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Affirmative Action in Procurement: A Preview of the Post-*Adarand* Regulations in the Context of an Uncertain Judicial Landscape

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Introduction

Great media interest accompanied the spring 1997 publication of the Clinton Administration's proposed approach for addressing affirmative action in federal procurement.¹ On 9 May 1997, the Federal Acquisition Regulation Council published in the Federal Register proposed rules intended to "mend, not end" affirmative action in federal procurement.² On the same day, the Department of Justice (DOJ) published an accompanying notice which addressed more than a thousand comments raised in response to the DOJ's proposed reforms,³ which were published the preceding year.⁴

Although affirmative action in federal procurement is not new,⁵ the recently proposed regulatory scheme has been more than two years in the making. Given the scope of the changes and the underlying need for the change, the elapsed time is

understandable. Throughout this period, various interest groups have watched the development of the rules with keen interest. When these proposed rules become final, they will dramatically alter the procedure through which the government provides expanded opportunities for small disadvantaged businesses (SDBs) to gain access to federal procurement awards. When implemented, the new procedures will merit attention by procurement attorneys due to the ongoing controversy surrounding the topic they address;⁶ the introduction of innovative solutions intended to survive intense judicial scrutiny; and the high-profile, ongoing litigation that prompted the need for revised rules.

This article introduces the proposed regulatory scheme in the context in which the rules were prepared; discusses the judicial decisions (focusing primarily on *Adarand Constructors, Inc. v. Peña*⁷) that led the government to embark upon its effort

1. See Stephen Barr, *Contracting Rule Changes to Affect Minority Firms*, WASH. POST, May 7, 1997, at A19; John M. Broder, *U.S. Readies Rules Over Preferences Aiding Minorities*, N.Y. TIMES, May 6, 1997, at A1 (Washington Final Ed.); Laurie Kellman, *Race, Sex Preferences on Contracts Survive*, WASH. TIMES, May 7, 1997, at A1; Hilary Stout & Eva M. Rodriguez, *Government Contracts to Minority Firms Increase Despite Court's 1995 Curb on Affirmative Action*, WALL ST. J., May 7, 1997, at A20; *Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences In Contract Actions*, 67 FED. CONT. REP. 547 (BNA May 12, 1997); *FAR Proposal Adopts Price Evaluation Adjustment to Benefit SDBs*, 39 GOV'T CONT. ¶ 240 (May 14, 1997).

2. Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,786 (1997).

3. Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648 (1997).

4. 61 Fed. Reg. 26,042 (1996).

5. The Department of Defense (DOD) has afforded preferences to small disadvantaged business (SDBs) by statute since 1987. The defense authorization and/or appropriations acts of 1987 and the following years have established the goal that five percent of all the DOD procurements be awarded to SDB concerns, which include historically black colleges and universities and other minority institutions. In order to meet the five percent goal, Congress authorized the DOD to use less than full and open competition and price preferences not to exceed ten percent. See, e.g., 10 U.S.C. § 2323, formerly Pub. L. No. 99-661, § 1207 (10 U.S.C. § 2301); see also U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 226.7003 (Apr. 1, 1984) [hereinafter DFARS]. In 1994, through the Federal Acquisition Streamlining Act, Congress extended the authority in section 2323 to all agencies. Pub. L. No. 103-355, § 7102, 108 Stat. 3243 (1994) (codified at 15 U.S.C. § 644 note). Regulations to implement this new statutory authority were delayed because of *Adarand* and the corresponding effort to review Federal affirmative action regulations. See, 60 Fed. Reg. 48,258, 48,259 (1995).

6. For a discussion of recent, related proposed legislation, see *Bill to Ban Contracting Preferences Wins House Judiciary Panel Approval Along Party Lines*, 68 FED. CONT. REP. 28 (BNA July 14, 1997) and *GOP Legislators Renew Campaign to Ban Racial Preferences in Government Programs*, 67 FED. CONT. REP. 740 (BNA June 23, 1997).

7. 115 S. Ct. 2097 (1995). Regardless of the significance one attaches to the *Adarand* decision, the practitioner should be acquainted with some of the post-*Adarand* decisional law which interprets and applies the landmark decision.

to redefine its methodology for promoting affirmative action through federal procurement; highlights recent judicial decisions that have applied *Adarand* in the context of federal procurement and may have complicated the landscape upon which the new rules will be imposed; provides an overview of the proposed rules; and offers a number of considerations for the practitioner in anticipation of the promulgation of the new rules.

Adarand: A Landmark Case Alters the Existing Landscape

On 12 June 1995, the United States Supreme Court issued its landmark opinion in *Adarand Constructors, Inc. v. Peña*.⁸ Some legal commentators believe that *Adarand* was the most significant decision to address a social issue since *Brown v. Board of Education*.⁹ Others believe that *Adarand* is simply the logical extension of the Supreme Court's holding in *City of Richmond v. J.A. Croson Co.*,¹⁰ in which the Court applied a strict scrutiny standard of review to a local, race-based affirmative action measure.¹¹ In *Adarand*, the Court arguably applied the same standard to a federal program.¹²

The underlying facts of *Adarand* are rather straightforward. In 1989, the Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (Mountain Gravel).¹³ Mountain Gravel then solicited bids for the guardrail work under the contract.¹⁴ *Adarand Constructors, Inc.*, a Colorado-based highway construction contractor, submitted the low bid for the work.¹⁵ Gonzales Construction Company (Gonzales) also submitted a bid for the project.¹⁶

The prime contract between Mountain Gravel and the CFLHD granted Mountain Gravel additional compensation if it retained subcontractors for the project which were small businesses controlled by "socially and economically"¹⁷ disadvantaged individuals. Gonzales was certified as such a business; *Adarand* was not.¹⁸

Despite *Adarand's* low bid, Mountain Gravel awarded the subcontract to Gonzales.¹⁹ The Chief Estimator of Mountain Gravel submitted an affidavit to the Court stating that it would have accepted *Adarand's* bid had it not been for additional payment it received by hiring Gonzales instead.²⁰

8. *Id.*

9. 347 U.S. 483 (1954). See William T. Coleman, *Adarand and Its Aftermath, How the Supreme Court Overestimated Precedent and Underestimated the Impact of Its Decision*, 31 PROCUREMENT LAW. 12 (Winter 1996). In his article, Mr. Coleman, General Counsel for the United States Army, noted:

[T]he Supreme Court's analysis was off the mark, and more importantly for the procurement community, it appears that the Court gave no thought to the impact of the decision. With billions of procurement dollars riding in the balance, policymakers, regulation writers, and procurement officials are faced with the daunting task of reengineering a massive set of programs under the Supreme Court's guidelines that would have been better left to the more flexible give-and-take of legislative rulemaking procedures.

Id. at 12. See also, Margery Newman, *Affirmative Action and the Construction Industry*, 25 PUB. CONT. L.J. 433, 448 (1996) ("Actually, *Adarand* may beg more questions than it answers."); Reba Cecilia Heggs, *Practitioner's Viewpoint: What to Expect After Adarand*, 25 PUB. CONT. L.J. 451, 456 (1996) ("The most probable effect will be increased work for agency attorneys and private counsel litigating both sides of an unresolved social and legal issue."); Devon E. Hewitt, *Adarand: Misplaced Politics in the Courts*, 30 PROCUREMENT LAW. 1 (Spring 1995); *Adarand: New Law Needed?*, 30 PROCUREMENT LAW. 19 (Spring 1995).

10. 488 U.S. 469 (1989).

11. *Id.*

12. See 48 C.F.R. §§ 19.001, 19.703(a)(2) (1996).

13. *Adarand*, 115 S. Ct. at 2101.

14. *Id.*

15. *Id.*

16. *Id.*

17. "[S]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(C)(5) (1994). "[E]conomically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A).

18. *Adarand*, 115 S. Ct. at 2101.

19. *Id.*

Subcontracting plans similar to the one included in the contract between Mountain Gravel and the CFLHD are required in many federal agency contracts. Additionally, federal law requires that the clause specifically state that “the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.”²¹

Adarand: Arguments and Findings

After losing the guardrail contract to Gonzales, Adarand filed suit in the United States District Court for the District of Colorado. Adarand argued that the presumption set forth in the Small Business Act “discriminates on the basis of race in violation of the Federal Government’s Fifth Amendment obligation not to deny anyone equal protection of law.”²² The government disagreed, and the district court granted the government’s motion for summary judgment.²³ Adarand appealed the district court’s decision to the Tenth Circuit, which affirmed the lower court’s ruling.²⁴ The United States Supreme Court granted certiorari.

In a five-to-four decision, the Supreme Court vacated and remanded the case. The Court declared that all racial classifi-

cations by government actors, whether benign or pernicious, must be analyzed by a reviewing court using a “strict scrutiny” standard.²⁵ Only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster.²⁶ With *Adarand*, the Supreme Court overruled its decision from five years earlier in *Metro Broadcasting, Inc. v. FCC*.²⁷

Anticipating possible repercussions, Justice O’Connor, author of the majority opinion in *Adarand*, stated:

Because our decision today alters the playing field in some important respects, we think it is best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be narrowly tailored to achieve [their] significant governmental purpose of providing subcontracting opportunities for small disadvantaged enterprises The Court of Appeals did not decide the question of whether the interests served by the use of subcontracting compensation clauses are properly described as “compelling.” It also did not address the question of narrow tailor-

20. *Id.*

21. *Id.* at 2103.

22. *Id.* at 2101.

23. *Adarand Constructors, Inc. v. Skinner*, 709 F. Supp. 240 (D. Colo. 1992).

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

25. *Adarand*, 115 S. Ct. at 2113. To survive the strict scrutiny standard, the classification must be tested by two prongs. First, there must be a compelling government interest for the racial or ethnic classification. That is, what is the government’s reason for using a racial or ethnic classification? Second, in addition to advancing a compelling government goal or interest, any governmental use of race must be narrowly tailored. Put another way, the strict scrutiny test means:

[T]he justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a “compelling” or “overriding” end—one whose value is so great that it justifies the limitation of fundamental constitutional values.

. . . .

Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote the compelling interest. Although absolute necessity might not be required, the justices will require the government to show a close relationship between the classification and promotion of a compelling or overriding interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee

RONALD D. ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 18.3 (1986).

26. *Adarand*, 115 S. Ct. at 2097.

27. 497 U.S. 547, 567-68 (1990). In *Metro Broadcasting Inc.*, the Court “relied on *Bakke* and Justice Stevens’ vision of affirmative action” to uphold FCC affirmative action programs in the licensing of broadcasters on nonremedial grounds; the Court said that “diversification of ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation’s radio and television airwaves.” *Id.*

ing in terms of our strict scrutiny cases, by asking, for example whether there was “any consideration of the use of race-neutral means to increase minority participation in government contracting [citation omitted], or whether the program was appropriately limited such that it “will not last longer than the discriminatory effects it is designed to eliminate”²⁸

Even though the Supreme Court announced the appropriate standard to apply to race-based classifications (i.e., “strict scrutiny”), it did not address the underlying merits of the case itself.²⁹ As discussed below, the district court recently published its decision on the remand in *Adarand*. In the intervening two years, however, the Court’s *Adarand* decision served as the foundation for a number of subsequent cases and the proposed regulations discussed below. Several federal courts have taken tentative steps to apply the strict scrutiny standard to federal acquisitions.³⁰ In most of these cases, however, the plaintiffs lacked standing to challenge the constitutionality of a particular program under *Adarand*.³¹

On Remand, Adarand Obtains Summary Judgment

In early June 1997, on remand from the United States Supreme Court, the United States District Court for the District of Colorado granted summary judgment in favor of *Adarand*.³² As discussed above, in its landmark 1995 decision, the Supreme Court held that all programs imposing race-based

classifications must be adjudicated under the strict scrutiny standard. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.³³

In his seventy-one page decision on remand, Judge John L. Kane, Jr. summarized the underlying facts³⁴ and then embarked upon an in-depth discussion and analysis. The core issue was the application of the strict scrutiny test, and Justice O’Connor had framed the issue:

[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws [under the Fifth or Fourteenth amendment] has not been infringed All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest.³⁵

On remand, Judge Kane concluded that the subcontracting compensation clause program was not sufficiently narrowly tailored to pass the strict scrutiny test.³⁶ Judge Kane, however, in dicta, discussed the application of the compelling interest prong of the strict scrutiny test.³⁷

28. *Adarand*, 115 S. Ct. at 2118 (citation omitted).

