir. 1987) (Army Reserve); Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978) (applicant for enlistment); *see also* Collins v. Secretary of Navy, 814 F. Supp. 130, 131 (D.D.C. 1993) ("Every Court of Appeals that has addressed the issue has held that Title VII is inapplicable to uniformed members of the military.") (citations omitted).

[66] 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

Richard Johnson, a black male, based his rejection for enlistment in part on Title VII.[67] Johnson argued that the relationship between the federal government and a uniformed member of the armed forces was that of employer-employee, and that a potential enlistee should be treated like an applicant for employment under Title VII.[68]

The Eighth Circuit rejected Johnson's argument, pointing to material differences in employment relationships between service members and civilians.[69] Further, the court reviewed the language of Title VII and the statutory definitions of "military departments" and "armed forces," concluding that "if Congress had intended for [Title VII] to apply to the uniformed personnel of the various armed forces it would have said so in unmistakable terms."[70]

Other circuits addressing the issue have reached the same conclusion using the same or similar statutory interpretation.[71] Accordingly, courts have refused to extend Title VII protections to regular commissioned officers,[72] members of the United States Army Reserve,[73] and members of the National Guard, with or without federal recognition.[74]

Section 717(a) of Title VII extends the protections against employment discrimination to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in 5 U.S.C. § 102, the military departments are the Department of the Army, the Department of the Navy, and the Department of the Air Force, which includes both uniformed personnel and civilian employees.[75] In Title 10 U.S.C. § 101(4), Congress provided a separate definition of the "armed forces," which includes the Army, Navy, Air Force, Marine Corps and Coast Guard. The latter definition refers only to uniformed military personnel.[76]

The courts have determined that the two statutory definitions are not interchangeable,[77] and that the differences in the two definitions indicate that Congress intended a distinction between "military departments" and "armed forces."[78] Further, nothing in Title VII's legislative history indicates that Congress intended to extend the legislation's protections to members of the armed forces.[79] Accordingly, because Congress did not specifically include uniformed members of the military under Title VII's protective umbrella, the courts have refused to extend its protections to members of the armed forces.[80]

---

[67] The Army rejected Johnson because of his numerous arrests, poor employment record, and failure to graduate from high school. *Id.* at 1221-22. The district court granted the defendant's motion for summary judgment holding, in part, that Title VII did not apply to uniformed members of the armed forces or to applicants for enlistment. *Id.* at 1222.

[68] *Id.* at 1223.

[69] The court noted that a soldier in the Army is not free to quit his job, cannot be fired, and that a soldier is subject to both military discipline and military law. *Id.* at 1223 n.4. *See also Roper*, 832 F.2d at 248 ("The relationship between the government and a uniformed member of the military remains unlike the relationship which exists between civilian employer and employee."); MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.16(d), at 216 (1988) ("military service in a uniformed service, including the National Guard, is not an employment relationship. Thus, admission into a uniformed military service is not regulated by Title VII, nor are decisions concerning persons in the uniformed services in areas such as assignments, promotions, pay, and discipline.").

[70] Johnson v. Alexander, 572 F.2d 1219, 1228 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

[71] Stinson v. Hornsby, 821 F.2d 1537, 1539 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Roper*, 832 F.2d at 248 (2d Cir. 1987); Salazar v. Heckler, 787 F.2d 527, 532 (10th Cir. 1986); Gonzalez v. Department of Army, 718 F.2d 926, 928 (9th Cir. 1983); *see* Ridgway v. Aldridge, 709 F. Supp. 265, 268 (D. Mass. 1989) (dicta) ("courts have held that Title VII . . . is inapplicable to the military's uniformed personnel.").

[72] *Gonzalez*, 718 F.2d at 926.

[73] *Roper*, 832 F.2d at 247.

[74] Frey v. California, 982 F.2d 399, 404 (9th Cir. 1993) (state National Guard officer, but not a member of the National Guard of the United States); *see also* Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988) (enlisted member of Alabama National Guard serving on full-time military duty pursuant to 10 U.S.C. § 502(f)); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981) (enlisted member of Arkansas National Guard and National Guard of the United States).

[75] Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

[76] *Gonzalez*, 718 F.2d at 928.

[77] *Johnson*, 572 F.2d at 1224 n.5.

[78] *Gonzalez*, 718 F.2d at 928.

[79] *Id.* at 928; Roper v. Department of Army, 832 F.2d 247, 248 (2d Cir. 1987).

[80] Frey v. California, 982 F.2d 399, 404 (9th Cir. 1993) ("The courts have held that [Title VII] do[es] not apply to the military primarily because of a determination that, if Congress had intended to encroach upon the special status of the military in our system by extending these protections, it would have expressed its intention clearly."); *Johnson*, 572 F.2d at 1224 ("If Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms.").

The Age Discrimination in Employment Act of 1967

Section 15 of the Age Discrimination in Employment Act of 1967 (ADEA)[81] "prohibits the Federal Government from discriminating based on age in most of its civilian employment decisions concerning persons over 40 years of age."[82] Congress amended the ADEA in 1974 to prohibit age discrimination in the "military departments."[83] Because Title VII precedent is generally applied to ADEA cases[84] and because Title VII contains the identical "military departments" coverage, the courts have held that Congress did not intend ADEA protections to extend to "uniformed personnel, whether active or reserve, of the armed forces."[85]

The Rehabilitation Act of 1973

In 1978, Congress extended the Rehabilitation Act of 1973 to cover the federal government.[86] Since that time, the only appellate court to address the issue, the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit), has held that a uniformed member of the armed forces may not maintain a lawsuit under this statute.[87]

In *Smith v. Christian*,[88] the Eleventh Circuit confronted for the first time the applicability of the Rehabilitation Act to uniformed military personnel. Because Smith was missing his right index finger, the Navy rejected his application for a Reserve Commission in conjunction with Smith's application for a medical scholarship.[89] Smith challenged the rejection by filing suit, claiming a violation of the Rehabilitation Act. The district court granted summary judgment, concluding that § 504 of the Rehabilitation Act did not override the Secretary of the Navy's authority to establish physical standards for reserve officer applicants and that the Secretary of the Navy's specific statutory authority to set physical standards took precedence over the Rehabilitation Act's general guidelines.[90] Applying rules of statutory construction, the Eleventh Circuit reasoned that the Secretary's specific statutory authority could not be nullified by a statute of general application absent clear indication of congressional intent to the contrary.[91]

Subsequently, the Eleventh Circuit squarely confronted the issue whether the Rehabilitation Act applied to uniformed military personnel. In *Doe v. Garrett*,[92] a member of the Naval Reserve who tested positive for the Human Immunodeficiciency Virus challenged his release from active duty pursuant to the Rehabilitation Act.[93] Relying on case law excluding uniformed military personnel from Title VII's protection, the district court granted summary judgment to the Navy.[94]

Upholding the district court's grant of summary judgment, the Eleventh Circuit posited that case law addressing Title VII's applicability to the military, and its reasoning, must be consulted in applying the Rehabilitation Act to uniformed military personnel.[95] Determining that the Rehabilitation Act did not apply to uniformed military personnel, the court opined that "it would be

---

[81] 29 U.S.C. § 621 (1988).

[82] Lehman v. Nakshian, 453 U.S. 156, 157 (1981).

[83] 29 U.S.C. § 633a(a); *see also Lehman*, 453 U.S. at 157.

[84] *Lehman*, 453 U.S. at 168 n.15; *see also* Helm v. California, 722 F.2d 507, 509 (9th Cir. 1983) ("This court has applied Title VII precedent to ADEA cases.") (citation omitted).

[85] Kawitt v. United States, 842 F.2d 951, 953 (7th Cir. 1988) (former member of Naval Reserve); *see also* Spain v. Ball, 928 F.2d 61, 63 (2d Cir. 1991) (applicant for commission in the Navy); *Helm*, 722 F.2d at 509 (retired Army National Guard officer); *see* Ridgway v. Aldridge, 709 F. Supp. 265, 268 (D. Mass 1989) (dicta) ("the courts have been unwilling to extend ADEA to protect uniformed personnel, whether active or reserve, in the armed forces.").

[86] Milbert v. Koop, 830 F.2d 354, 356 (D.C. Cir. 1987) ("extended § 504's proscription against handicap discrimination to 'any program or activity conducted by an Executive agency or by the United States Postal Service'.").

[87] *Id.* at 357-59 (declining to decide the issue because of its holding that a commissioned officer of the Public Health Service is not a member of the armed forces.).

[88] 763 F.2d 1322 (11th Cir. 1985).

[89] *Id.* at 1323.

[90] *Id.* at 1324. The Secretary's authority to set physical standards was contained in 10 U.S.C. §§ 591(b), 5579(a).

[91] *Id.* at 1325. Furthermore, the court noted the "wide latitude" that Congress has afforded the Executive Branch in determining who may be commissioned in the military. *Id.* Further, the court determined that its holding was underscored by the fact that the Department of Defense had enacted regulations against handicap discrimination, which omitted coverage of any program concerning the procurement of military personnel. *Id.* (citing 32 C.F.R. §§ 56.1, 56.7 (1984)).

[92] 903 F.2d 1455 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

[93] *Id.* at 1457. Doe did not exhibit symptoms of the Acquired Immune Deficiency Syndrome (AIDS). *Id.*

[94] *Id.* at 1458.

[95] *Id.* at 1461.

incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap, when statutory claims based on sex, race, religion, or national origin are barred."[96]

The Civil Rights Enforcement Statutes

Following the Civil War, Congress enacted the federal civil rights enforcement statutes[97] to buttress the guarantees of the 13th and 14th Amendments of the Constitution.[98] The statutes permit private parties to maintain a federal cause of action to enforce particular civil rights.[99] However, these statutes provide only limited recourse to technicians.

As federal employees, technicians possess limited avenues of redress under these statutes to challenge personnel actions. Because of Title VII's exclusivity, a technician may not maintain a lawsuit pursuant to § 1981[100] Additionally, several courts have held that § 1981 does not waive the sovereign immunity of the United States to suit.[101]

To prevail under 18 U.S.C. § 1983, a technician must establish a "deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States . . . by a person acting under color of *state* law."[102] Generally, "a person acts under color of state law when his or her actions are 'fairly attributable to the State,' that is, when the person's 'official character is such as to lend the weight of the [s]tate to his [or her] decisions.'"[103]

Unless the challenged actions of federal officials are performed under color of state law,[104] a technician may not maintain a lawsuit pursuant to § 1983 based on the actions of federal officials acting under color of federal law.[105] Accordingly, the relevant inquiry for courts evaluating a technician's § 1983 law suit is whether the adjutant general or other officers of the National Guard were acting under color of state or federal law when the challenged action was undertaken.[106]

---

[96] *Id.*

[97] 42 U.S.C. §§ 1981, 1983, 1985(3), 1986 (1988).

[98] CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § 4.0, at 4-1 (2d ed. 1994).

[99] *Id.* Section 1981 enforces the 13th Amendment, deals exclusively with racial discrimination, and focuses primarily on discrimination in the making and enforcement of employment contracts. *Id.* Section 1983 enforces the due process and equal protection clauses of the 14th Amendment, but provides a cause of action "*only* for deprivations 'under color of state law.'" *Id.* (emphasis in original). Section 1985(3) prohibits conspiracies intended to deprive persons of various rights, privileges or immunities. *Id.* at 4-2. The statute is not a "general federal tort law" and creates no substantive rights; it "merely provides a remedy for the violation of the rights designated in the statute." Brace v. Ohio State Univ., 866 F. Supp. 1069, 1075 (S.D. Ohio 1994) (does not permit suit for breach of contract). Section 1986 censures those who are aware of a violation of § 1985, but fail to prevent it. RICHEY, *supra* note 98, at 4-2. The success of a § 1986 claim is entirely dependent on the underlying § 1985 claim. Boldthen v. Independent Sch. Dist. No. 2397, 865 F. Supp. 1330, 1339 (D. Minn. 1994). A detailed discussion of these statutes is beyond the scope of this article.

[100] RICHEY, *supra* note 98, § 4:14, at 4-9; *see also* Espinueva v. Garrett, 895 F.2d 1164, 1165 (7th Cir.) ("Section 1981 does not apply to employment discrimination cases involving the federal government.") (citing Brown v. General Services Administration), *cert. denied* 497 U.S. 1005 (1990); Newbold v. United States Postal Serv., 614 F.2d 46, 47 (5th Cir.), *reh'g denied mem.*, 616 F.2d 568 (5th Cir), *cert. denied*, 449 U.S. 878 (1980); Giles v. Equal Employment Opportunity Commission, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981).

[101] *See* Petterway v. Veterans Hospital, 495 F.2d 1223, 1225 n.3 (5th Cir. 1974); Navy, Marshall & Gordon, P.C. v. United States Int'l Dev.-Cooperation Agency, 557 F. Supp. 484, 488 (D.D.C. 1983).

[102] Tenorio v. Murphy, 866 F. Supp. 92, 96 (E.D.N.Y. 1994) (citations omitted) (emphasis added); *see also* United Auto Workers v. Gaston Festivals, Inc., 43 F.2d 902, 906 (4th Cir. 1995) ("only extends to persons acting under color of state law"); Broadway v. Block, 694 F.2d 979, 981 (5th Cir. 1982) ("as expansive as that statute is, it only covers derivations of rights under color of state law"). The statute itself creates no substantive rights; it "merely provides a remedy for the deprivation of existing constitutional or statutory rights." *Boldthen*, 865 F. Supp. at 1335 (citing Wilson v. Garcia, 471 U.S. 261, 278 (1985)); *see also* Gates v. Walker, 865 F. Supp. 1222, 1238 (S.D. Miss. 1994). Further, the statute does not address violations of state rights, it "protects only federal rights." Smith v. Avino, 866 F. Supp. 1399, 1401 n.4 (S.D. Fla. 1994) (citation omitted).

[103] Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1565 (S.D. Fla. 1994) (citing Burch v. Apalachee Community Health Serv., Inc., 840 F.2d 797, 803 (11th Cir. 1988)).

[104] *See* Francis-Sobel v. University of Maine, 597 F.2d 15 (1st Cir.), *cert. denied*, 444 U.S. 949 (1979).

[105] RICHEY, *supra* note 98, § 4:48, at 4-26; *see also* Seber v. Unger, 881 F. Supp. 323, 327 & n.4 (N.D. Ill. 1995); *see Broadway*, 694 F.2d at 981; *Tenorio*, 866 F. Supp. at 96 ("It is well-established rule of law that § 1983 claims cannot be maintained against the United States government or persons in their official capacity.") (citations omitted). Additionally, in the employment discrimination context, the federal anti-discrimination statutes—Title VII, ADEA and the Rehabilitation Act—are a federal employee's exclusive remedy, precluding suit pursuant to § 1983. White v. General Sercies Agency, 652 F.2d 913, 916-17 (9th Cir. 1982); Moche v. City Univ. of N.Y., 781 F. Supp. 160, 167 (E.D.N.Y. 1992) (Title VII), *aff'd*, 999 F.2d 538 (2d Cir. 1993); Giles v. EEOC, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981) (Title VII and ADEA).

[106] Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 767 (7th Cir. 1993). No set formula for making this determination exists; the "evaluation . . . focuses on the nature of that action and functional capacity of the actor." *Id.* "We do not ask whether the conduct was pursuant to a state statute but 'whether there is a sufficiently close nexus between the State and the challenged action.'" *Id.* (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)); *see also* Johnson v. Orr, 780 F.2d 386, 390 (3d Cir. 1986).

Several federal courts of appeal have held that the state adjutant general and National Guard officials act under color of state law for purposes of 42 U.S.C. § 1983 when participating in personnel decisions affecting National Guard technicians.[107] Although recognizing that the adjutant general's authority to administer the technician program is derived from federal statute—the National Guard Technician Act—and that the National Guard is heavily influenced and funded by the federal government, these courts focused on Congress's intent to recognize the state characteristics of the National Guard "by providing for certain administrative authority at the State level"[108]

The Supreme Court's ruling in *Will v. Michigan Department of State Police*,[109] that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983,"[110] severly diluted the precedential value of this body of law as authority for permitting technician lawsuits. Therefore, unless the suit is one for injunctive relief,[111] a technician acting in a state National Guard capacity cannot maintain a § 1983 suit against the state National Guard or any of its officers in their official capacity.[112] However, state officials sued in their individual capacities are considered "persons" for purposes of § 1983.[113]

Because § 1985(3) does not require state action, the courts have split on whether federal officials can be sued under this statute.[114] However, at least with regard to employment discrimination lawsuits, the exclusivity of the federal anti-discrimination statutes precludes lawsuits brought against federal officials in their official capacities.[115]

In their capacity as state National Guard members, technicians may seek to collaterally attack the loss of their civilian position by challenging the underlying loss of their state National Guard status.[116] The federal civil rights enforcement statutes provide guardsmen with a frequently used,[117] but uncertain, mechanism for mounting a challenge. For example, a state's United States Constitution Eleventh Amendment immunity may preclude relief pursuant to §§ 1981[118] and 1983.[119] The intracorporate con-

---

[107] *Johnson*, 780 F.2d at 386; NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980); Rowe v. Tennessee, 609 F.2d 259 (6th Cir. 1979). Significantly, none of the three courts addressed whether the National Guard, or its officers, was a "person" for purposes of § 1983. To be held liable pursuant to 1983, the defendant must be a "person" within the meaning of the statute. Thompson v. City of Los Angeles, 885 F.2d 1439, 1442-43 (9th Cir. 1989).

[108] *Johnson*, 780 F.2d at 391; *NeSmith*, 615 F.2d at 200; *Rowe*, 609 F.2d at 264.

[109] 491 U.S. 58 (1989).

[110] *Id.* at 71. The Court's reasoning extends to state agencies, which are considered to be arms of the state. Reiger v. Kansas Pub. Emp. Ret. Sys., 755 F. Supp. 360, 361 (D. Kan. 1990). Additionally, territories are not "persons" for purposes of § 1983. Brest v. District of Columbia, 743 F.2d 44 (D.C. Cir. 1990). However, the District of Columbia is considered a municipality, rather than a state or territory, and falls within § 1983's definition of a "person." *Id.* at 47. Accordingly, a member of the District of Columbia National Guard would not be bound by the Supreme Court's holding in *Will*.

[111] The courts do not consider a suit against a state official in his official capacity for injunctive relief to be one against the state. *Will*, 491 U.S. at 71 n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'") (citations omitted); *see also* Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 361 n.8 (4th Cir. 1991); Rosen v. Chang, 758 F. Supp. 799, 801 (D.R.I. 1991).

[112] *See* Introini v. South Carolina Nat'l Guard, 828 F. Supp. 391 (D.S.C. 1993) (member of state National Guard on full-time status).

[113] Hafer v. Melo, 112 S.Ct. 358, 360 (1991); White v. Gregory, 1 F.3d 267, 270 (4th Cir. 1993). Suits against individual defendants may still be defeated as nonjusticiable. *See, e.g., Introini*, 828 F. Supp. at 393, 395 ("Every court of appeals that has addressed this issue since [Chappell v. Wallace, 462 U.S. 296 (1983)] was handed down has held that a member of the National Guard may not sue his military superiors for alleged constitutional violations under § 1983."). Additionally, officials sued in their individual capacities "may assert personal immunity defenses such as objectively reasonable reliance on existing law." *Hafer*, 112 S. Ct. at 362.

[114] RICHEY, *supra* note 98, § 4:108, at 4-57.

[115] *See* RICHEY, *supra* note 98, § 4:108, at 4-57 (citing Brown v. General Services Administration, 425 U.S. 820 (1976)); *see also* Rowe v. Sullivan, 967 F.2d 186, 189 (5th Cir. 1992); Keene v. Costle, 589 F. Supp. 687 n.1 (E.D. Pa. 1984) (Title VII); Giles v. Equal Employment Opportunity Community, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981) (Title VII and ADEA are exclusive). Additionally, "intramilitary actions may not be cognizable under § 1985(3)." *Id.* (citing Bois v. Marsh, 801 F.2d 462, 469-70 (D.C. Cir. 1986); Alvarez v. Wilson, 600 F. Supp. 706, 712 (N.D. Ill. 1985)). Further, conspiracy to violate Title VII is not actionable under § 1985(3). Philippeaux v. North Cent. Bronx Hosp., 871 F. Supp. 640, 656 n.10 (S.D.N.Y. 1994).

[116] *See* Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1005 & n.1 (8th Cir. 1989) (action brought pursuant to 42 U.S.C. §§ 1981, 1983); Uhl v. Swanstrom, 876 F. Supp. 1545, 1554 (N.D. Iowa 1995).

[117] "[S]uits by Guardsmen under the civil rights statutes are not an infrequent occurrence." Hawkins, *supra* note 4, at 100.

[118] Although the Eleventh Amendment has been used to preclude a suit for damages, some courts have applied a distinction between prospective and retroactive relief against states. RICHEY, *supra* note 98, § 4:12, at 4-8.

[119] "[Section] 1983 was not intended to abrogate a state's Eleventh Amendment immunity." RICHEY, *supra* note 98, § 4:50, at 4-26; *see also* Meadows v. Indiana, 854 F.2d 1068, 1069 (7th Cir. 1988) (11th Amendment bars official-capacity suit against state officials and state by Guardsmen). A plaintiff cannot evade a state's immunity "by naming a state official in his or her official capacity in an action for monetary relief . . . [h]owever, in an injunctive or declaratory action grounded on federal law, a state's immunity can be overcome by naming state officials as defendants." RICHEY, *supra*, at 4-27 (citing Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)); *see also* Gray v. Lewis, 51 F.3d 426, 430 n.1 (4th Cir. 1995). However, the Eleventh Amendment does not bar a suit for injunctive relief that contains an ancillary monetary demand. *Id.* (citing Edelman v. Jordon, 415 U.S. 651 (1974)); *see also* Tenorio v. Murphy, 866 F. Supp. 92, 96 (E.D.N.Y. 1994) ("money damage actions brought against state officials in their official capacity must be dismissed as they are, in reality, against the State . . . [however] money damages claims against state officials in their individual capacity are allowed to stand.").

spiracy doctrine may bar a § 1985(3) lawsuit if all the alleged conspirators are members of a single legal entity, for example, the National Guard.[120] Further, National Guard members must contend with the uncertain issues of justiciability and reviewability.[121]

Civil Service Reform Act

In 1978, Congress enacted the Civil Service Reform Act (CSRA)[122] to replace an outdated "patchwork system [of administrative and judicial review of adverse personnel actions] with an integrated scheme . . . designed to balance the legitimate interests of various categories of federal employees with the needs of sound and efficient administration."[123] The CSRA's comprehensive scheme for review of personnel actions is a federal civilian employee's exclusive remedy for adverse personnel actions not involving allegations of discrimination.[124] This principle of exclusivity applies to National Guard technicians.[125]

Although bound by the exclusivity of the CSRA, technicians may not maintain a lawsuit under this statute. Congress explicitly excluded technicians from the CSRA protections. Specifically, § 7511(b)(5) denies administrative and judicial review to "an employee described in § 8337(h)(1) relating to technicians in the National Guard."[126] Recent congressional amendments to the CSRA noted, but declined to alter, this statutory exclusion.[127]

In *Booth v. United States*,[128] a technician challenged his resignation as involuntary, alleging the government breached his employment contract by coercing his resignation with threats of removal.[129] The United States Court of Federal Claims denied the government's motion to dismiss for lack of subject matter jurisdiction, reasoning that Booth's complaint stated a cause of action under the Tucker Act, but nonetheless granted summary judgment to the United States.[130]

The United States Court of Appeals for the Federal Circuit (Federal Circuit) reversed and remanded. The Federal Circuit determined that the CSRA exclusively governed federal personnel issues, including those personnel matters affecting National Guard technicians.[131] However, because the CSRA specifically excluded technicians from administrative and judicial review,[132] the United States Court of Federal Claims lacked subject matter jurisdiction over Booth's lawsuit.[133]

---

[120] RICHEY, *supra* note 98, § 4:112, at 4-58 ("An issue that has divided the courts . . . is whether individual agents or officers of a single corporate entity can form a 'conspiracy' within the meaning of § 1985(3)."). The intracorporate conspiracy doctrine applies to governmental entities. Edmonds v. Dillin, 485 F. Supp. 722 (N.D. Ohio 1980).

[121] *See infra* notes 152-62 and accompanying text. At least five circuits have held nonjusticiable § 1983 suits for monetary and injunctive relief by Guardsmen. Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 769 (7th Cir. 1993). The Third Circuit has permitted suit for injunctive relief. Spence v. Holesinger, 693 F. Supp. 703, 706 (C.D. Ill. 1988) (citing Jorden v. National Guard Bureau, 799 F.2d 99, 106 (3d Cir. 1986), *cert. denied*, 108 S.Ct. 66 (1987)) (permitting a suit for injunctive relief).

[122] Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in various sections of 5 U.S.C.).

[123] United States v. Fausto, 484 U.S. 439, 445 (1988) (citation omitted). The CSRA was the first major legislative reform of the government's personnel system since the Pendleton Act of 1883. H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 How. L.J. 283, 297 (1986). Motivation for reorganizing the federal government personnel system was not rooted in concerns over individual rights; rather, the government's motivation stemmed from concerns that, as an employer, the federal government did not possess an adequate mechanism for disposing of incompetent employees and that performance was not adequately considered as a criteria for rewarding federal employees. *Id.*

[124] Steele v. United States, 19 F.3d 531 (10th Cir. 1994); Roth v. United States, 952 F.2d 611 (1st Cir. 1991) (state law claims of slander when utterances concerned job performance); McAuliffee v. Rice, 966 F.2d 979, 980 (5th Cir. 1992) (Administrative Procedures Act); Stephens v. Department of Heath & Human Serv., 901 F.2d 1571, 1575 (11th Cir. 1990) (preference eligible as well as non-preference employees); *see* LeBlanc v. United States, 50 F.3d 1025, 1030 (Fed. Cir. 1995); Greenlaw v. Garrett, 43 F.3d 462, 465 (9th Cir. 1994) (preempts state tort claims). In cases based on allegations of discrimination, the technician's exclusive remedy lies with one of the three federal anti-discrimination statutes. The CSRA only applies to federal civilian employees, it does not afford protection to uniformed military personnel.

[125] Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993).

[126] *Id.* at 620. Title 5 U.S.C. § 8337(h)(1) "defines 'technician' as 'an individual employed under § 709(a) of title 32 who, as a condition of the employment, is required under § 709(b) of such title to be a member of the National Guard and to hold a specified military grade.'" *Id.* at 620 n.4.

[127] Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990), *reprinted in* 1990 U.S.C.C.A.N. 695, 699.

[128] 990 F.2d 617 (Fed. Cir. 1993). Richard Booth was a National Guard technician who alleged that the United States coerced his resignation, breaching his employment contract. *Id.* at 619. Booth asserted that jurisdiction existed under the Tucker Act. *Id.*

[129] *Id.* at 618-19.

[130] *Id.* at 619.

[131] *Id.*

[132] *Id.* (citing 5 U.S.C. § 7511(b)(5) (1988)).

[133] *Id.* at 620.

Tucker Act

The Tucker Act[134] waives sovereign immunity for specified types of monetary claims against the United States.[135] Specifically, the claim must be "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[136]

However, not all claims based on a federal law or regulation are actionable under the Tucker Act.[137] The Tucker Act, by itself, does not create a substantive right to money damages against the United States.[138] Any such substantive right "must be found in some other source of law, such as the Constitution, or any Act of Congress, or any regulation of an executive department."[139]

For Tucker Act claims exceeding $10,000, the United States Court of Federal Claims exercises exclusive jurisdiction.[140] The Tucker Act provides for concurrent jurisdiction in the federal district courts for claims less than $10,000.[141]

The Tucker Act is not available to technicians challenging adverse personnel actions. The exclusivity of the CSRA preempts suits based on the Tucker Act.[142] As discussed earlier, in *Booth* the Federal Circuit held that this principle of exclusivity precluded a technician from bringing a lawsuit against the United States based on the Tucker Act.[143]

Administrative Procedures Act

The Administrative Procedures Act (APA)[144] waives sovereign immunity "for claims against the government for unlawful agency actions other than money damages claims."[145] Section 704 of the APA provides for judicial review for "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court."[146] Conversely, the APA does not waive sovereign immunity when judicial review of the challenged agency action, and an adequate remedy, exists elsewhere.[147]

Generally, the APA is available to uniformed members of the United States Armed Forces,[148] including members of the National Guard in a federal status, but the APA is not available to National Guard members challenging actions taken against them by officials acting in a state capacity.[149] Accordingly, members of the National Guard may use the APA to challenge military decisions—which ultimately impact on their civilian technician status—only when wearing a "federal hat" at the time of the adverse action.