29. *Id.* at 2119. The Court, in explaining its rationale for remanding the case, stated that unresolved questions involving complex regulatory regimes implicated by the use of subcontractor compensation clauses needed to be addressed. *Id.* The Court submitted to the lower courts the question of “whether any of the ways in which the government uses subcontractor compensation clauses can survive strict scrutiny.” *Id.* As noted above, Justice O’Connor noted: “Because our decision today alters the playing field in some important respects, we think it is best to remand the case to the lower courts for further consideration in light of the principles we have announced.” *Id.* at 2118.

30. See, e.g., *C.S. McCrossan Co. v. Cook*, No. 95-1345-HB, 1996 WL 310298 (D.N.M. Apr. 2, 1996); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357 (D.D.C. 1996); *Ellsworth Assocs., Inc. v. United States*, 926 F. Supp. 207 (D.D.C. 1996); *Dynalantic Corp. v. Department of Defense*, 937 F. Supp. 1 (D.D.C. 1996).

31. The doctrine of standing serves to “identify those disputes which are appropriately resolved through the judicial process.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In order to meet the jurisdictional requirement for standing, three elements must be established: (1) an “injury in fact,” which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct; and (3) that it is likely, as opposed to speculative, “that injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

32. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997). See generally *Adarand Wins Summary Judgment; Court Says Federal DBE Program Fails Strict Scrutiny Test*, 67 FED. CONT. REP. 687 (BNA June 9, 1997); *District Court Rejects Constitutionality of Affirmative Action Programs in Remand of Adarand*, 39 GOV’T CONT. ¶ 287 (Fed. Pubs. June 11, 1997).

33. *Adarand*, 115 S. Ct. at 2113.

34. *Adarand*, 965 F. Supp. at 1557.

35. *Id.* at 1569 (citing *Adarand*, 115 S. Ct. at 2112).

36. *Id.* at 1570.

37. *Id.* Judge Kane considers such a discussion important “in light of the lacuna left by the Court on the subject when it remanded the case.” *Id.*

The Court Finds A Compelling Interest

In applying the strict scrutiny test, the initial inquiry is whether the interest cited by the government as its reason for injecting the consideration of race is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the governmental actor is concerned.³⁸ Judge Kane commented that the compelling interest inquiry is the linchpin of constitutionality under the strict scrutiny test, and he reasoned that the narrow tailoring prong merits review only when the governmental action under judicial review is shown to be supported by such a compelling interest.³⁹

Adarand argued that the government did not show a compelling interest in the use of race in awarding federal contracts. Adarand asserted that the government admitted that there had been no history of race-based governmental discrimination in awarding construction contracts in Colorado.⁴⁰ Adarand argued, under *Richmond v. J.A. Croson Co.*,⁴¹ that “there must be specific findings of past state-sponsored discrimination before adopting a race-based remedy” More specifically, Adarand contended that there must be particularized findings that the federal government has discriminated on the basis of race in awarding federal highway construction contracts in Colorado.⁴² After detailing the broad array of government responses, the court noted that:

[T]he diametric arguments of the parties concerning what constitutes a compelling governmental interest for Congress and the evidence required to establish such an interest are not surprising. They reflect the [Supreme Court] majority’s failure . . . to define the parameters of Congress’ powers under § 5 of the Fourteenth Amendment “to

enforce, by appropriate legislation, the provisions of this article” Not surprisingly, Justice O’Connor side-stepped this issue of Congress’ acknowledged unique Section 5 powers, since addressing it would have opened a Pandora’s box that would have significantly weakened the notion of congruence.⁴³

Judge Kane explained that “nothing in [*Adarand*] or any other Supreme Court decision persuades me that in subjecting a statutory or regulatory scheme created by Congress to strict scrutiny, one is to ignore Congress’ ability to legislate nationwide to address nationwide problems thus placing it on the same constitutional plane as a city council.”⁴⁴ Nonetheless, Judge Kane reasoned that “Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications.”⁴⁵ After extensive analysis, the court attributed significantly more weight to the government’s record “than to that brushed aside in *Croson*”⁴⁶ and concluded that “Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a ‘compelling governmental interest.’”⁴⁷

Failing the Narrow Tailoring Test

The court was not similarly swayed with regard to the government’s effort to narrowly tailor its program. Finding the subcontracting compensation clause to be a “bonus,” Judge Kane explained that:

To the extent that [a subcontracting compensation clause] payment acts as a gratuity for a prime contractor who engages a [disadvantaged business or DBE], it cannot be said to be narrowly tailored to the government’s interest of eliminating discriminatory barriers.

38. *Id.* According to the court in *Adarand*, compelling interest is the linchpin of constitutionality under strict scrutiny. In *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980), the Court noted that “[a] ‘compelling’ interest is required because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic”

39. *Adarand*, 965 F. Supp. at 1570. In a parenthetical, Judge Kane seemed agitated by the fact that the Supreme Court, in remanding the case, did not “give any meaning to the phrase compelling interest” either by a definition or illustration. *Id.*

40. *Id.*

41. 488 U.S. 469 (1989).

42. *Adarand*, 965 F. Supp. at 1562.

43. *Id.* at 1572 (citations omitted).

44. *Id.* at 1573.

45. *Id.*

46. *Id.* at 1574 (citation omitted).

47. *Id.* at 1576.

ers Where subcontracting to a DBE does not cause an increase in costs, the prime contractor receives additional payment because of a choice based only on race.⁴⁸

The court further found “it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such program is both underinclusive and overinclusive.”⁴⁹ The court further distinguished the disputed program (which lacked individualized inquiries) from the 8(a) program (which mandates inquiry into each participant’s economic disadvantage).⁵⁰ As a result, the court found the challenged affirmative action programs unconstitutional.

Other Courts React to the Supreme Court’s *Adarand* Decision

Dynalantic: *8(a) Under Fire*

In the period between the Supreme Court’s *Adarand* decision and the district court’s decision on remand, federal courts grappled with the prospect of applying the principles of *Adarand*, and several initial cases raised the threshold question of standing. The first case was *Dynalantic Corp. v. Department of Defense*.⁵¹ In that case, the plaintiff, a nonminority-

owned small business, sought an injunction to prevent the Navy from awarding a contract under the Small Business Administration’s (SBA) 8(a) program.⁵² The plaintiff argued that the 8(a) program, with its implementing statute and regulations, violated the Fifth Amendment of the United States Constitution. More specifically, Dynalantic claimed the 8(a) program was a “race-based” program that excluded Dynalantic from competing for the subject procurement (a helicopter trainer project) solely on the basis of race.

The court rejected the plaintiff’s argument. The court held that Dynalantic lacked standing to challenge the constitutionality of the 8(a) program. Initially, the court noted that Dynalantic failed to meet the “injury-in-fact” requirement with respect to the issue of the SBA’s alleged discrimination in administering the 8(a) program.⁵³ The court analogized Dynalantic to *Ray Baillie Trash Hauling, Inc. v. Kleppe*,⁵⁴ the only federal circuit case to squarely address the issue of standing to challenge the constitutionality of the 8(a) program on equal protection grounds.

Just like the plaintiff in *Ray Baillie*, Dynalantic neither applied for the 8(a) program nor did it ever contend that it could satisfy the social or economic disadvantage requirement.⁵⁵ In addition to the injury-in-fact requirement, the court found that Dynalantic lacked standing under the “redressability prong of

48. *Id.* at 1579.

49. *Id.* at 1580.

50. *Id.* at 1580-81.

51. 937 F. Supp. 1 (D.D.C. 1996).

52. *Id.* at 1-2. The court in *Dynalantic* provided a synopsis of the Small Business Administration’s 8(a) program. The court stated:

Under the 8(a) program, the SBA may award government procurement contracts to “socially and economically disadvantaged small business concerns.” 15 U.S.C. § 637(a). A small business concern seeking admission to the 8(a) program must be certified by the SBA as being at least 51 percent owned and controlled by one or more individuals that satisfy the criteria for social and economic disadvantaged status. 15 U.S.C. § 637(4)(A).

. . . .

A business that is certified for entry into the 8(a) program may participate in the program for a maximum period of nine years. 15 U.S.C. § 636(j)(10); 13 C.F.R. § 124.110(a). However, a participant in the 8(a) program may be graduated from the program before the expiration of the nine years if the business substantially achieves its business plan. 13 C.F.R. § 124.208(a). Further, any individual will be deemed ineligible for continued participation in the program if that individual’s personal net worth exceeds \$750,000.

Id. at 2.

53. *Id.*

54. 477 F.2d 696, 710 (5th Cir. 1973). In this case, a white-owned small business never applied for entry into the 8(a) program. In finding that Ray Baillie lacked standing to bring the action, the Fifth Circuit noted:

“[P]laintiff [has] failed to meet . . . [the injury-in-fact] requirement with respect to the issue of SBA’s alleged discrimination in administering the section 8(a) program. The plaintiffs never applied for participation in the section 8(a) program. Furthermore, they do not even contend that they are socially and economically disadvantaged and therefore eligible for participation in the program. Thus, whatever the outcome of the litigation, the plaintiffs will not be directly affected.”

Id. at 710.

55. *Dynalantic*, 937 F. Supp. at 6.

the Article III standing analysis.”⁵⁶ As to “redressability,” it is well established that a court should invalidate only so much of a statute as is necessary.⁵⁷ As the Supreme Court stated in *Buckley v. Valeo*,⁵⁸ “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.”

The court in *Dynalantic* found that if the presumption of social disadvantage was struck down as unconstitutional, the balance of the statutory and regulatory scheme would remain valid. According to the court:

If the presumption of social disadvantage were struck, all applicants to the 8(a) program would be required to demonstrate social disadvantaged status by providing clear and convincing evidence. Further, as is presently the case, an 8(a) applicant would not be certified for participation unless he or she independently demonstrated economic disadvantage. Thus, *Dynalantic*’s alleged injury-in-fact would not be redressed by striking 13 C.F.R. § 124.105(b) since it has failed to allege that it is either socially or economically disadvantaged.⁵⁹

Although the resolution of *Dynalantic* was made on the constitutional principle of standing, the court made several important comments about *Adarand*. First, the court noted that the case raised a number of issues of first impression. Next, the

court observed that the degree to which congressional findings on race-based discrimination are entitled to some “heightened level of deference is not ascertainable at this time.”⁶⁰ Third, in fashioning a remedial program, the court stated, “drawing on antitrust principles, the relevant geographic and product markets that Congress must consider in fashioning a federal remedial program have not been fleshed out.”⁶¹ Finally, the court asked whether Congress had to make specific findings in a particular industry (i.e., military simulator industry) or could Congress rely upon findings of discrimination in the greater defense industry.⁶² These issues were left for future resolution by courts.

Dynalantic appealed both the denial of its motion for a preliminary injunction and the judgment against it to the Court of Appeals for the D.C. Circuit,⁶³ where it received a divided, yet more favorable, welcome. After enjoining the procurement pending appeal, the appellate court reversed the district court in a two-to-one decision.⁶⁴ In doing so, the court took a far broader approach to standing than the court below.

By the time the case reached the appellate court, the procurement had been canceled and removed from the 8(a) program.⁶⁵ Because the plaintiff, *Dynalantic*, could now compete for the contract, the government asserted that the issue challenged below was moot. *Dynalantic* and the appellate court disagreed. The court granted *Dynalantic*’s alternative request to allow it to amend its pleadings to raise a general challenge to the 8(a) program.⁶⁶ Rather than limit its focus to the present procurement, the court questioned “whether future use of the 8(a) program will impact” on *Dynalantic*.⁶⁷

56. *Id.*

57. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

58. 424 U.S. 1, 108 (1976).

59. *Dynalantic*, 937 F. Supp. at 7.

60. *Id.* at 10. This goes to the compelling interest component of the strict scrutiny test. That is, what is the reason for using racial or ethnic classifications? Should Congress, as opposed to a state legislature or federal agency, be given special deference in determining what is a compelling interest?

61. *Id.* With respect to geographic markets, “it is not clear at the present time with limited record developed to date, whether Congress may rely upon evidence of discrimination in just a few states or whether Congress must demonstrate that there has been discrimination throughout the country.” *Id.*

62. *Id.*

63. See generally Eileen Malloy, *D.C. Circuit to Hear Constitutional Challenges to 8(a) Procurements in DynaLantic, Cortez III*, 67 FED. CONT. REP. 154 (BNA Feb. 10, 1997); *D.C. Circuit Set to Hear Post-Adarand Constitutional Challenge of 8(a) Set-Aside*, 39 GOV’T CONT. ¶ 94 (Fed. Pubs. Feb. 26, 1997).