Further, the APA is not available to National Guard technicians for actions taken against them in their civilian technician

---

[134] 28 U.S.C. §§ 1346(a)(2), 1491 (1988).

[135] United States v. Mitchell, 463 U.S. 206, 212 (1983).

[136] 28 U.S.C. § 1491 (1988); *see also* Kanemoto v. Reno, 41 F.3d 641, 644 (Fed. Cir. 1994). The Tucker Act "does not reach claims based on contracts implied in law, as opposed to those implied in fact." *Mitchell*, 463 U.S. at 218.

[137] *Mitchell*, 463 U.S. at 216.

[138] *Id.*

[139] *Id.* (citing 28 U.S.C. § 1491 (1988)). The plaintiff bears the burden of establishing that "the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-17 (citation omitted). The National Guard Technician's Act fails to provide any substantive right to money damages against the United States. *See* 18 U.S.C. § 709 (1988).

[140] *Kanemato*, 41 F.3d at 644; Charles v. Rice, 28 F.3d 1312, 1321 (1st Cir. 1994) (Big Tucker Act claims).

[141] *Mitchell*, 463 U.S. at 212 n.10 (citing 28 U.S.C. § 1346(a)(2) (1988)); *Charles*, 28 F.3d at 1321 (Little Tucker Act claims).

[142] United States v. Fausto, 484 U.S. 439 (1988).

[143] Booth v. United States, 990 F.2d 617, 619-20 (Fed. Cir. 1993).

[144] 5 U.S.C. §§ 701-06 (1988).

[145] Kanemoto v. Reno, 41 F.3d 641, 644 (Fed. Cir. 1994); *see also* Sargent v. United States, 780 F. Supp. 296, 298 (E.D. Pa. 1992) ("monetary damages, a form of relief that is not available under the APA"). However, the courts do not consider all monetary relief, *e.g.*, restitution, to be "money damages" for purposes of the Administrative Procedures Act. *Reno*, 41 F.3d at 644 (citing Bowen v. Massachusetts, 487 U.S. 879 (1988)).

[146] 5 U.S.C. § 704 (1988); *Kanemato*, 41 F.3d at 644.

[147] *Kanemato*, 41 F.3d at 644 (citing Mitchell v. United States, 930 F.2d 893, 895-96 (Fed. Cir. 1991)).

[148] Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976) ("applies to the Army in peacetime"). However, the APA does not apply to "'military authority exercised in the field in time of war or in occupied territory.'" 5 U.S.C. § 551(1)(G) (1988); *Ornato*, 546 F.2d at 14. Additionally, the Administrative Procedures Act does not apply to actions by "courts martial and military commissions." 5 U.S.C. § 551(1)(F) (1988).

[149] Gilliam v. Miller, 973 F.2d 760, 762-64 (9th Cir. 1992).

status. First, the CSRA is the technician's exclusive remedy,[150] even if it fails to provide adequate relief.[151] Several courts have specifically held that the exclusivity of the CSRA preempts a suit based on the APA.[152]

Second, the APA provides for limited review of an agency action except when a statute precludes judicial review.[153] Specifically, § 702 provides that "[n]othing herein (1) affects other limitations on judicial review . . . or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[154]

The plain and unambiguous language of the National Guard Technicians Act precludes judicial review.[155] Section 709(e)(5) of the National Guard Technicians Act states: "Notwithstanding any other provision of law . . . (5) a right of appeal which may exist with respect to [section 709 (1), (2), (3), and (4)] *shall not* extend beyond the adjutant general of the jurisdiction concerned."[156] Because the National Guard Technician Act's literal language precludes judicial review of a National Guard technician's termination, the APA provides no waiver of sovereign immunity.[157]

Justiciability

Assuming a technician's lawsuit is not otherwise dismissed, a federal court must consider whether the contested issue is one that it should review. Usually, the deference that courts afford to military decisions is characterized in terms of "justiciability"[158] or "reviewability."[159] The ability of a technician to survive justiciability/reviewability depends on the specific decision challenged, the particular "hat" the technician was wearing at the time of the decision, the particular jurisdiction entertaining the lawsuit, and the specific justiciability/reviewability test used by the federal court.[160]

"[A] concept of uncertain meaning and scope, [justiciability] is the term of art employed to give expression to this dual limita-

---

[150] *See* McAuliffe v. Rice, 966 F.2d 979, 980 (5th Cir. 1992); Ryon v. O'Neill, 894 F.2d 199, 203 (6th Cir. 1990); *but cf.* Johnson v. Orr, 776 F.2d 75 (3d Cir. 1985) (permitting APA review of technicians' removal, but failing to address CSRA exclusivity).

[151] McGregor v. Greer, 748 F. Supp. 881, 884 (D.C. Cir. 1990) ("the CSRA defines plaintiff's exclusive rights as a public employee, regardless of her lack of remedies."); *see* LeBlanc v. United States, 50 F.3d 1025, 1030 (Fed. Cir. 1995) ("The CSRA superseded preexisting remedies for all federal employees, even those who had no remedy or only limited remedies under the new system, for all types of personnel action within its scope."); *cf.* Spagnola v. Mathis, 859 F.2d 223, 227 (D.C. Cir. 1988) (courts should focus on "the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder").

[152] *McAuliffe*, 966 F.2d at 980; *Ryon*, 894 F.2d at 203-04; Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983); Mittleman v. United States Treasury, 773 F. Supp. 442, 449 (D.D.C. 1991); *McGregor*, 748 F. Supp. at 884; McDowell v. Cheney, 718 F. Supp. 1531, 1544 (M.D. Ga. 1989); *see* Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982) ("decline to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA."); *but cf.* Helsabeck v. United States, 821 F. Supp. 404 (E.D.N.C. 1993) ("Because NAFI employees are excluded from the coverage of the [CSRA], however, other remedies for wrongful termination can be available to them under the APA.").

[153] Railway Labor Exec. Ass'n v. National Mediation Bd., 29 F.3d 655, 672 (D.C. Cir. 1994) (Randolph, J., Mikva, C.J., Wald, J., Edwards, J., & Sentelle, J., concurring) ("Under the APA, there is judicial review unless the statute, by its terms or as judicially interpreted, precludes it."); *McAuliffe*, 966 F.2d at 980 n.1; James Madison Ltd. by Hecht v. Ludwig, 868 F. Supp. 3, 7 (D.D.C. 1994) ("this review procedure is unavailable in situations where a statute explicitly precludes judicial review.") (citing § 701(a)(1)); *see also* Henry v. Office of Thrift Supervision, 43 F.3d 507, 512 (10th Cir. 1994) ("APA does not confer jurisdiction where another statute denies it").

[154] 5 U.S.C. § 702 (1988).

[155] Under the traditional canons of statutory construction, interpretation of a statute begins with its language, the plain meaning of which is generally considered to be conclusive. Rumsey Indian Rancheria Wintun Indians v. Wilson, 41 F.3d 421, 426 (9th Cir. 1994). Legislative history may only be consulted when the meaning of the statutory language is unclear. United States v. Houlihan, 871 F. Supp. 1495, 1501 (D. Mass. 1994) (citations omitted); *see also* Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1986) (if the plain language of the statute settles the question, a court should look to the legislative history "to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.").

[156] emphasis added.

[157] However, in Chaudoin v. Atkinson, 494 F.2d 1323 (3d Cir. 1974), the Third Circuit considered the meaning of this portion of the statute, although the issue had not been addressed in the district court. In a footnote, the court opined that "the phrase [shall not extend beyond the adjutant general of the jurisdiction concerned] was intended by Congress to limit the extent of administrative appeals but was not designed to prevent granting to a person . . . judicial review." *Id.* at 1327-28 n.5. In reaching this conclusion, the court relied on "legislative history and of similar statutes and of the case law," but failed to identify these references. *Id.* The authors have been unable to locate any legislative history supporting the court's opinion. *But cf.* Becker v. Rice, 827 F. Supp. 589, 595 (W.D. Ark. 1993) (declining review pursuant to 42 U.S.C. § 1983, in part, because 32 U.S.C. § 709(e)(5) precluded judicial review).

[158] *See* Mier v. Owens, 1995 WL 341777, *2 (9th Cir. 1995); Wright v. Park, 5 F.3d 586, 589 (1st Cir. 1993); Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992); Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986); *Becker*, 827 F. Supp. at 593.

[159] *See, e.g.*, Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905, 907 (10th Cir. 1987); Blevins v. Orr, 721 F.2d 1419, 1421 (D.C. Cir. 1983); Turner v. Egan, 358 F. Supp. 560, 563 (D. Alaska), *aff'd mem.*, 414 U.S. 1105 (1973).

[160] *See* Hawkins, *supra* note 4, at 100 (courts of appeal disagree on justiciability test to be used) n.8 (listing a *Mindes* test, a standard justiciability test, and a *Ferres* test).

tion placed upon the federal courts by the case-and-controversy doctrine."[161] No precise definition exists "because of the 'notorious difficulty' of defining the concept."[162]

Arguably a subset of justiciability,[163] and not easily distinguishable, the concept of reviewability appears to be slightly more issue specific and reflects notions of comity and prudential concerns about judicial competence in military matters.[164] Regardless of any technical distinctions between these legal concepts, in the military context, courts use the two terms interchangeably.[165]

Because of the hybrid military/civilian nature of National Guard technicians, numerous courts have opined that the military justiciability doctrine applies to National Guard technicians as federal civilian employees.[166] Further, National Guard technicians are primarily military in nature,[167] a factor weighing against justiciability of technician challenges. However, the courts of appeals have split as to the justiciability of civil rights enforcement lawsuits brought by guardsmen in their state capacity.[168]

Under limited circumstances, a technician's lawsuit challenging a military decision may be justiciable. At least one court has held that technicians acting purely in their capacity as civilian employees could maintain a Title VII suit challenging a military decision that adversely impacted on their status as a civilian employee.[169]

Conclusion

National Guard technician lawsuits require the government attorney to cut through the gordian knot of intertwined legal principles created by the dual status of technicians. Slicing through that knot is best achieved by compartmentalizing the technician's allegations after determining the particular "hat" that the technician was wearing at the time of the adverse personnel action.

---

[161] Flast v. Cohen, 392 U.S. 92 (1968). There is a distinction between subject matter jurisdiction and justiciability; a court may possess jurisdiction over the subject matter, but the case may be nonjusticiable if "the claim presented and the relief sought are of the type which [do not] admit of judicial resolution . . . [or] the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." Powell v. McCormack, 395 U.S. 486, 516-17 (1969).

[162] Wymbs v. Republican State Exec. Comm., 719 F.2d 1072, 1085 n.34 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1600 (1984).

[163] *See* Khalsa v. Weinberger, 779 F.2d 1393, 1395 (9th Cir.) ("the doctrine of limited reviewability of certain military regulations and decisions is a matter of justiciability, analogous to the political questions doctrine"), *aff'd*, 787 F.2d 1288 (9th Cir. 1985).

[164] *See* Orloff v. Willoughby, 345 U.S. 83 (1953); Blevins v. Orr, 721 F.2d 1419, 1421 (D.C. Cir. 1983) (reviewability of military decisions guided by Supreme Court's decision in *Orloff*); *cf.* WRIGHT, MILLER & COOPER, 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D 278 (1984) (some "rulings reflect a refusal to exercise the judicial power even in cases within the reach of Article III, invoking prudential principles for wise administration of the power"). The test of "reviewability" is oftentimes associated with that test first articulated in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). Thomas R. Folk, *The Military, Religion, and Judicial Review: The Supreme Court's Decision in Goldman v. Weinberger*, ARMY LAW., Nov. 1986, at 9 ("the nonreviewability test first developed in *Mindes v. Seaman* and now used by the majority of courts of appeals.").

[165] Bledsoe v. Webb, 839 F.2d 1357, 1359 n.1 (9th Cir. 1988) ("'Justiciable' and 'reviewable' are used interchangeably throughout this opinion."); Jordon v. National Guard Bureau, 799 F.2d 99, 101 n.1 (3d Cir. 1986) ("in the context of claims against the military, 'justiciability,' is sometimes used interchangeably with 'reviewability' to denote generally the propriety of a court's hearing a particular claim"), *cert. denied*, 484 U.S. 815 (1987); Navas v. Gonzalez Vales, 752 F.2d 765, 769 (1st Cir. 1985); Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981) ("A fair reading of *Mindes* indicates that the terms reviewable and justiciable were used interchangeably. We discern no difference in the meanings of these terms in the present context."); Ridgway v. Aldridge, 709 F. Supp. 265, 270 n.7 (D. Mass. 1989); *cf.* Hawkins, *supra* note 3, at 100 n.6 ("The term 'justiciability' in this article is generally interchangeable with the term 'reviewability.'"). The authors of this article will also use the two terms interchangeably.

When reviewing internal military decisions, the majority of courts apply some version of the test articulated in *Mindes*. John N. Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J. LAW & POL'Y 147, 170 (1993) ("standard of review most commonly applied by lower counts"). Several courts have applied the *Mindes* analysis to disputes involving National Guard technicians. *See* Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986); NeSmith v. Fulton, 615 F.2d 196, 201-03 (5th Cir. 1980); Turner v. Egan, 358 F. Supp. 560, 562-64 (D. Alaska), *aff'd mem.* 414 U.S. 1105 (1973).

[166] Gilliam v. Miller, 973 F.2d 760, 762 (9th Cir. 1992); Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992); *Sebra*, 801 F.2d at 1141.

[167] *Wright*, 5 F.3d at 588 ("Irreducibly military in nature"); *see also NeSmith*, 615 F.2d at 201 ("In substance . . . the position is one in a military organization.").

[168] Hawkins, *supra* note 4, at 100 & n.7-8.

[169] *Bledsoe*, 839 F.2d at 1357 (female civilian employee survives justiciability challenge to Title VII suit challenging Navy's decision refusing to permit her to embark on aircraft carrier); *see* Mier v. Owens, 1995 WL 341777, at *3 (9th Cir. 1995) ("A Title VII claim challenging the refusal to allow a female civilian employee to embark on a Naval aircraft carrier is not so 'inherently military' as to be nonjusticiable.") (interpreting *Bledsoe*).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

International and Operational Law Notes

Congressional Testimony on Assistance by the Department of Defense to the Preparations for the Bureau of Alcohol, Tobacco, and Firearms Raid on the Branch Davidian Compound at Waco, Texas

On 20 July 1995, several Department of Defense (DOD) personnel, including two United States Army judge advocates, testified on the subject of the DOD assistance to the preparations for the failed February 1993 Bureau of Alcohol, Tobacco, and Firearms (BATF) raid on the Branch Davidian Compound near Waco, Texas. Specifically, they focused on the assistance provided by United States Army Special Forces. The testimony took place in hearings held jointly by the Crime Subcommittee of the House Judiciary Committee and the National Security, the International Affairs, and the Criminal Justice Subcommittee of the House Government Reform and Oversight Committee.[1] The testimony revealed that the DOD assistance was legal.[2]

In January 1993, the BATF requested DOD assistance from Operation Alliance Headquarters, Fort Bliss, El Paso, Texas.[3] The BATF maintained that it had evidence of a methamphetamine lab at the compound and initially requested that the DOD's Joint Task Force Six (JTF-6) provide personnel to critique their operations plan for a raid, to assist in developing a rehearsal site and conduct rehearsals with the BATF for the raid, and to provide medical support for casualty evacuation near the site of the raid.

Considerable controversy surrounded the BATF's assertion of a "drug connection" with regard to the Branch Davidian Compound.[4] The drug connection was significant because this nexus is required to solicit JTF-6 assistance. The mandate for JTF-6 strictly limits assistance to planning and coordinating counter-drug support to federal, state, and local law enforcement agencies (LEAs).[5] Furthermore, assistance provided by JTF-6 is generally nonreimbursable.[6] The JTF-6 planned to use its Rapid Support Unit (RSU) to provide support to the BATF.[7]

Concerned about the extent of the RSU's involvement in the preparations for the raid, particularly in providing on site medical support, RSU members contacted their parent unit, the 3d Special Forces Group, United States Army, for guidance. When apprised of the potential RSU tasking, Lieutenant Colonel Philip Lindley,

---

[1] *Review of the Siege of Branch Davidian's Compound in Waco, Texas*, Jul. 20, 1995 (available in LEXIS, News Library, and FEDNEW File) [hereinafter Review of the Siege].

[2] The laws of central concern were the Posse Comitatus Act, 18 U.S.C. § 1385 (1995) and the Military Support to Civilian Law Enforcement Agency Statutes, 10 U.S.C. §§ 371-381 (1995).

[3] Operation Alliance is a coordinating and planning group operating under the policy guidance of the Office of National Drug Control Policy, an agency of the Executive Branch. Its membership includes over twenty federal, state, and local law enforcement agencies. Co-located with the Department of Defense's Joint Task Force Six (JTF-6) at Fort Bliss, Texas, Operation Alliance provides coordination and asset sharing with federal, state, and local organizations to further drug interdiction efforts along the southwest border. One of the federal members of Operation Alliance, JTF-6 supports Operation Alliance by planning and coordinating all requested DOD support to federal, state, and local organizations along the southwest border. DEP'T OF DEF., JOINT PUB. 3-07.4, JOINT COUNTER-DRUG OPERATIONS, paras. III-36, 37, VI-23 (9 Aug. 1994) [hereinafter JOINT COUNTER-DRUG OPERATIONS].

[4] Despite allegations to the contrary, the hearings elicited no testimony confirming that the Bureau of Alcohol, Tobacco, and Firearms purposefully lied about the drug connection. *See* Sue Anne Presley & John F. Harris, *Clinton Joins Democratic Offensive on Waco*, WASH. POST, July 21, 1995, at A1, A8. *See also* REPORT OF THE DEPARTMENT OF TREASURY ON THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS INVESTIGATION OF VERNON WAYNE HOWELL ALSO KNOWN AS DAVID KORESH 211-14 (Sept. 1993) [hereinafter TREASURY REPORT].

[5] JOINT COUNTER-DRUG OPERATIONS, *supra* note 3, at VI-15, 16.

[6] Funding for JTF-6 support is provided by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1004, 104 Stat. 1485, 1629 (1990), which authorizes ten specific types of counter-drug support to federal, state, local, or foreign law enforcement agencies on a nonreimbursable basis. Additional authority may be found for JTF-6 counter-drug activities, as well as for general support to law enforcement agencies outside the counter-drug arena, in the Military Support for Civilian Law Enforcement Agency Statutes, 10 U.S.C. §§ 371-81. Regarding reimbursement under the latter statutes, § 377 restates the principles of reimbursement of the Economy Act, 31 U.S.C. § 1535 but also lists the circumstances in which reimbursement is not required. Those provisions state that reimbursement to a civilian law enforcement agency is not required if the support is provided in the "normal course of military training" or if it "results in a benefit to the element of the DOD providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training." 10 U.S.C. § 377 (1995). As a practical matter, much of the support provided by JTF-6 meets these waiver requirements; thus, law enforcement agencies are not required to reimburse the Department of Defense for support received.

[7] The rapid support unit provides JTF-6 with quick reaction counter-drug capability. It consists of several Special Forces A-teams, on temporary duty at Fort Bliss, Texas, that are capable of responding to law enforcement agency requests for tactical assistance such as reconnaissance, listening and observation posts, and mobile training teams.

Deputy Staff Judge Advocate, United States Army Special Forces Command, questioned the legality of the mission.[8] After extensive legal and operational review, the BATF revised their request for assistance and the only support that the RSU actually provided to the BATF was communications training, emergency medical evacuation training, pickup/landing zone training, range control support, and tactical vehicle dismount training, which occurred at Fort Hood, Texas.

While the focus of the joint hearings was to review the actions of federal law enforcement, the congressional members also were interested in determining the legality of the military role in the BATF raid.[9] The testifying panel members included Ambassador Allen Holmes, Assistant Secretary of Defense for Special Operations/Low Intensity Conflict, Major General John Pickler, former JTF-6 commander, Brigadier General Walter Huffman, Assistant Judge Advocate General for Civil Law, Lieutenant Colonel Philip Lindley, former Deputy Staff Judge Advocate for the United States Army Special Forces Command, Mr. Christopher Crain, United States Army Special Forces Command, and four members of the 3d Special Forces Group who were attached to the RSU.

Several DOD related legal issues were discussed during the testimony. First, as an issue ancillary to the drug nexus issue, the congressional members were interested in the JTF-6 standard of review of LEA requests for counter-drug support in ascertaining the existence of a drug nexus. On this line of questioning, Major General Pickler responded that the JTF-6 does not question the veracity of "credentialed officials of duly constituted law enforcement agencies," but that he was informed that there was evidence of drug activity on the part of several of the Branch Davidian members as well as evidence of precursor chemicals being present on the site.[10]

Of primary interest to judge advocates was Brigadier General Huffman's testimony regarding the Posse Comitatus Act (PCA) and its amendments.[11] Before discussing the role of the RSU, Brigadier General Huffman first addressed the applicability of the PCA to the National Guard.[12] The PCA only applies to the National Guard when they become federalized; in either status as state active duty or Title 32 status, the PCA does not apply.[13]

Next, Brigadier General Huffman discussed the fiscal issue of the assistance provided. While confirming that, based on the drug connection, the JTF-6 provision of counter-drug support does not require civilian law enforcement agencies to reimburse the DOD, he also observed that, outside of JTF-6, a drug connection is not required for DOD assets to provide support to LEAs under the Military Support to Civilian Law Enforcement Agency Statutes.[14] Next, following Lieutenant Colonel Lindley's discussion of his role in the evolution of the BATF support plan, Brigadier General Huffman opined that the Army involvement was well within the law as contained in the PCA and the Military Support to Civilian Law Enforcement Agency Statutes. The congressional members also individually questioned each panel member as to whether they were present at the raid site on 28 February, to which all panel members responded in the negative.

None of the congressional members challenged or disputed the testimony of the panel members on any of these issues. Several congressional members praised Lieutenant Colonel Lindley and the RSU members for their role in the RSU mission formulation. Furthermore, the congressional members and the primary panel members were confident that the current PCA and the Military Support to Civilian Law Enforcement Statutes were sufficiently clear. They also agreed that these statutes provided the DOD with ample ability to support LEAs in their counter-drug operations.

---

[8] While 10 U.S.C. § 373 authorizes the DOD to provide training in the operation and maintenance of equipment and expert advice, DOD Directive 5525.5, in implementing the statute, contains additional requirements from the legislative history of 10 U.S.C. §§ 371-381. Of particular concern in the Waco scenario was the requirement that neither the training nor expert advice entail any of the following: (1) regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations; (2) involvement of DOD personnel in a direct role in a law enforcement operation; or (3) performance of the assistance at a location where a reasonable likelihood of a law enforcement confrontation exists. DEP'T OF DEF., DIRECTIVE 5525.5 (WITH CHANGE ONE), DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, encl. 4, paras. 4-3, 4-4 (15 Jan. 1986); *See also* DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT, paras. 3-6, 3-7 (1 July 1983).

[9] It appears that an article in the May 1995 issue of *Soldier of Fortune*, alleged that the JTF-6 RSU provided much more training, including close quarters combat training, and that four RSU members actually traveled to Waco with the BATF and were present at the raid site on the day of the raid. These allegations were on the minds of the congressional members during the testimony; however, none of these allegations were supported by the testimony.

[10] Review of the Siege, *supra* note 1, at 10, 13. Ambassador Holmes reiterated this testimony. *Id.* at 16. *See also* TREASURY REPORT, *supra* note 4, at 214 (stating that no formal standard by which the military defines a drug nexus in a law enforcement investigation exists).

[11] 10 U.S.C. § 1385 (1995).

[12] This issue arose when Brigadier General Huffman was questioned about the propriety of the use of an Alabama Air National Guard F-4C (Phantom/Wild Weasel) aircraft to take reconnaissance photographs of the Branch Davidian Complex. Review of Siege, *supra* note 1, at 5, 6.

[13] *Id. See also* DEP'T OF DEFENSE, DIRECTIVE 5525.5 (WITH CHANGE ONE), DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 4-6; DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT, para. 3-2 (1 July 1983).

[14] *See supra* notes 6, 8.

Congressional accountability highlights the importance of the legal training and advice that judge advocates give to soldiers in highly visible operations other than war.[15] Lieutenant Commander Winthrop.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Office Management Note

TJAGSA Legal Assistance Course

The 38th Legal Assistance Course is scheduled for the week of 26 February to 1 March 1996. Interested personnel should refer to the Continuing Legal Education News section of this issue of *The Army Lawyer* for information on obtaining a quota. Major Block.

Soldiers' and Sailors' Civil Relief Act Note

The Soldiers' and Sailors' Civil Relief Act: Due Process for Those Who Defend Due Process

Introduction

Although service members take an oath to support and defend the Constitution, they often find themselves unexpectedly at odds with our legal process. For example, courts in the Commonwealth of Virginia, without the due process afforded by the Soldiers' and Sailors' Civil Relief Act (SSCRA),[16] have been entering default judgments against military defendants who are unable to appear in court because of their military service.[17] In many of these cases, the service member first discovers the judgment on return from an extended deployment or training exercise.

Apparently, most of Virginia's courts fail to follow § 520 of the SSCRA addressing default judgments.[18] Although this failure appears to be an oversight, the consequences can be far reaching for many service members who return from deployments only to discover liens on their property, frozen accounts, and negative information on their credit reports. Reopening a default judgment often requires a significant amount of their time and expense.

Case Examples

Scenario 1

In December 1993, a soldier deployed on orders to Somalia. In January 1994, his spouse vacated their apartment, left Virginia with all of their household goods, and failed to pay the rent. After posting a "Notice of Motion for Judgment" on the apartment door, the apartment manager obtained a default judgment against the soldier. The soldier returned from Somalia to an empty apartment and an empty bank account. His other account at the installation credit union had been frozen. A legal assistance officer counseled the soldier on the right to have the judgment reopened because the SSCRA procedures were not followed. Deciding to "put it behind him" and not contest the matter, the soldier paid the judgment, including the court costs. The soldier was denied access to his credit union account for almost two weeks while the matter was being addressed.

Scenario 2

After a soldier departed on orders to Somalia, her car was repossessed in accordance with the terms of the purchase contract. The car dealership obtained a default judgment against her while she was in Somalia. On her return, she filed a motion to reopen the judgment, which was granted, and she negotiated a settlement with the creditor. Her credit report, however, still contains negative information relating to the default judgment.

---

[15] Support to domestic authorities and support to counter-drug operations are two types of operations other than war. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, ch. 13 (1993).

[16] 50 U.S.C. app. §§ 501-548, 560-593 (1988) (as amended by the Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, 105 Stat. 39 (1991)).

[17] Lieutenant Colonel Uldric L. Fiore, Jr. originally raised this issue as the Staff Judge Advocate at Fort Eustis, Virginia. Captains Albert Anzini, III and Jonathan A. Kent in the same office both provided substantial input.

[18] Pursuant to 50 U.S.C. Appendix § 520, if a default of any appearance by the defendant occurs before the plaintiff can obtain a default judgment, the plaintiff must submit an affidavit stating whether the defendant is, or is not, in the military or that the plaintiff does not know whether the defendant is in the military service. The court must appoint an attorney when the defendant is in the military service and does not know whether the defendant is in the military service. The court-appointed attorney has the responsibility to determine whether the defendant is in the military and, if so, typically to request a stay of the proceedings. A judgment obtained without the affidavit is voidable on the defendant's showing that presentation of a legal or meritorious defense was prejudiced by his or her military service. If the plaintiff's affidavit shows that the defendant is in military service or that military status is unknown, then the court must make its own finding as to military status. If the court concludes that the defendant is in military service, then it must appoint an attorney to represent the absent service member and protect his or her interest prior to entering any default judgment. The court may also require a bond from the plaintiff conditioned to indemnify the service member against loss or damage should the default judgment later be set aside in whole or in part. Finally, the court may enter any other order for the service member's protection that it deems necessary. For a general discussion of other protections, see TJAGSA Practice Notes, Legal Assistance Items, *Using the Soldiers' and Sailors' Civil Relief Act to Your Clients' Advantage*, ARMY LAW., Dec. 1993, at 34.

Scenario 3

In two separate cases, landlords obtained default judgments against soldiers for alleged arrearages in rent. In both cases, the soldiers had invoked the military clause in their rental agreements to terminate the leases and had informed the landlords that they were leaving. Despite the landlords having clear knowledge of the soldiers' deployed status, they were able to get default judgments against the soldiers by posting "Notices of Motion for Judgment" on the doors of the vacated apartments. In the worst of the two cases, the landlord obtained a garnishment order against the soldier's bank account, forcing the soldier to apply for an Army Emergency Relief loan while seeking to reopen the default judgment.

Section 520 of the SSCRA

Missing in all of these cases were the default judgment protections of § 520 of the SSCRA. These due process protections have been noticeably absent in a variety of civil cases and not just in landlord-tenant or car repossession cases. Section 520 states that in any action commenced in any court, if there is no appearance made by the defendant, the plaintiff must file with the court an affidavit, which must state one of three things: (1) that the defendant is not in military service, (2) that the defendant is in military service, or (3) that the plaintiff is unable to determine the defendant's military status.[19] This affidavit is so important that the SSCRA makes it a crime to make or use a false affidavit.[20] Indications are that many jurisdictions in Virginia do not even know of the requirement for an affidavit.[21]

Additional SSCRA § 520 Protections and Department of Defense Policy

Additional steps to protect absent soldiers are found in § 520. If the plaintiff's affidavit shows that the defendant is in military service or that military status is unknown, then the court must make its own finding as to military status. If the court concludes that the defendant is in military service, then it must appoint an attorney to represent the absent service member and protect his or her interest prior to entering any default judgment.[22] The court also may require a bond from the plaintiff conditioned to indemnify the service member against loss or damage should the default judgment later be set aside in whole or in part.[23] Finally, the court may enter any other order for the service member's protection that it deems necessary.[24] The Virginia courts, for the most part, have not required the military affidavit.

The Department of Defense requires service members to pay their just debts in a timely manner.[25] Service members must manage their personal affairs satisfactorily, and commanders may not tolerate irresponsibility, neglect, dishonesty, or evasiveness.[26] The failure to pay debts promptly and honorably may result in disciplinary or administrative action. The SSCRA was never intended to relieve service members of their legal obligations nor to provide them immunity against civil lawsuits. However, the SSCRA does afford them certain due process protections when there is a conflict between appearing in court and military service.

A Historical Perspective

During the American Civil War, many states enacted "stay laws" that were tantamount to an absolute moratorium on civil actions brought against service members.[27] To unify the purpose and effect of these laws, Major John H. Wigmore, well known for his authoritative work on evidence, drafted the SSCRA of 1918.[28] In the SSCRA of 1918, Congress rejected the arbitrary and inflexible "stay laws" and enacted limited protections. The SSCRA of 1918 proved to be successful, and the SSCRA of 1940[29] was essentially a reenactment of the World War I statute. In 1948, Congress continued the SSCRA of 1940 "until repealed or otherwise terminated by a subsequent Act of Congress."[30] With occa-

---

[19] 50 U.S.C. app. § 520(1) (1990).

[20] *Id.* § 520(2). The maximum punishment is imprisonment for a year or a $1000 fine or both.

[21] Captain Jonathan A. Kent, Assistant Judge Advocate at Fort Eustis, Virginia, previously contacted the clerk of court offices in five Virginia jurisdictions. Clerks of Court in Fairfax, Newport News, Norfolk, and Williamsburg either did not know what a military affidavit was or said it was not required. In Richmond, the clerk stated that she had seen military affidavits, but they were not regularly required.

[22] 50 U.S.C. app. § 520(1) (1990).

[23] *Id.*

[24] *Id.*

[25] DEP'T OF DEF., DIR. 1344.9, INDEBTEDNESS OF MILITARY PERSONNEL (27 Oct. 1994).

[26] *See* DEP'T OF ARMY, REG. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL, paras. 1-5, 3-1 (14 Mar. 1986).

[27] H.R. REP. No. 181, 65th Cong., 1st Sess. 18-32 (1917).

[28] Act of March 8, 1918, ch. 20, 40 Stat. 440 (1918).

[29] Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 U.S.C. app. § 501-591 (1988)).

[30] 62 Stat. 623 (1948).

sional amendments, the SSCRA remains in effect today during a time when world wide training exercises and deployments remain commonplace. The focus of the SSCRA is to provide for "the *temporary suspension* of legal proceedings and transactions which may prejudice the civil rights of persons" in military service.[31] The protections in § 520 of the SSCRA serve this purpose.

Proposed Rule Changes in Virginia

One means of ensuring that courts recognize and apply § 520 protections for service members is to change the rules of court in Virginia. On behalf of all the uniformed services, I presented the problem to the Virginia Military Advisory Council (VMAC) on 30 May 1995 in Richmond. Governor George Allen chaired the meeting. The VMAC was created in 1986 to address matters of mutual interest between the Commonwealth of Virginia and the uniformed services. In 1988, it was permanently established in law.[32]

At the VMAC meeting in May, Governor Allen gave the default judgment issue to the state attorney general to address with the Supreme Court of Virginia. Legislation, if necessary, also will be considered for introduction at a future session of the Virginia General Assembly. As a result of work by attorneys at the Fort Eustis Staff Judge Advocate's Office[33] and Mr. John J. Beall, Jr.[34] at the Virginia Attorney General's Office, changes have been proposed to the Virginia rules of court. The Virginia State Bar's Special Committee on Military Law supports these proposals[35] and proposed changes to Rule 3:17, Judgment by Default,[36] and similar changes to Rule 7B:9, Failure of Defendant to Appear.

Proposed Rule 3:17, Judgment by Default

The proposed changes to Rule 3:17, Judgement by Default, include the following:

> A defendant who fails to plead to a notice of motion for judgment within the required time is in default *unless the failure to plead is occasioned by his military service.* The defendant waives trial by jury and all objections to the admissibility of evidence. The defendant is not entitled to notice of any further proceedings in the case, including notice to take depositions, except that written notice of any further proceedings shall be given to defendant's counsel of record, if any. When service of process is effected by posting, no judgment by default shall be entered until the requirements of Code of Virginia § 8.01-296 (2)(b)[37] have been satisfied. The court shall, on motion of the plaintiff, enter judgment for the amount appearing to the court to be due, *provided there is an affidavit filed setting forth facts that the defendant is not in military service. If the plaintiff is unable to determine whether or not the defendant is in military service, the court shall make inquiry to ascertain facts about the defendant in order to determine whether the court should require that a bond be filed by the plaintiff approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he or she may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. The court may fashion any other relief the court deems appropriate as provided for in the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. § 501 et seq., particularly § 520).* If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages.

Proposed Rule 7B:9, Failure of Defendant to Appear

The proposed changes to Rule 7B:9, Failure of Defendant to Appear, include the following:

---

[31] 50 U.S.C. app. § 510 (1990) (emphasis added).

[32] VA. CODE ANN. §§ 9-95.5 to 9-95.6 (Michie 1950). The Virginia Military Advisory Council is composed of not more than twenty five members, to include the lieutenant governor, the attorney general, the adjutant general, the chairman of the board of military affairs, the chairman of the house committee on militia and police, the chairman of the senate committee on general laws, and all the military commanders of major commands and installations in the Commonwealth of Virginia. *See Magers and Koren, Virginia Military Advisory Commission--A Unique Forum for Improved Relations Between the Commonwealth of Virginia and the Armed Forces*, ARMY LAW., Sept. 1987, at 29; Magers and Koren, *Virginia Military Advisory Commission Update*, ARMY LAW., Aug. 1988, at 15.

[33] *See supra* note 17.

[34] Mr. Beall is the Senior Assistant Attorney General. Fort Eustis United States Army judge advocates originally submitted a proposed change to Rule 3:17. Mr. Beall made a few changes to this proposal and also added proposed changes to Rule 7B:9.

[35] Mr. Beall and I presented the issue to this committee on 29 September 1995. Ms. Susan W. McMakin chairs the committee.

[36] Changes emphasized.

[37] VA. CODE ANN. § 8.01-296(2)(b) (Michie 1994).

Except as may be provided by statute, a defendant who fails to appear in person or by counsel is in default *unless the failure to appear is occasioned by his military service,* and the defendant;

(a) Waives all objections to the admissibility of evidence; and

(b) Is not entitled to notice of any further proceeding in the case, except that when service is by posting pursuant to Code of Virginia § 8.01-296(2)(b), the ten day notice required by that section shall be complied with; and

(c) On request made in person in court by the plaintiff, the plaintiff's regular and bona fide employee, or any other person authorized by law, judgment shall be entered for the amount appearing to the judge to be due; *provided there is an affidavit filed setting forth facts that the defendant is not in military service. If the requesting party is unable to determine whether or not the defendant is in military service, the court shall make inquiry to ascertain facts about the defendant in order to determine whether the court should require that a bond be filed by the plaintiff approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. Additionally, the court may fashion such other relief as deemed appropriate as provided for in the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. § 501 et seq., particularly § 520).* If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof. Cross references—See also Code of Virginia § 16.1-97.1, granting the Court authority to grant a rehearing. *See, as well, Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. § 501 et seq., particularly § 520) for requirements of appointing counsel and setting bond.*

Conclusion

When no appearance is made by a defendant in a civil case, the Virginia courts should recognize and apply the protections found in § 520 of the SSCRA. Requiring a military affidavit from the plaintiff is the first step. Establishing the court-appointed attorney and setting the plaintiff's bond are the next steps. If a military address for a service member is desired, all the service branches have a world wide locator service.[38] If, in the opinion of the court, the ability of the service member to conduct a defense is materially affected by reason of military service, the court should consider a stay of the proceedings on its own motion or upon application to it.[39]

If courts enter default judgments while disregarding SSCRA protections, it may unnecessarily complicate the lives of many otherwise responsible service members. The SSCRA is intended to help reduce the burdens of civil obligations on service members, freeing them to concentrate on their military duties with fewer distractions and worries.[40] Judge advocates can help ensure that the protections of the SSCRA are being observed in their jurisdictions by addressing SSCRA default judgment issues with the appropriate state officials. Lieutenant Colonel Craig L. Reinold, Deputy Staff Judge Advocate, Headquarters, United States Army Training and Doctrine Command, Fort Monroe, Virginia.

Office Management and Professional Responsibility Note

Redacting Legal Assistance Reading File Materials

Review of outgoing correspondence and other materials prepared by legal assistance attorneys provides the Staff Judge Advocate (SJA) with an invaluable look at the operations of the legal assistance office. Not only can the SJA get a feel for the types of problems being confronted by the military community, but he or she can get a sense of the level of sophistication and quality being brought to bear on a problem by individual legal assistance attorneys. Regular review of legal assistance correspondence also may help the SJA or Deputy SJA develop plans for enhanced training or staffing that will require long-range budget adjustments.[41] Finally, as supervisory judge advocates, the SJA and Deputy SJA have a professional responsibility to keep themselves informed about the nature and quality of the work

[38] Army World Wide Locator, (703) 325-3732; Air Force World Wide Locator, (210) 652-5774; Navy World Wide Locator, (703) 614-5011, 614-3155; Marine Corps World Wide Locator, (703) 640-3942; Coast Guard World Wide Locator (913) 295-2697. Some of the locator services have a recording that provides a mailing address to use for locating individual service members.

[39] 50 U.S.C. app. § 521 (1990) (as amended by the Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub.L.No. 102-12, 105 Stat. 39 (1991)). *See* Lackey v. Lackey, 278 S.E.2d 811 (1981).

[40] LeMaistre v. Leffers, 333 U.S. 1, 6 (1948).

[41] Staff Judge Advocates have a responsibility to train subordinates under both *Army Regulations 27-1 and 27-26.* DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICES, para. 5-2a(2)(a) (3 Feb. 1995); DEP'T OF ARMY REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 5.1, (1 May 1992) [hereinafter Army Rule]. The comment to *Army Rule 5.1* notes the special role that supervisory lawyers have when supervising sections of their office with adverse interests. One approach suggested by the comment is to have one supervisory judge advocate supervise and advise, for instance, legal assistance while another supervisory judge advocate advises administrative law when there is an actual or potential conflict of interest. *Id.* comment.

product of attorneys and support personnel under their direct supervision.[42]

Despite the benefit of including legal assistance materials in the SJA's reading file, Chiefs of Legal Assistance face a continuing dilemma when it comes to forwarding materials for inclusion in the file—how do you keep the boss informed of office activities and issues without breaching client confidences or creating unnecessary conflicts? According to *Army Rule 1.6*, all information learned within the scope of the attorney client relationship is confidential.[43] The rule contemplates three limited exceptions to revealing client confidences: (1) when the client consents,[44] (2) the future crime exception,[45] and (3) within the legal office to further representation of the client, which is the most problematic in legal assistance offices.[46]

The last exception contemplates that attorneys may need to consult with other attorneys within an office to formulate a strategy to best suit the needs of the client.[47] The rule allows attorneys to enlist the aid of nonattorney members of the support staff to assist in the representation.[48] Finally, the comment to *Army Rule 1.6* states that supervisors also may receive confidential information to properly supervise work of subordinates.[49]

In general, items in the reading file do not create an issue of improper release of client confidences. Most of the items in the file are letters to third parties written on behalf of the client. Review of these letters contains little potential for creating conflicts of interest or for violating a client's confidence. A problem could arise, however, when the attorney is communicating with a client whose interests are adverse to those of the command. For example, a letter from a legal assistance attorney to a client might outline a strategy to defeat a report of survey. In such a case, both supervisors and legal assistance attorneys should exercise some caution. Revealing legal assistance client confidences to supervisory attorneys under these circumstances has the potential of creating a conflict of interest for supervisory attorneys because of their roles in representing the Army through the command.[50]

A tension exists between needs of supervisors to be informed about what subordinates are doing, and the roles of supervisors as attorneys for another client. Supervisory attorneys could take a number of approaches to resolving this tension. Without taking an absolute position on what may or may not be a violation of our military rules of professional responsibility, one reasonable solution is to try to avoid the issue altogether by redacting personal identifiers from legal assistance materials placed in the reading file. While logical, redaction may have been avoided historically because it was cumbersome and slow. Automation and the use of search and replace functions and "macros" can make a difference.

One example of the use of macros to redact personal identifiers in WordPerfect documents can be found in the December 1994 issue of *The Army Lawyer*.[51] This brief note from the field includes actual macros that will automatically generate file, client, and redacted reading file copies of legal assistance correspondence.[52] Offices using these macros that have developed improvements, or offices that have developed similar macros for alternative word processing programs, such as Microsoft Word, are encouraged to share them on the Legal Automation Army Wide System Electronic Bulletin Board Service (BBS) at the legal assistance conference.[53] Major Block.

Consumer Law Note

The Federal Trade Commission (FTC) recently issued two rules that may provide significant new protections to legal assis-

---

[42] *Id.* 5.1 (the rule states the supervisor must take reasonable steps to ensure all lawyers conform to the ethical rules).

[43] "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d)." *Id.* 1.6.

[44] *Id.*

[45] *Id.* 1.6(b). This rule states that a lawyer "shall" reveal information fitting the requirements of the rule regarding a future crime involving imminent death, serious bodily harm, or threats to national security. *Id.*

[46] *Id.* 1.6(a).

[47] *Id.* (disclosure impliedly authorized to carry out representation). The comment adds that lawyers may communicate with supervisory lawyers and paralegals to further the scope of the client's representation. *Id.* comment.

[48] *Id.*

[49] *Id.*

[50] "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client." *Id.* 1.7(a).

[51] Notes from the Field, *Automating Your Correspondence*, ARMY LAW., Dec. 1994, at 62.

[52] *Id.* at 63.

[53] The author of the December 1994 note, Mr. Gunter Filippuci, is now working for the Air Force at the Ramstein Legal Office, but he is still available to answer questions at DSN 314-480-2013/5908.

tance clients, a new version of the door-to-door sales rule and a new telemarketing rule. The new door-to-door sales rule clarifies and updates the existing rule. The telemarketing rule implements new legislation at 15 U.S.C. §§ 6102-6108.[54]

Door-to-Door Sales

The FTC first established the cooling-off period for door-to-door sales in 1972.[55] Except for minor amendments at its inception and additional minor amendments in 1988, the rule has remained unchanged.[56] On 15 April 1995, the FTC asked for public comment on the new door-to-door sales rule.[57] The FTC received comments from numerous organizations, including trade and consumer entities.[58] After reviewing the comments, the FTC decided to retain the rule with only minor changes.

One of the most significant changes was to alter the name of the door-to-door sales rule. The FTC decided to change the name of the rule to the "rule concerning cooling-off period for sales made at homes or at certain other locations."[59] While creating a more cumbersome name, the FTC sought to eliminate confusion over the scope of the rule. The old name gave the impression that the rule only applied to sales made in a person's home. The name of the new rule states that it applies to a wider range of locations for sales[60] The FTC also added a nonexclusive list of places that fall within the scope of the rule. These include hotel and motel rooms, convention centers, fairgrounds, the buyer's workplace and dormitory lounges.[61]

The other change that the FTC made was to align the definition of "business day" with current federal holidays. Under the rule, a buyer may cancel the purchase anytime before midnight on the third "business day" following the sale. The old rule defined a business day as any day *except* Sunday and certain federal holidays.[62] These holidays included Washington's Birthday, instead of President's Day, and did not include Martin Luther King, Jr.'s birthday. The FTC decided to amend the rule to update the list of federal holidays.[63] As amended, the rule should continue to assist legal assistance clients in rescinding contracts. The new rule became effective 19 December 1995.[64]

The Telemarketing Rule

The 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act[65] required the FTC to promulgate regulations necessary to regulate the telemarketing industry. On 23 August 1995, the FTC issued its rules, effective 31 December 1995.[66] The statute and the rules create new protections for consumers in a variety of telemarketing areas. First, the rules generally regulate the conduct of telemarketers. Second, the rules regulate the conduct of both credit repair services and so called "recovery room" operators.

The primary focus of the new rules is in regulating abusive, unfair, or deceptive acts and practices in the telemarketing industry. The rules achieve these goals by a combination of warnings to consumers and restrictions on the actions of sellers. Telemarketers must inform potential buyers at the beginning of the phone call that the caller is attempting to make a sale, the nature of the goods or services for sale, and that no purchase or payment is necessary to win a prize or participate in a promotional scheme.[67] Additionally, the rules now regulate when telemarketers may make sales calls. Under the new rules, a salesperson may only call between the hours of 8:00 a.m. and 9:00 p.m. in the time zone in which the buyer resides. The rules also prohibit false and misleading statements, harassment, and profane or obscene language.[68]

---

[54] 15 U.S.C. §§ 6102-6108 (1990).

[55] 37 Fed. Reg. 22,934 (1972).

[56] 60 Fed. Reg. 54,180 (1995).

[57] 59 Fed. Reg. 18,008 (1994).

[58] 60 Fed. Reg. 54,180-81 (1995).

[59] *Id.* at 54,180.

[60] 60 Fed. Reg. 54,180, 54185 (1995).

[61] *Id.*

[62] 16 C.F.R. § 429.1(f) (1994).

[63] 60 Fed. Reg. 54180, 54186 (to be codified at 16 C.F.R. § 429.0(f)).

[64] 60 Fed. Reg. 54180 (1995).

[65] 15 U.S.C. §§ 6101-6108 (1994).

[66] 60 Fed. Reg. 43,842 (1995).

[67] 16 C.F.R. §§ 310.4(d)(1)-(4) (1995).

[68] *Id.* § 310.4(a).

The rules also significantly restrict three other potential telemarketing abuses. The rules require that sellers offering certain services refrain from collecting money for the services until after completing the service. These services include "credit repair," arranging for credit, and so called "recovery rooms."

"Credit repair" generally includes a promise that the seller will reduce or eliminate adverse items from an individual's credit rating. In reality, there is virtually nothing that a "credit repair" service can do for consumers that consumers cannot do for themselves.[69] The new rules require the service to provide proof to the consumer that the "repair" is complete before collecting payment. The required proof is a credit report issued within the last six months.[70]

"Recovery room" operations promise that they will recover products or services sold, but not delivered, by other telemarketers. As with "credit repair," the new rules require complete performance before the seller may collect payment.[71]

The last restriction prohibits the collection of a fee before granting a loan or an extension of credit when the lender has promised a high likelihood of success in granting or arranging the loan.[72] This rule targets potentially unscrupulous loan companies, which promise clients a high likelihood of obtaining credit. In return for accepting an application for credit, these companies collect an application fee. Under the new rule, they will no longer be able to collect this fee until after they actually extend credit.

The new rules should significantly enhance the arsenal of the legal assistance attorney. Major McGillin.

Family Law Notes

Medical and Dental Care for Wards and Preadoptive Children

Several statutory changes have extended medical and dental benefits to certain wards and preadoptive children. *Army Regulation 600-8-14, Identification Cards, Tags, and Badges* (15 July 1992) (*AR 600-8-14*), does not reflect these changes, and many legal assistance attorneys may be unaware of them.

Section 702 of the National Defense Authorization Act for Fiscal Year 1994[73] and § 701 of the National Defense Authorization Act for Fiscal Year 1995[74] broadened the definitions of dependents who are eligible for medical care. The new definitions are found in Title 10 of the U.S.C.[75]

Before these amendments, wards and preadoptive children were not eligible for either medical or dental care.[76] To remedy this, the 1994 amendments included in the definition of dependent an "unmarried person who is placed in the legal custody of the member . . . as a result of an order of a court . . . in the United States (or a territory or possession) for a period of at least twelve consecutive months."[77] The child must also be under age twenty-one (twenty-three if a full time student) or incapable of self-support. This change was sufficient to entitle these dependents to care in military medical facilities on a space available basis.

The 1995 amendment included in the definition of dependent "an unmarried person who is placed in the home of a member . . . by a placement agency (recognized by the Secretary of Defense) in anticipation of legal adoption by the member."[78] This change was sufficient to entitle these dependents to care in military medical facilities on a space available basis.

The 1995 amendment also modified 10 U.S.C. §§ 1076a and 1079 to make both categories of dependents eligible for the Dependent's Dental Program and CHAMPUS.[79]

The United States Army Personnel Command (PERSCOM), by electronic message, directed the extension of these benefits to wards and preadoptive children,[80] and PERSCOM will include these changes in the next update to *AR 600-8-19*.[81] Major Emswiler, Department of the Army Legal Assistance, Office of The Judge Advocate General, Washington, D.C.

---

[69] *See generally, FTC Adopts New Telemarketing Rule*, NATIONAL CONSUMER LAW CENTER REPORTS DECEPTIVE PRACTICES AND WARRANTIES EDITION 1, 2 (July/Aug. 1995).

[70] 16 C.F.R. § 310.4(a)(2) (1995).

[71] *Id.* § 310.4(a)(3).

[72] *Id.* § 310.4(a)(4).

[73] Pub. L. 102-484, Oct. 23, 1992, 106 Stat. 2315 (1992).

[74] Pub. L. 103-337, Oct. 5, 1994, 108 Stat. 2663 (1994).

[75] 10 U.S.C. § 1072 (1994).

[76] DEP'T OF ARMY, REG. 600-8-14, IDENTIFICATION CARDS, TAGS, AND BADGES, fig. B-1A (15 July 1992).

[77] 107 Stat. 1547, 1686 (1993).

[78] 108 Stat. 2663, 2797 (1994).

[79] *Id.*

[80] Message, Commander, United States Army Personnel Command, TAPC-PDO-IP, subject: Changes in Benefits and Entitlements for Members of the Armed Services and Eligible Family Members (131346Z Mar 95).

[81] *Id.*

Resolving Paternity and Nonsupport Allegations—No Easy Way Out

Two recent court cases from Wisconsin and Arkansas focused on attempts to contract away child support and paternity allegations.[82] In both situations, the results were the same. The attempts were ineffective to the great detriment of the alleged father. Recent cases from Florida and New Hampshire further clarify that this is true no matter what representations are made about fault for pregnancy, and that adoption does not cut off support obligations, at least to the extent of arrearages.[83]

In *Jasmine J.E. v. John E.P.*,[84] the Wisconsin case, a child's unwed mother settled a paternity case against the alleged father for $5000. Some ten years later, a paternity suit was again initiated against the alleged father. As a result, he was determined to be the child's father and ordered to pay support. Finding that Wisconsin law prevents abrogation of support obligations by agreement, the court further determined that he was not due credit for the $5000 paid to the mother in 1981.[85]

Along similar lines, in *Davis v. Office of Child Support Enforcement*,[86] the Arkansas case, a paternity case against an alleged father was dismissed with prejudice after the parties settled. Under the terms of the settlement, the alleged father paid $10,000 towards medical expenses and child support. Although the first suit was dismissed with prejudice, the State of Arkansas Office of Child Support Enforcement subsequently initiated a paternity action seeking payment of child support. Finding that the suit was not barred, the Arkansas Supreme Court noted that "a parent can not permanently bargain away a child's right to support."[87]

Some alleged fathers may feel they are being unfairly burdened with obligations resulting from parenthood and seek to relieve themselves of these obligations. In *Welzenbach v. Powers*,[88] a New Hampshire case, the father of an illegitimate child sought damages from the child's mother based on her misrepresentations regarding the adequacy of contraceptive measures she had taken. As damages, the father sought to be reimbursed in part for the child support payments that he had been ordered to pay. In denying the father's claims, the New Hampshire Supreme Court determined that the action violated public policy requiring parents to support their children.

In *Kranz v. Kranz*,[89] a Florida decision, a child was born during the marriage but placed in the custody of the mother following the divorce of the parties. Thereafter, the mother remarried, and the mother's new husband adopted the child. Relying on Florida statutory law that terminates support obligations on adoption, the trial court held that all support obligations including arrearages had been discharged. Reversing on appeal, the appellant court held that the law is prospective and does not discharge existing support arrearages.[90]

All of the cited opinions reflect the strength of public policy in favor of enforcing a child's right to support. The action of the courts in these cases reemphasizes the point that avoiding paternity allegations and nonsupport complaints, through settlement or otherwise, may work to the significant disadvantage of an alleged parent.[91]

Legal assistance attorneys must ensure that clients understand that it is unlikely that paternity and nonsupport allegations will just go away. A strong public policy favoring paternal support drives the courts. Any action short of disqualification as a prospective parent through blood testing where paternity is at issue, or in obtaining judicial approval of limitations on support obligations, may operate to preserve issues for another day. Major Block.

Drafting a Separation Agreement? Don't Forget the Survivor Benefit Plan!

Legal assistance attorneys have more to consider than just division of military retired pay when advising spouses seeking to divorce a service member. Legal assistance attorneys must not forget about the Survivor Benefit Plan when drafting a separation

---

[82] Jasmine J.E. v. John E.P., 22 Fam. L. Rep. (BNA) 1046 (Wis. Ct. App. 4th Dist. Nov. 9, 1995); Davis v. Office of Child Support Enforcement, 22 Fam. Law Rept. (BNA) 1047 (Ark. Sup. Ct. Nov. 6, 1995).

[83] Kranz v. Kranz, 22 Fam. Law Rept. (BNA) 1021 (Fla. 3rd Dist. Ct. App. Oct. 5, 1995); Welzenbach v. Powers, 21 Fam. Law Rept. (BNA) 1496 (N.H. Sup. Ct. June 30, 1995).

[84] 22 Fam. Law Rept. (BNA) 1046 (Wis. Ct. App. 4th Dist. Nov. 9, 1995).

[85] *Id.* at 1496.

[86] 22 Fam. L. Rep. (BNA) 1047 (Ark. Sup. Ct. Nov. 6, 1995).

[87] *Id.* at 1497.

[88] 21 Fam. L. Rep. (BNA) 1496 (NH Sup. Ct. June 30, 1995).

[89] Kranz v. Kranz, 22 Fam. Law Rept. (BNA) 1021 (Fla. 3d Dist. Ct. App. Oct. 5, 1995).

[90] *Id.* at 1021.

[91] The same proposition holds true for delay or refusing to cooperate given the potential for award of child support retroactive to birth. *See* Nebraska *ex re.* Matchett v. Dunkle, 508 N.W.2d 580 (1993).

agreement. Failure to do so will waive the former spouse's claim to benefits under the Survivor Benefit Plan.

Former spouses of service members must do two things to ensure that they are covered by the Survivor Benefit Plan. First, they must obtain a court order.[92] They can either enter into a written agreement with their service member former spouse agreeing that he or she must maintain coverage under the Survivor Benefit Plan and have that agreement incorporated or ratified by a court, or they can obtain a court order stating that the service member former spouse will provide coverage for them under the Survivor Benefit Plan.[93] Second, former spouses must send a copy of the court order to the Defense Finance and Accounting Service (DFAS) within one year of the date of the court order.[94] If a former spouse fails to ensure that both of these steps are taken, he or she runs the risk of not being covered by the Survivor Benefit Plan on the death of the service member former spouse.

The recent case of *Sumakeris v. United States*[95] illustrates this point. Mrs. Sumakeris was married to her service member husband when he retired, and he elected to cover her under the Survivor Benefit Plan. Mrs. Sumakeris and her service member husband divorced shortly thereafter. Despite being represented by legal counsel, the parties did not agree to provide Survivor Benefit Plan coverage for Mrs. Sumakeris, and her husband was not ordered to elect Survivor Benefit Plan coverage in her favor. Not surprisingly, neither she nor her attorney sent a copy of the divorce decree to the DFAS. Mr. Sumakeris canceled his participation in the Survivor Benefit Plan.