64. *Dynalantic Corp. v. Department of Defense*, No. 96-5260, 1997 U.S. App. LEXIS 13622 (D.C. Cir., June 10, 1997); see generally, Eileen Malloy, *D.C. Circuit Panel Says DynaLantic Has Standing to Challenge 8(a) Program, May Amend Complaint*, 67 FED. CONT. REP. 717 (BNA June 16, 1997); Eileen Malloy, *D.C. Circuit Hears DynaLantic’s Appeal From Dismissal of Its 8(a) Challenge*, 67 FED. CONT. REP. 482 (BNA Apr. 21, 1997).

65. The government affidavit explained that the procurement was removed from the 8(a) program because the delays associated with the litigation had led to operational and safety concerns. At the time, no simulator was available for training on the designated aircraft. *Dynalantic*, 1997 U.S. App. LEXIS 13622, at *7. See also Eileen Malloy, *Navy Cancels 8(a) Procurement Being Challenged By DynaLantic Corp.*, 67 FED. CONT. REP. 222 (BNA Feb. 24, 1997).

66. *Dynalantic*, 1997 U.S. App. LEXIS 13622, at *9.

67. *Id.* at *19.

Absent a government declaration that it would “decide never again to set aside a simulator contract under 8(a),” the appellate court concluded that “Dynalantic’s injury looms close enough to support its standing to pursue the case.”⁶⁸ The court specifically noted, among other things, that: the number of qualified 8(a) firms registered with the procuring center had more than doubled between 1993 and 1995; the procuring center sets aside every contract for which qualified 8(a) firms are available; and because the sole source 8(a) procurements are not preceded by public notice, “Dynalantic learns about their award only after the fact.”⁶⁹ As a result, the majority, despite a strong dissent,⁷⁰ concluded that:

Dynalantic’s injury—its inability to compete on equal footing with 8(a) participants—is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program. . . .⁷¹

Ellsworth Associates: *Standing Limits Review*

In *Ellsworth Associates, Inc. v. United States*,⁷² the plaintiff ran smack into a more conventional “standing” brick wall. Ellsworth, a minority-owned business, was the incumbent con-

68. *Id.* at *20.

69. *Id.* at *20-21.

70. Chief Judge Edwards, in dissenting, frankly stated:

Appellant’s challenge . . . is moot because the government canceled its bid solicitation and gave adequate assurances that 8(a) would not be used again should solicitation be reopened. Thus, appellant prevailed on the precise issue that prompted this lawsuit. However, applicant now smells blood and has decided that, so long as it is already in court, it might just as well use the occasion to attack the entire statute.

Id. at *23. In another colorful passage, the Chief Judge explained that:

During oral argument . . . the suggestion was made that use of a “social and economic disadvantage” standard is essentially the same as providing that “only rich white business people will get procurement jobs.” This suggestion is completely off the mark: the disputed “social and economic disadvantage” standard includes both whites and blacks, whereas the hypothetical standard favoring “rich white business people” expressly excludes blacks. No doubt a program preferring “rich white business people” would fail constitutional scrutiny, but to acknowledge this is to say absolutely nothing about the merits of the 8(a) set-aside.

Id. at *26-27.

71. *Id.* at *22.

72. 926 F. Supp. 207 (D.D.C. 1996).

73. *Id.* at 208.

74. 13 C.F.R. § 124.208 (1996). Firms graduate from the 8(a) program when they successfully achieve the targets, objectives, and goals set forth in their business plan prior to expiration of the program term. *Id.*

75. Ellsworth asserted that its rights to equal protection were violated. *Ellsworth*, 926 F. Supp. at 209.

76. *Id.* at 209-10.

77. *Id.* at 210.

tractor on a contract with the National Oceanic and Atmospheric Administration (NOAA) for computer support services. The contract expired on 31 January 1996. The government decided that the follow-on contract would be handled through the 8(a) program.⁷³ By including the follow-on contract in the 8(a) program, it excluded Ellsworth, which had graduated from the 8(a) program.⁷⁴ Ellsworth raised a constitutional challenge to the 8(a) program.⁷⁵

The court found that the plaintiff lacked standing to challenge the constitutionality of the 8(a) program under *Adarand*. “Because Ellsworth was ineligible to participate in the Program by virtue of the expiration of its eligibility rather than because of the alleged unconstitutionality of the regulation, the plaintiffs lacked standing to challenge the Program or its administration by the federal defendants.”⁷⁶ More specifically, Ellsworth’s inability to compete for the follow-on contract was not traceable to the NOAA’s actions. Ellsworth’s injuries stemmed from the fact that it was no longer eligible to compete in the program. That reason was unrelated to race.⁷⁷

McCrossan: *Holding the Line*

In *C.S. McCrossan Co. v. Cook*,⁷⁸ a federal district court finally addressed issues beyond that of standing.⁷⁹ In that case, the plaintiff, a commercial construction contractor operating in Minnesota, New Mexico, and Arizona, sought a preliminary

injunction challenging the constitutionality of the 8(a) program under *Adarand*.⁸⁰ The procurement involved construction work for the Army at the White Sands Missile Range.⁸¹

McCrossan was a large contractor with annual receipts in 1995 of between \$50-\$75 million. In denying McCrossan's motion for preliminary injunction, the court indicated that McCrossan was not likely to prevail on the merits.⁸² The court merely stated: "Defendants have submitted significant evidence that the 8(a) program may survive strict scrutiny as articulated in *Adarand*."⁸³ Unfortunately for the practitioner, the court did not explain the nature of the "significant evidence" it considered.

Cortez: An Equal Protection Approach

The last of the four cases was *Cortez III Service Corp. v. NASA*.⁸⁴ In that case, the plaintiff, a New Mexico based corporation, was awarded a contract by the NASA's Lewis Research Center in 1986 pursuant to the 8(a) program.⁸⁵ The contract was known as the Consolidated Logistics and Administrative Support Services (CLASS) Contract.⁸⁶ In 1990, the CLASS contract expired, and a new "CLASS II" was awarded under

full and open competition.⁸⁷ Cortez won the follow-on contract.

The CLASS II was scheduled to expire on 30 September 1996. In 1995, the NASA began to prepare for the second follow-on procurement, known as the Management and Operations Contract I (MOC I). The new procurement was to include all of the same services under the CLASS II procurement as well as extra services that had been awarded to smaller firms under the 8(a) program. Although the MOC I contract would be larger than the CLASS II, the NASA decided to offer the entire contract as an 8(a) contract.⁸⁸

Although Cortez originally qualified under the 8(a) program, it conceded that it no longer qualified for the 8(a) program. Cortez had grown and developed into a large, nonminority-owned business. Further, it completed the nine-year period under which a firm is eligible to remain in the 8(a) program.⁸⁹

Cortez contended that, in making the MOC I an 8(a) contract, the NASA violated Cortez's equal protection rights by "initiating a race-based program that was not narrowly tailored to a compelling government interest under *Adarand*."⁹⁰ The first issue the court addressed was standing. In a somewhat cur-

78. No. 91-1345-HB, 1996 WL 310298 (D.N.M. Apr. 2, 1996).

79. *Id.* at *3. In finding that McCrossan had standing to challenge the constitutionality of the 8(a) program, the court noted:

Although Defendants attempted to characterize this set-aside program [8(a) program] as one based on size and economic status of the owner, the fact remains that "economic disadvantage" requires a showing of "social disadvantage" which then implicates the race-based challenge. By restricting the bidding to 8(a) program participants, Defendants created a 100% set-aside program. Plaintiff is not seeking admission into the 8(a) program. It is challenging the government's preferential treatment towards 8(a) program participants in the bidding of the job order contract. Plaintiff claims that, although it is able and ready to bid on the job order contract, Defendants' policy of limiting bidders to 8(a) program participants prevents it from competing on an equal footing and thus violates the Equal Protection Clause of the Fifth Amendment.

Id.

80. *Id.* at *1.

81. *Id.*

82. A party seeking a preliminary injunction must establish the following four elements: (1) it will suffer irreparable injury unless an injunction is issued; (2) the threatened injury alleged outweighs whatever damage the proposed injunction will cause the defendants; (3) the injunction, if issued, would not be adverse to the public interest; and (4) substantial likelihood exists that it will eventually prevail on the merits. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992).

83. *McCrossan*, 1996 WL 310298, at *9.

84. 950 F. Supp. 357 (D.D.C. 1996).

85. *Id.* at 358.

86. *Id.* The contract required the plaintiff to provide the Lewis Research Center with a wide range of services, from transportation to property disposal to video production.

87. *Id.* Full and open competition means that contractors of any size, or social or economic background, can compete for the contract.

88. *Id.* at 358-59.

89. *Id.* at 359. An individual or firm can participate in the 8(a) program only one time. After leaving the program for any reason, a business cannot reapply. 13 C.F.R. § 124.108 (1996).

sory treatment, the district court concluded Cortez did, in fact, have standing.⁹¹

Cortez did not challenge the facial constitutionality of the 8(a) program.⁹² Rather, it argued that the 8(a) program had been applied in an unconstitutional manner in the MOC I procurement.⁹³ The court noted that even though the 8(a) program is facially constitutional, it does not give the NASA or the SBA “carte blanche” to apply it without consideration of the limits of strict scrutiny.

In this regard, the court stated that, to comply with the equal protection requirements of the Fifth Amendment of the United States Constitution, federal agencies must employ an analysis similar to the one proposed by the DOJ in its guidance to agencies following the decision in *Adarand*.⁹⁴ The DOJ provided agencies with some questions that they should ask in determining whether a program satisfies *Adarand*.⁹⁵ The court specifically cited the following analysis:

If the program is intended to serve remedial objectives, what is the underlying factual predicate of discrimination? Is the program justified solely by reference to general societal discrimination [or] general assertions of discrimination in a particular sector or indus-

try? Without more, these are impermissible bases for affirmative action. If the discrimination to be remedied is more particularized, then the program may satisfy *Adarand*. In assessing the nature of the factual predicate of discrimination, the following factors should be taken into account . . . What is the nature of the evidence of [discrimination]? If it is statistical or documentary, are the statistics based on minority underrepresentation in a particular sector or industry compared to the general minority population? Or are the statistics more sophisticated or focused? For example, do they attempt to identify the number of qualified minorities in that sector or industry or seek to explain what that number would have looked like “but for” the exclusionary effects of discrimination . . . ?⁹⁶

The court specifically held that such an analysis is required to meet the narrowly tailored prong of the strict scrutiny test.⁹⁷ In reaching its conclusion, the court found that neither the NASA nor the SBA did “anything approaching” the kind of analysis proposed by the DOJ. Rather, they relied upon the facial constitutionality of the 8(a) program.⁹⁸ Accordingly, the

90. *Cortez*, 950 F. Supp. at 359-60. The plaintiff also contended that the NASA violated the Administrative Procedures Act (APA) by offering a contract under the 8(a) program that will eventually exceed the dollar limits for such contracts. To be eligible for the 8(a) program, a company must have annual sales of \$20 million or less. The NASA projected that MOC I would be worth \$20 million a year. The plaintiff contended that if MOC I meets its projections, after one year, the firm awarded the contract would no longer be eligible and would have to surrender the contract.

91. *Id.* at 360. The court applied a three prong analysis: (1) plaintiff must allege that it suffered some actual or threatened injury; (2) the injury must be traceable to the challenged conduct, and (3) there must be a substantial likelihood that the alleged injuries will be redressed by a judicial decision. *Jacobs v. Barr*, 959 F.2d 313, 315 (D.C. Cir. 1992). The court concluded that: if the MOC I is set aside the plaintiff would have standing because it would lose its right to compete for a valuable contract; the plaintiff’s injury is fairly traceable to the decision by the NASA and the SBA to offer the contract under the 8(a) program; and if the court determines that the NASA and the SBA violated the Constitution or the APA, it can take appropriate action to enable Cortez to compete for the MOC I contract. *Cortez*, 950 F. Supp. at 360.

92. *Cortez*, 950 F. Supp. at 361. The court, in dicta, addressed the constitutionality of the 8(a) program and stated:

The court agrees with the parties that facially, 8(a) meets constitutional muster. Congress first implemented the Small Business Act to combat serious unlawful discrimination in government contracting. In oversight and reauthorization hearings held since the implementation of the act, Congress has continued to find such discrimination. Without question, there is a compelling governmental interest in combating such discrimination where it exists. In the case of 8(a), the legislation and related regulations are narrowly tailored to the extent that they limit set asides to a minimum of five percent of government contract and create only a rebuttable presumption that minority contractors are eligible for the program. Furthermore, where necessary, Congress has amended the statute so that it may fulfill its purpose as swiftly and as fairly as possible.

Id.