Because Mrs. Sumakeris did not obtain a court order and did not send a copy of it to DFAS within one year of the date of the court order, she was not entitled to coverage under the Survivor Benefit Plan. Even though Mrs. Sumakeris was never notified that her ex-husband had cancelled her coverage, the court held that she had waived her right to coverage under the Survivor Benefit Plan.

Legal assistance attorneys should ensure their clients understand the Survivor Benefit Plan and the need for former spouses to take affirmative steps to protect their Survivor Benefit Plan rights. To prevent waiver, Survivor Benefit Plan coverage must be provided for in a court ratified separation agreement or court order which must be filed with DFAS within one year of the date of the court order. Major Henderson.

Contract Law Notes

New Investigation and Reporting Requirements for Antideficiency Act Violations

A violation of the Antideficiency Act (ADA)[96] is a serious matter.[97] Unfortunately, such violations continue to plague the Department of Defense (DOD).[98] Recently, the Deputy Secretary of Defense (DEPSECDEF) issued a directive, *DOD Directive 7200.1*, providing guidance to both the DOD Comptroller and the heads of DOD components for investigating and reporting potential ADA violations.[99] The *DOD Directive 7200.1* establishes a standard requiring the expeditious investigation of actual or apparent ADA violations by trained investigating officers appointed from outside the organization being investigated. Further, the DEPSECDEF tasked the heads of DOD components, including the Secretary of the Army, to establish and maintain a roster of individuals qualified to perform the duties of an investigating officer. The heads of DOD components must ensure that the investigators are chosen by the commander of a major command (MACOM) or a higher headquarters.[100]

Both the DOD Comptroller and the Secretary of the Army have responded quickly to *DOD Directive 7200.1*. On 1 August 1995, the DOD Comptroller issued volume 14 of the *Department of Defense Financial Management Regulation (DOD FMR)*.[101] This regulation provides comprehensive guidance for those responsible for investigating ADA violations, reporting findings, and administering punishment. It also contains useful checklists

---

[92] 10 U.S.C. § 1450(f)(3)(A) (1988).

[93] *Id.*

[94] *Id.* § 1450(f)(3)(B).

[95] 34 Fed.Cl. 246, 1995 WL 576775 (Fed. Cl. Sept. 28, 1995).

[96] 31 U.S.C. §§ 1341-42, 1344, 1511-17 (1988). Generally, the act prohibits obligating or expending funds in excess of amounts available in an appropriation or formal subdivision of funds, obligating funds in advance of an appropriation, or accepting voluntary services. *Id.*

[97] 31 U.S.C. § 1349(a) provides that violators shall be subject to "appropriate administrative discipline," including suspension from duty without pay or removal from office. 31 U.S.C. § 1350 provides that knowing and willful violators shall be fined not more than $5000, imprisoned for not more than two years, or both.

[98] *See* Memorandum, Office of the Undersecretary of Defense (Comptroller), for Deputy Assistant Secretary of the Army for Budget, subject: FY 1994 Reserve Component Anti-Deficiency Violations (21 Oct. 1994); Memorandum, Assistant Secretary of the Army for Research, Development, & Acquisition, to All Army Contracting Activities, subject: Delegation of Authority to Approve Certain Cost-Plus-Fixed-Fee (CPFF) Contracts Funded With Military Construction/BRAC Appropriations (4 Aug. 1994) (DOD agencies improperly awarded CPFF contracts for BRAC projects without obtaining the required approval, thereby violating the ADA).

[99] DEP'T OF DEFENSE, DIR. 7200.1, ADMINISTRATIVE CONTROL OF APPROPRIATIONS (4 May 1995) [hereinafter DOD Directive 7200.1]. This Directive cancelled DOD Directive 7200.1 dated 7 May 1984. *Id.*

[100] *Id.* para. E.2.b.

[101] DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MGMT. REG., vol. 14 (1 Aug. 1995) [hereinafter DOD FMR].

for both appointing officers and investigating officers, provides numerous examples of ADA violations, and discusses in detail the five most common violations of the ADA by DOD activities.[102]

In a similar vein, the Principal Deputy Assistant Secretary of the Army for Financial Management and Comptroller (Army Comptroller) implemented *DOD Directive 7200.1* by promulgating *Supplemental Guidance*[103] to *Army Regulation 37-1*.[104] Like the *DOD FMR*, the *Supplemental Guidance* contains checklists for investigating and appointing officers and a checklist for the final summary report of violation. More importantly, the *Supplemental Guidance* contains significant changes to the existing investigating and reporting requirements of *Army Regulation 37-1*. Some of these changes include:

Identifying Investigators

The Deputy Assistant Secretary of the Army (Financial Operations) (DASO(FO)) is required to maintain a roster of "qualified investigating officers."[105] To be a qualified investigating officer, one must have attended the Fiscal Law Course,[106] have a background in resource management addressing fiscal policy and fund control issues, or have completed prior ADA investigations. Each MACOM or agency must update the roster on a quarterly basis.

Independent Investigations

In accordance with *DOD Directive 7200.1*, the *Supplemental Guidance* requires a MACOM commander or the commander at the next higher level above the activity where the violation occurred to appoint the investigators and to review the investigation reports.[107] Additionally, the appointing officer must select the investigators from an office other than the office in which the alleged violation occurred.[108]

Team of Experts

The Supplemental Guidance adopts a team approach to conducting the ADA investigation. The appointing officer must appoint a "team of experts" to conduct the investigation, including a "Team Leader" from the Department of the Army roster.[109] The investigating team must consist of a financial management expert, a lawyer, and a person with "functional expertise." Conducting the investigation is the team leader's primary duty.[110]

Flash Report

A flash report is still required on discovery of a potential ADA violation.[111] However, the flash report is no longer forwarded to the Defense Finance and Accounting Service[112] but rather to the DASA(FO). The flash report should include the names of the investigation team members.

Preliminary Investigation

Rather than launching an immediate *Army Regulation 15-6*[113] investigation on discovery of a potential violation of the ADA,[114] the *Supplemental Guidance* requires a "preliminary investigation"

---

[102] The five most common ADA violations are: (1) exceeding the $300,000 limit on the use of operation & maintenance funds for minor construction projects, (2) exceeding available funds in an appropriation or allotment, (3) exceeding the $50,000 limit on the use of operations & maintenance funds for items of equipment, (4) failing to record obligating documents in a timely manner, resulting in over obligation of funds, and (5) obligating funds in advance of their availability. *Id.* ch. 10, para. 4.

[103] Memorandum, Principal Deputy Assistant Secretary of the Army Financial Management and Comptroller, subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (17 Aug. 1995) [hereinafter Supplemental Guidance]. This *Supplemental Guidance* will eventually be included in a revision to *Army Regulation 37-1*.

[104] DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 91) [hereinafter Army Regulation 37-1].

[105] Supplemental Guidance, *supra* note 103, attch. 1, at 2. The use of the roster is suspended until further notice to allow time for the roster to be established. *Id.*

[106] The Judge Advocate General's School, United States Army, Charlottesville, Virginia, currently conducts three resident Fiscal Law Courses per year, one in October and two in May. For information about curriculum content, call the Contract Law Department, The Judge Advocate General's School, United States Army at (804) 972-6360.

[107] Supplemental Guidance, *supra* note 103, attch. 1, at 2.

[108] The investigators must have "no vested interest in the outcome," and be "capable of conducting a complete, impartial, unbiased investigation." DOD FMR, *supra* note 101, ch. 4, para. D.

[109] Supplemental Guidance, *supra* note 103, attch. 1, at 2.

[110] The requirement to appoint an investigative "team" has existed since December 1994. *See* Memorandum, Assistant Secretary of the Army (FM), subject: Change to AR 37-1, Chapter 7, Administrative Control of Appropriations and Financing of Requirements (22 Dec. 94).

[111] Supplemental Guidance, *supra* note 103, attch. 1, at 1; Army Regulation 37-1, *supra* note 104, para. 29-16b, c.

[112] Army Regulation 37-1, *supra* note 104, para. 29-16b.

[113] *See* DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) [hereinafter Army Regulation 15-6].

[114] *See* Army Regulation 37-1, *supra* note 104, para. 7-7a(2)(a).

to determine whether or not a violation has occurred.[115] The focus of this investigation is on "the sequence of events which caused the violation," rather than the individual responsible for the violation.[116] Although the *Supplemental Guidance* does not state the amount of evidence required before starting a preliminary inquiry, the *DOD FMR* suggests that the amount is somewhere in the neighborhood of a "mere scintilla."[117] The results of the preliminary investigation must be forwarded to the DASA(FO). If the Army Comptroller approves a finding that no violation occurred, no further investigation is required.

Follow-On Investigation

If the preliminary investigation concludes that an ADA violation occurred, the appointing officer must select investigators to conduct an investigation[118] pursuant to *Army Regulation 15-6*.[119] Although not required, the investigators for the follow-on investigation would logically be the same "team of experts" who conducted the preliminary investigation. The focus of the *Army Regulation 15-6* investigation is on identifying the individuals responsible for the violation, recommending actions to preclude similar violations in the future, and reporting the actions required to "correct" the violation.[120]

Time Lines

The responsible commander must submit the flash report to the DASA(FO) no later than 15 days after the discovery of the potential violation. The results of the preliminary investigation must be provided to the DASA(FO) no later than 90 days from the date of discovery and the final *Army Regulation 15-6* report (complete with legal reviews and statements from those individuals determined responsible) no later that 150 days. Requests for extensions must be submitted to the Army Comptroller for approval no later than 30 days prior to the scheduled completion date.

Conclusion

The ADA has come of age. No longer relegated to the back burner status of unimportant issues, ADA violations are now the subject of intense scrutiny by the DOD and, ultimately, Congress.[121] As a result, judge advocates and civilian attorneys will be heavily involved in ADA investigations. In addition to performing legal reviews of preliminary and follow-on investigations,[122] legal advisors will serve as part of the investigatory team.[123] Legal advisors must, therefore, be prepared to advise appointing officers and investigating officers on their roles and responsibilities in conducting and reviewing investigations of ADA violations. A good working knowledge of fiscal law is essential. Moreover, legal advisors must be familiar with *Army Regulation 37-1* and its *Supplemental Guidance*, volume 14 of the *DOD FMR*, and *DOD Directive 7200.1*. Major Causey.

Criminal Law Notes

Will Prosecutors Ever Learn? Nondisclosure at Your Peril.

Last term, the Supreme Court issued opinions in several high profile cases. However, the Court's latest foray in the area of discovery in the case of *Kyles v. Whitley*[124] received little atten-

---

[115] Supplemental Guidance, *supra* note 103, attch. 1, at 1. Interestingly, the *DOD FMR* does not describe this process as an "investigation" but rather as a "preliminary review."

[116] *Id.* The *Supplemental Guidance* does not require the investigating officer to read rights warnings to any individuals questioned during the preliminary investigation. Nevertheless, investigating officers should read Article 31, Uniform Code of Military Justice rights (or the right against self-incrimination under the Fifth Amendment to the United States Constitution, as appropriate) to anyone suspected of violating the ADA.

[117] *See* DOD FMR, *supra* note 101, ch. 3, para. A1 (requiring "preliminary checks" of the applicable records when there is "some evidence" that a violation "may have occurred").

[118] Supplemental Guidance, *supra* note 103, attch. 1, at 1. The formal investigation should be initiated within 15 business days. *See* DOD FMR, *supra* note 101, ch. 3, para. A4.

[119] The *DOD FMR* describes the follow-on investigation as a "formal investigation" to distinguish it from the preliminary review. The requirement for a "formal investigation" should not be confused with "formal procedures" under *Army Regulation 15-6*. Although the *Supplemental Guidance* requires a follow-on investigation pursuant to *Army Regulation 15-6*, it does not require the use of formal procedures. Thus, the appointing authority may satisfy the requirement to conduct a follow-on investigation by appointing an investigating team to conduct an informal *Army Regulation 15-6* investigation. *Cf.* Army Regulation 15-6, *supra* note 113, para. 1-4b(3) (formal procedures are not mandatory unless required by other applicable regulations or directed by higher authority).

[120] Supplemental Guidance, *supra* note 103, att. 1, p. 1. The report of investigation should include at least six parts: Authority; Matters Investigated; Facts; Discussion; Conclusions; and Recommendations. *See* DOD FMR, *supra* note 101, ch. 7, para. B.

[121] *See* 31 U.S.C. § 1351 (requiring reports to the President and Congress of "all relevant facts and a statement of actions taken").

[122] *See* Supplemental Guidance, *supra* note 103, attch. 1, at 1, 3, 4. The appointing officer is required to ensure that a legal review is attached as part of the final report of investigation. *See also* DOD FMR, *supra* note 101, ch. 3, para. A3 (requiring coordination of the preliminary review with legal counsel); ch. 7, para. 6 (requiring appointing official to ensure a legal review of the Report of Violation).

[123] Supplemental Guidance, *supra* note 103, attch. 1, at 1.

[124] 115 S. Ct. 1555 (1995).

tion. Nonetheless, the Court's rulings in *Kyles* is important for military justice practitioners for several reasons. First, the opinions in *Kyles* reflect the justices' varying attitudes towards criminal law.[125] *Kyles* also highlights, once again, the problems faced by the prosecution when it fails to disclose evidence to the defense.

Curtis Lee Kyles was convicted of first degree murder and sentenced to death for killing a sixty year old woman outside Schwegmann's, a New Orleans grocery store.[126] After the case was affirmed on direct appeal,[127] during a collateral attack on the conviction, the defense objected to the failure of the prosecution to disclose certain evidence.[128] The Louisiana state courts rejected the attack as did the lower federal courts.[129] The Supreme Court granted certiorari,[130] questioning the standard the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) applied to assess the impact of the undisclosed evidence.

During their investigation, police discovered that a lone gunman struggled with the victim, a woman, as she loaded groceries into a red Ford LTD, shot her with a revolver, and then drove off in her car. Six eyewitnesses saw the assailant and said he was a black male.[131] However, the descriptions varied as to his height, weight, age, build, and hair length.[132] The police recorded the license plate numbers of all cars left at the store's parking lot on the theory that the gunman drove to the store and left his own car there before departing in the victim's car.

Two days after the shooting, a man called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis.[133] The caller said his name was James Joseph. He had heard about the murder and was concerned that he had unknowingly bought the victim's car. The police arranged to meet with Mr. Joseph in person later that day.[134]

During the meeting, Joseph provided more information, some of which differed from his earlier account. He identified himself as Joseph Banks and said his nickname was Beanie.[135] He now said that he did not see Kyles at all on Thursday, the day of the murder, but saw him Friday when he bought a red Ford LTD from him. Beanie described Kyles as slim, about six feet tall, twenty-four to twenty-five years old, with a "bush" hairstyle. Beanie answered affirmatively to the question of whether Kyles ever wore his hair in "plaits."[136]

Beanie took police to the car, which turned out to belong to the victim. He expressed concern that he would be suspected of the murder because people saw him drive the stolen car on Friday night and because he changed the license plates. Beanie told police that Kyles frequently robbed people and had threatened to kill Beanie. Beanie also said Kyles owned two pistols, a .38 caliber and a .32 caliber. Beanie told police that after buying the car, he and his "partner," Johnny Burns, drove Kyles to the store where the victim was killed, so Kyles could retrieve his car, an orange four door Ford.[137] The police found groceries in the victim's car and a baby's potty seat. Beanie also recounted how Kyles retrieved a woman's brown purse from some nearby bushes.

Beanie then returned to the police station with the officers, where he signed a statement summarizing his story. Although

---

[125] The lineup of the justices will come as no surprise to observers of the Court. Justice Souter wrote the majority opinion. He was joined by Justices Stevens, O'Connor, Ginsburg, and Breyer. Justice Stevens wrote a concurring opinion, joined by Justices Ginsburg and Breyer, in which he countered the dissent's argument that certiorari had been improvidently granted. *See infra* note 166 discussion and accompanying text. Justice Scalia authored the dissenting opinion in which Chief Justice Rehnquist and Justices Kennedy and Thomas joined. 115 S. Ct. at 1576.

[126] *Id.* at 1559. Kyles's first trial resulted in a hung jury. *Id.*

[127] State v. Kyles, 513 So. 2d 265 (La. 1987), *cert. denied*, 486 U.S. 1027 (1988).

[128] *See infra* notes 141-142 and accompanying text.

[129] *See* State *ex rel.* Kyles v. Butler, 566 So. 2d 386 (La. 1990); Kyles v. Whitley, 5 F.3d 806 (5th Cir. 1993).

[130] 114 S. Ct. 1610 (1994).

[131] 115 S. Ct. at 1560. All of these eyewitnesses were men. Two men were standing at a nearby bus stop. Three other men were working in the parking lot of the store. A sixth man was driving a truck that was stopped at traffic light near the crime scene. *Id.* at 1560 n.2.

[132] Two witnesses said the man was seventeen or eighteen. Another witness said he was as old as twenty-eight. *Id.* at 1560. One witness said he appeared to be 5'4" or 5'5", medium build and between 140-150 pounds. A different witness thought the gunman was slim and about six feet tall. One witness indicated he had a moustache while the others did not mention facial hair at all. Finally, one witness said the man's hair was shoulder length while another described it as short. Four of the six eyewitnesses said the gunman had braided hair. *Id.* at 1560-61.

[133] *Id.* at 1561. Later in the conversation, the man said that Curtis's last name was Kyles. *Id.*

[134] *Id.*

[135] *Id.* Beanie's actual name turned out to be Joseph Wallace. *Id.*

[136] *Id.* Plaits are braids. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 898 (1990).

[137] *Id.* The police later took Beanie to the scene of the crime where he pointed out where he, Burns, and Kyles found Kyles's car. *Id.* at 1562.

portions of the written statement were consistent with the earlier oral version, other parts were not. This time, Beanie said that after he bought the car, he and Kyles transferred groceries and a brown purse from the Ford LTD to Kyles's own car. They then drove both cars to Kyles's apartment where they unloaded the groceries. A few hours later, they drove to Schwegmann's, recovered Kyles's car, and picked up a big brown pocketbook next to a building.[138]

The day after talking to the police, Beanie spent several hours at Kyles's apartment. Based on information Beanie provided, the police arrested Kyles and searched his apartment. The police found the murder weapon, a .32 caliber revolver; a homemade shoulder holster that fit the weapon; and cans of pet food in a Schwegmann's sack.[139] The pet food was the same brand the victim normally purchased. No fingerprints were found on any of this evidence. A Schwegmann's receipt was found on the front passenger-side of the Ford LTD, but the receipt had Kyles's fingerprints on it.[140]

Prior to trial, the defense requested disclosure of any exculpatory or impeachment evidence.[141] The prosecution indicated that no such information existed.[142] At trial, four eyewitnesses testified for the state.[143] Beanie did not testify. The trial resulted in a mistrial.[144] After the trial, a prosecutor reinterviewed Beanie. This time, Beanie said that he, Kyles, and two other men retrieved Kyles's car on Thursday, not Friday.[145] Beanie said that they then drove to the home of one of the men, picked up grocery bags, a child's potty, and a brown purse and took all the items to Kyles's apartment.[146]

At the second trial, the same eyewitnesses testified. Also, the prosecution introduced a photograph of the crime scene taken after the murder and argued that a car in the photo belonged to Kyles. The defense contended that the eyewitnesses were mistaken, and that Beanie framed Kyles out of jealousy to remove suspicion from himself and to get reward money.[147] Several witnesses testified that they saw Beanie, with his hair braided, shortly after the murder driving the Ford LTD. Another witness said Beanie tried to sell him the car on the night of the murder. Johnny Burns said that on Sunday he saw Beanie stoop down near the stove in Kyles's apartment where the gun was found.[148] There was also testimony that Beanie was interested in Kyles's girlfriend.[149] Despite this testimony, the jury convicted Kyles of first degree murder and sentenced him to death.[150]

The Court's majority opinion, written by Justice Souter, reviews previous discovery decisions in *Brady v. Maryland*,[151] *United States v. Agurs*,[152] and *United States v. Bagley*.[153] *Bagley* held that

---

[138] *Id.* The Court points out that this statement was inconsistent with Beanie's earlier statements and did not even make sense. It was impossible for the men to pick up Kyles's car at the store if Beanie saw Kyles with the car and the purse earlier when the sale was made. The police, however, did not try to clarify these inconsistencies. *Id.*

[139] *Id.* The pistol was behind the stove in the kitchen. It contained five live rounds and one spent cartridge. The holster was in a wardrobe located in a hallway leading to the kitchen. *Id.*

[140] *Id.* at 1563. Another receipt was found in the trunk of the Ford LTD, but Kyles's prints were not on it. Beanie's fingerprints were not compared to those on any of the items found. The victim's fingerprints were not found on the cans of pet food. *Id.*

[141] The opinion is unclear as to whether this was a standard "boilerplate" discovery request. In any event, under *Bagley*, the standard to be applied is the same for a general request, no request, or a specific request. *See infra* note 154 and accompanying text.

[142] *Id.* The Court points out that despite this negative response the prosecution was aware of the following evidence: (1) statements taken from six eyewitnesses after the murder, (2) a record of Beanie's first phone call to the police, (3) a tape recording of Beanie's conversation with police on Saturday, (4) Beanie's typed and signed statement, (5) a list of the license plate numbers of all cars parked at the crime scene on the night of the murder (the list did not include Kyles's car), (6) a police memo requesting authorization for the seizure of trash outside Kyles's apartment, and (7) evidence linking Beanie to other crimes. *Id.*

[143] *Id.* The four witnesses were at or near the murder scene. Three of the four had selected Kyles out of a photo lineup. The photo array did not include Beanie's photograph. *Id.*

[144] *Id.* The jury deadlocked after four hours. *Id.*

[145] *Id.* Beanie said he got the car between 5:00 p.m. and 7:30 p.m., and he was accompanied by Johnny Burns and Kevin Black. Black testified for the defense in the first trial. *Id.*

[146] *Id.* at 1564. Kevin Black lived in the home they visited, and his statement was not provided to the defense. *Id.*

[147] *Id.*

[148] *Id.* The defense theory was that Beanie planted the weapon to frame Kyles. *See supra* note 147, and accompanying text.

[149] 115 S. Ct. at 1564. Kyles's girlfriend, a woman named Pinky Burns, was the sister of Johnny Burns, Beanie's friend and "partner." Kyles was the father of Pinky Burns's children. *Id.* at 1561 n.4.

[150] *Id.* at 1564. Beanie received $1600 in reward money. *Id.*

[151] 373 U.S. 83 (1963).

[152] 427 U.S. 97 (1976).

[153] 473 U.S. 667 (1985).

regardless of a specific discovery request, a general request, or no request at all, favorable evidence is material, and its suppression violates due process if there "is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[154]

Justice Souter explains the major tenets of *Bagley*. First, he points out that the defense need not show by a preponderance of the evidence that disclosure would have resulted in an acquittal. Rather, the touchstone is whether there is a "reasonable probability" the result would have been different. In other words, the question is whether the defendant received a fair trial. A "reasonable probability" is shown when the failure of the government to disclose the information undermines confidence in the outcome of the trial."[155] Justice Souter then points out that *Bagley* did not create a sufficiency of the evidence test. That is, the defense does not have to show that without the undisclosed evidence there would not be enough evidence remaining to convict.[156] Instead, the focus is whether the evidence could have changed the way the case was tried in such a way that the same result no longer seems assured. Third, Justice Souter disagrees with the Fifth Circuit's application of a harmless error standard to a *Bagley* violation.[157] Justice Souter traces the Supreme Court's development of the standard for constitutional disclosure claims and concludes that *Agurs* created a higher standard than that used for other habeas cases.[158] Once the reasonable probability standard of *Agurs* and *Bagley* has been satisfied, however, a harmless error analysis does not apply.[159] Finally, in determining whether evidence is material, the cumulative effect of the nondisclosed evidence is considered. The Court rejects the Fifth Circuit's item-by-item approach to assessing reasonable probability that the result of the trial would have been different.[160]

Justice Souter then applies the *Bagley* test to the facts of the case. He first points out that failure to disclose the eyewitnesses' statements seriously undermined the defense's ability to cross-examine and impeach two of the state's star witnesses. One witness described the assailant appearance as being far different than Kyles's. The second witness initially told police that he only saw the gunman as he sped away in the victim's car, a red Thunder-bird. At trial, this same witness identified Kyles as the gunman and said that he saw him shoot the victim in the head with a ".32, a small black gun," then drive off in the victim's Ford LTD. Justice Souter concludes that these key inconsistencies could have easily destroyed the witnesses' credibility in the jurors' minds.[161]

Justice Souter next turns to the prosecution's failure to disclose Beanie's pretrial statements. Although Beanie did not testify, Justice Souter explains that, given Beanie's inconsistent statements, the defense could have called him as an adverse witness. The significant inconsistencies in Beanie's statements would be powerful ammunition for destroying his veracity in such a situation.[162] The statements also would have been useful to support the defense theory that the police ignored possible suspects and conducted a shoddy investigation.[163]

The prosecution's failure to turn over the list of cars found at the crime scene denied the defense the opportunity to further discredit Beanie's contention that he assisted in picking up Kyles's

---

[154] *Id.* at 682.

[155] 115 S. Ct. at 1566 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)).

[156] *Id.* at 1566.

[157] *Id.* The circuit court held that after a court concludes that the failure to disclose constitutes error, the court must further determine whether the error is harmless. State *ex rel.* Kyles v. Butler, 566 So. 2d 386 (La. 1990); Kyles v. Whitley, 5 F.3d 806, 818 (5th Cir. 1993).

[158] Justice Souter explains that in *Chapman v. California*, the Court held that a constitutional error will overturn a conviction unless the error is "harmless beyond a reasonable doubt." 115 S. Ct. at 1566-67 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Later, the Court held that a different standard should apply in habeas cases, that is, the case should be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict." 115 S. Ct. at 1567 (quoting Brecht v. Abrahamson, 113 S. Ct. 1710 (1993)).

[159] 115 S. Ct. at 1567.

[160] *Id.*

[161] *Id.* at 1569-71. In reaching this conclusion, Justice Souter emphasizes that the prosecution repeatedly referred to the two men as the government's best witnesses. *Id.* at 1571.

[162] *Id.* For example, on two occasions, Beanie said that he bought the car from Kyles on Thursday, the day of the murder. However, during the taped conversation and in his written statement, Beanie said that he first saw Kyles and the car on Friday. *Id.* at 1561-62. In the phone call to police, Beanie said that he bought a red Thunderbird from Kyles. In later statements, it was a Ford LTD. *Id.* During the recorded conversation with police, Beanie said that after buying the car, he drove Kyles to Schwegmann's, where they found Kyles's car, and Kyles retrieved a brown purse from some bushes. In the written statement, Beanie said that after the purchase, they transferred groceries and a brown purse from the Ford LTD to Kyles's car. Later, they drove to Kyles's car at Schwegmann's,and Kyles picked up a purse next to a building. *Id.*

[163] *Id.* at 1571-72. Justice Souter persuasively argues that Beanie should have been treated as a suspect by police based on the following: his admissions that he changed the license plates on the Ford LTD; his police record, including crimes near the location of Schwegmann's; his knowledge of the crime scene; and his remark that if the police "set [Kyles] up good," they would find the murder weapon. *Id.* at 1572-73.

car at the crime scene some time after the murder. It also would have fit the defense theory that the police investigation was unreliable.[164]

Justice Souter then reviews the remaining evidence and finds that it constitutes less than "overwhelming proof" of guilt. He concludes that, taken together, the undisclosed evidence undermines confidence in the verdict.[165] Accordingly, the Court reversed the conviction.[166]

Kyles v. Whitley is significant for several reasons. First, the split among the members of the Court over the decision to grant certiorari illustrates the divergent views towards criminal procedure generally, and death penalty cases particularly. The case also clarifies the *Bagley* holding. In *Kyles*, the Court emphasizes that a reasonable probability does not require the defense to establish that, had the evidence been disclosed, the result at trial would have certainly been different. Nor does a reasonable probability require a finding that it is more likely than not that the evidence would have changed the result.[167] Rather, the proper focus of a *Bagley* inquiry is whether the accused received a fair trial despite nondisclosure of evidence. The accused's due process rights are violated only if the government's failure to disclose undermines confidence in the outcome.

The Court's rejection of a sufficiency of the evidence approach to analyzing these errors makes it very difficult for a trial counsel to predict whether the failure to disclose evidence will violate an accused's constitutional rights. Despite overwhelming evidence of guilt, a due process violation is established if the suppressed evidence puts "the whole case in such a different light as to undermine confidence in the verdict."[168] The Court's approach properly shifts the focus of the inquiry from other incriminating evidence to the significance of the suppressed evidence.

For the military practitioner, of course, Rule for Courts-Martial 701[169] and Article 46[170] already provide strict guidance for the disclosure of evidence. The Court of Appeals for the Armed Forces has repeatedly pointed out that disclosure obligations in the military extend far beyond the constitutional protections afforded civilian defendants.[171] Because our rules favor generous discovery, trial counsel will never want to knowingly withhold potentially exculpatory evidence.[172]

Kyles is of particular interest to the appellate attorney who now has more ammunition with which to argue that the suppression of evidence violated the accused's due process rights. Where the suppressed evidence is significant in terms of quality and quantity, the Supreme Court has shown that it will not hesitate to overturn a conviction. Major Wright.

---

[164] *Id.* at 1573-74.

[165] *Id.* at 1574-75. Justice Souter concludes that the police relied on an informant whose credibility was in serious doubt and who could have planted the evidence they found, that the lead detective was either untruthful or uninformed, that one of the eyewitnesses described a gunman who looked more like the informant than the defendant, that another eyewitness was coached, and that eyewitness descriptions varied significantly. *Id.* at 1575.

[166] *Id.* at 1576. In a brief concurring opinion, three justices disagree with the dissent's contention that certiorari was improvidently granted. Justices Stevens, Ginsburg, and Breyer consider the case important because the original mistrial indicated that the case was close, that there were multiple items not disclosed, and that a review of the case left doubt as to the defendant's guilt. *Id.* The dissent, authored by Justice Scalia, begins by criticizing the majority's decision to grant certiorari in a case where the issue, in the dissent's view, is whether the law has been properly applied to the facts. That the sentence included the death penalty has little impact on the dissent. The dissent contends that the circuit court applied the proper rule of law, and that the Court's review of the case is intensely fact specific. *Id.* at 1576-78. Having expressed disagreement with the grant of certiorari, the dissent goes on to address the merits of the case. The dissent agrees with the majority's pronouncement that the undisclosed evidence must be considered cumulatively. For the dissent, however, the failure to disclose witness statements had a negligible effect on the verdict because the statements only involved two of the four testifying witnesses. The dissent sees no reasonable probability that the jury would have believed all four witnesses were mistaken about the defendant's identity. *Id.* at 1578-79. Because of overwhelming evidence of guilt, the dissent contends that the suppressed evidence would have been immaterial to both the verdict and the death sentence. *Id.* at 1585.

[167] 115 S. Ct. at 1566 (quoting Strickland v. Washington, 466 U.S. 668, 693 (1984); Nix v. Whiteside, 475 U.S. 157, 175 (1986)). *Strickland* established the test to evaluate claims of ineffective assistance of counsel. In *Strickland*, the Supreme Court rejected the more likely than not standard as too burdensome for the defense. Although that standard is used for determining whether newly discovered evidence warrants a new trial, the Court pointed out that in those situations, one is not concerned that the original trial was unfair or inaccurate. *Strickland*, 466 U.S. at 694. On the other hand, in the context of assessing counsel's deficient performance, the critical issue is whether the accused was afforded his constitutionally guaranteed Sixth Amendment right to the effective assistance of counsel. *See* U.S. CONST. amend. VI. Therefore, the *Strickland* Court concluded that the reasonable probability standard was appropriate. 466 U.S. at 694.

[168] 115 S. Ct. at 1566. For example, confidence in the verdict might be questioned if the suppressed evidence would have suggested a different trial strategy, raised another defense, or presented other evidence.

[169] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 701 (1995 ed.) [hereinafter MCM].

[170] 10 U.S.C. § 846 (1988).

[171] United States v. Green, 37 M.J. 88 (C.M.A. 1993); United States v. Hart, 29 M.J. 407 (C.M.A. 1990); United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986). *See also* MCM, *supra* note 169, R.C.M. 701 analysis, app. 21, at A21-31 to A21-32.

[172] In addition to violating the *Rules for Courts-Martial* or case law, failure to disclose evidence or information known to the trial counsel may violate ethical guidelines. *See, e.g.*, DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 3.8d (1 May 1992).

Firearms Training System: A Proposal for Future Rules of Engagement Training

A squad of United States Infantrymen is patrolling the border between the Former Yugoslav Republic of Macedonia and Bosnia. Cresting a hill near the border, the squad is approached by armed Bosnian Serbs. For a tense moment, the Serbs point their apparently loaded AK-47 rifles at them.

The above scenario is not contrived. 3d Infantry Division soldiers found themselves in this dilemma during *Task Force Able Sentry* duty in the Former Yugoslav Republic of Macedonia.[1] The proper use of force is critical in a peace keeping operation. The use of force to attain a short term tactical success could lead to a long term strategic failure.[2] With increasing frequency, future military operations will require United States soldiers to apply varying degrees of force.

From operations other than war (OOTW)[3] to traditional force on force engagements, the operational tempo and rules of engagement (ROE) can quickly change.[4] United States Armed Forces need to prepare for this challenge. Recently, the Commander in Chief, United States Army Europe (USAREUR), commented on these training challenges:

> Regardless of unit type, whether a finance detachment or an infantry squad, leaders must understand certain OOTW tasks and train their soldiers on them . . . OOTW brings a totally new dimension to training to which USAREUR commanders must adapt. For example, chaplains, unit legal officers, and public affairs personnel now have significant roles in maneuver units. They truly become combat multipliers and should be incorporated in the commander's decision-making process for peace operations. Additionally, as part of training programs for peace operations, develop systems for dealing with the media. We must train to interact with the media intelligently in the sensitive environment of OOTW, where perception is reality and where misperception can hinder or deny mission accomplishment.[5]

A significant part of the training needs to be focused on the use of force and ROE for individual responses. This article proposes that the Army adopt an inter-active computer simulation training device already employed by the Federal Bureau of Investigation (FBI).

Changing political realities place United States forces in situations more familiar to civilian law enforcement officers than to traditional warfighters.[6] Regardless of the policy debate concerning whether United States soldiers should be involved in "law enforcement" missions,[7] reality has shown that soldiers have been and will be placed in police type situations where a more discriminating use of force is required. Even in traditional force on force conflicts, post combat operations, and nation building missions will require soldiers to operate in environments with something less than a declared hostile ROE.

Although ROE development has been the subject of comprehensive articles,[8] the Army's current use of force and ROE training could be improved to better prepare soldiers for these new missions. The greatest void is in the development and implementation of a practical hands-on training device for individual soldiers preparing for OOTW missions.

---

[1] Interview with Task Force Judge Advocate, In Wuerzburg, Germany (Aug. 1994).

[2] DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS, (Dec. 1994).

[3] *See* DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, ch. 13 (14 June 1993). The United States joint military community adopted the term soon thereafter. *See* JOINT CHIEFS OF STAFF, PUBLICATION 3-0, DOCTRINE FOR JOINT OPERATIONS, paras. I-3 to I-4 (9 Sept. 1993). Even as this article was being drafted, the United States Army strongly indicated that the term itself will drop out of usage although the missions described by the term will remain a focus of doctrinal development. *See* Memorandum, Commander, United States Army Training and Doctrine Command, subject: Commander TRADOC's Philosophy on the Term "Operations Other Than War" (2 Nov. 1992).

[4] In Somalia and Haiti, United States soldiers assumed *de facto* law enforcement roles. United States soldiers in both locales performed street patrolling duties and often confronted situations where they had to protect innocent lives—even if this role was not in their mission statement or charter. *See* CENTER FOR L. AND MIL. OPERATIONS, THE LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, LESSONS LEARNED FOR JUDGE ADVOCATES, at 32 (3 Oct. 1995) [hereinafter HAITI—LESSONS LEARNED].

[5] Policy Letter 95-1, Commander in Chief, United States Army Europe, subject: Command Policy Letter #1 (xx XXX xx).

[6] HAITI-LESSONS LEARNED, *supra* note 4, at 19.

[7] *See* Lieutenant Colonel Geoffrey B. Demarest, *United States Army, The Strategic Implications of Operational Law* (comprising a "Blue Cover Publication" of the Foreign Military Studies Office at Fort Leavenworth, Kansas) (1995).

[8] *See* Major Mark S. Martins, United States Army, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, at 293 (1994) (this comprehensive guide to rules of engagement development, training, and implementation identifies the Firearms Training System as a useful civilian law enforcement tool).

Before analyzing the applicability of the FBI's training device for military use, it is essential to understand the similarities between civil law and military ROE concerning the use of force. Civil law requires the "reasonable" use of force against imminent threat of death or serious bodily injury.[9] Most modern military ROE embrace the concept of reasonable use of force with language concerning "hostile acts" and "hostile intent."[10]

As demonstrated by civil case law, "reasonableness" allows for a more forceful response than many would anticipate. The reasonable use of force standard also applies in military operations, but OOTW mission parameters often complicate a soldier's ability to apply a reasonable response. Unlike pre-planned attacks, raids, or ambushes, most OOTW missions do not clearly identify a hostile force prior to engagement. Therefore, the reasonableness of a response is often predicated on identifying hostile acts or intent. This decision may be made by a young, frightened soldier whose actions will be firmly rooted in the quality of training.

Action and Reaction Time

Threatening behavior that constitutes hostile acts or intent often cannot be clearly defined under OOTW ROE. Further, soldiers generally are not allowed to commit a pre-emptive strike against a potential threat, yet they must be ready to respond appropriately to hostile acts from an unidentified enemy. Under these circumstances, soldiers must quickly analyze the situation, and several physiological factors may affect their perception and analysis of the threat, which may or may not justify a reasonable belief that use of deadly force is authorized under the OOTW ROE. Like civilian law enforcement officers, soldiers in OOTW situations will be forced to react quickly and appropriately to potential hostile acts. This could range from an isolated sniping incident to a military type assault on a traffic control point or checkpoint. Unfortunately, once a hostile act is initiated, the party in the defensive posture may receive casualties before an appropriate reaction is taken. The ability of a soldier to stop a hostile act is generally limited to small arms fire, and the soldier may have only seconds to confront the hostile act.[11]

Sensory Distortion Phenomena

In extremely violent situations, the body's survival mechanisms focus on the threat, which increases the likelihood of stress induced error. In these situations, the mind must analyze in seconds events that usually take minutes to explain or analyze rationally. Historically, there are many examples of this phenomena. Winston Churchill, in describing his experience of battle at Omdurman, stated that it was like watching a silent film. Police officers often completely discharge their firearms and later report that they cannot recall ever hearing a shot or feeling recoil.[12]

Despite the inherent stresses, danger, and difficulties, United States soldiers are often deployed with minimal guidance on the use of force,which most often is in the form of "last resort" language.[13] "Last resort" language may be improper for three reasons: (1) it may cause soldiers to hesitate when reacting, allowing the hostile act to achieve its intended effect or escalate in violence,[14] (2) it is not required by international law nor most strategic policy objectives, and (3) commanders may be tempted to substitute "last resort" caveats for essential training on how and when to respond with deadly force.

Furthermore, although OOTW ROE "last resort" language may be understood by lawyers, senior commanders, and plan-

---

[9] The following language from three seminal use of force cases highlights the judicial recognition of the speed and turbulence surrounding use of force scenarios:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Allowance must be made for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. Graham v. Connor, 490 U.S. 386 (1989).
>
> Where a law enforcement officer has probable cause to believe that a criminal suspect poses a threat of serious physical harm, either to the officer or to others, it is not unreasonable to prevent escape by using deadly force; thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. Tennessee v. Garner, 471 U.S. 1, at 9 (1985).
>
> Personal notions of proper police procedure must not be substituted for the instantaneous decision of the officer at the scene. What constitutes reasonableness may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. Smith v. Freland, 954 F.2d 343 (6th Cir. 1992). Reasonableness does not require that the officer to select the "least intrusive" alternative, only a "reasonable" one. Illinois v. Lafayette, 462 U.S. 640 (1983).

[10] See Secret Chairman of the Joint Chiefs of Staff, Instruction 3121.01, Standing Rules of Engagement for United States Forces (1 Oct. 1994) (including an unclassified portion, Enclosure A, intended for wide distribution) (this document is the source from which most mission rules of engagement are derived).

[11] John C. Hall, *Deadly Force in the Defense of Life*, FBI Law Enforcement Bulletin (Aug. 1993) [hereinafter Hall].

[12] Interview with John C. Hall, FBI Special Agent, in Quantico, Virginia (June, 1994) [hereinafter Interview with Hall].

[13] For example, deadly force will not be used except as a last resort.

[14] The last resort language may have contributed to the United States Marines lack of precautions and readiness in the Beirut, Lebanon, bombing attack of October 1983. *See generally* DEP'T OF DEFENSE, REPORT OF THE COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT (23 Oct. 1983) (The Commission's findings on this incident highlight many inadequacies ranging from the specific rules of engagement to national policy objectives; however, the findings identified that the Marine sentries involved were not properly trained as to when to react with deadly force.).

ners, it may be misunderstood and misapplied by soldiers who have not had the benefit of practical and realistic hands-on training. *At a minimum*, lane training, role playing, and other situational training exercises (STXs) should be considered.

Civilian law enforcement agencies recognize that individuals will react to stress as they were trained. Accordingly, civilian law enforcement agencies spend a great deal of time on realistic use of force training for their agents. The Federal Bureau of Investigation (FBI) maintains a premiere law enforcement use of force training program. In addition to outstanding hands-on training facilities, the FBI also has a historical, legal, and technical database on use of force situations.[15] The Firearms Training System is perhaps the most effective device in the FBI's training inventory.[16]

Firearms Training System

Unlike traditional target ranges, the Firearms Training System (FATS) attempts to replicate the conditions of stress, time compression, and sensory deprivation prevalent in violent situations. The system consists of a large training room with a wall-sized projection screen. Projected onto this screen are differing CD-ROM (compact disc read only memory) driven scenarios requiring an agent to make use of force decisions in accordance with FBI policy. The scenarios are fast-paced, offered in varying degrees of illumination, often innocuous, and always subject to change. The agent in training is equipped with a realistic simulated weapon which emits laser "bullets" that impact on the target screen. The laser sensitive screen instantly records the shots on the system's computer. The computer, depending on the placement of shots, lack of shots, or verbal commands, then continues the scenario to its conclusion. The computer can then play back the scenario to show the hits and misses. More importantly, the training staff can identify appropriate or inappropriate uses of deadly force.[17]

Prior to undergoing FATS training, FBI agents are briefed extensively in the classroom on the FBI's use of force policy. In military scenarios, the appropriate use of force would be mission specific. The role of a judge advocate, therefore, would be to brief soldiers on the use of force policy for a specific mission, observe the FATS training, then debrief the soldiers, forcing them to justify their actions. The RAMP training[18] and STX debriefings would go hand-in-hand with this type of training.

The Army already possesses the basic hardware used to train military policemen that could accommodate the FATS.[19] The differences, however, between the current Army systems and the FBI systems are significant:

(1) The FBI systems are capable of "branching." That is, the program's responses are dependent on the actions of the trainee. If the trainee issues clear and concise orders, the system may resolve itself without escalating in violence. If the trainee shoots poorly, or merely wounds a subject, the subject may return fire. The Army systems are not capable of branching and continue without regard to the trainee's decisions. As such, they are marginally useful as initial shoot-don't shoot training devices.

(2) The FBI scenarios are being specifically written for FBI use of deadly force policy while the Army systems are generic law enforcement scenarios not tailored to the military police's use of deadly force policy. More importantly, no developed or implemented scenarios cover military operations.

The Army could develop a full range of ROE dependent FATS scenarios which would present realistic OOTW training. Because the Army already has fielded the hardware to support such a system, the costs of development would be limited primarily to the production of the new scenarios. When developing an Army system, the following factors should be considered:

(1) The classified nature of most ROE would generate special production, storage, and utilization problems. This could be attenuated by reviewing classification levels and limiting truly classified scenarios to smaller units such as special operations, scouts, or long range surveillance detachments.

(2) The number of scenarios that would be needed to cover the spectrum of both conventional and OOTW would be high. Additionally, to achieve branching capabilities, each scenario

---

[15] *See* Hall, *supra* note 11.

[16] The Firearms Training System is developed and manufactured by Firearms Training Systems, Inc., Norcross, Georgia.

[17] Hall, *supra* note 11; *see generally* Interview with Hall, *supra* note 12 (the author visited the FBI Academy in June 1995 and in August 1995 where FBI instructors, including John C. Hall, explained and demonstrated the Firearms Training System).

[18] *See* HAITI—LESSONS LEARNED, *supra* 4, at 86, discussing default rules of engagement principles to be taught as a common soldier task under the acronym of RAMP (Return fire with aimed fire; Anticipate attack; Measure the amount of force; and Protect with deadly force only human life and property designated by command). The RAMP principles should be taught in briefings, situation training exercises, and other throughout rules of engagement train-ups for specific missions.

[19] At least fifty systems are in United States Army Europe supply channels alone.

would require many iterations to be recorded in production. Costs could be lessened by joint planning and scripting.

(3) The possibility of changes in international law or the political goals of the United States may make these programs obsolete. Updates and proper training of the trainers would be necessary. Self-defense and use of deadly force, however, would remain the focus of the program—areas of the law which are fairly stable.

The importance of effective individualized ROE training cannot be overstated in light of the volatile political situations in regions where most OOTW missions will be conducted. The uncertainties and "fog of war" described in Chapters 13 and 14 of *Field Manual 100-5, Operations*,[20] can be reduced by realistic OOTW ROE training. The FATS system, by closely mimicking the threatening situations encountered in OOTW, would provide more effective use of force training under stressful conditions. Captain David G. Bolgiano.

[20] DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993).

USALSA Report

United States Army Legal Services Agency

Litigation Division Notes

The Proposed Military Personnel Review Act

The Military Personnel Branch of the United States Army's Litigation Division defends the United States government and its officials in lawsuits that challenge military personnel decisions and actions. Typical examples of such suits include challenges to the Department of Defense's (DOD) policy on homosexual conduct, disputes over disability determinations, and claims by current or former soldiers who allege that they have been adversely affected by personnel actions such as adverse evaluation reports, nonselection for promotion, administrative discharges, or incorrect military records. The DOD is currently drafting proposed legislation—the Military Personnel Review Act[1]—which would dramatically affect the Army's defense of those suits.[2] This note briefly analyzes the significant litigation aspects of this proposed legislation.

Currently, soldiers obtain judicial review of personnel actions in all district courts and in the United States Court of Federal Claims. Appeals of those decisions go to the federal circuit courts of appeals. Depending on the federal circuit in which the suit is filed, results on fundamental questions may vary: whether exhaustion of administrative remedies is required before filing suit;[3] when the cause of action accrues for statute of limitation purposes;[4] and whether the particular issue is one within that, or another, court's exclusive jurisdiction.[5] Not surprisingly, different courts reach conflicting conclusions on the same issues. These inconsistencies cause an unproductive expenditure of time and money by plaintiffs, government attorneys, and the courts.

The purpose of the proposed Military Personnel Review Act (MPRA) is to establish a uniform, effective, and efficient means to review justiciable military personnel decisions. First, the proposal would mandate exhaustion of administrative remedies, making the military review boards the focal points of decisions

[1] This is not the official title of the act, but for purposes of this note, the proposal will be described as the Military Personnel Review Act.

[2] A DOD working group, chaired by the United States Air Force, is currently reviewing the proposed legislation. For the current status of the review of the proposed legislation, contact Major Kevin Chapman, (703) 696-1613.

[3] *Compare* Duffy v. United States, 966 F.2d 307 (7th Cir. 1992) *and* Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974) (exhaustion required) *with* Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986) (exhaustion permissive).

[4] *Compare* Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985) *and* Blassingame v. Secretary of the Navy, 811 F.2d 65 (2d Cir. 1987) (cause of action accrues when plaintiff exhausts administrative remedy) *with* D'Andrea v. United States, 27 Fed. Cl. 612 (1993), *aff'd*, 6 F.3d 786 (Fed. Cir. 1993) (cause of action accrues at time of challenged action).

[5] The "Little Tucker Act" provides that "district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *See* 28 U.S.C. § 1346(a)(2) (1988). The Court of Federal Claims, however, has exclusive jurisdiction over such claims in excess of $10,000. *Id.* § 1491. Jurisdictional disputes often arise when a soldier brings suit in federal district court and, as relief, seeks reinstatement in the Army. If the plaintiff were to prevail, reinstatement would result in the court awarding the soldier back pay, usually in an amount greater than $10,000. The Government, with varying degrees of success, often argues that the case should be transferred to the United Court of Federal Claims. *Compare* Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991) *with* Poole v. Rourke, 779 F. Supp. 1546 (E.D. Cal. 1991).

concerning military personnel. For actions challenging Army decisions, a plaintiff would be required to seek relief through the Army Discharge Review Board,[6] if applicable, and the Army Board for Correction of Military Records[7] prior to judicial review. The boards would make any necessary findings of fact, interpret applicable regulations and statutes, and issue final decisions. Additionally, the MPRA would clarify current statute of limitations issues. A plaintiff would be required to pursue administrative relief with the appropriate service board within three years of the challenged action to preserve the right to seek subsequent judicial review.[8]

Another provision of the MPRA would eliminate all trial court level review of military personnel actions. A plaintiff would no longer be able to challenge adverse agency administrative decisions in a federal district court or in the United States Court of Federal Claims. Instead, adverse decisions would be appealed, within sixty days of the administrative decision, directly to a federal appellate court. Two courts under serious consideration to perform that review would be the United States Court of Appeals for the Federal Circuit or the United States Court of Appeals for the Armed Forces, either of which would be the sole and centralized forum for judicial review.[9]

This proposed legislation presents a number of advantages to the services and potential plaintiffs. The requirement to first exhaust administrative remedies before the military review boards would allow complaining parties to obtain relief without resorting to the judicial process. Factual and legal arguments would be more clearly focused in detailed administrative records, and the services would be given an increased opportunity to discover and correct their own errors before judicial review. Centralizing appellate review in one court would foster the development of uniform case law and would eliminate confusing jurisdictional issues and conflicting precedent. In short, the proposed legislation would, if enacted, establish an effective avenue of relief for a soldier and provide an efficient means to review military personnel decisions.

Whether this proposal will ever become law, much less remain in its current form, is uncertain. However, given the intense scrutiny this area is receiving in Congress and in the DOD,[10] it is very likely that some form of legislation addressing litigation of military personnel decisions will ultimately become law. Major Kevin Chapman.

Environmental Law Division Notes

Recent Environmental Law Developments

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

Calculating Potential to Emit for Emergency Generators

The Environmental Protection Agency (EPA) has issued guidance pursuant to § 112 and Title V of the Clean Air Act on emergency electrical generators and their potential to emit.[11] An emergency electrical generator is defined as a generator whose sole function is to provide back-up power when electricity from a local utility is interrupted. The EPA has determined that 500 hours is an appropriate default assumption for estimating the number of hours that an emergency generator could be expected to operate under worst case conditions. Alternative estimates can be made on a case-by-case basis when justified by the source owner or permitting authority; if, for example, historic data on local power outages indicate that a larger or smaller number would be appropriate. Lieutenant Colonel Olmscheid.

---

[6] Pursuant to 10 U.S.C. § 1553, the Secretary of the Army has established the Army Discharge Review Board (ADRB). The policies, procedures, and governing rules of the ADRB are set out in *Army Regulation 15-180, Boards, Commissions, and Committees: Army Discharge Review Board* (15 Oct. 1984), and can be found at 32 C.F.R. § 581.2. Title 10 U.S.C. § 1553 provides, "The Secretary . . . shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal . . . of any former member of an armed force under the jurisdiction of his department . . . . A board established under this section may . . . change a discharge or dismissal, or issue a new discharge, to reflect its findings."

[7] Pursuant to 10 U.S.C. § 1552, the Secretary of the Army has established the Army Board for Correction of Military Records (ABCMR). The policies, procedures, and governing rules of the ABCMR are set out in *Army Regulation 15-185, Boards, Commissions, and Committees: Army Board for Correction of Military Records* (18 May 1977), and can be found at 32 C.F.R. § 581.3. Title 10 U.S.C. § 1552 provides "The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice."

[8] The MPRA would also effectively overrule cases like Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994) (holding that § 205 of the Soldiers' and Sailors' Civil Relief Act suspends the Board for Correction of Military Records' three-year statute of limitations during a service member's period of active service).

[9] This process is analogous to review of civilian personnel complaints brought before the Merit Systems Protection Board and subsequently appealed to the United States Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703 (1988).

[10] *See* sections 555 and 559 of House Report 1530, as passed by the Senate, the pending National Defense Authorization Act for Fiscal Year 1996.

[11] 42 U.S.C. §§ 7401-7642 (1988).

Endangered Species Act Update

The Reauthorization of the Endangered Species Act (ESA)[12] has stirred considerable discussion in Congress; however, little interest has been shown in changing federal agencies' roles to conserve and recover threatened and endangered species. Most of the debate has centered on relieving the ESA's burden on private landowners. Consequently, a revised ESA could mean that federal lands will ultimately play an even greater role in the conservation and recovery of listed species.

While the congressional deliberations simmer, installations are reminded of the continuing need to comply with chapter 11 of *Army Regulation 200-3, Natural Resources: Land, Forest and Wildlife Management, Endangered/Threatened Species Guidance (AR 200-3)*,[13] which implements the ESA in the Army. Any change to the ESA, or the Army's requirements under the ESA, promptly will be reflected in *AR 200-3*, chapter 11. In the interim, the Army remains committed to being a national leader in conserving listed species and will continue to carry out mission requirements in harmony with the requirements of the current ESA. Major Ayres.

Endangered Species Act Compliance

One of the most crucial steps an installation can take toward ESA compliance is to publish an Endangered Species Management Plan (ESMP). Installations should not delay production and publication of their ESMP pending the ESA's Reauthorization. *Army Regulation 200-3*, chapter 11, provides details on the preparation and approval process of ESMPs. Some of the key points for ESMP preparation include:

* Establish an installation working team to draft the ESMP. At a minimum, the team should include natural resources personnel, individuals involved in testing and training activities, and environmental law specialists.

* Prepare ESMPs for each listed and proposed species and critical habitat but consider a combined ESMP that addresses each species by focusing on the ecosystem approach.

* Establish installation conservation goals in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service.

* Omit state listed species—they are not required for ESMPs.

* With the installation commander's approval, incorporate the ESMP into the installation's integrated natural resources management plan.

Major Ayres.

The Current ESA Reauthorization Discussion

No clear winner has emerged in the ESA Reauthorization process. Currently, four House bills and four Senate bills are being considered to revise or to reauthorize the ESA. The Reauthorization bill submitted by Representatives Young (R-Alaska) and Pombo (R-California), HR 2275 (Young/Pombo bill), seems to have received the most attention from the media because it presents the most sweeping revision of the ESA. Like several of the proposals, the Young/Pombo bill would require government compensation of landowners affected by the species law. Yet, unlike other proposals, the bill would also decrease the degree of consultation currently required of federal agencies under section 7 of the ESA. Reportedly, two House Republicans, Representatives Gilchrest (R-Maryland) and Saxton (R-New Jersey), are preparing another Reauthorization bill in response to the Young/Pombo bill. According to the sponsors, their bill would highlight the ecosystem approach as the key to protecting habitat for the preservation of wildlife. Several of the bills, including the Young/Pombo bill, have been referred to committee for review. Major Ayres.

Clean Water Act Enforcement

In the case of *United States v. Telluride Co.*,[14] the United States District Court for the District of Colorado (District of Colorado) ruled that the Clean Water Act violations occurring more than five years before the EPA filed an enforcement action was barred by the general statute of limitations.[15] The District of Colorado court based its decision on *3M Company (Minnesota Mining & Manufacturing) v. EPA*.[16] In *3M*, the United States Court of Appeals for the District of Columbia (D.C. Circuit) held that the five-year statute of limitations for an action, suit, or proceeding for enforcement of a civil fine, penalty, or forfeiture applied to administrative proceedings brought by the EPA to impose civil penalties for violations of the Toxic Substances Control Act. The D.C. Circuit reasoned that an administrative proceeding was "for

---

[12] 16 U.S.C. §§ 668-1542 (1988).

[13] DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES: LAND, FOREST AND WILDLIFE MANAGEMENT, ENDANGERED/THREATENED SPECIES GUIDANCE, ch. 11 (28 Feb. 1995) [hereinafter Army Regulation 200-3].

[14] 884 F. Supp. 404 (D. Colo. 1995) (order granting partial summary judgment).

[15] 28 U.S.C. § 2462 (1988) (five year statute of limitations).