93. *Id.*

94. Memorandum from Walter Dellinger, Office of Legal Counsel, U.S. Department of Justice, to Legal Counsel (June 28, 1995) (on file with the authors).

95. *Cortez*, 950 F. Supp. at 362.

96. *Id.* (emphasis added).

97. *Id.*

98. *Id.* A factor in the court’s decision to issue a preliminary injunction appeared, from the record, to be the manner in which the NASA handled the procurement. The court noted that the NASA’s first effort to offer the MOC I contract as a set aside was rejected by its own attorneys as a possible violation of the standards set forth in *Adarand*. Undeterred, the NASA turned to the SBA to include the procurement in the 8(a) program and to do a “passage around *Adarand*.” *Id.*

court found that a preliminary injunction should be issued on Cortez's equal protection claim.⁹⁹

The Proposed Regulatory Scheme

Against this backdrop, the United States government has toiled to construct a revised, defensible, affirmative action procurement program. In embarking upon this ambitious rule-drafting exercise, the DOJ summarized six principal factors that provide context for the narrow tailoring prong of strict scrutiny:

- (1) Whether the government considered race-neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action;
- (2) the scope of the program and whether it is flexible;
- (3) whether race is relied upon as the sole [or as one] factor . . . in the eligibility determination;
- (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool;
- (5) whether the duration of the program is limited and . . . subject to periodic review; and
- (6) the extent of the burden imposed on nonbeneficiaries¹⁰⁰

Although public comments may result in changes, this article addresses the contents of the recently published proposed Federal Acquisition Regulation (FAR) rule.¹⁰¹ The elements of the proposed rules, which primarily would be found in FAR

Part 19, are summarized in this article by addressing which contractors stand to benefit from the rule, how those contractors stand to benefit, and finally, what foundation underlies the proposed regulatory scheme.

Eligibility: A Broadened SDB Definition

Although addressed in the proposed FAR Subpart 19.3, eligibility will be controlled by the proposed rules recently published by the SBA.¹⁰² Under the proposed program, firms would demonstrate their SDB eligibility either by producing a certification from an SBA approved organization or, as discussed below, obtaining a determination from the SBA.

Disadvantaged status will depend upon two criteria: (1) social and economic disadvantage (which may or may not be presumed), and (2) ownership and control of the concern. Designated minority groups would retain a presumption of social and economic disadvantage. Offerors lacking a presumption of social and economic disadvantage could seek to obtain a determination of social and economic disadvantage from the SBA.¹⁰³ Contracting officers will be able to verify the SDB status of non-presumed firms through an SBA on-line central registry of firms holding such an SBA determination.

Critics have focused considerable interest on the use of the *preponderance of the evidence* standard for determining the social and economic disadvantage of individuals that do not qualify for a presumption of disadvantage.¹⁰⁴ The preponderance standard is distinguished from the clear and convincing

99. *Cortez* is currently pending appeal in the D.C. Circuit; the appeal, No. 97-5021, was filed on 28 January 1997. *Id.*

100. Although the proposed rules address all of the enumerated factors, not all are relevant in every situation. 61 Fed. Reg. 26,042 (1996).

101. *See* Federal Acquisition Regulation: Reform of Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,786 (1997). The public comment period was extended from 8 July 1997 until 8 August 1997. 62 Fed. Reg. 37,847 (1997). *See generally* Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences In Contract Actions, 67 FED. CONT. REP. 547 (BNA May 12, 1997); FAR Proposal Adopts Price Evaluation Adjustment to Benefit SDBs, 39 GOV'T CONT. ¶ 240 (May 14, 1997).

102. Small Business Size Regulations: 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals; Proposed Rule, 62 Fed. Reg. 43,583 (1997). *See also* Peter Behr, *SBA Program to Accept More White Women: Minority Firms Have Been Getting Most Aid*, WASH. POST, at A1 (Aug. 13, 1997); Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences In Contract Actions, 67 FED. CONT. REP. 547 (BNA May 12, 1997).

103. 62 Fed. Reg. 25,788 (1997). The proposed regulations do not alter the criteria for determining a contractor's status as a small business. *See, e.g.*, GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 19.301 (Apr. 1, 1984) [hereinafter FAR]. Some commentators lamented that the proposed rules gave no consideration to firms owned by women "despite the fact that many women entrepreneurs had endured the effects of discrimination similar to that suffered by minorities." The DOJ explains that neither section 7102 of the FASA nor 10 U.S.C. § 2323 authorize affirmative action for women and that, as a result, the proposed rules are limited to implementing affirmative action for designated minority groups. Moreover, *Adarand* applied the strict scrutiny standard to race-based actions, while gender-based actions remain scrutinized by a lesser standard of review. The DOJ asserts, however, that the lowering of the standard of proof for non-minority firms as SDBs, discussed below, could create opportunities (for example, under the 8(a) program) for women-owned firms not owned by minorities. 62 Fed. Reg. 25,652-53 (1997).

104. The preface to the recently proposed SBA regulations explain that:

[R]edesignated Sec. 124.103(c) (present Sec. 124.105(c)) would be amended to require an individual who is not a member of a designated socially disadvantaged group to establish his or her social disadvantage by a preponderance of the evidence presented in the 8(a) BD application. This is a change from the current regulation which requires that an individual who is not a member of a designated group establish his or her social disadvantage on the basis of clear and convincing evidence.

62 Fed. Reg. 43,583, 43,587 (1997).

evidence currently required by the SBA for certification in the 8(a) program. The DOJ suggests that “[t]here is significant legal support for the use of the preponderance of the evidence [standard] when an agency is determining what is essentially a question of civil law” and notes that the Supreme Court has found that standard appropriate in civil litigation involving discrimination.¹⁰⁵ Despite comments to the contrary, the DOJ expects that the “SBA will review these applications rigorously” and that “[c]areful scrutiny of applications under proper standards will result in the rejection of undeserving applicants”¹⁰⁶

Any offeror, a contracting officer, or the SBA could challenge an individual firm’s SDB eligibility.¹⁰⁷ Even a party ineligible to protest—either due to timeliness or an absence of standing—can, in effect, protest an SDB’s eligibility by persuading the contracting officer (CO) to adopt the protest grounds.¹⁰⁸

Procurement Mechanisms—Preferences, Etc.

The proposed FAR rules employ three basic mechanisms to benefit SDBs. The three mechanisms available are: (1) a price evaluation adjustment or preference of up to ten percent; (2) a source selection evaluation factor or subfactor for planned SDB participation in the contract, primarily at the subcontract level; and (3) monetary incentives for subcontracting with SDBs.¹⁰⁹ These mechanisms would be adjusted annually and made available on an industry-by-industry basis, according to two-digit Standard Industrial Classification (SIC) Major Groups.¹¹⁰

The price evaluation adjustment or the source selection evaluation factor or subfactor for planned SDB participation in the contract (which can range from zero to ten percent):

will represent the maximum credit that each agency may use in the evaluation of [offers] from SDBs and prime contractors who commit to subcontracting with SDBs. *The size of the credit will depend, in part, on the extent of the disparity between the benchmark limitations and minority SDB participation in federal procurement and industry.* It also will depend upon an assessment of pricing practices within particular industries to indicate the effect of credits within that industry.¹¹¹

The monetary incentives for subcontracting with SDBs operate by contract clause. To receive the incentive, the contractor commits to try to award a certain amount (of the total dollars that it plans to spend on subcontracts) to SDBs in appropriate two-digit SIC codes. If the contractor exceeds the target, the contractor is eligible to receive a stated percentage (between one and ten percent) of the dollars in excess of the target. The CO, however, can deny the contractor this reward for a number of specified reasons, and the contractor cannot seek a remedy pursuant to the Disputes clause.¹¹²

The proposed regulations also reserve the right to employ more aggressive or, arguably, innovative tools. The proposed rule notes that the Commerce Department “is not limited to the SDB procurement mechanism identified” where it finds: (1)

105. *Id.* at 25,648-49, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55, 261 (1989) (preponderance standard), and *referencing Herman & MacLean v. Hudleston*, 459 U.S. 375, 389-90 (1983) (clear and convincing evidence standard should be limited to civil questions in which “particularly important individual interests or rights are at stake” such as “termination of parental rights, involuntary civil commitment, and deportation”).

106. 62 Fed. Reg. 25,648-49 (1997).

107. Prime contractor size protests are processed under FAR 19.302; subcontractor size protests are processed under FAR 19.703(b).

108. 62 Fed. Reg. 25,788 (1997) (proposed FAR 19.305).

109. The price evaluation adjustment language is applied to sealed bid procurements. *Id.* at 25,787 (proposed FAR 14.206, 14.502). The evaluation factor language is applied to the negotiated procurements. *Id.* (proposed FAR 15.605, 15.608, 15.1003). The proposed clause, 52.219-23, instructs evaluators to add a factor (to be determined) to the price of all offers except SDBs (that have not waived the adjustment) or otherwise successful offers (over the dollar threshold) of eligible products under the Trade Agreements Act. *See FAR, supra* note 103, 25.402.

110. The proposed general policy statement explains:

The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms, and their effective dates for new solicitations for the upcoming year.

62 Fed. Reg. 25,786-87 (1997).

111. 61 Fed. Reg. 26,047 (1996) (emphasis added).

112. 62 Fed. Reg. 25,793 (1997) (proposed FAR 52.219-26). The CO need not give the contractor the percentage if he or she determines that the excess SDB participation was not due to the contractor’s effort. For example, the contractor could forfeit its recovery if the participation was skewed due to an SDB subcontractor cost overrun, or if the contractor failed to disclose to the CO, during negotiations, its planned SDB subcontract awards.

“substantial and persuasive evidence” that there is a “persistent and significant underutilization” of SDBs in certain industries “attributable to past or present discrimination” and (2) that the three available mechanisms are incapable of alleviating the problem.¹¹³

Limitations on the Use of Mechanisms

The proposed regulations identify four types of acquisitions in which *price adjustments* shall not be used: (1) acquisitions at or below the simplified acquisition threshold; (2) contracts awarded under the 8(a) program; (3) acquisitions that are set aside for small business; or (4) acquisitions for long distance telecommunications services.¹¹⁴ Similar exemptions apply to the use of the *evaluation factor* for SDB participation. That mechanism is not to be evaluated for contracts awarded under the 8(a) program or acquisitions that are set aside for small business. Moreover, the evaluation factor mechanism is not to be evaluated in (a) lowest cost, technically acceptable, negotiated procurements or (b) contract actions that will be performed outside of the United States.¹¹⁵

Individual agencies are responsible for ensuring that the use of particular mechanisms does not cause specific industries “to bear a disproportionate share of the contracts awarded by a contracting activity of the agency to achieve its goal for SDB concerns.”¹¹⁶ If an agency identifies such a disproportionate share, the agency can seek a determination from the Commerce Department permitting the contracting activity to limit the use of the specific SDB mechanism.¹¹⁷

Benchmarking: The Key to Post-Adarand Strict Scrutiny

The proposed rules are intended to create a flexible system in which race-neutral alternatives should be used to the maximum extent possible. Race should become a factor “only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination.”¹¹⁸ The keystone for the future of the program, therefore, is the “benchmarks.” “Application of

the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination.”¹¹⁹ The proposed general policy statement directs that:

The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms, and their effective dates for new solicitations for the upcoming year.¹²⁰

The DOJ explains that the Commerce recommendation will “rely primarily on Census data to determine the capacity and availability of minority-owned firms.”¹²¹ The recommendation to the OFPP as to how to use the available procurement mechanisms will depend upon the benchmarks derived by the Commerce Department. The DOJ explains that:

[A] statistical calculation representing the effect discrimination has had on suppressing minority business development and capacity would be made, and that calculation would be factored into benchmarks Regardless of the outcome of that statistical effort, the effects of discrimination will be considered when utilization exceeds the benchmark and it is necessary to determine whether race-conscious measures in a particular SIC code should be curtailed or eliminated. Before race-conscious action is decreased, consideration will be given to the effects discrimination has had on minority business development in that industrial area, and the need to consider race to address those effects.¹²²

113. *Id.* at 25,787-88 (proposed FAR 19.201(b)).

114. *Id.* at 25,789 (proposed FAR 19.1102).

115. *Id.* at 25,790 (proposed FAR 19.1202-2).

116. *Id.* at 25,788 (proposed FAR 19.201(f)(1)); *see also*, 61 Fed. Reg. 26,047 (1996).

117. 62 Fed. Reg. 25,788 (1997) (proposed FAR 19.201(f)(1)).

118. 61 Fed. Reg. 26,049 (1996).

119. *Id.*

120. 62 Fed. Reg. 25,786-87 (1997).

121. *Id.* at 25,650. Much of the data will come from the Commerce Department’s Survey of Minority-Owned Business Enterprise.

The SDBs remain concerned that the proposed affirmative action measures can be curtailed or eliminated based upon the success of SDBs in obtaining government work within certain industries. The DOJ responded that:

Achievement of a benchmark in a particular SIC code does not automatically mean that race-conscious programs . . . will be eliminated in that SIC code. The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in [an] SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, [OFPP] may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of such action.¹²³

Nonetheless, the DOJ has articulated what some SDBs fear. "When Commerce concludes that the use of race-conscious measures is not justified in a particular industry (or region), the use of the bidding credit and the evaluation credit will cease."¹²⁴ Benchmarking, therefore, will undoubtedly tailor what previously was a broad, sweeping program. As at least one commentator articulated:

An important development that likely will come out of *Adarand* is an increased reliance on disparity studies. Although . . . disparity studies may be expensive and unwieldy, the fact that they need to be conducted on a local level means that the opportunity for input will be greater and the compelling government purpose will be clearer. Also, because the studies will be conducted in a focused manner, once the "compelling government

purpose" has been established, it will not require a quantum leap to get at a "narrowly-tailored" program.¹²⁵

The DOJ states that a compelling interest warranting race-conscious efforts in federal procurement remains.¹²⁶ The Urban Institute concluded that "minority-owned businesses receive far fewer government contract dollars than would be expected based on their availability."¹²⁷ So long as race-conscious means are needed to afford minority firms a fair opportunity to compete for federal contracts,¹²⁸ the DOJ's conclusion appears valid.

Considerations for the Practitioner

The DOJ intends for the final version of these proposed regulations to withstand the strict scrutiny discussed above. Unfortunately, looking at *Adarand* and the subsequent federal district court cases, which challenged either the constitutionality of the 8(a) program or the federal agencies' application of the 8(a) program, one cannot assume that the courts will universally defer to the new rulemaking. For the practitioner or the casual observer, numerous issues may merit examination.

First, standing is in the eye of the beholder. It is not easy to reconcile how a federal district court in New Mexico determined that *McCrossan*, a large, non-minority owned contractor, had standing to challenge the constitutionality of the 8(a) program under the equal protection guarantees of the Fifth Amendment, while the district court in the District of Columbia determined that a small, minority-owned firm lacks standing.

Second, each of the cases discussed above were addressed during the preliminary stages of the proceedings. Like *Adarand* itself, none of the cases addressed above had a complete record fleshing out the constitutional merits of the 8(a) program under a strict scrutiny analysis. Perhaps, there was such an analysis in *McCrossan*; however, the court simply gave the practitioner a cursory summation that the 8(a) program would likely survive strict scrutiny based upon the "significant evidence" submitted, without telling the practitioner what evidence it considered.¹²⁹

122. *Id.* at 25,650-51.

123. *Id.* at 25,652. Any such analysis would be the responsibility of the Commerce Department, rather than the OFPP.

124. 61 Fed. Reg. 26,047 (1996).

125. Margery Newman, *Affirmative Action and the Construction Industry*, 25 PUB. CONT. L.J. 433, 448 (1996).

126. For a more extensive analysis of the compelling interest, see the DOJ's *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,042, 26,050 (1996).

127. 62 Fed. Reg. 25,653.

128. *Id.*

129. *C.S. McCrossan Co. v. Cook*, No. 91-1345-HB, 1996 WL 310298, at *3 (D.N.M. Apr. 2, 1996).

Third, the practitioner should watch the *Cortez* case closely for several reasons. It may be the first time a district court fully explores the application of the 8(a) program in the context of the *Adarand* strict scrutiny test. It may also provide some insight on the type of analysis that local counsel and contracting officers may be called upon to perform prior to submitting a procurement into the 8(a) program. Attorneys should ask themselves if, as a policy, they want federal courts guiding the appropriate analysis for the application of the strict scrutiny standard for their procurements. Many believe that federal courts will continue to fill that void until the DOJ and/or federal agencies adopt definitive guidance on the proper application of the strict scrutiny standard in federal procurements. Failure to address the problem means relinquishment of the solution to the courts—an unsatisfying approach.

Finally, implementing the procurement rules likely will take time and effort, and the results are not guaranteed. The DOJ was frank in its assessment of the hurdles to be overcome in promulgating its new regulations:

The structure of affirmative action in contracting . . . will not be simple to implement and will undoubtedly be improved through

further refinement. Agencies will have to make judgments and observe limitations in the use of race-conscious measures, and make concentrated race-neutral efforts that are not required under current practice. The Supreme Court, however, has changed the rules . . . The challenge for the federal government is to satisfy, within these newly-applicable constitutional limitations, the compelling interest in remedying the effects of discrimination that Congress has identified.¹³⁰

Barring unexpected developments, the promulgation of final rules for affirmative action in Federal procurement can be expected soon. After all of the litigation, analysis, and policy debate, the new rules must be implemented, one procurement at a time, at the installation procurement office. Given the public scrutiny of these issues and the proven litigiousness of the interested parties, effort by contracting personnel to become familiar with these new rules will be time well spent.

130. 61 Fed. Reg. 26,050 (1996) (emphasis added).

“Though this be madness, yet there is method in it”:¹ A Practitioner’s Guide to Mental Responsibility and Competency to Stand Trial

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Introduction

You are a defense counsel at a large Army installation and are detailed to represent Staff Sergeant (SSG) Johnson, a senior noncommissioned officer with over fifteen years of outstanding service. Your client is charged with several offenses, including assault on a commissioned officer, larceny of three compact discs from the post exchange, and communicating a threat to his brigade command sergeant major. You have just concluded your third meeting with SSG Johnson and are baffled by his demeanor, as well as the conduct giving rise to the charges. During your meetings, SSG Johnson either prattles on excitedly or lapses into sullen moods during which you get no response from him. You have talked to the chain-of-command, and the only helpful information came from the company first sergeant, who said that about six months ago SSG Johnson suddenly began acting erratically and having problems dealing with people. The first sergeant explained that he tried to talk to SSG Johnson several times about the situation but was ignored. After some time, the first sergeant decided that if SSG Johnson did not want help, he was on his own.

You are unsure how to proceed at this point; your experience up to this point is limited to three guilty pleas and one contested drug distribution case. You seek the sage advice of your senior defense counsel, Major Sugna² and proceed to lay out the facts. Major Sugna listens thoughtfully and then says, “Have you thought about requesting a sanity board?” You blink several times. Nonplused by your apparent ignorance of this court-martial procedure Major Sugna settles into his chair and says,

“Let me explain a few things that you need to know when you become concerned about a client’s mental condition.”

Questions about an accused’s mental condition generally arise during the course of court-martial proceedings in one of two ways. First, a soldier may not even be competent to stand trial at all. Second, even if an accused is deemed competent, a defense can be based on a lack of mental responsibility. Because of the special procedures associated with the litigation of these issues, it can be a difficult area.

A lack of mental responsibility is a complete defense to criminal culpability.³ Mental responsibility must be distinguished from mental competency or competency to stand trial.⁴ Mental responsibility refers to a person’s mental condition at the time an offense was committed and criminal responsibility for that offense.⁵ Competency to stand trial, on the other hand, deals with a soldier’s mental condition at the time of trial and his ability to assist in his own defense.⁶ Counsel must understand the difference, as well as recognize that one or both may arise during court-martial proceedings.

Competency to Stand Trial

Sometimes referred to as mental capacity, mental competency refers to the present ability of the accused to stand trial and to participate in and to understand the trial process. Convicting an incompetent person violates due process.⁷ The *Manual for Courts-Martial* provides that no person should be brought to trial if that person is presently suffering from a men-

1. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

2. Your discussion with Major Sugna is based on Professor James W. McElhaney’s popular litigation column in the *ABA Journal*. In the feature, Angus, a seasoned and wily advocate, typically describes various aspects of trial practice to an appreciative audience of young attorneys. See, e.g., James W. McElhaney, *Don’t Take the Bait*, *A.B.A. J.*, June 1997, at 80.

3. UCMJ art. 50a (1994); *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 916(k)(1) (1995) [hereinafter *MCM*] (providing that “it is an affirmative defense . . . that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of [the] acts”).

4. *United States v. Lopez-Malave*, 15 C.M.R. 341 (C.M.A. 1954) (holding that each of the two areas focuses on a different relevant time and presents a completely separate analytical question).

5. See *infra* notes 24-37 and accompanying text.

6. See *infra* notes 7-23 and accompanying text.

7. See *Drope v. Missouri*, 420 U.S. 162, 181-82 (1975); *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966).

tal disease or defect that renders him mentally incompetent to understand the nature of the proceedings or to cooperate intelligently in his defense.⁸ Like mental responsibility, this standard was changed after Congress passed the Insanity Defense Reform Act in 1984.⁹

The test for competency has been described as whether the accused “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”¹⁰ Factors suggesting problems with competency could include whether the accused understands that: he could be confined if convicted, he might not see his family for an extended period of time, his military career could be terminated, he could be reduced in rank, or he may carry the stigma of a federal conviction. To cooperate in one’s defense, an accused need not deal with legal matters but should be able to assist with recounting facts, identifying witnesses, and similar matters.¹¹

Counsel who question an accused’s competency to stand trial should request a sanity board.¹² Based on the board’s results, the General Court-Martial Convening Authority (GCMCA) may decide that the accused is not competent. If so,

the GCMCA can transfer the accused to the custody of the Attorney General.¹³ Alternatively, the government may proceed to trial, placing the burden on the defense to make a motion for appropriate relief with the military judge.¹⁴ When an issue of competency is raised, the judge decides the issue as an interlocutory question of fact.¹⁵ The accused is presumed to be competent unless he can show by a preponderance of evidence that he is not competent.¹⁶

If the accused is found not competent to stand trial, the proceedings are suspended and the GCMCA will transfer the accused to the custody of the Attorney General.¹⁷ The judge may authorize a delay, which would be excluded from the speedy trial clock.¹⁸ Alternatively, the convening authority may withdraw or dismiss the charges.¹⁹

Once the accused is under the control of the Attorney General, federal law governs his commitment.²⁰ The accused may be confined for a reasonable period of time, not to exceed four months, if there is a substantial probability that he will become competent during that time.²¹ If the accused has improved at the end of the hospitalization period, the military will regain control of the individual.²² If he is still incompetent to stand

8. MCM, *supra* note 3, R.C.M. 909.

9. See *infra* note 31 and accompanying text. The 1986 amendments to the MCM adopted the federal standard for competency, found at 18 U.S.C. § 4241(d). Exec. Order No. 12,550, 51 C.F.R. 6497 (1986), reprinted as R.C.M. 909. The effective date of the new rule was 1 March 1986. *Id.* § 6. The old standard provided: “No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or [to] cooperate intelligently in the defense of the case.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 909 (1984) [hereinafter 1984 MANUAL]. The biggest change is the addition of a requirement for a mental disease or defect.

10. *United States v. Lilly*, 34 M.J. 670, 675-76 (A.C.M.R. 1992) (citation omitted). It should be noted that amnesia is not equivalent to a lack of capacity. See *United States v. Lee*, 22 M.J. 767 (A.F.C.M.R. 1986) (holding that an accused might not remember an offense but could analyze his culpability in light of what he knows about his character and likelihood of committing such a crime).

11. *Lee*, 22 M.J. at 769. The accused must have the requisite mental power and understand his situation to the extent necessary to decide whether to testify and otherwise to participate in his defense. *Id.*

12. See *infra* notes 38-68 and accompanying text. Once a sanity board is requested, the military judge must consider the sanity board report before ruling on competency to stand trial. *United States v. Collins*, 41 M.J. 610 (Army Ct. Crim. App. 1994). In *Collins*, the judge denied a request for a sanity board and, at the same court session, found the accused competent to stand trial. The Army Court of Criminal Appeals concluded that the judge erred in failing to order the sanity board before ruling on competency. *Id.* at 612. Whenever competency is in issue, a sanity board should be conducted before a competency ruling is made.

13. UCMJ art. 76b(a)(1) (1996). See also Joint Service Committee on Military Justice Report, *Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 145.

14. See MCM, *supra* note 3, R.C.M. 906(b)(14).

15. *Id.* R.C.M. 909(c)(1) discussion; *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991). *Accord* *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993), *cert. denied*, 114 S. Ct. (1994).