[16] 17 F.3d 1453 (D.C. Cir. 1994).

the enforcement of" a civil penalty under terms of the general limitations statute. The statute of limitations started to run when 3M allegedly committed the violations giving rise to penalties rather than the date the EPA reasonably could have been expected to detect the violations. It should be noted, however, that other courts have held that, for purposes of the Clean Water Act, the statute of limitations commences when discharge reports are filed with the EPA, not when the illegal discharge occurs.[17]

The EPA, concerned that the ruling in *Telluride* has troubling implications for other environmental enforcement actions, has asked the Department of Justice to take an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit. Major Saye.

Availability of Government Witnesses in Civil Litigation

The ELD has recently received several questions from the field on whether current or former Department of Army (DA) employees (including active and retired military personnel, and DA contract personnel) may be subpoenaed for deposition or interviewed in connection with an environmental lawsuit in which the United States is not a party. *Army Regulation 27-40*[18] establishes the procedures that must be followed to protect government interests that may or may not be readily apparent. This is especially true in environmental litigation where liability issues are often settled in piecemeal fashion, causing parties to be added throughout the course of the suit.

DA Policy

Current and former DA employees are generally prohibited from testifying or disclosing official information in response to subpoenas, court orders, or requests. "Official information" that may not be disclosed encompasses all information acquired by DA personnel as part of their official duties or because of their official status while they were employed by or on behalf of the DA. Additionally, current DA personnel generally may not testify as an expert witness or give an expert opinion for a party other than the United States. Likewise, former DA personnel normally are precluded from giving expert testimony or opinions concerning official information, subjects, or activities, unless serving as a government witness.

Exceptions

Persons or parties may submit written requests (fourteen days in advance) to depose or question current or former DA employees about official information. These requests must specifically address the nature and relevance of the information sought. Staff judge advocates or legal advisors may grant such requests after carefully considering the releasability factors outlined in *Army Regulation 27-40*[19] and consulting with an ELD litigation attorney. The Chief, ELD, may also grant special written authorization for current or former DA personnel to testify as expert witnesses or to render expert opinions on environmental subjects or activities where exceptional need is shown and when testimony is not adverse to the interest of the United States.

Environmental law specialists should ensure that all DA personnel involved with environmental activities understand that they must immediately contact their legal advisors if they receive a subpoena, court order, or informal request to discuss any subject related to their official duties. Major Mayfield.

EPA Document Production Critical

In calculating the amount of a proposed penalty in an administrative complaint for an alleged violation of the Resource Conservation Recovery Act (RCRA),[20] the EPA conducts a two-part analysis pursuant to its 1990 RCRA Civil Penalty Policy. First, the EPA determines the "gravity-based" penalty component and any multiday component by examining the potential for harm to the environment and the extent of deviation from the statutory requirement. Second, the EPA "adjusts" this figure either upward or downward to examine the applicability of the following factors: (1) good faith efforts to comply or lack of good faith, (2) degree of willfulness and/or negligence, (3) the alleged violator's history of noncompliance, (4) the alleged violator's ability to pay (downward adjustment only), (5) any supplemental environmental projects undertaken (downward adjustment only), and (6) other unique factors (such as, litigation risks). The EPA inspector fills out detailed final penalty worksheets and narrative explanations as part of the analysis of these factors.

Review of the EPA's penalty calculations and worksheets is critical to an environmental law specialist's defense of their client installation. In July 1995, an Alabama wood treatment company was fined $497,500.00 by the EPA for operating a hazardous waste disposal facility without a permit in violation of RCRA and Alabama hazardous waste regulations.[21] After reviewing the EPA's worksheets, however, the company was able to argue successfully that the EPA had exaggerated the harm to the environment and that the company's good faith efforts to comply with the law had not been sufficiently taken into account. Based on these arguments and the determination that the proposed fine was

---

[17] Public Interest Research Group of New Jersey v. Powell Duffryn, 913 F.2d 64, 75 (3d Cir. 1990); United States v. Hobbs, 736 F. Supp. 1406 (E.D. Va. 1990). *aff'd* 947 F.2d 941 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 2274 (1992); and Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287-288 (N.D. N.Y. 1986).

[18] DEP'T OF ARMY, REG. 27-40, LITIGATION, ch. 7 (19 Sept. 1994) [hereinafter Army Regulation 27-40].

[19] *Id.* para. 7-5(b).

[20] 42 U.S.C. §§ 6901-6986 (1988).

[21] In re Everwood Treatment Co., No. RCRA-IV-92-15-R (EPA ALJ July 7, 1995).

designed to punish rather than deter, the company was only assessed a penalty of $59,700.00.

In an attempt to bolster its negotiating strength, the EPA occasionally has refused to release its penalty worksheets and narratives, citing Freedom of Information Act exemption 5[22] as attorney work product and predecisional deliberative documents. If the EPA refuses to disclose its penalty calculation documentation, despite negotiation demonstrating the accelerated and fair results achieved by open disclosure, then a motion to compel discovery must be filed immediately. The motion should state how, under 40 C.F.R. § 22.19, further discovery would not unreasonably delay the proceeding, that the information is not otherwise obtainable, and that it is highly probative on the issues alleged in the complaint. Contact your major command environmental law specialist or the ELD for assistance in assessing your particular situation. Captain Anders.

Fine Reporting Policy for Environmental Law Specialists

Reporting Enforcement Actions

Immediately report to the major command (MACOM) any enforcement action (ENF), notice of violation (NOV), notice of noncompliance, or suspected noncompliance with federal, state, or local environmental regulations. The MACOM will report within forty-eight hours to the United States Army Environmental Center in accordance with *Army Regulation 200-1, Environmental Protection and Enhancement.*[23]

Any actual or likely ENF or NOV taken against the Army that involves a fine, penalty, fee, tax, media attention, or has potential or actual off-post impact should be reported by the MACOM environmental law specialist to the ELD within forty-eight hours after receipt. The installation environmental law specialist should provide written notification to the MACOM environmental law specialist and the ELD describing the alleged violation(s), the regulator's intended response, and the installation's position on the action within seven days of receipt of the violation notification.

Updating of Enforcement Actions

Notify the MACOM environmental law specialist of all significant activity in all open ENFs. Send a detailed summary of the status of all active ENFs to the MACOM environmental law specialist by the fifteenth day of each month. Forward all environmental agreements contemplated through the MACOM to ELD for legal review prior to signing. Environmental agreements include, but are not limited to, consent orders, consent agreements, compliance agreements, memorandums of agreement, memorandums of understanding, federal facility agreements (also called IAGs), and federal facility compliance agreements. Captain Anders.

Multisector General Stormwater Permit

On 29 September 1995, the EPA published notice of its multisector general stormwater permit in the *Federal Register.* The multisector permit replaces the original group permit concept that was abandoned by the EPA. The multisector permit will provide industry specific coverage for installations located in states and other areas that do not administer the stormwater permit program for federal facilities such as Arizona, Delaware, Florida, Idaho, Louisiana, Maine, Massachusetts, New Hampshire, New Mexico, Oklahoma, Texas, Vermont, Washington, Puerto Rico, the District of Columbia, Johnston Atoll, and Midway and Wake Islands. The EPA will encourage states that do have stormwater permit authority to consider adopting the multisector permit.

The multisector permit covers twenty-nine industrial sectors, including: (1) hazardous waste treatment, storage, or disposal facilities; (2) landfills and land application sites; (3) steam electric power generating facilities; (4) vehicle maintenance or equipment cleaning areas; (5) wastewater treatment works; and (6) printing and publishing facilities. Installations that include more than one of the listed twenty-nine industrial activities must comply with the permit and monitoring requirements for each activity.

Installations in the affected states will have *ninety (90)* days to decide whether to seek coverage under the multisector permit or to remain subject to the general permit issued by the EPA on 9 September 1992. If a decision is made to seek coverage under the multisector permit, a notice of intent must be filed with the EPA by 28 December 1995.

Like the baseline general permit, the multisector permit requires installations to develop a stormwater pollution prevention plan and fulfill recordkeeping, monitoring, and reporting requirements. One advantage of the multisector permit is that it offers reduced monitoring requirements for installations that meet pollution goals. Another advantage is that it contains pollution prevention and monitoring requirements tailored to specific industries.

Several types of stormwater discharges will not be eligible for the multisector permit. These include: (1) stormwater discharges subject to an existing permit, except for facilities that are currently subject to the baseline general permit; (2) discharges associated with industrial activity from inactive mines, inactive landfills, and inactive oil and gas operations that are located on federal lands; (3) activities that would result in a violation of the National Historic Preservation Act; and (4) activities that are likely to adversely affect endangered species.

---

[22] 40 C.F.R. § 2.118(a)(5) (1995).

[23] Dep't of Army, Reg. 200-1, Environmental Protection and Enhancement, para. 12-7 (23 Apr. 1990).

The Army Environmental Center intends to provide more detailed technical information concerning the multisector stormwater permit to affected installations in the near future. Major Saye.

Installation Status Report Approved

General Dennis J. Reimer, Chief of Staff of the Army, has approved the new Installation Status Report II (Environment) (ISR II) for use in the continental United States in fiscal year 1996. The ISR II assesses an installation's environmental status and assigns a readiness "C" rating. Implementation of the ISR II in 1996 will proceed as follows:

January	ISR II Installation Level Training
January--March	Headquarters Training
March--April	Installation submission of ISR II
June	MACOM Submission of ISR II to Headquarters

The ISR II is designed to provide the commander with a macrolevel overview of the installation and serves as an annual environmental compliance assessment system (ECAS) internal audit. The external ECAS program will continue on a three year cycle, but the ISR II should help spot and prevent problem areas on a nearly continuous basis using command resources. Mr. Nixon.

Landfill Regulated Source

The United States District Court for the Eastern District of Pennsylvania held that a landfill is a major emissions source under the Clean Air Act (CAA), and that operation of the landfill without a permit violates the CAA.[24] The Pennsylvania Department of Environmental Resources Bureau of Waste Management issued a solid waste permit to the landfill operators in 1992. The permit did not require the operators to obtain a CAA New Source Review Permit but did require them to obtain a permit to install and operate a gas management system. The district court held that the landfill emits enough volatile organic compound to be classified as a major stationary source of air pollution and it should be subject to part D of the CAA preconstruction review requirements for areas classified as not in compliance with the CAA requirements. This case stands for the proposition that landfills are stationary sources subject to regulation under the CAA. Lieutenant Colonel Olmscheid.

Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act

Specific intent to arrange for the disposal of a hazardous substance is not required to be liable for cost recovery as an "arranger" under 42 U.S.C. § 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act. Both the parent company and the officers of a corporation arranging for disposal may be liable if they have the authority to control the disposal of hazardous substances and exercise "actual or substantial control, directly or indirectly, over the arrangement for disposal or the off-site disposal, of hazardous substances." Active corporate officials who have the authority and ability to control disposal arrangements may be held liable even if they do not actually seek to control, or are aware of, the arrangements to dispose of hazardous substances.[25] Lieutenant Colonel Lewis.

Clean Air Act—Title V Fossil Fuel Boilers

The commander, as the responsible official of an installation, must certify that the installation is in compliance with the requirements of the Clean Air Act pursuant to the Title V program. As part of the application process, the commander must ensure that the installation has conducted a thorough compliance assessment and that the application contains an accurate description of the installation's compliance status. This compliance assessment includes a review of current major and minor new source review (NSR) permits.

Commanders are not required to consider previous NSR permit applicability determinations as part of their inquiry in preparing Title V permit applications. Commanders must rectify past noncompliance as it is discovered and remain subject to enforcement actions for any past noncompliance. Furthermore, the permit shield does not apply to noncompliance that occurred prior to, or continues after, submission of the Title V permit application.

A specific area of concern involves fossil fuel boilers under the NSR permit program. Installations may have modified or constructed new fossil fuel boilers that qualify as a "major source" under the NSR permit program without first meeting NSR permit requirements. If an installation meets the "major source" threshold, the commander must meet NSR requirements before authorizing any modifications or new construction of fossil fuel boilers.

The EPA's White Paper dealing with Title V applications, published 10 July 1995, makes clear that if an NSR analysis was made and it was determined that the installation was not a major source, the installation does not need to revisit the issue and second guess its original determination. If an error concerning NSR applicability is discovered during the Title V application process, the commander is obligated to rectify the error and meet the NSR requirements. This obligation holds true regardless of whether the state issued a minor source permit for the construction or modification of a fossil fuel boiler.

---

[24] Ogden Projects, Inc. v. New Morgan Landfill Co., No. 94-CV-3048, U.S. Dist. LEXIS * (E.D. PA. Sept. 22, 1995).

[25] United States v. TIC Investment Corp., No. 95-1035 (8th Cir. Oct. 16, 1995).

In determining whether an installation is a "major source" for the NSR program, the commander of the installation should carefully consider whether all boilers must be included as part of a single source in determining the applicability of the NSR or the Title V requirements. In some cases, installations may be appropriately divided into several sources. Source determinations for installations should be made by installation legal and technical personnel in coordination with state regulators. Direct questions on this issue to Lieutenant Colonel Olmscheid at DSN 426-1569 or (703) 696-1569, or Mr. Larry Webber at the United States Army Environmental Center at DSN 584-1214 or (410) 671-1214. Lieutenant Colonel Olmscheid.

Environmental Compliance Assessment System

Army Regulation 200-1, Environmental Protection and Enhancement,[26] requires each installation to establish and maintain an Environmental Quality Control Committee (EQCC). The EQCC acts on a broad range of installation environmental issues, priorities, policies and strategies. The EQCC also plays a key role in conducting internal environmental quality control assessments and preparing for external ECAS assessments. The installation environmental law specialist is an integral member of the EQCC, which is also comprised of members representing the command, operations, engineering, resource management, safety, medical, and tenant activities. Overseas, the EQCC is often referred to as the environmental protection committee (EPC) because this is the term used in the Overseas Environmental Baseline Guidance Document (OEBGD).

External ECAS assessments are coordinated and planned by the Army Environmental Center. The external ECAS assessment is normally conducted by a team of twelve to twenty technical experts and typically lasts at least one week. The team conducts an inbrief and outbrief for the installation command and staff. The team leader also conducts a daily brief with the installation environmental management officer (EMO) to discuss the ECAS team's daily findings and recommendations. We recommend that the installation environmental law specialist attend as many of these briefings as possible.

The installation environmental law specialists should also be actively involved in providing guidance on legal issues that may arise. The major command environmental law specialists should also attend, or arrange for another attorney to attend, as many ECAS assessments as possible. The 1996 schedule of upcoming external ECAS assessments by major command follows:

Forces Command: Fort Irwin, 18 Mar to 5 April; Fort Stewart, 29 April to 17 May; Fort Drum, 17 June to 3 July; and Fort Lewis, 12 to 30 August.

Military District of Washington: Fort Meade, 2 to 19 January; Fort A.P. Hill, 22 April to 10 May.

Training and Doctrine Command: Fort McClellan, 16 October to 3 November; Fort Ord, 27 November to 15 December; Fort Sill, 29 January to 16 February; Fort Chaffee, 8 to 26 April; Fort Eustis and Fort Story, 3 to 21 June; Fort Monroe, 5 to 16 August.

United States Army Europe: Netherlands, 5 to 9 February; Mannheim, Germany, 4 to 8 March; Grafenwoehr, Germany, 17 to 21 June; Wuerzburg, Germany, 15 to 19 July; Hanau, Germany, October (dates to be determined).

Eighth United States Army: 501st S.G., Korea, March (dates to be determined).

United States Army Pacific: Fort Richardson, Fort Wainwright, and Fort Greely, Alaska, 20 May to 7 June; Hawaii, 9 to 27 September.

Medical Command: Walter Reed AMC, 22 January to 2 February.

United States Military Academy: West Point, 26 February to 15 March.

Army Materiel Command: Anniston ADA, Alabama, January; Harry Diamond Lab, Maryland, January; Pueblo ADA, Colorado, February; Sunflower AAP, Kansas, March; Scranton AAP, Pennsylvania, April; Sierra AD, California, April; Indiana AAP, Indiana, June; Badger AAP, Wisconsin, June; Detroit Arsenal, Michigan, July; Iowa AAP, Iowa, July; Tobyhanna AD, Pennsylvania, August; Dugway PG, Utah, September.

Major Ayres and Mr. Nixon

Clean Air Act Fines and Penalties

The following is reprinted from a memorandum from the General Counsel of the Army to the Chief Counsel, United States Army Corps of Engineers, dated 26 October 1995:

> This is to reiterate the Army's position with respect to the payment of civil fines and penalties to state and local authorities for past violation of air pollution control laws and regulations in view of the recent decision in *United States v. Georgia Dept. of Natural Resources*, no. 1:94-CV-2993-JOF (N.D.Ga. Aug. 2, 1995).
>
> Section 118(a) of the Clean Air Act (CAA), as amended (42 U.S.C. § 7418(a)), generally waives the federal government's sovereign immunity regarding federal, state, local, and interstate air pollution control laws and

[26] DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 12-13 (23 Apr. 1990).

regulations. As a result of this waiver, Army facilities must pay nondiscriminatory, administrative fees and assessments imposed by state and local authorities to defray the costs of the air pollution regulatory program. In *United States v. Georgia Dept. of Natural Resources*, however, the court upheld the Army's position that § 118(a) does not waive federal sovereign immunity with respect to punitive civil fines and penalties assessed by state and local governments. See *U.S. Dept. of Energy v. Ohio*, 112 S.Ct. 1627 (1992). Such fines and penalties are distinguishable from court-ordered, coercive penalties, which are within the scope of the waiver in § 118(a) and must be paid by Army activities.

Army activities that are assessed civil fines or penalties by state or local authorities for violations of air pollution control requirements should assert sovereign immunity and attempt to negotiate a satisfactory compliance agreement or consent order that does not provide for the payment of civil fines or penalties, including any stipulated penalties. In such cases, Army activities may offer to pay an administrative fee, to defray the costs associated with the state or local agency's investigation and enforcement action. Army activities should not pay administrative fees that are clearly in excess of the state or local agency's costs.

The Army is fully committed to supporting federal, state, and local programs to improve air quality. While Army activities are not subject to punitive fines and penalties they are nevertheless legally required to comply with all federal, state, and local air pollution control requirements "in the same manner and to the same extent as any nongovernment entity" (CAA § 118(a)). Army activities are fully subject to and must comply with administrative and judicial compliance orders. Moreover, Army personnel, in their individual capacity, are subject to criminal sanctions, and possible civil penalties, for violating air pollution control laws and regulations.

In view of the legal and policy concerns discussed in the above memorandum and to ensure consistency within the Army, legal offices should continue to coordinate with the Environmental Law Division the disposition of cases involving fines and penalties for air pollution control laws and regulations. Major Teller.

Chief Administrative Law Judge Opens the Environmental Protection Agency's Penalty Policy to Attack

Chief Administrative Law Judge Jon Lotis ruled on 29 September 1995 that the EPA's penalty policies for environmental violations do not bind judicial penalty decisions unless those policies are promulgated by formal public notice and comment pursuant to the Administrative Procedure Act (APA).[27]

The decision concerned numerous alleged storage and disposal violations of the Toxic Substances Control Act (TSCA) by the company Group Eight, and one alleged improper disposal by Group Eight's insurance carrier. The EPA assessed a fine of $78,000 for the alleged violations, using its TSCA Civil Penalty Policy. Although Judge Lotis ruled that the company had committed the violations and ordered Group Eight to pay a penalty of $66,000, he found fault with the EPA's use of the penalty guidelines.

In defense of his departure from the EPA's guideline analysis, Judge Lotis pointed out that under the EPA's Rules of Practice, 40 C.F.R. § 22.27(b), the judge is only required to "consider" civil penalty policy guidelines, which states "[The rules] do not require the judge to calculate the penalty according to the strictures and parameters set forth in a penalty policy . . . if that were the case, penalty policies would be viewed by the courts as tantamount to agency rules which must meet the notice and comment requirements of the Administrative Procedure Act."[28] Significantly, Lotis cites *United States Telephone Ass'n v. Federal Communications Commission*[29] in which the United States Court of Appeals for the District of Columbia set aside the Federal Communications Commission's penalty schedule for noncompliance with notice and comment procedures. Judge Lotis wrote, "If the PCB penalty policy serves as a rule, it cannot be applied without APA rulemaking procedures; if it is a statement of agency policy, then it serves merely as an indication of an agency's current position on a particular regulatory issue."[30] While Judge Lotis stopped short of characterizing the PCB penalty policy as either a policy statement or an "invalid" rule, he concluded that "for evidentiary purposes, . . . the determination of the proper penalty level must rest on the evidence presented."[31]

---

[27] *In re* Group Eight Technology, I TSCA-V-C-66-90, 1995 TSCA LEXIS 15 (1995).

[28] *Id.* at 36-37.

[29] 28 F.3d 1232 (D.C. Cir. 1994).

[30] *In re Group Eight Technology*, 1995 TSCA LEXIS 15, at 39.

[31] *Id.* at 41.

The *Group Eight* case is significant in several respects. First, the EPA views the decision as an affront to its enforcement program. As one EPA source summarized the decision, "If EPA wants a judge to consider its policy, [the agency] must put a rule in for comment."[32] While this quote is a misreading of Judge Lotis's holding, it demonstrates the discomfort with which the EPA views the ruling and suggests a sense of apprehension that may be exploited during negotiations. Second, Judge Lotis's reasoning rests on that of *United States Telephone Association*, a case which struck down application of an agency's civil penalty policy for failure to follow formal rulemaking procedures. Last, Chief Judge Lotis's opinion may carry substantial precedential weight in cases before other administrative law judges.

While the *Group Eight* case specifically addressed the EPA's TSCA Civil Penalty Policy, Judge Lotis's reasoning could be applied to the EPA's use of any statutory civil penalty policy. The *Group Eight* decision obligates the EPA in assessing a penalty to support any findings, assumptions, or determinations. So long as the hearing judge has considered the policy, he or she is free to apply the penalty based solely on the strength of the parties' evidence. This increases the burden on the EPA to support its assessed penalties and should provide a better negotiating stance to those installations cited with violations. Captain Anders.

Administrative Stay of Used Oil Regulatory Provisions

On 30 October 1995, the EPA announced an administrative stay of certain provisions of the Used Oil Management Standards[33] pending promulgation of rulemaking policies to amend the standards. The standards, issued in September 1992, allow management of oils as mixtures of used oil and characteristic hazardous waste if the hazardous characteristic was removed. In accordance with these standards, the decharacterized mixture was subject to regulation only under 40 C.F.R. § 279 and not as hazardous waste under 40 C.F.R. § 261.3. Therefore, the land disposal restrictions of 40 C.F.R. § 268 did not apply to disposal of the decharacterized mixture.

Only two weeks after the Used Oil Management Standards were promulgated, the United States Court of Appeals for the District of Columbia in the case of *Chemical Waste Management, Inc. v. EPA* invalidated dilution of characteristic hazardous waste as a form of treatment.[34] Citing *Chemical Waste Management*, Safety Kleen Corporation challenged the used oil management standards as violative of the statutory land disposal requirements of the Resource Conservation and Recovery Act. Safety Kleen asserted that the used oil rules allowed wastes that were decharacterized by their mixture with used oil to be land disposable despite the presence of hazardous constituents. The EPA's stay of the mixture provisions of 40 C.F.R. § 279.10(b)(2) indicates the need to modify the used oil mixture rules to comply with the *Chemical Waste Management* decision.

The remainder of the used oil regulations will be effective. The EPA's stay of 40 C.F.R. § 279.10(b)(2) means that land disposal regulations will apply to mixtures of used oil and characteristic hazardous waste even if the characteristic is no longer exhibited. The practical effect of the stay is that mixing will be discouraged, and the EPA believes that the segregated waste streams will be more likely to be recycled. Major Anderson-Lloyd.

---

[32] *Report*, INSIDE E.P.A. WEEKLY, Oct. 20, 1995, at 16.

[33] 40 C.F.R. § 279 (1995).

[34] 976 F.2d 2 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 1961 (1993).

Claims Report

United States Army Claims Service

Claims Note

Tax Implications of Structured Settlements

Army claims personnel are cautioned not to make any representations about the tax implications of annuities during negotiations of a structured settlement. It is the firm policy of the Department of Justice to never make any statements as to the taxability of any such funding agreement. Interpretation of the Tax Code is the responsibility of the Internal Revenue Service. Any statement by Army representatives on these issues could lead to a conflict and, in any event, is totally unauthorized. This Note shall be placed in Army claims offices' policy files to ensure its permanent retention and review by newly assigned claims personnel. Mr. Rouse.

Tort Claims Note

Tort Claims Based on Premises Liability at State Owned Army National Guard Facilities

State owned Army National Guard (ARNG) facilities such as armories and training camps[1] are used for a variety of purposes.

---

[1] This note concerns only state owned or leased facilities. Some examples of state owned training camps are Camp Blanding, Florida; Camp Shelby, Mississippi; Camp Robinson, Arkansas; Camp Grayling, Michigan; Camp Ripley, Minnesota; Camp Guernsey, Wyoming; and Camp Williams, Utah.

Training camps are open for training activities of all the Armed Forces and for certain recreational activities that may include the public. Armories also are open for public use. These properties are subject to frequent trespassing that often lead to claims for injuries or deaths from such causes as exploding duds, motorcyclists running into wire barriers, and falls into pits dug across roadways or on icy stairways.

Federal technicians (FT)[2] and Active Guard Reserve (AGR) personnel[3] are frequently in charge of such facilities and are responsible for their proper maintenance and security. Both FT and AGR are paid by the United States Army. Should claims for civilian injuries or deaths be considered under the Federal Tort Claims Act (FTCA),[4] National Guard Claims Act (NGCA)[5] or under state law?[6]

While FT and AGR personnel assigned to duties in a state are paid by the United States, they are required to be members of the ARNG[7] to qualify for employment. The FT and AGR personnel are under the control of the state adjutant general (AG) who prescribes their duties. The AGR personnel are not subject to the Uniform Code of Military Justice (UCMJ) but to state military law, and the FT, as civilians, are not subject to the UCMJ.[8] Both the federal government and the state benefit from the activities of ARNG as held in *Lee*,[9] which extended the holding of the United States Supreme Court in *Levin*.[10]

The ARNG facilities are funded at least partially by federal funds. However, the use of such funds is a matter under the control of the state AG. Matters like when to repair a parking lot or stairway and how to secure an impact area are issues for the state, not the federal government. Thus, a claim based on a landowner's duty to warn should be lodged against the state under state law, not under the FTCA.[11] In *Miller v. United States*, a United States District Court in Indiana ruled that a member of the Indiana ARNG on annual training under 32 U.S.C. § 503 was both an employee of the United States for purposes of the FTCA and an employee of the state. Duty for annual training was at the order of the Indiana Governor. While the Indiana ARNG was engaged in installing culverts at Camp Atterbury, Indiana, as part of their annual training, Miller was injured when he drove an all-terrain vehicle into an unmarked ditch that Logan, an Indiana ARNG member, had dug across the road. The fact that the ARNG member's training was federally funded was not considered determinative. The court cited *United States v. Orleans* as follows:

> Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well . . . . The Federal Government in no sense controls 'the detailed physical performance of' all the programs and projects that it finances by gifts, grants, contracts, or loans.[12]

The controlling factor was whether day-to-day operations were supervised by the United States. Camp Atterbury is licensed by the United States to the state of Indiana which has exclusive control over the land and facilities. The state directed and controlled the culvert project. The United States had no knowledge of its existence and no control over its operation. Accordingly, the United States was dismissed from the suit.

The same rationale applies to claims for injuries caused by exploding duds taken from impact areas on ARNG property. Such

---

[2] Federal employees hired under 32 U.S.C. § 709 (1998).

[3] Army National Guard personnel on active duty under 32 U.S.C. § 505(f) (1988). DEP'T OF ARMY, REG. 135-2, ARMY NATIONAL GUARD AND UNITED STATES ARMY RESERVE FULL-TIME SUPPORT PROGRAM, para. 10b (1 June 1990) RESERVE PERSONNEL UPDATE 23 (1 Sept. 1994).

[4] 28 U.S.C. § 2671 (1988); DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, ch. 4 (1 Aug. 1995) [hereinafter Army Regulation 27-20].

[5] 32 U.S.C. § 715 (1988); Army Regulation 27-20, *supra* note 4, ch. 6.

[6] While some states have waived sovereign immunity for National Guard activities, many have not. Some states have liability insurance, but it is usually to cover nontactical vehicles.

[7] The National Guard must be distinguished from National Guard of the United States. For a good overview, see Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service"*, ARMY LAW., June 1994, at 35.

[8] A federal technician, as a member of the National Guard, must comply with training requirements such as summer camp and weekend drill. During such periods of active duty for training, they are subject to state military law, not the Uniform Code of Military Justice.