16. MCM, *supra* note 3, R.C.M. 909(b), (c)(2).

17. UCMJ art. 76b(a)(1) (1996). See also Joint Service Committee, *supra* note 13, at 145-46. The article discusses the provisions of the new legislation and points out that several unanswered questions remain, including legal representation while the accused is in the hands of federal authorities and appellate review of a judge’s competency determination.

18. MCM, *supra* note 3, R.C.M. 707(c)(1) discussion. See also *infra* note 52 and accompanying text.

19. MCM, *supra* note 3, R.C.M. 909(c)(2) discussion.

20. UCMJ art. 76b(a)(2) (1996) (providing that action will be taken in accordance with title 18 of the United States Code).

trial, the director of the facility where the accused is hospitalized can request further hospitalization.²³

Mental Responsibility

Article 50a of the Uniform Code of Military Justice provides that a person is not mentally responsible if, at the time the offense was committed, the person, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts.²⁴ This standard became law in 1986.²⁵ The standard matches that applicable in the federal courts and is similar to the *M’Naghten* test.²⁶ The test differs from the military’s old standard in several ways. First, the accused must suffer from a *severe* mental disease or defect.²⁷ Second, the individual must suffer *complete* impairment rather than *substantial* or *great* impairment.²⁸ Next, the focus is now on understanding one’s conduct rather than controlling it.²⁹ Finally, a person need only know that his conduct is *wrongful*, not necessarily that it is *criminal*.³⁰

The changes to the military’s standard followed congressional action that changed the way mental responsibility was tried in federal district court. Congress responded after public

outcry over the perceived ease with which a criminal accused could successfully mount an insanity defense.³¹ The new standard in the military became effective for all offenses committed on or after 1 November 1986.³²

Probably the most contentious aspect of litigating mental responsibility is the requirement for a severe mental disease or defect. The existence of a *severe* mental disease or defect is a threshold requirement before any finding of insanity can be made.³³ Counsel may wonder what makes a mental disease severe. Unfortunately, there is no clear answer to this question. Article 50a is silent, but the *Manual for Courts-Martial* does address the issue. The *Manual* states that “the term ‘severe mental disease or defect’ does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.”³⁴

Despite this language, the Court of Military Appeals³⁵ (CMA) has rejected this interpretation of the mental responsibility standard. The court has held that the term severe mental disease or defect does not require a psychosis.³⁶ Instead, the determination of whether a condition amounts to a severe mental disease or defect is made by considering the individual facts

21. 18 U.S.C. § 4241(d) (1994).

22. UCMJ art. 76b(a)(3) (1996).

23. 18 U.S.C. §§ 4241(d), 4246(a) (1994). The soldier can be hospitalized for an additional period of time until his mental condition improves or the charges against him are disposed of, whichever is earlier. *Id.*

24. UCMJ art. 50a (1988). It also provides that mental disease or defect does not otherwise constitute a defense. *Id.*

25. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 802, 100 Stat. 3905 (1986).

26. MCM, *supra* note 3, R.C.M. 916(k) discussion (citing *M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843)). The federal standard is found at 18 U.S.C. § 20 (1994). For an excellent and detailed history of the insanity defense in the military prior to the 1986 changes, see Captain Charles E. Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1 (1983).

27. Major Rita R. Carroll, *Insanity Defense Reform*, 114 MIL. L. REV. 183, 189 (1986). The old standard only referred to a mental disease or defect. 1984 MANUAL, *supra* note 9, R.C.M. 916(k)(1). See also *infra* notes 33-37 and accompanying text.

28. Carroll, *supra* note 27, at 189 (indicating that the language “substantial lack of capacity” was deleted in favor of “was unable”).

29. *Id.* at 188 (Congress eliminated the volitional prong.). The new standard emphasizes cognition rather than volition. See *United States v. Rosenheimer*, 807 F.2d 107 (7th Cir. 1986); *Insanity Defense in Federal Courts: Hearings on H.R. 6783 Before the Subcomm. on Criminal Justice of the H.R. Comm. On the Judiciary*, 97th Cong. 227-33 (1982) [hereinafter *Hearings*] (statement of Stephen J. Morse, Professor of Law and Professor of Psychiatry and Behavioral Sciences).

30. Carroll, *supra* note 27, at 212-13.

31. *Id.* at 183-87. The outcry peaked in 1982 after a jury found John Hinckley not guilty by reason of insanity of the attempted assassination of President Ronald Reagan. *Id.* at 184. As reflected by the words of the subcommittee chairman, “the Hinckley verdict accelerated our concern” with the insanity issue. *Hearings, supra* note 29, at 143 (statement of John Conyers, Jr., Chairman). The subcommittee considered many different proposals, including eliminating the insanity defense, creating a guilty but insane verdict, and limiting expert testimony. Even though there was strong disagreement about which proposal was the best, the consensus view was that the existing standard was “too vague and too broad and allows too many people to come under the umbrella of insanity.” *Id.* at 4 (statement of Arlen Specter, member of the Senate Judiciary Committee).

32. MCM, *supra* note 3, R.C.M. 916(k) discussion.

33. *United States v. Farmer*, 6 M.J. 897 (A.C.M.R. 1979) (analyzing the American Law Institute standard, which was in effect prior to the changes to Article 50a in 1986).

34. MCM, *supra* note 3, R.C.M. 706(c)(2)(A).

and circumstances in each case. Counsel cannot refer to a medical treatise and find a list of conditions which will be listed as severe mental diseases or defects, because it is a legal term and not a medical term. Having said that, however, an expert can opine that a certain condition is a severe mental disease or defect as long as the witness limits himself to a medical opinion. The CMA has acknowledged that any attempts to provide further clarification would only be confusing and prejudicial.³⁷

Sanity Boards

In confronting the issue of an accused's mental condition, the starting point for counsel is often the sanity board. Once counsel realize that mental responsibility will be an issue at trial,³⁸ they should request that an inquiry be made into the accused's mental condition. Although the defense counsel normally requests the sanity board, anyone involved in the administration of the case can do so.³⁹ The request can be made at any stage of the proceeding, including post-trial. Before referral of charges, a convening authority can order the sanity inquiry;

after referral, the military judge has that power.⁴⁰ The request for a sanity board should include those facts which reflect or suggest problems with the accused's mental status.⁴¹ Typically, this might include facts surrounding the commission of offenses with which the accused is charged, other odd behavior, statements made by the accused, background information, and any other information that might be relevant. The request should also mention those questions that the board will be expected to answer, as well as any other issues related to the accused's mental condition.⁴² Frequently, the request will also ask the board to conduct certain psychological or psychiatric tests. Counsel should be as specific as possible in identifying areas they want the board to explore.

The standard for ordering a sanity board is fairly low; any request that is made in good faith and is not frivolous should be granted.⁴³ Despite this low threshold, trial counsel will often oppose a defense request for a sanity board, assuming that the sanity board is intended as either a delay tactic or a fishing expedition. The problem is, absent some showing of bad faith, a judge applying the proper standard will almost always grant

35. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review. The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

36. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988). Major Benedict was charged with conduct unbecoming an officer by taking indecent liberties with a child under 16. In his defense, he called two psychiatrists who testified that the accused suffered from pedophilia, a mental disease or defect, and that, as a result, he was not responsible for his actions. On cross-examination, one psychiatrist admitted that pedophilia was a "non-psychotic disorder." In rebuttal, a government psychiatrist went even further and testified that any nonpsychotic disorder would not meet the legal definition of a "mental disease or defect." The CMA concluded that such testimony inaccurately stated the law and that an accused was not required to show a psychosis before prevailing on a defense of lack of mental responsibility. *Id.* at 259. A psychosis is a "fundamental mental derangement characterized by defective or lost contact with reality." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 951 (1986). It is normally characterized by hallucinations and delusions. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). The *Benedict* court was also troubled by the government witness, a medical expert, testifying about legal conclusions. The court noted that the witness usurped her role in providing legal guidance to the fact-finder. *Benedict*, 27 M.J. at 259. See also *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993) (holding that "an accused need not be found to be suffering from a psychosis in order to assert an affirmative defense based on lack of mental responsibility"), *cert. denied*, 114 S. Ct. (1994). *Contra United States v. Lewis*, 34 M.J. 745 (N.M.C.M.R. 1991) (intermittent explosive disorder is a nonpsychotic disorder that does not amount to a "severe mental disease or defect" within the meaning of Article 50a, UCMJ), *pet. denied*, 36 M.J. 60 (C.M.A. 1992).

37. *United States v. Cortes-Crespo*, 13 M.J. 420 (C.M.A. 1982) (conceding that the court was unable to define a severe mental disease or defect "beyond the use of the terms themselves").

38. As indicated before, a sanity board may also be requested when competency is at issue. See *supra* text accompanying note 12.

39. MCM, *supra* note 3, R.C.M. 706(a) (listing who can request a sanity board: any commander who considers the disposition of the charges, an investigating officer, trial counsel, defense counsel, military judge, or court member.). Mention of court members contemplates those occasions when the issue of mental responsibility arises for the first time at trial. Cf. *United States v. Sims*, 33 M.J. 684 (A.C.M.R. 1991) (military judge should have directed sanity inquiry or inquired of defense counsel whether expert opinions had been obtained regarding the accused's mental condition when accused made several bizarre statements at trial regarding an invisible friend and described himself as the "incredible hulk").

40. MCM, *supra* note 3, R.C.M. 706(b). Any convening authority who has the charges for disposition may order a sanity inquiry. This would include a summary or special court-martial convening authority. This is useful to remember because sanity inquiries ordered by these convening authorities will obviously be completed sooner than those ordered by the general court-martial convening authority (GCMCA) or the judge. The GCMCA may still order a sanity inquiry after referral (up until the first session of the court-martial proceeding), if the judge is not reasonably available. *Id.* A judge is not bound by the convening authority's ruling. *Id.*

41. For a sample sanity board request, see CRIMINAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 310, TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK, fig. 3-31 (Mar. 1995) [hereinafter JA 310].

42. See *infra* notes 48-49 and accompanying text. Counsel may ask the board to look into other issues affecting the accused's thinking process, including the use of alcohol, post-traumatic stress syndrome, or abuse suffered as a child.

43. *United States v. Kish*, 20 M.J. 652 (A.C.M.R. 1985).

the request for a sanity board. The government's opposition will only result in even more delay. When a request is made before referral, trial counsel would be better off recommending that the convening authority approve the request so that the board may begin as soon as possible.

Trial counsel are not without recourse when opposing a request for a sanity board. If a mental evaluation has already been performed, then counsel may be able to argue that it is an "adequate substitute" for a sanity board. In *United States v. Jancarek*,⁴⁴ the Army Court of Military Review held that a mental evaluation was an "adequate substitute" for a sanity board, where the physician who evaluated the accused had completed her psychiatric residency and was serving as the Chief of Community Mental Health. The psychiatrist testified regarding the accused's competency to stand trial, provided a specific diagnosis of the accused, knew that the accused was pending court-martial at the time of the examination, and indicated that no purpose would be served by further inquiry during a sanity board.⁴⁵ However, completion of a Mental Status Evaluation Form⁴⁶ has been held not to be an adequate substitute for a sanity board, even if filled out by a psychiatrist.⁴⁷

Once the decision is made, the judge or convening authority should sign an order directing that the sanity board be conducted. The order should contain the reasons why the accused's mental status is in doubt and the questions the board should consider. Rule for Court-Martial (R.C.M.) 706 sets out four questions that must be addressed at a minimum. These questions basically address whether the accused is mentally responsible and competent to stand trial, using the legal definitions for those terms.⁴⁸ In addition, the order may direct the board to consider other issues relating to the accused's mental condition.⁴⁹

A sanity board is composed of one or more persons, each of whom must be either a physician or a clinical psychologist.⁵⁰ In addition, at least one member of the board should be a psychiatrist or a clinical psychologist.⁵¹ Typically, the commander of the medical treatment facility will appoint the sanity board. Frequently, three members sit as the sanity board, but three members are not required. While this offers the board the advantage of considering different viewpoints, it tends to slow things down. Government counsel interested in minimizing delays may want to remind the appointing authority that a sanity board may consist of only one person. Although the command generally abhors delays in the processing of a court-

44. 22 M.J. 600 (A.C.M.R. 1986), *pet. denied*, 24 M.J. 42 (C.M.A. 1987).