[9] Lee v. Yee, 643 F.Supp. 593 (D. Haw. 1986) *aff'd sub nom*; United States v. Hawaii, 832 F.2d 1116 (9th Cir. 1987) (in which the State of Hawaii was required to pay ninety percent of a settlement in a suit against the United States by a person injured in a collision with a National Guard recruiter. The court held that the recruiter on duty under 32 U.S.C. § 505 was both an employee of the state and the United States even though the Federal Tort Claims Act includes persons on duty under Title 32.). *See* Joseph H. Rouse, *Claims Under the National Guard Claims Act*, ARMY LAW., May 1972, at 13; Joseph H. Rouse, *Tort Claims Arising From Federally Supported National Guard Training*, ARMY LAW., Jan. 1987, at 45.

[10] Maryland for Use of Levin v. United States, 381 U.S. 41 (1965).

[11] Miller v. United States, Civ. IP92-165-C (S.D. Ind. 1993), which stated that the Army National Guard personnel at summer camp were under state tort act, not the Federal Tort Claims Act.

[12] United States v. Orleans, 425 U.S. 807, 815 (1976).

a case would be based on state control over the impact area even though a dud might have originated from firing activities of active Armed Forces. Similarly, a claim for an injury resulting from improperly maintained ARNG armories would implicate a state responsibility. When such claims are filed, mirror files should be sent to the United States Army Claims Service (USARCS) to permit close monitoring of the investigation by the appropriate USARCS Area Action Officer.

Since the 1981 amendment to the FTCA, the NGCA has been utilized only for noncombat claims arising out of ARNG activities because the FTCA is the exclusive tort remedy for claims against the United States.[13]

In conclusion, the USARCS maintains the position that the concerned state, not the United States, is primarily liable for claims under the operation of activities and facilities under the exclusive control of the state. Mr. Rouse.

Personnel Claims Note

The Need for Information—Carrier Correspondence

At the Military Personal Property and Claims Symposium held on 13 September 1995, in Alexandria, Virginia, the Household Goods Forwarders Association (Association) requested that the military claims services include certain types of information in future correspondence with the carrier industry. The information requested includes the date the correspondence was dispatched, the shipper's name, and the government bill of lading (GBL) number.

The Association representative indicated that much correspondence received from field claims offices and claims services does not contain this information, which is necessary for carriers to timely respond to the government. A field claims office's claim number does not help a carrier except as a reference when corresponding with the inquiring field claims office. The claims service representative pointed out that it was standard practice to provide such information in all correspondence but that all field claims offices would be reminded to provide this information. In return, it was requested that the carrier industry also furnish field claims offices with this information in their own correspondence to the government. Lieutenant Colonel Kennerly.

Processing Article 139 Claims Under the New Claims Regulation

Overview

Entitled "Redress of injuries to property," Article 139[14] of the Uniform Code of Military Justice (UCMJ) allows commanders to investigate allegations of a wrongful taking or the willful destruction of property by soldiers and to direct the finance office to pay a victim directly from the wrongdoer's pay when appropriate. In instances of multiple offenders, a victim may file a claim either against the individually named offenders or, if the names cannot be ascertained, the victim may file a claim against all the members of the offenders' unit who were present when the wrong occurred.[15] The Defense Finance Accounting Service (DFAS) will then offset the payment of the claim from the paychecks of the offenders.

Under the latest version of *Army Regulation 27-20*,[16] which went into effect on 1 September 1995, the manner of processing Article 139 claims underwent some significant changes. The interpretive guidance set forth in *Department of the Army Pamphlet 27-162*[17] (*DA PAM 27-162*) is also under revision, and a new version is scheduled to be published during either the summer or fall of 1996. This article explains the Article 139 process under the latest version of the regulation and provides interpretive guidance that will be published in the next edition of *DA PAM 27-162*. Because of proposed organizational changes in the next version of the *DA PAM 27-162*, pinpoint citations to the current edition, which are used in this article, will no longer be correct on publication of the new version.[18] However, all of the policies described in this article are currently valid and will continue to be so under the next edition of *DA PAM 27-162*.

Overview of Major Changes in the Processing of Claims

Previously, Article 139 claims were processed through the special courts-martial convening authority (SPCMCA) having jurisdiction over the soldier against whom the claim was made. If the claim was for more than $5000 and was determined to be valid, the SPCMCA would direct DFAS to pay the claim up to $5000 and would forward the residual claim to the Commander of the United States Army Claims Service (USARCS) for final action.

---

[13] 28 U.S.C. §§ 2671-2679 (1988).

[14] 10 U.S.C.A. § 939 (1984 & Supp. 1995).

[15] *Id.* § 939(b)) (1984 & Supp. 1995).

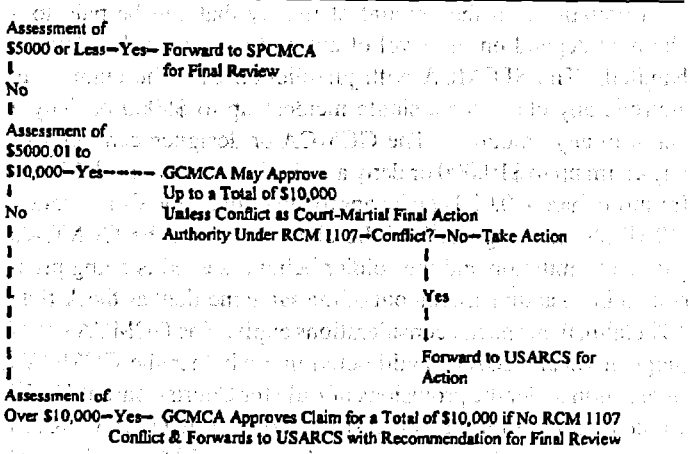
[16] Army Regulation 27-20, *supra* note 4, ch. 9.

[17] DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS, ch. 10 (15 Dec. 1989) [hereinafter DA PAM 27-162].

[18] The next edition of the *DA PAM 27-162* will be organized so that chapters of the *DA PAM 27-162* mirror those of *Army Regulation 27-20*. Thus, because the implementation of Article 139 claims is found in Chapter 9 of *Army Regulation 27-20*, the interpretive guidance will be found in Chapter 9 of the next edition of the *DA PAM 27-162*.

Under the new system, claims for more than $5000 will be submitted through the SPCMCA to the general courts-martial convening authority (GCMCA) having jurisdiction over the soldier against whom the claim is made. If a conflict of interest prevents the GCMCA from taking action, the claim will be forwarded to USARCS. If not, the GCMCA may approve claims up to $10,000. For valid claims over $10,000, the GCMCA will approve the claim for $10,000 and forward it, along with a recommendation, to the Commander, USARCS, for final action. For a basic overview of the new system, refer to the chart below.

Liability Level Forwarding Flow Chart



Processing Article 139 Claims Under the New System: Individuals Subject to Liability

Article 139 is designed to ensure that people are compensated when members of the military commit fraud against them, steal from them, or vandalize their property. Article 139 applies to anyone under the UCMJ—soldiers, sailors, airmen, marines, members of the Coast Guard, and reservists if their status subjects them to the UCMJ.[19] In the case of reservists who commit a wrong while subject to the UCMJ but then revert to regular reserve status, their liability follows them so that their reserve command has authority to withhold their reserve pay. When a victim cannot identify the particular individuals who caused the harm but can identify the unit, the approval authority can assess and apportion liability among all members of that unit who were present at the scene when the wrong occurred. So, for example, if First Squad of First Platoon is out drinking together and gets involved in a bar fight, destroying the bar in the process, and the specific wrongdoers cannot be ascertained, then all the members of First Squad who were present at the bar fight could be held liable for a portion of the damage. Where it is possible to establish the identity of the specific wrongdoers, they alone should be held responsible for the damage.

Proper and Improper Claimants

Anyone, whether an individual or an organization, may file an Article 139 claim with the exception of the federal government and agents and instrumentalities such as appropriated fund or nonappropriated fund agencies of the federal government.[20] Proper claimants include, but are not limited to: civilians, other service members, foreign nationals, businesses, charities, and state and local governments. The only organizations that clearly may not use the Article 139 procedures are United States government agencies.

Compensable Actions

Article 139 allows the command to compensate victims who have suffered either *willful damage*[21] or a *wrongful taking*[22] of property that is outside the scope of the soldier's duties.[23] Therefore, it is necessary to understand how these terms are defined.

Willful damage falls into two categories. The first category involves intentional acts without justification and may be thought of as vandalism. An example of willful damage might be a soldier who slashes the tires of another soldier's automobile. The second category involves riotous acts, violent or disorderly acts, acts of depredation, or conduct showing a reckless and wanton disregard for the property rights of others. For example, a soldier who randomly fires a weapon into the air, thus breaking a shopkeeper's window, is acting with such wanton disregard for the probable consequences of his actions that he could be held liable under Article 139. Alternatively, a soldier who accidentally knocks over a lamp and breaks it during a drunken brawl could also be held liable.[24] Even though the soldier did not mean to break the lamp, his involvement in a drunken brawl constitutes conduct showing a reckless and wanton disregard for the property rights of others. The claim is therefore compensable.

A wrongful taking involves the unauthorized taking or withholding of property with the intent to temporarily or permanently deprive the owner or lawful possessor of the property the posses-

[19] *Army Regulation 27-20*, paragraph 9-5d, states that claims resulting from the conduct of reservists who were not subject to the Uniform Code of Military Justice at the time of the offense are not actionable.

[20] DA PAM 27-162, *supra* note 17, para. 10-3.

[21] Army Regulation 27-20, *supra* note 4, para. 9-4a; DA PAM 27-162, *supra* note 17, para. 10-3a.

[22] Army Regulation 27-20, *supra* note 4, para. 9-4b; DA PAM 27-162, *supra* note 17, para. 10-3b.

[23] Army Regulation 27-20, *supra* note 4, para. 9-5c, provides that claims resulting from scope of employment are not actionable.

[24] DA PAM 27-162, *supra* note 17, para. 10-3b(1).

sion of that property. Thus, larceny, forgery, embezzlement, fraud or misappropriation would all be compensable under Article 139. For example, if a soldier makes unauthorized telephone calls using a roommate's telephone card, the roommate could put in an Article 139 claim for the cost of the unauthorized telephone calls.

Noncompensable Actions

At this point, it is important to note that Article 139 is a limited remedy narrowly tailored to provide timely relief for certain specific claims for property. Because Article 139 claims provide an easy method for pursuing claims, they can become subject to abuse. Certain forms of claims are explicitly prohibited under this process.

Article 139 is not designed to be a mechanism for debt collection. Claims resulting from a breach of a contractual or fiduciary duty are not actionable unless the agreement is merely a cloak for a plan to steal.[25] For example, a soldier who falls behind on the repayment of a loan would not be liable under Article 139 unless the soldier borrowed the money as a pretense for theft.

Article 139 cannot be used to hold a soldier liable for negligent acts.[26] Negligence is defined as the failure to use the level of care that a reasonably prudent person would use under similar circumstances. Negligent acts are different from the prior examples used above in the section on compensable actions where soldiers could clearly see that their actions would likely cause damage to property. For example, if a soldier in a china shop accidentally knocks over a dish, that soldier could not be held liable under Article 139 unless there were additional facts to show that the soldier acted in a disorderly or reckless manner.

Finally, Article 139 cannot be used to compensate someone for personal injuries or death,[27] subrogated claims,[28] or consequential or indirect damages.[29]

Proper Format for a Claim

An Article 139 claim may be presented by either the claimant or the claimant's authorized agent. Initially, the claim may be presented orally, but within ten days of the oral presentation, it must be reduced to writing, signed, and must state a definite sum in United States dollars.[30] The claim should provide enough information to allow an adequate investigation of the circumstances.

Settlement Authority Based on the Amount Claimed

Limitations on the amount of money that can be paid to a claimant depend on the level of authority at which the claim is handled. The SPCMCA with jurisdiction over the claim may approve any claim for a single incident up to $5000 or deny a claim in any amount.[31] The GCMCA or designee can approve any claim up to $10,000 or deny a claim in any amount.[32] Claims for more than $10,000 can be approved only by the Commander, USARCS, or designee.[33] If the claim is within the GCMCA's payment limitation and the soldier being assessed is being prosecuted in an action arising out of the same incident as the Article 139 claim, then special considerations apply. The GCMCA's staff judge advocate (SJA) should determine whether the GCMCA's final action under the provisions of Rule for Courts-Martial 1107[34] would be compromised. If the SJA determines that the GCMCA's final action would be compromised, then the SJA may forward the claim to USARCS for action.

Time Limitations for Submitting Claims

A claim based on Article 139 must be submitted within *ninety days (90)* of the incident out of which the claim arose unless the SPCMCA who has initial jurisdiction over the claim determines that good cause has been shown for any delay.[35] The SPCMCA has the final decision about what constitutes good cause. A

[25] Army Regulation 27-20, *supra* note 4, para. 9-4b; DA PAM 27-162, *supra* note 17, para. 10-3b.

[26] Army Regulation 27-20, *supra* note 4, para. 9-4a; DA PAM 27-162, *supra* note 17, para. 9-5a.

[27] Army Regulation 27-20, *supra* note 4, para. 9-5b.

[28] *Id.* para. 9-5e.

[29] *Id.* para. 9-6c; DA PAM 27-162, *supra* note 17, para. 10-3.

[30] Army Regulation 27-20, *supra* note 4, para. 9-7a; DA PAM 27-162, *supra* note 17, para. 10-5b.

[31] Army Regulation 27-20, *supra* note 4, para. 9-6b(1).

[32] *Id.* para. 9-6b(2).

[33] *Id.* para. 9-6b(3).

[34] Under Rule for Courts-Martial 1107, the convening authority in a general court-martial shall take action on the sentence and findings of the court-martial unless impracticable. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1107 (1984). The general courts-martial convening authority's fair exercise of discretion may be compromised where he has a predetermined view of the outcome, and adjudicating a claim in excess of $5000 against a soldier who is later court-martialed for the same offense may raise the presumption that the general courts-martial convening authority has a predetermined view of the case. If the staff judge advocate determines that the general courts-martial convening authority's final action would be compromised, then the staff judge advocate may forward the claim to the United States Army Claims Service for action.

[35] Army Regulation 27-20, *supra* note 4, para. 9-6a.

victim's ignorance of their Article 139 rights or lack of knowledge of the identity of the offender(s) is an example of a situation that will generally constitute good cause.[36]

Forwarding the Claim to the Proper Jurisdiction

On receiving an Article 139 complaint, an officer has a duty to forward it to the SPCMCA having authority over the affected soldier. In situations where more than one SPCMCA may have authority over the soldier or the claim is against a member of a sister service, then special rules apply. If all of the SPCMCAs with potential jurisdiction fall under a single GCMCA, then the complaint should be forwarded to that GCMCA, who will designate one of the SPCMCAs to process the claim. If the SPCMCAs with potential jurisdiction fall under different GCMCAs, then the SPCMCA whose headquarters is closest to the place where the incident giving rise to the claim occurred has jurisdiction. Finally, if the claim is against a member of one of the other services, then it should be forwarded to the commander of the nearest major command of the relevant service which is the equivalent of a Major Army Command (MACOM).[37]

Time Limitations for Processing the Claim

Article 139 claims should be processed quickly to give timely relief to victims. Claims judge advocates and claims attorneys are directed to maintain an Article 139 log and to monitor the time suspenses on all pending Article 139 claims to ensure that this happens.[38] The regulation sets forth the following timetable:

(1) Any officer receiving a claim must forward it to the SPCMCA having jurisdiction over the soldier or soldiers against whom the claim is made within two working days.[39]

(2) If the claim appears to be cognizable, the SPCMCA will appoint an Investigating Officer (IO) within four working days of receipt of the claim .[40]

(3) If the claim does not appear to be cognizable, the SPCMCA may refer it for legal review within four working days of receipt. The claims office has five working days to render a written legal opinion.[41]

(4) The IO has ten working days (which can be extended by the SPCMCA) to conduct an investigation and render findings and recommendations to the SPCMCA.[42]

(5) The SPCMCA will refer the claim, with the IO's investigation, to the claims office for legal review. No time is specified for how long the SPCMCA should take to make this referral. Five working days should be sufficient.

(6) The claims office has five working days (which may be extended by the SPCMCA for good cause) to render a written legal review.[43]

(7) If the claim is for $5000 or less, the claim will be returned to the SPCMCA for final action. If the claim is for more than $5000, the head of an area claims office will conduct a legal review within five working days and forward the claim to the GCMCA for approval of an assessment not to exceed $10,000. If the claims office referred to above is the area claims office, these two five-working-day-periods will be consolidated into one five-working-day-period. If the GCMCA's SJA determines that a conflict exists under Rule for Courts-Martial 1107, then the SJA will forward the claim packet, along with a description of the problem, to the Commander, United States Army Claims Service, for approval of an assessment not to exceed the liability recommended by the IO.

(8) The approval authority, either the SPCMCA or the GCMCA, will approve or disapprove the claim in an amount equal to or less than the amount recommended by the IO. No time limits apply to making the decision. However, five working days should be sufficient to render a decision and notify the parties involved.

(9) The approval authority will notify both parties of the determination and of the separate rights to request reconsideration. Final action

---

[36] DA PAM 27-162, *supra* note 17, para. 10-5a.

[37] Army Regulation 27-20, *supra* note 4, para. 9-7b.

[38] DA PAM 27-162, *supra* note 17, para. 10-6b.

[39] Army Regulation 27-20, *supra* note 4, para. 9-7b.

[40] *Id.* para. 9-7c(1).

[41] *Id.* para. 9-7c(2).

[42] *Id.* para. 9-7d(2).

[43] *Id.* para. 9-7e.

will be suspended for ten working days to allow for such a request.[44] On receipt of such a request, final action will be suspended for five working days while the request is taken under consideration by the approval authority.

(10) If the GCMCA determines that the claimant should be entitled to relief in an amount exceeding $10,000, then the GCMCA will approve the claim for $10,000, direct that an assessment for that amount be taken, and forward the claim packet, along with the GCMCA's recommendation, to the Commander, USARCS for approval of an assessment over $10,000.

Claims Time Line

Claim Received.
⇓
Two Working Days to Forward to SPCMCA.
⇓
Four Working Days for SPCMCA to Appoint IO or
Send to the Claims Judge Advocate for a Legal Review to Dismiss the Claim.
Claims Judge Advocate has five Working Days to Complete Legal Review.
⇓
Ten Working Days for the IO to Complete Investigation
and Tender Recommendations and Findings to the SPCMCA.
⇓
SPCMCA Has Five Working Days to Refer Claim for Legal Review.
Five Working Days for the Claims Judge Advocate to Perform Legal Review.
⇓
If the Claim is for $5000 or Less, A Decision is Made
Within Five Working Days by the SPCMCA and both Parties are Notified.
⇓
Ten Working Days for Either Claimant or Respondent to Request Reconsideration.
If a Request for Reconsideration is Received, Five Working Days to Reconsider the Claim.
⇓
If the Claim for is for $5000 or Less and is Determined to be Valid,
then Direct DFAS to Pay the Victim.
⇓
If the Claim is for More than $5000, Send to the GCMCA's Area Claims Office
For a Legal Review Which Will be Completed Within Five Working Days.
If GCMCA's Claims Office is the Same as the SPCMCA's Claims Office,
Use the Initial Legal Review, to Include A RCM 1107 Conflict Analysis.
⇓
If a RCM 1107 Conflict Exists, Forward to USARCS.
⇓
If No Conflict, Five Working Days for the GCMCA to Decide on an Assessment up to$10,000
and Notify both Parties in Writing.
⇓
Ten Working Days for Either Claimant or Respondent to Request Reconsideration.
If a Request for Reconsideration is Received, Five Working Days to Reconsider the Claim.
⇓
If the Claim was Determined to be Valid, then Direct DFAS to Pay the Victim up to $10,000
and Forward to USARCS with Recommendation for Any Assessment Over $10,000.

Using Chapter 11 Personnel Claims Act Procedures to Expedite the Article 139 Payment Process

A delay in payment to a claimant may result in hardship. If an Article 139 claim will be unduly delayed, the area claims office may process the claim under the Personnel Claims Act[45] pursuant to *Army Regulation 27-20*, Chapter 11, if it is otherwise cognizable under that regulation.[46] If claims are handled in this manner, the claims office must counsel claimants on their responsibility to repay the government for any overpayment that they may receive should the Article 139 claim later turn out to be successful.

The Investigation

In accordance with the procedures in *Army Regulation 15-6*,[47] the SPCMCA will appoint an IO to conduct the investigation. The IO will use the procedures in *Army Regulation 15-6*, Chapter 4, which govern informal investigations.[48] Any warrant or commissioned officer may serve as an IO,[49] to include the claims judge advocate. If the claim does not appear to be cognizable, such as a claim against a civilian employee, then the SPCMCA may refer the claim for legal review. If, after legal review, the claim does not appear to be cognizable, the SPCMCA can dismiss it without appointing an IO.[50] The IO must provide notification to the soldier against whom the claim is made.[51] If the soldier offers to make restitution, the IO, with the SPCMCA's approval, can delay the proceedings until the end of the next pay period to allow the soldier an opportunity to repay the victim.[52] If the soldier pays off the entire claim, the claim will be dismissed.[53] If, however, the soldier does not make full restitution to the victim, then the IO will continue with the investigation and determine whether or not the claim has merit.[54]

Advising the Investigating Officer of Article 139 Investigation Requirements

Claims judge advocates should take a proactive role in the Article 139 process. They have a responsibility to make available the relevant regulations and forms to the IO. They also must counsel the IO about his duties, the standard of proof, and the applicable rules of evidence. Many field offices have assembled

[44] *Id.* para. 9-7f.

[45] Personnel Claims Act, 31 U.S.C.A. § 3721 (1984 & Supp. 1995).

[46] Army Regulation 27-20, *supra* note 4, para. 9-7.

[47] DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 June 1988) [hereinafter Army Regulation 15-6].

[48] Army Regulation 27-20, *supra* note 4, para. 9-7c(1).

[49] Army Regulation 15-6, *supra* note 47, para. 2-1c(1).

[50] Army Regulation 27-20, *supra* note 4, para. 9-7c(2).

[51] *Id.* para. 9-7d.

[52] *Id.* para. 9-7d(1).

[53] *Id.* para. 9-7d(1).

[54] *Id.* para. 9-7d(2).

"IO guidelines" with the relevant regulations and forms attached as tabs to help instruct IOs on their role in the process. This practice is strongly encouraged. It is also important to remember that for many IOs and commanders their previous participation in the military legal process has usually been with military justice. They may be inclined to use improper standards, such as those used in courts-martial, because they are more familiar with them. Claims officers must, therefore, take special care to educate IOs and commanders about the proper standards to be used in administrative proceedings.

Processing Claims Against Soldiers Who Are Absent Without Leave

Occasionally, a claim is made against a soldier who is absent without leave (AWOL). When the accused soldier is AWOL, thus precluding notification by the IO, the claim can be processed in the soldier's absence.[55] If the claim against an AWOL soldier is approved, then a copy of the claim and a memorandum authorizing a pay assessment against the soldier will be forwarded by transmittal letter to the servicing Defense Accounting Office (DAO) for offset against the soldier's pay account.[56]

The Standard of Proof

The standard of proof required to recommend or find a soldier liable is by "a preponderance of the evidence."[57] This means that the IO must conclude that it is more likely than not that the claim is valid. This judgment should be based on the strength of the evidence that the IO gathers during the investigation.

Evidence

Because the Article 139 investigation is administrative rather than criminal, evidentiary standards are more relaxed than those in military justice. The IO should interview all witnesses and may consider a wide range of evidence, including some that may not be admissible in a court of law.[58] Subject to exceptions explicitly put forth in *Army Regulation 15-6*, the IO may review "anything that in the minds of reasonable persons is relevant and material to an issue."[59] When appropriate, the IO should warn those interviewed that they have a right not to incriminate themselves by discussing their involvement in a suspected criminal offense.[60] When a respondent or witness declines to answer questions, the IO will consult with the legal advisor about what action is appropriate to take. A DA Form 3881, Rights Warning Procedure/Waiver Certificate, should be used when appropriate.

Although the standards of evidence for an administrative procedure are flexible, limits on what forms of evidence that can be used exist.[61] The following limitations precluding the use of evidence apply:

(1) Information discovered through or associated with an inspector general's report, except when disclosure has been approved by the appropriate directing authority;[62]

(2) Communications between a soldier and the soldier's attorney;[63]

(3) Communications between a soldier and the soldier's spouse;[64]

(4) Communications between a soldier and the clergy, which were made either as a formal act of religion or as a matter of conscience;[65]

(5) Statements made off the record. Such evidence may not be considered for its substance. It may be used only to help in finding additional, admissible evidence;[66]

---

[55] *Id.* para. 9-7d(3).

[56] *Id.* para. 9-7d(3).

[57] DA PAM 27-162, *supra* note 17, para. 10-5e(2).

[58] Army Regulation 15-6, *supra* note 47, para. 3-6; DA PAM 27-162, *supra* note 17, para. 10-5e(1) (cover the rules of evidence to be used in Article 139 investigation proceedings).

[59] Army Regulation 15-6, *supra* note 47, para. 3-6a.

[60] *See* 10 U.S.C.A. § 831 (1984 & Supp. 1995); Army Regulation 15-6, *supra* note 47, para. 3-6c(5).

[61] The restrictions described in this paragraph are found at *Army Regulation 15-6*, para. 3-6c. *Supra* note 47. *See also Military Rules of Evidence 502* (Lawyer-Client Privilege), *503* (Communications to Clergy), and *504* (Husband-Wife Privilege). MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 803(2) (1984) (1994 Edition).

[62] Army Regulation 15-6, *supra* note 47, para. 3-6c(1).

[63] *Id.* para. 3-6c(1).

[64] *Id.* para. 3-6c(1).

[65] *Id.* para. 3-6c(1).

[66] *Id.* para. 3-6c(3).

(6) Statements signed by a soldier because of the origin, incurrence, or aggravation of a disease or injury that he or she has suffered, and which are against that soldier's interests, may not be considered about the origin, incurrence, or aggravation of that disease or injury.[67]

(7) "No evidence of the results, taking, or refusal to take a polygraph (lie detector) test will be considered without the consent of the person involved in such tests."[68]

(8) Confessions or admissions that are obtained through unlawful coercion or inducement likely to affect their truthfulness will not be admitted into evidence.[69]

(9) Evidence obtained as the result of a search by members of the Armed Forces acting in their official capacity, where they know the search is unlawful under the Fourth Amendment of the United States Constitution, cannot be used against any person whose rights were violated by the search unless the legal advisor determines that such evidence would have been inevitably discovered. In all other cases, evidence obtained from a search or an inspection may be accepted, even if the evidence would be ruled inadmissible in a criminal proceeding.[70]

Reporting Findings

When the investigation is complete, the IO's findings should be reported on DA Form 1574, Report of Proceedings by Investigating Officer/Board of Officers, and address, at a minimum, the following four questions:

(1) Is the claim by a proper claimant, in writing, and for a definite sum?

(2) Was the claim made within 90 days of the incident or was good cause shown for any delay?

(3) Was the claim for property of the claimant that was wrongfully taken or willfully destroyed by a member or members of the United States Army?

(4) Is the claim meritorious in the specific amount?[71]

Legal Review

After the IO completes the report, the next step in the process is for the field claims office supporting the SPCMCA to provide a written legal opinion to the SPCMCA.[72] That opinion should answer the following three questions:

(1) Is the claim cognizable under Article 139 and *Army Regulation 27-20*?

(2) Are the IOs findings and recommendations supported by the evidence?

(3) Has the IO substantially complied with the procedural requirements of Article 139, *Army Regulation 27-20*, and *Army Regulation 15-6*?

If the claim is for more then $5000, then the GCMCA's area claims office will perform the legal review. The GCMCA's SJA will then determine whether the GCMCA's final action as the convening authority of a court-martial under the provisions of *Rule for Courts-Martial* 1107 would be compromised.

Assessment

When an approving authority determines that a claim has merit, the DFAS must assess the pay of the soldier who committed the wrong to pay restitution to the claimant. On receipt of the Article 139 assessment, the servicing finance officer will withhold the amount directed by the approval authority.[73] The assessment is binding on the finance officer and not subject to appeal. However, the assessment is subject to limitations in the finance regulations. If the finance officer to whom the assessment is directed cannot withhold the soldier's pay because the finance officer does not have the soldier's pay record or the soldier is in a no-pay-due

---

[67] *Id.* para. 3-6c(4). *See also* 10 U.S.C.A. § 1219 (1984 & Supp. 1995).

[68] *Id.* para. 3-6c(2).

[69] *Id.* para. 3-6c(6).

[70] *Id.* para. 3-6c(7).

[71] DA PAM 27-162, *supra* note 17, para. 10-5e(4).

[72] The responsibilities of the claims office supporting the special courts-martial convening authority are set forth at *Army Regulation 27-20*, paragraph 9-7e. *Supra* note 4.