45. *Id.* at 604. See also *United States v. Nix*, 36 C.M.R. 76 (1965). Recently, the Navy-Marine Corps Court of Criminal Appeals concluded that a sanity board did not have to be conducted when earlier exams by a psychiatrist and clinical psychologist had already been performed. In *United States v. English*, a Marine referred himself to a Navy hospital for suicidal thoughts and depression. 44 M.J. 612 (N.M. Ct. Crim. App. 1996) (*pet. granted* by CAAF, Jan. 21, 1997). After evaluating him, a psychiatrist and clinical psychologist concluded that he was exaggerating his symptoms, and they reported this to the command. After the command preferred charges of malingering and attempted malingering, the defense requested a sanity board. After hearing the testimony of the two mental health professionals, the judge found the prior mental evaluations to be "adequate substitutes" for a sanity board. The judge relied on the testimony of the psychiatrist and psychologist that: (1) their exams complied with R.C.M. 706 requirements, including the questions to be addressed; (2) the accused was competent to stand trial and was mentally responsible for his actions; and (3) if ordered to conduct a sanity board, they would not need to interview the accused any further or change their opinions regarding his mental status. *Id.* at 613-14. The appellate court affirmed.

46. U.S. Dep't of Army, DA Form 3822-R, Report of Mental Status Evaluation (Oct. 1982). This form contains a series of blocks to be checked off which purport to describe the person's behavior, alertness, thinking process, etc. It is required for certain administrative separation actions under the provisions of *Army Regulation 635-200*. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 1-34b (17 Sept. 1990) [hereinafter AR 635-200].

47. *United States v. Collins*, 41 M.J. 610 (Army Ct. Crim. App. 1994). In *Collins*, the trial counsel offered a mental status evaluation and represented that the individual who signed as the "Chief CMHS" was a psychiatrist. The judge held that the evaluation was not an adequate substitute for a sanity board but then went on to rule on the accused's competency to stand trial without directing a sanity board. The Army court agreed that the evaluation did not have the depth required for a sanity board and noted that the form reflects only a cursory review of the soldier and is limited to determining whether administrative proceedings could continue. *Id.* at 613.

48. MCM, *supra* note 3, R.C.M. 706(c)(2) provides that a sanity board will be instructed to make findings on the following questions:

- (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? . . .
- (B) What is the clinical psychiatric diagnosis?
- (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
- (D) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or [to] cooperate intelligently in the defense?

Note that the language in question D differs slightly from R.C.M. 909, which is the competency standard. A proposed amendment to R.C.M. 706(c)(2)(D) will make the language identical. MCM, *supra* note 3, R.C.M. 706(c)(2)(D) (proposed Apr. 1996).

49. For example, the order may direct the administration of certain psychological tests. See *supra* note 42 and accompanying text. The order should also contain instructions to the board addressing release of the report. MCM, *supra* note 3, R.C.M. 706(c)(3); see also *infra* notes 64-65 and accompanying text.

50. MCM, *supra* note 3, R.C.M. 706(c)(1).

51. *Id.*

martial, a reasonable amount of time spent performing a mental evaluation is excluded from the speedy-trial clock.⁵²

Article 31⁵³ warnings do not apply at a sanity inquiry because Military Rule of Evidence (MRE) 302 protects anything the accused says from being used against him.⁵⁴ The privilege is designed to balance the accused's right to present an insanity defense with the privilege against self-incrimination.⁵⁵ Because his statements are protected, the accused can be compelled to cooperate with the examination. If he refuses to cooperate, the judge can prohibit the defense from presenting evidence on the issue of the accused's mental condition.⁵⁶ Military Rule of Evidence 302 is a compromise designed to encourage an accused to speak freely to the board.

It is important to note that the privilege only applies to a sanity board properly ordered pursuant to R.C.M. 706.⁵⁷ It will not attach to other mental evaluations performed on the accused. In *United States v. Toledo*,⁵⁸ the defense counsel sent his client to an Air Force psychologist to determine "whether or not there were any possible problems concerning sanity."⁵⁹ At trial, the government called the psychologist as a witness to testify about the accused's truthfulness and his sexual history. The CMA pointed out that MRE 302 only applies to mental examinations

ordered under R.C.M. 706 and found no error in the testimony. The court cautioned that a military member has no right to "commandeer" a government expert, bypassing the proper authorities.⁶⁰ Even where a mental examination has been considered an "adequate substitute,"⁶¹ at least one service court has ruled that MRE 302 does not protect the accused's statements.⁶²

Counsel who wish to avoid the above results should consider requesting that a mental health official be appointed to the defense team and cloaked with the attorney-client privilege.⁶³ Any statements the accused makes to such an individual would then be protected, albeit by a different privilege.

Additional protection for the accused is provided by limits on release of the report. Initially, only the board's ultimate conclusions to the questions posed in the order are given to counsel for both sides, the convening authority, and the military judge (after referral).⁶⁴ Only the defense counsel, medical personnel (if necessary for medical reasons), and the accused's commander (upon request) are entitled to the full report.⁶⁵ The military judge may direct release of the report to other individuals.

If the defense counsel intends to present the defense of lack of mental responsibility or any expert testimony relating to the

52. *Id.* R.C.M. 707(c)(1) discussion. *See, e.g.,* *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993) (government's negligence or bad faith can be considered in determining whether the sanity board was completed within a reasonable time); *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983) (51 days reasonable); *United States v. Palumbo*, 24 M.J. 512 (A.F.C.M.R. 1987) (45 days reasonable); *United States v. Pettaway*, 24 M.J. 589 (N.M.C.M.R. 1987) (36 days was a reasonable time for a second sanity board); *United States v. Freeman*, 23 M.J. 531 (A.C.M.R. 1986) (43 days reasonable);

53. UCMJ art. 31 (1994) (providing military members with a right against self-incrimination).

54. MCM, *supra* note 3, MIL. R. EVID. 302. Military Rule of Evidence 302 protects statements made by the accused as well as derivative evidence. Derivative evidence has been construed broadly by military courts. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 140 (3rd ed. 1991). Even if Article 31 warnings are given, the accused may still claim the privilege. MCM, *supra* note 3, MIL. R. EVID. 302(a).

55. MCM, *supra* note 3, MIL. R. EVID. 302 analysis, app. 22, at A22-7. The drafters point out that if an accused could present an insanity defense but refuse to speak to a sanity board on grounds that it would incriminate him, the prosecution would have a difficult time rebutting the defense. *Id.*

56. *Id.* This authority stems from *United States v. Babbidge*, 40 C.M.R. 39 (1969), where the CMA concluded that the defense's presentation of an insanity defense operated as a qualified waiver of Article 31 rights. "When the accused opened his mind to a psychiatrist in an attempt to prove temporary insanity, his mind was opened for a sanity examination by the Government." *Id.* at 44.

57. MCM, *supra* note 3, MIL. R. EVID. 302(a) ("[A]ccused has a privilege to prevent any statement made by the accused at a *mental examination ordered under R.C.M. 706 . . .*") (emphasis added).

58. 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid.*, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 U.S. 889 (1988).

59. *Id.* at 274. Counsel apparently saw this as a preliminary step to requesting a formal sanity board. Counsel asked the psychologist to keep his conclusions and notes confidential. *Id.*

60. *Id.* at 276. The danger is that the government may be left without its own expert and with no way to consult with the defense's expert.

61. For a discussion of an "adequate substitute" for a sanity board, see *supra* notes 44-46 and accompanying text.

62. *United States v. English*, 44 M.J. 612 (N.M. Ct. Crim. App. 1996) (pet. granted by CAAF, Jan. 21, 1997). Since the evaluations were not ordered pursuant to R.C.M. 706, statements the accused made were not privileged under MRE 302. The court held that MRE 302 was not designed to apply retroactively. *Id.* at 615.

63. MCM, *supra* note 3, MIL. R. EVID. 502 (communications between a client or a client's lawyer and the lawyer's representative are privileged); *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1610 (1994).

64. MCM, *supra* note 3, R.C.M. 706(c)(3)(A). The officer who ordered the inquiry, the accused's commander, and the Article 32 investigating officer, if any, can also receive the board's conclusions.

accused's mental condition, he is required to notify the trial counsel.⁶⁶ Violation of this rule may result in exclusion of the defense evidence.⁶⁷ Once this notice is received, the government has a reciprocal duty to inform the defense of the witnesses it plans to call in rebuttal of such a defense.⁶⁸ Upon receipt of this information, the trial counsel should request a copy of the full sanity board report. The government is still not entitled to the accused's statements to the board at this point. If the defense refuses to release the report, the trial counsel may have to ask the military judge to direct release.

Request for Expert Witness

Frequently, issues of mental responsibility will involve a request for an expert witness. The defense must first ask the convening authority to authorize the employment of the expert

and include the cost and reasons why the expert is necessary.⁶⁹ If the convening authority denies the request, the defense may renew the request before the military judge. The judge applies a two-prong test in deciding whether to order the production of the witness: (1) is the expert relevant and necessary? and (2) has the government provided an adequate substitute?⁷⁰

The United States Supreme Court has also held that a criminal defendant is entitled to the assistance of a psychiatrist to prepare an insanity defense.⁷¹ The accused must first establish, however, that his mental condition will be a "significant factor" in the trial.⁷² Such a showing should be based on facts and circumstances similar to those cited in a sanity board request. For example, in *Ake v. Oklahoma*,⁷³ the Supreme Court found that insanity was an issue where the defendant had previously been found incompetent to stand trial for a period of six weeks, was involuntarily committed during that time, exhibited bizarre

65. *Id.* R.C.M. 706(c)(3)(B). Once the accused's mental condition is placed in issue, the full report, less any statements made by the accused, will be given to the trial counsel. *Id.* MIL. R. EVID. 302 analysis, app. 22, at A22-8.

66. *Id.* R.C.M. 701(b)(2). The rule provides: "If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to the accused's mental condition, the defense shall, before the beginning of the trial on the merits, notify the trial counsel of such intention." *Id.* Notice should be written and include the names and addresses of the witnesses the defense will call in connection with these issues. *Id.* R.C.M. 701(b)(2) discussion. The rationale behind this requirement is that the government may need time to prepare its case in rebuttal. Requiring notice eliminates delays. In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court upheld a state rule which required the defense to give notice of alibi. The Court rejected the argument that such a rule violated the right against self-incrimination. *Id.*

67. See, e.g., *Michigan v. Lucas*, 500 U.S. 145 (1991) (preclusion of evidence for the violation of a notice requirement under a state rape-shield law may be appropriate where the failure to notify was willful misconduct designed to gain a tactical advantage over the prosecution); *Taylor v. Illinois*, 484 U.S. 400 (1988) (exclusion of defense alibi witness may be appropriate where defense counsel willfully and blatantly violated discovery rule). *But see* *United States v. Walker*, 25 M.J. 713 (A.C.M.R. 1987). In *Walker*, the trial judge excluded a psychiatrist's testimony because the defense failed to give notice five weeks earlier, when motions were heard. The judge looked to Federal Rule of Criminal Procedure 12.2(b), which requires such notice to be provided to the government within the time provided for the filing of pretrial motions, to "fill in the gaps" of R.C.M. 701. The Army Court of Military Review found the exclusion an abuse of discretion, noting that normally a continuance would solve the problem. *Id.* at 717 n.6.

68. MCM, *supra* note 3, R.C.M. 701(a)(3)(B). Such notice should also be in writing. *Id.* R.C.M. 701(a)(3)(B) discussion.

69. *Id.* R.C.M. 703(d). See JA 310, *supra* note 41, figures 3-47 and 3-48, for sample requests for government and non-government experts. For a list of suggested fees for experts published by the Department of Justice, see Memorandum, Trial Counsel Assistance Program, TCAP Memo. No. 108 (Oct.-Nov. 1995).

70. MCM, *supra* note 3, MIL. R. EVID 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). The defense has no right to a particular expert. *United States v. Burnette*, 29 M.J. 473 (C.M.A.) (the defense summarily rejected all government experts), *cert. denied*, 111 S. Ct. 70 (1990). The government may satisfy its obligation to provide an expert by tendering an adequate substitute. An adequate substitute is one who shares the same opinion as the expert requested by the defense. *United States v. Van Horn*, 26 M.J. 434, 439 (C.M.A. 1988) ("However, where there are divergent scientific views, the Government cannot select a witness whose views are very favorable to its position and then claim that this same witness is 'an adequate substitute' for a defense-requested expert of a different viewpoint."); *United States v. Guitard*, 28 M.J. 952, 954 (N.M.C.M.R. 1989) (holding that the Sixth Amendment right of compulsory process "demands that an 'adequate substitute' for a particular requested expert witness at trial not only possess similar professional qualifications as the requested witness, but also be willing to testify to the same conclusions and opinions").