[73] *Id.* para. 9-7g.

status, then the finance officer must promptly notify the approval authority of this fact in writing.

Post Settlement Action

After action on the claim is completed, the claims office servicing the command that took final action on an Article 139 claim will retain the original file and forward a complete copy of the file to the SPCMCA.[74] The claim will be filed locally, per the Modern Army Record Keeping System (MARKS), *Army Regulation 25-400-2*. If a claim was processed under the Personnel Claims Act (*Army Regulation 27-20*, Chapter 11), then a copy of the Article 139 claim file will be incorporated into the Chapter 11 claim file.

Remission of Indebtedness

By statute and regulation, an enlisted soldier is entitled to seek a remission of a debt owed to the United States government.[75] In an Article 139 claim, the debt is owed to the claimant. Because the United States and its instrumentalities lack standing to pursue an Article 139 claim, the United States can never be the entity under Article 139 to whom money is owed. Remission of indebtedness procedures do not apply to Article 139 claims, and a soldier cannot be relieved of his obligation through the remission of indebtedness process.[76]

Conclusion

Article 139 claims provide a fast and efficient way for commanders to redress wrongs involving the theft or destruction of property caused by soldiers under their command. When properly utilized, such claims have the effect of maintaining good relations with the civilian community and improve the morale of aggrieved soldiers. By understanding and publicizing the Article 139 process, claims judge advocates can help foster fairness, improve morale, and military and civilian community relations in support of the chain of command. Captain Koonin.

---

[74] *Id.* para. 9-7h.

[75] *See generally* 10 U.S.C.A. 4837(d) (1984 & Supp. 1995); DEP'T OF ARMY, REG. 37-104-4, FINANCIAL ADMINISTRATION: MILITARY PAY AND ALLOWANCES POLICY AND PROCEDURES-ACTIVE COMPONENT, chs. 20, 32 (30 Sept. 1994); DEP'T OF ARMY, REG. 600-4, PERSONNEL-GENERAL: REMISSION OR CANCELLATION OF INDEBTEDNESS FOR ENLISTED MEMBERS (1 Dec. 1983).

[76] *See* Army Regulation 27-20, *supra* note 4, para. 9-7i.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Academic Year 1995-1996 Judge Advocate Triennial Training and Judge Advocate Officer Advanced Course, Phase II

Academic Year 1995-1996 Judge Advocate Triennial Training (JATT) and the Judge Advocate Officer Advanced Course (JAOAC), Phase II, will be conducted at The Judge Advocate General's School in Charlottesville, Virginia, beginning 16 June 1996 and ending on 28 June 1996. Officers desiring to attend JAOAC must complete Phase I (Nonresident) portion before 24 May 1996. No exceptions will be granted unless in cases of extreme hardship. Officers attending both courses must meet the height and weight standards prescribed in *Army Regulation 600-9*. Officers must also bring a valid DA Form 705, Army Physical Fitness Test Score Card, which shows a passing score within the previous twelve months or be prepared to take and pass the Army Physical Fitness Test within the first week of the course. The subject areas for this year's JATT training are criminal law and operational/international law. The United States Army Training Requirements and Resources System are as follows:

Course	Course Number	Class Number
JATT	5F-F57	096
JAOAC	5F-F55	096

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

Following is an update schedule of The Judge Advocate General's Continuing Legal Education On-Site Schedule. *If you have any questions about the On-Site schedule, please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380.* Major Storey.

THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION ON-SITE TRAINING, ACADEMIC YEAR 96

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
24-25 Feb	Denver, CO 87th LSO Doubletree Inn 13696 East Iliff Pl. Aurora, CO 80014	MAJ Kevin G. MacCary 87th LSO Bldg. 820, Fitzsimons AMC McWethy USARC Aurora, CO 80045-7050 (303) 977-3929
24-25 Feb	Salt Lake City, UT UTARNG National Guard Armory 12953 South Minuteman Dr. Draper, UT 84020	LTC Michael Christensen HQ, UTARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
24-25 Feb	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	MAJ George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
2-3 Mar	Colombia, SC 12th LSO Univ. of South Carolina School of Law Columbia,SC 29208	LTC Robert H. Uehling 12th LSO 5116 Forest Drive Columbia, SC 29206-4998 (803) 790-6104
9-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
16-17 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402 (707) 544-5858
23-24 Mar	Chicago, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION ON-SITE TRAINING, ACADEMIC YEAR 96

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
26-28 Apr Note: 2.5 days	St. Louis, MO 89th RSC/MO ARNG Marriot Pavalion 1 Braodway St. Louis, MO 63102 (314) 421-1776	LTC John O'Mally 8th LSO ATTN: AFRC-AMO-LSO 11101 Independence Ave. Independence, MO 64054 (816)836-7031
4-5 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM Sheraton Grand Hotel 4860 W. Kennedy Blvd. Tampa, FL 33609 (813)286-4400	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 (305) 357-7600

Professional Responsibility Notes

Office of The Judge Advocate General
Standards of Conduct Office

Lawyers Lose Good Standing in Some States by Requesting Inactive Status and Paying Reduced Fees: Army Regulations Require Army Military and Civilian Lawyers to Assure Their Continued Good Standing

Army Rule 5.5
(Unauthorized Practice of Law)

Army Rule 7.1
(Communications Concerning a Lawyer's Services)

Army Rule 8.4
(Falsely Communicating Licensure)

Army Regulation 27-1, Paragraph 13-2h(2), and
Army Regulation 600-8-24, Paragraph 4.2b(9)
(Army Judge Advocates Must Remain in Good Standing)

Army Regulation 690-200
Chapter 213, Subchapter 4, Paragraph 4-5b
(Civilian Attorneys Must Be in Good Standing
As Defined by the Pertinent Bar of a State, Territory,
District of Columbia, or Puerto Rico)

Judge Advocate Publication 1-1:
Personnel Policies, Paragraphs 6-15, 6-16
(Judge Advocates Must Pay Bar Membership Fees)

Army military and civilian lawyers who elect inactive bar status may find that they no longer qualify to practice law in the Army if their states do not recognize inactive members as being in good standing.[1] Army lawyers always have been required to establish their good standing with a bar before being commissioned in The Judge Advocate General's Corps (JAG Corps) or being hired for a civilian position. Now, that requirement extends for the duration of lawyer's Army service.

Three regulations require Army military and civilian lawyers to maintain good standing. The first is *Army Regulation 27-1, Judge Advocate Legal Services*, revised effective 3 March 1995 (*AR 27-1*). Chapter 13, Voluntary Active Duty with the Judge Advocate General's Corps, now affirmatively requires that JAG Corps officers remain members in good standing of the bar of the highest court of a state of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.[2] The second is *Army Regulation 600-8-24, Officer Transfers and Discharges*, effective 1 November 1995 (*AR 600-8-24*), which permits elimination action for officers who lose their professional licenses.[3] Department of the Army civilian attorneys have been under a similar good standing requirement since 1993.[4] In practical terms, Army attorneys must continuously maintain their ability to obtain a certificate of good standing.

The definition of good standing varies among the states. In some states, inactive members are members in good standing. In some states, inactive status members may not be considered in good standing where attorneys request inactive status to qualify for waived or reduced membership fees, disciplinary fees, or fees for mandatory continuing legal education (MCLE).

The clarifying additions to the regulations were promulgated to prevent recurrence of bar membership issues that first surfaced with the Pennsylvania Bar. In one case, the Standards of Conduct Office (SOCO) notified the state that The Judge Advocate General (TJAG) had disciplined an Army civilian attorney who, according to Army records, was a member of the Pennsylvania Bar. Pennsylvania Bar officials responded that the attorney had been registered as "involuntarily inactive," paying no fees for more than twenty years. In a second case, TJAG received an allegation that an officer's good standing had lapsed for nonpayment of mandatory fees. In two additional cases, Pennsylvania would not issue Army attorneys certificates of good standing because the attorneys had elected inactive status.

Indiana also provides an instructive example. Inactive status in Indiana is elected by filing an affidavit stating that the attorney is not practicing law in Indiana. Inactive status allows an attorney to remain on the Indiana Supreme Court's roll of attorneys, subject to reactivation at a later date. Attorneys who elect inactive status are not required to pay Indiana's annual disciplinary fee; however, they also are not considered in good standing under the state's admission and discipline rules.[5] On the other hand, Utah and Kansas have recently certified Army lawyers as being in good standing even though they are presently in "inactive" status.[6]

---

[1] Memorandum, Subject: "In Good Standing" Bar Membership, DA OTJAG Personnel Management Office (2 Jun 95) (copy maintained at Office of The Judge Advocate General, United States Army, Standards of Conduct Office, Washington, D.C.).

[2] DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES, ch. 13 (3 Feb. 1995).

Most attorneys are members of the states, the District of Columbia, or Puerto Rico. Furthermore, members of the established bars of the United States Virgin Islands, American Samoa, and Guam also traditionally qualify for service with The Judge Advocate General's Corps. Pending updates to *Army Regulation 27-1* and the Army's two commissioning regulations, the updates recited below are expected to enumerate specifically the bar of the Commonwealth of Puerto Rico and generally refer to "the territories." The updates will dispense with the "federal court" option (evidently originally intended to include attorneys practicing in the territories), thereby avoiding any mistaken interpretation that mere federal court admission will satisfy the good standing requirement.

The two commissioning regulations to be updated are, as follows: DEP'T OF ARMY, REG. 601-100, PERSONNEL PROCUREMENT: APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY, para. 2-51c (1 Sept. 1981) (now reading: "Be admitted to practice before the highest court of a State or a Federal court; and be in good standing before the bar."); DEP'T OF ARMY, REG. 135-100, ARMY NATIONAL GUARD AND ARMY RESERVE: APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS OF THE ARMY, para. 3-13a(2) (1 Feb. 1984) (now requiring applications to include a certificate or statement from the highest court of a state or a federal court showing admission to practice and current standing).

[3] Elimination action may be initiated for "[c]onduct or actions that result in the loss of a professional status, such as withdrawal, suspension or abandonment of professional license, endorsement, or certification that is directly or indirectly connected with or is necessary for the performance of one's military duties." DEP'T OF ARMY, REG. 600-8-24, PERSONNEL-GENERAL: OFFICER TRANSFERS AND DISCHARGES, para. 4-2b(9) (21 July 1995).

[4] DEP'T OF ARMY, REG. 690-200, CIVILIAN PERSONNEL: GENERAL PERSONNEL PROVISIONS, ch. 213, subch. 4, para. 4-5b (3 Sept. 1993) (IC2) (Department of Army civilian attorney "must be member in good standing (as defined by the pertinent bar) of the bar of a State, territory, the District of Columbia, or the Commonwealth of Puerto Rico.").

[5] Letter from Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court (May 16, 1995) (copy maintained at the Office of The Judge Advocate General, United States Army, Standards of Conduct Office, Washington, D.C.).

[6] Letter from Clerk of the Supreme Court of Kansas (Feb. 21, 1995) (copy maintained at the Office of The Judge Advocate General, United States Army, Standards of Conduct Office, Washington, D.C.); letter from Admissions Administrator, Utah State Bar (Mar. 2, 1995) (copies maintained at The Judge Advocate General's Office Standards of Conduct Office, Washington, D.C.).

In addition to good standing issues, electing inactive status may have unexpected and undesirable consequences for an Army attorney. Texas denied a retiring Army attorney admittance under its reciprocity rules. Texas would not credit the attorney with any of the many years of inactive status that the attorney had with another state bar when calculating the mandatory minimum number of years of non-Texas bar membership.

Illinois permits active military lawyers to register without a fee and grants registration with a greatly reduced fee for civilian attorneys who neither practice in, reside in, nor are employed in the state. Nonregistration, however, will cause removal of an attorney from the master roll. A removed person who holds himself or herself out as being authorized to practice law in the state is engaged in the unauthorized practice of law and may be held in contempt of the Supreme Court of Illinois.

A Mississippi attorney electing inactive status pays reduced annual fees but may not represent that he or she is licensed to practice law in the state. An inactive Mississippi attorney is prohibited from practicing law in the state until he or she complies with the requirements for active status.

> Since a layman could reasonably believe that being "licensed and admitted to practice in Mississippi" means that the attorney is presently able to counsel on matters involving Mississippi law, when in fact said attorney is prohibited from such action, then the communication would be a material misrepresentation of fact and/or likely to create an unjustified expectation about results the lawyer can achieve, all as prohibited by Rule 7.1.[7]

However, reacquiring good standing may entail more difficulty than merely writing out a check for the current year's fees. For example, Illinois imposes a reinstatement fee of $10.00 per month for each month that a fee is delinquent. West Virginia requires an applicant for active status to have completed twelve hours of MCLE within the preceding twelve months.[8]

The SOCO is currently compiling information to help Army lawyers better understand the myriad of bylaws, rules, regulations, and statutes of the various state bars. A compendium of state-by-state good standing requirements will be complied and published as soon as it becomes available from bar officials.

In the meantime, Army attorneys are responsible for assuring that they have current good standing. If not, then they must immediately qualify or requalify themselves. Lieutenant Colonel Neveu and Mr. Eveland.

---

[7] Ethics Committee of the Mississippi State Bar, Opinion 150 (1988).

[8] *Rules and Regulations of the West Virginia State Bar*, ch. VII, at 9; Community on Legal Ethics of the West Virginia State Bar v. Berzito, 1994 W. Va. LEXIS 127 (1994).

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

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

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

2. TJAGSA CLE Course Schedule

1996

January 1996

8-12 January:	1996 Government Contract Law Symposium (5F-F11).
9-12 January:	USAREUR Tax CLE (5F-28E).
22-26 January:	48th Federal Labor Relations Course (5F-F22).
22-26 January:	23d Operational Law Seminar (5F-47).
31 January - 2 February:	2d RC Senior Officers Legal Orientation Course (5F-F3).

February 1996

5-9 February:	134th Senior Officers' Legal Orientation Course (5F-Fl).
5 February - 12 April:	139th Basic Course (5-27-C20).
12-16 February:	PACOM Tax CLE (5F-F28P).
12-16 February:	62d Law of War Workshop (5F-F42).
12-16 February:	USAREUR Contract Law CLE (5F-Fl8E).
26 February - 1 March:	38th Legal Assistance Course (5F-F23).

March 1996

4-15 March:	136th Contract Attorneys' Course (5F-Fl0).
18-22 March:	20th Administrative Law for Military Installations Course (5F-F24).
25-29 March:	1st Contract Litigation Course (5F-F102).

April 1996

1-5 April:	135th Senior Officers' Legal Orientation Course (5F-F1).
15-19 April:	1996 Reserve Component Judge Advocate Workshop (5F-F56).
15-26 April:	5th Criminal Law Advocacy Course (5F-F34).
22-26 April:	24th Operational Law Seminar (5F-F47).
29 April- 3 May:	44th Fiscal Law Course (5F-F12).
29 April- 3 May:	7th Law for Legal NCOs' Course (512-71D/20/30).

May 1996

13-17 May:	45th Fiscal Law Course (5F-F12).
13-31 May:	39th Military Judge Course (5F-F33).
20-24 May:	49th Federal Labor Relations Course (5F-F22).

June 1996

3-7 June:	2d Intelligence Law Workshop (5F-F41).
3-7 June:	136th Senior Officers' Legal Orientation Course (5F-F1).
3 June - 12 July:	3d JA Warrant Officer Basic Course (7A-550A0).
10-14 June:	26th Staff Judge Advocate Course (5F-F52).
17-28 June:	JATT Team Training (5F-F57).
17-28 June:	JAOAC (Phase II) (5F-F55).

July 1996

1-3 July:	Professional Recruiting Training Seminar
1-3 July:	27th Methods of Instruction Course (5F-F70).
8-12 July:	7th Legal Administrators' Course (7A-550A1).
8 July - 13 September:	140th Basic Course (5-27-C20).
22-26 July:	Fiscal Law Off-Site (Maxwell AFB) (5F-12A).
24-26 July:	Career Services Directors Conference.

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

29 July - 8 May 1997:. 45th Graduate Course (5-27-C22)

30 July - 2 August: 2d Military Justice Managers' Course (5F-F31).

August 1996

12-16 August: 14th Federal Litigation Course (5F-F29).

12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).

19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).

19-23 August: 63d Law of War Workshop (5F-F42).

26-30 August: 25th Operational Law Seminar (5F-F47).

September 1996

4-6 September: USAREUR Legal Assistance CLE (5F-F23E).

9-13 September: 2d Procurement Fraud Course (5F-F101).

9-13 September: USAREUR Administrative Law CLE (5F-F24E).

16-27 September: 6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1996

February 1996

12-14, GI: Environmental Laws and Regulations Compliance Course, San Antonio, TX

15-17, NITA: Deposition Skills Programs: Pacific Deposition, San Diego, CA

22 - 3 March, NITA: Basic Trial Skills Programs, Fort Lauderdale, FL

March 1996

6-8, NITA: Deposition Skills Programs: Southeast Deposition, Chapel Hill, NC

15, NITA: Discovering the Secrets of Effective Depositions, Las Vegas, NV

15-24, NITA: Basic Trial Skills Programs, Chicago, IL

22-24, NITA: Advocacy Teach Training Programs, Cambridge, MA

25-27, GI: Environmental Laws and Regulations Compliance Course, Jackson Hole, WY

July 1996

21-26, APA: 31st Annual Seminar/Workshop, New Orleans, LA

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744 (800) 521-8662.

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3203
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, N.W., Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510 (800) 727-1227.

LSU: Louisiana State University
Center of Continuing Professional Development Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482
(612) 644-0323 in (MN and AK).

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774

PLI: Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually

Jurisdiction	Reporting Month
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	Prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	End of two-year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

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

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

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

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. These publications are for government use only.

Contract Law

*AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

*AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance, JA-261(93) (293 pgs).

AD A281240 Office Directory, JA-267(94) (95 pgs).

AD B164534 Notarial Guide, JA-268(92) (136 pgs).

AD A282033 Preventive Law, JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide, JA-260(93) (206 pgs).

AD A297426 Wills Guide, JA-262(95) (517 pgs).

AD A268007 Family Law Guide, JA 263(93) (589 pgs).

AD A280725 Office Administration Guide, JA 271(94) (248 pgs).

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

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

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

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

Administrative and Civil Law

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

*AD A301061 Environmental Law Deskbook, JA 234(95) (268 pgs).

*AD A298443 Defensive Federal Litigation, JA-200(95) (846 pgs).

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

*AD A298059 Government Information Practices, JA-235(95) (326 pgs).

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

Labor Law

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

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

Developments, Doctrine, and Literature

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

Criminal Law

AD A274406 Crimes and Defenses Deskbook, JA 337(94) (191 pgs).

AD A274541 Unauthorized Absences, JA 301(95) (44 pgs).

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

*AD A274628 Senior Officers Legal Orientation, JA 320(95) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA 310(95) (390 pgs).

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

International and Operational Law

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

Reserve Affairs

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

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. 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.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(*1*) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(*2*) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

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

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

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community by providing the Army and other Department of Defense (DOD) agencies access to the LAAWS BBS. Whether you have Army access or DOD-wide access, all users may download The Judge Advocate General's School, United States Army (TJAGSA), publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

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

(a) Active duty Army judge advocates;

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

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

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

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

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

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

(h) Individuals with approved, written exceptions to the access policy. Requests for exceptions to the access policy should be submitted to:

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

(2) DOD-wide access to the LAAWS BBS currently is restricted to all DOD personnel dealing with military legal issues (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791).

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation.

d. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours.

e. *The Army Lawyer* will publish information on new publications and materials available through the LAAWS BBS.

4. Instructions for Downloading Files from the LAAWS BBS

Instructions for downloading files from the LAAWS BBS are currently being revised. If you have a question or a problem with the LAAWS BBS, leave a message on the BBS. Those personnel needing uploading assistance may contact SSG Aaron P. Rasmussen at (703) 806-5764.

5. TJAGSA Publications Available Through the LAAWS BBS

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

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	April 1995	1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995.

FILE NAME	UPLOADED	DESCRIPTION
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.

FILE NAME	UPLOADED	DESCRIPTION
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	November 1995	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	November 1995	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	November 1995	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	November 1995	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	November 1995	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.

FILE NAME	UPLOADED	DESCRIPTION
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

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

Requests must be accompanied by one 5¹/4-inch or 3¹/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

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

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

5. Articles

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

Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WILLIAM AND MARY L. REV. 199 (1995).

John S. Applegate, *Witness Preparation*, 39 DEF. L. J. 457 (1995).

Richards J. Heuer, Drug Use and Abuse: Background Information for Security Personnel, 24 POLYGRAPH 151 (1995).

Walter E. Jordan, Judge, *A Trial Judge's Observation About Voir Dire Examination*, 30 DEF. L. REV. 223 (1995).

Paul J. Routh, *Liabilities of Tax Preparers: An Overview*, 34 DEF. L. J. 497 (1995).

Dennis R. Suplee, *Depositions—Objectives, Strategies, Tactics, Mechanics and Problems*, 32 DEF. L. REV. 425 (1995).

Terry J. Tondro, *Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789 (1995).

Jay Ziskin, *Cross-Examination of the Quantitative Expert*, 32 DEF. L. J. 259 (1995).

6. TJAGSA Information Management Items

Thanks to design and funding of a new *Novell* local area network (LAN) by the Office of the Judge Advocate General Information Management Office, TJAGSA is nearly finished upgrading and installing more than 200 faculty, staff, and classroom computers on the LAN. With the installation of a T-1 circuit, originally planned for November 1995, TJAGSA will be connected to the Office of the Judge Advocate General wide area network (WAN) and subsequently to the rest of the Department of Defense and the Internet. Electronic mail addresses for the TJAGSA staff and faculty will be published as soon as we are up on the WAN. Training on the new MicroSoft Office Software has been conducted and users are supportive of the transition. Future plans include moving into CD-ROM technology, continuing hardware upgrades, and adding fax server capability for all users.

In November, TJAGSA installed an electronic multimedia imaging center (EMIC). This system greatly enhances our ability to produce photographic imaging products and provides the platform for integrating multimedia into traditional visual information operations. The imaging is in a digital format on a Pentium 90 computer, which produces presentation graphics. This system accommodates and shares large (90 to 120 megabyte) files with other EMIC facilities. The system also allows photo manipulation with compact disc read and write capability.

Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or division. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

7. Articles

The following may be useful to judge advocates.

* James T. Richardson, Gerald P. Ginsburg, Sophia Gatowski, and Shirley Dobbin, *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995).

and Shirley Dobbin, *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995).

* International Committee of the Red Cross, 304 INT'L REV. RED CROSS, Jan-Feb 1995 (containing a variety of articles dealing with the protection of war victims and the implementation of international humanitarian law).

8. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources available for redistribution should contact Ms. Nell Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

* Military Justice Reporter, Vols 1 through 40, 3 Sets.

Office of the Judge Advocate General
2200 Army Pentagon
Attn: Christine M. Balog
Washington, D.C. 20310-2200
COM (703)695-5468
DSN 225-5468/6433

* USCA, Title 42 2011-2700, 2701- 3700, and 3701-4540, and 1995 Pocket Parts for Titles 19-50

HQ, U.S. Army
Special Operations Command
Attn: AOJA (CW2 Teresa A. Sicinski)
Fort Bragg, N.C. 28307-5200
COM (910)432-5058
DSN 239-5058

* Courts-Martial Reports, Vols 1 - 50 (1 set)

* Military Justice Reporter, Vols 1-32, (1 set)

* US Tax Cases

Vols 58-1, 58-2	Vol 75-2
Vols 59-1, 59-2	Vols 76-1, 76-2
Vols 60-1, 60-2	Vol 77-1
Vols 61-1, 61-2	Vols 78-1, 78-2
Vols 62-1, 62-2	Vols 79-1, 79-2
Vols 63-1, 63-2	Vol 80-1
Vols 64-1, 64-2	Vols 81-1, 81-2
Vols 65-1, 65-2	Vols 82-1, 82-2
Vols 66-1, 66-2	Vols 83-1, 83-2
Vols 67-1, 67-2	Vol 84-1
Vols 68-1, 68-2	Vols 85-1, 85-2
Vols 69-1, 69-2	Vols 86-1, 86-2
Vols 70-1, 70-2	Vols 87-1, 87-2
Vols 71-1, 71-2	Vol 88-1
Vols 72-1, 72-2	Vol 90-1
Vols 73-1, 73-2	Vol 91-1
Vol 74-1	Vol 92-1
Vol 93-1	

Yongsan Law Center
US Army Legal Services Activity-Korea
Unit #15322
Attn: FKJA-LS (Mr. Steve Neuenschwander)
APO AP 96205-0009
DSN 315-738-3233

Subject Index

The Army Lawyer
January 1995—December 1995

-A-

ANTIDEFICIENCY ACT

Violations of the Antideficiency Act: Is the Army Too Quick to Find Them?, MAJ Paul D. Hancq, July 1995, at 30.

ARMED FORCES, see also NATIONAL GUARD

Federal Representation of National Guard Members in Civil Litigation, MAJ Michael E. Smith, Dec. 1995, at 41.

Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases, The Honorable Sam Nunn, Jan. 1995, at 27.

Neither Man nor Beast: The National Guard Technician, Modern Day Military Minotaur, MAJ Michael J. Davidson & MAJ Steve Walters, Dec. 1995, at 49.

-C-

CIVILIANS

Exploring the Limits of Westfall Act Immunity, MAJ Christopher J. O'Brien, Aug. 1995, at 8.

Author Index

The Army Lawyer
January 1995--December 1995

Index of Legal Assistance Items

The Army Lawyer
January 1995-December 1995

ALLOTMENT

Involuntary Allotment Defenses, May 1995, at 71.

CASUALTY ASSISTANCE NOTE

Legal Aspects of Mass Casualty Operations: Lessons Learned in Support of the Pope Air Force Base Disaster, June 1995, at 58.

CHILD SUPPORT

Child Support Enforcement Against Military Personnel, Sept. 1995, at 28.

CLIENT SERVICES

Reports of Survey: An Overlooked Limit on Liability for Loss of Damage to Government Property, Mar. 1995, at 40.

CONSUMER LAW

Door-to-Door Sales; The Telemarketing Rule, Dec. 1995, at 68.

Involuntary Allotment Defenses, May 1995, at 71.

Fair Debt Collection Practices, June 1995, at 55.

DIVORCE

Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce?, Oct. 1995, at 28.

EARNED INCOME CREDIT

Earned Income Credit, Sept. 1995, at 29.

ESTATE PLANNING see also TAX

Earned Income Credit, Sept. 1995, at 29.

Internal Revenue Service Issues Final Regulations on Moving Expenses, Oct. 1995, at 28.

FAIR DEBT COLLECTION ACT, see also CONSUMER LAW

Fair Debt Collection Practices, June 1995, at 55.

FAMILY LAW

Child Support Enforcement Against Military Personnel, Sept. 1995, at 28.

Drafting a Separation Agreement? Don't Forget the Survivor Benefit Plan!, Dec. 1995, at 71.

Family Law Agreement—Exploring Their Limits, May 1995, at 70.

Medical and Dental Care for Wards and Preadoptive Children, Dec. 1995, at 70.

Property Accumulation During Separation, Jan. 1995, at 67.

Property Distribution—The Impact of Premarital Cohabitation, Mar. 1995, at 39.

Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce?, Oct. 1995, at 28.

Resolving Paternity and Nonsupport Allegations—No Easy Way Out, Dec. 1995, at 71.

Smoking and Child Custody Determinations, Jan. 1995, at 68.

Smoking and Child Custody Determinations—Part II, Mar. 1995, at 40.

Texas Amends Law to Permit Alimony . . . Sometimes!, Oct. 1995, at 27.

USFSPA Update—Using Formula Clauses to Define the Former Spouse's Share of Disposable Retired Pay, June 1995, at 53.

When is Property Not Really Property?, Sept. 1995, at 28.

LEGAL ASSISTANCE

1994 Chief of Staff Award for Excellence in Legal Assistance, June 1995, at 53.

Army Legal Assistance: Update, Initiatives, and Future Challenges, COL Alfred F. Arquilla, Dec. 1995, at 3.

MOBILIZATION AND DEPLOYMENT

LAAWS Competence—A Readiness Issue, Sept. 1995, at 29.

MOVING EXPENSES

Internal Revenue Service Issues Final Regulations on Moving Expenses, Oct. 1995, at 28.

PREVENTIVE LAW

Innovation—Creating Interest and Enthusiasm in Your Preventive Law Program, Oct. 1995, at 26.

*U.S. Government Printing Office: 1996 - 404-577/20008

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:

Yvonne M. Harrison

YVONNE M. HARRISON
Administrative Assistant to the
Secretary of the Army
01091

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

PIN: 047298-000