71. The right to expert assistance is grounded in the Due Process Clause and Article 46 of the UCMJ, which guarantees equal access to witnesses. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that due process guarantees a defendant access to a competent psychiatrist when his sanity is a significant factor at trial); *United States v. Garries*, 22 M.J. 288, 293 (C.M.A.) (military members entitled to investigative or other expert assistance as a matter of military due process), *cert. denied*, 479 U.S. 985 (1986). Generally, the issue is whether the defense has shown necessity. See *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994) (to show the need for an expert or an investigator, the defense must show: (1) why the expert assistance is needed; (2) what the expert or investigator would do; and (3) why defense counsel cannot do it himself); *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994) (holding that the defense did not show why a urinalysis expert was necessary to assist the defense in light of counsel's prior experience litigating urinalysis cases, familiarity with numerous articles on the topic, phone consultations with the expert, and failure to identify any specific problems with the collection and testing of the sample in question).

72. *Kelly*, 39 M.J. at 235; see also *Pedrero v. Wainwright*, 590 F.2d 1383, 1391 (5th Cir.) (criminal defendant's sanity at the time of the offense must be seriously in issue or there must be reasonable grounds to doubt the defendant's sanity before there arises any duty to appoint psychiatric witnesses; showing that the defendant was a drug addict and that he had been in a mental institution a few years before the offense was insufficient to establish his entitlement to a psychiatric expert at state expense), *cert. denied*, 444 U.S. 943 (1979); *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986) (sanity board's evaluation of the accused was sufficient; accused failed to show that sanity would be a significant factor at trial warranting services of particular psychiatrist).

behavior during his arraignment, and had to be heavily sedated once he was found competent; additionally, state psychiatrists believed Ake's mental illness was serious and might have begun years earlier.⁷⁴ However, a defense counsel's mere conclusion that his client cannot distinguish right from wrong at the time of the offense will be insufficient to justify the appointment of a psychiatrist.⁷⁵

Does the sanity board provide impartial psychiatric assistance? The answer to this question is not clear. Military courts have suggested that it does,⁷⁶ but certain circuit courts have disagreed.⁷⁷ The best argument for the defense is that due process demands that the defense have its own psychiatrist without being forced to rely on someone working for the government. The defense argument is strengthened if expertise in a particular mental disorder is needed, expertise which is lacking on the sanity board. For example, if the client was sexually abused as a child and exhibits symptoms typical of Post Traumatic Stress Disorder, perhaps a psychiatrist specializing in this area could assist the defense.

Defense counsel should be prepared to place facts on the record which support the need for a psychiatrist in each individual case. Articulate as many facts as possible which illustrate that sanity will be a major issue at the trial, like the counsel did in *Ake*. Call witnesses such as family members, co-workers, and supervisors who can describe the accused's erratic behavior. By building such a record, the defense will have a better chance of convincing a judge that it is entitled to its own psychiatrist and, if it fails, stands a greater chance of relief on appeal.

73. 470 U.S. 68 (1985).

74. *Id.* at 86-87.

75. *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986) (rejecting defense argument that a defendant's sanity at the time of the offense will always be a significant factor at trial whenever the defendant pleads insanity). In order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a "close" question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986). In *Cartwright*, the evidence reflected that the defendant's actions and conduct were very normal and cooperative; he displayed a calm disposition and was never on any medication. He did not display any erratic or bizarre behavior, had no mental illness, and had no neurological problems. His electroencephalogram test was normal, and he had an average IQ. *Id.* at 1212. In addition, inconsistencies in the defendant's story contradicted his claim that he suffered "blackouts," and threats he made towards the victims for failing to pay him for work he did suggested premeditation. *Id.* at 1213.

76. *United States v. Davis*, 22 M.J. 829 (N.M.C.M.R. 1986) (holding that a sanity board provides the accused with impartial psychiatric assistance); *United States v. Garries*, 22 M.J. 288 (C.M.A.) (in the usual case, the investigative, medical, and other expert services in the military are sufficient to permit the defense to adequately prepare for trial), *cert. denied*, 479 U.S. 985 (1986).

77. *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985) (concluding that denial of defense requested psychiatrist to rebut government psychiatrist who examined defendant and found him competent and sane violated due process as it deprived the accused of the benefit of such an expert by requiring the accused to share the expert's services with the government); *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990) ("[R]ight to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court, rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate, including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment.").

78. *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993) (citing *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1969) (C7, 1 Oct. 1982) (describing a limited defense)).

79. *See supra* notes 24-37 and accompanying text.

80. *MCM, supra* note 3, R.C.M. 916(k).

81. *Id.* R.C.M. 916(k) analysis, app. 21, at A21-62.

Partial Mental Responsibility

In addition to the defense of lack of mental responsibility, defense counsel may present evidence of partial mental responsibility. Partial mental responsibility, also called diminished capacity, refers to an impaired mental state which can negate the specific intent element of a criminal offense.⁷⁸ Evidence of partial mental responsibility can be used by the defense to present evidence of an accused's mental condition without having to satisfy the high burden of proof associated with a defense based on a lack of mental responsibility.

Partial mental responsibility has had a tortured path in the last ten years, since the changes to the mental responsibility standard.⁷⁹ Article 50a states that unless the standard for mental responsibility is met, a mental disease or defect does not otherwise constitute a defense. Rule for Court-Martial 916 states that evidence not amounting to a lack of mental responsibility is not "admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense."⁸⁰ According to the analysis, this language was included in order to avoid confusing the factfinder with needless psychiatric testimony.⁸¹ The CMA, however, has rejected the prohibition.

In *Ellis v. Jacob*,⁸² the accused was charged with unpremeditated murder of his two year-old son, an offense which requires a specific intent to kill or to inflict great bodily harm.⁸³ The defense wanted to present psychiatric testimony that the accused, in the time leading up to the death, had not been get-

ting much sleep, was under a lot of pressure, and as a result could have been psychologically impaired.⁸⁴ The defense expert also would have testified that the accused did not and could not form the specific intent necessary for the crime.⁸⁵ The military judge refused to allow the testimony.⁸⁶ In granting the accused's petition for extraordinary relief, the CMA held that partial mental responsibility is a rule of substantive law which the president could not eliminate, as it is beyond his rule-making authority.⁸⁷ After observing that the legislative history of Article 50a reflects that it parallel federal law on insanity, the CMA concluded that federal courts have distinguished the diminished capacity defense, which is not admissible, from evidence rebutting a mens rea element.⁸⁸ Congress never intended to exclude the latter.⁸⁹

Three years later, the CMA again addressed this issue. In *United States v. Berri*,⁹⁰ two defense psychiatrists testified about the accused's lack of mental responsibility in his trial for attempted murder, maiming, and aggravated assault.⁹¹ Neither side questioned the experts about specific intent, and the judge's instructions failed to explain that their testimony could rebut specific intent.⁹² On appeal, the CMA examined the testimony in detail and concluded that the accused was entitled to

an instruction that allowed the factfinder to consider such testimony on the mens rea issue.⁹³

Partial mental responsibility can be invaluable to the defense because it allows the defense to present evidence of the accused's mental condition to negate a mens rea element of a crime without shouldering the burden of proof necessary for lack of mental responsibility. Examples of the mens rea element include knowledge, premeditation, or intent. Counsel, of course, must remember that such testimony is only admissible when a specific intent crime is at issue.

Trial Considerations

At trial, the issues of lack of mental responsibility and partial mental responsibility can be raised by expert or lay testimony. Military Rule of Evidence 302 allows a prosecution expert to testify about the accused's mental condition once the defense has raised the issue with expert testimony.⁹⁴ Despite the rule's reference to expert testimony, the CMA has held that even lay testimony by the defense opens the door to testimony by a government expert.⁹⁵ The government expert cannot testify about

82. 26 M.J. 90 (C.M.A. 1988).

83. See UCMJ art. 118 (1994).

84. *Ellis*, 26 M.J. at 91. The accused and another soldier testified about the accused's physical, emotional, and mental condition. *Id.*

85. *Id.* In its opinion, the CMA noted that the basis for this proffered testimony was not clear. *Id.* at 94. Whenever counsel proffer evidence which is eventually excluded, they should clearly articulate for the record the substance of the excluded evidence.

86. *Id.* at 91. The judge based his ruling on Article 50a and R.C.M. 916(k)(2). *Id.*

87. See UCMJ arts. 36, 56 (1988).

88. *Ellis*, 26 M.J. at 93 (citing *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988); *United States v. Gold*, 661 F. Supp. 1127 (D.D.C. 1987); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985)). The CMA initially noted that the military standard for insanity is identical to the federal standard. Compare UCMJ art. 50a with 18 U.S.C. § 17. In *Pohlot*, the third circuit looked at the wording of the federal statute and the legislative history and determined that Congress only intended to bar affirmative defenses. 827 F.2d at 897. The court concluded that admitting psychiatric evidence to negate mens rea does not constitute a defense, it merely allows an element of the offense to be negated. *Id.* In *Frisbee*, a district court held that Congressional intent to limit a defendant's ability to rebut specific intent still allows expert testimony, subject to the limitations of F.R.E. 704(b). 623 F. Supp. at 1223.

89. *Ellis*, 26 M.J. at 93. The CMA looked at the proffered testimony in the case and held that testimony of sleep deprivation and its effect on possible psychological impairment was admissible. As to the other line of testimony, regarding the accused's intent and his ability to form intent, the CMA ruled that the defense had not adequately laid a foundation for such evidence. *Id.* at 94.

90. 33 M.J. 337 (C.M.A. 1991).

91. *Id.* at 339. All of these offenses require specific intent. See UCMJ arts. 77, 118 (attempted murder requires specific intent to kill or inflict great bodily harm); MCM, *supra* note 3, ¶ 50b (maiming requires intent to cause injury), ¶ 54b(4)(b) (intentional infliction of grievous bodily harm requires specific intent to inflict grievous bodily harm). The accused's offenses arose out of a confrontation with a shipmate in a motel parking lot. The accused, who had argued earlier in the day with this sailor, carried a shotgun. After the other sailor tried to run away, the accused shot him in the right arm and side. After his victim fell to the ground, the accused shot him again at "point blank range." The victim lost part of his right arm and underwent two major surgeries. *Berri*, 33 M.J. at 339.

92. *Berri*, 33 M.J. at 338. The judge had concluded that the psychiatric testimony did not rebut specific intent. As the CMA pointed out, he "effectively barred the members from considering the expert evidence on mens rea." *Id.* The court further noted that the members were free to consider lay testimony on the issue and to draw appropriate inferences from such testimony. *Id.*

93. *Id.* at 343. The court observed that the psychiatrists testified that the accused suffered from post-traumatic stress disorder (PTSD), dissociative episodes, and paranoid explosive personality disorder. One psychiatrist said that during PTSD episodes, a person would be "looney-tunes." *Id.* at 339. A second psychiatrist described the dissociative episodes as periods when the accused would neither understand reality nor know who he was. *Id.* at 340. This psychiatrist also stated that the accused was aware of much of his conduct but "it was as if he was watching someone else do it." *Id.*

anything the accused said to the board unless the accused first introduces such statements. Once the accused opens the door by introducing his statements, the MRE 302 privilege is waived.⁹⁶

The sanity board report is not admissible as an exception to the rule against hearsay; to present information from the sanity inquiry, the proponent must call one of the board members.⁹⁷ A board member can testify only about her own conclusions, not those of other board members.⁹⁸ In the military, an expert can opine whether the accused had the mental state constituting an element of a crime.⁹⁹ In the federal courts, Federal Rule of Evidence 704(b) prohibits such testimony. This difference is one of the few areas where the military has declined to adopt the federal position.¹⁰⁰ The rationale for this distinction is that military court members are better educated and sophisticated enough to disregard expert testimony that confuses civilian jurors.¹⁰¹ The military approach gives both sides much greater latitude in deciding how they want to present their case.

Deliberations on Findings

The accused is presumed to be sane.¹⁰² Under the current standard, the defense has the burden of establishing lack of mental responsibility by clear and convincing evidence.¹⁰³ Clear and convincing is a standard lower than proof beyond a reasonable doubt but higher than a preponderance.¹⁰⁴

Because of this burden of proof, special voting procedures apply when lack of mental responsibility is raised. Since the government still has the burden of proof on the charged offense, the factfinder must follow a two-tiered voting process.¹⁰⁵ In a trial with members, the members first vote on guilt or innocence for each offense.¹⁰⁶ If the accused is found guilty of any offense, the members then vote on the defense of mental responsibility for that offense.¹⁰⁷ If a majority of the members concludes that the accused is not mentally responsible, the

94. MCM, *supra* note 3, MIL. R. EVID. 302(b)(2). For a sample direct examination of a defense psychiatrist, see JA 310, *supra* note 41, para. 4-15.

95. *United States v. Bledsoe*, 26 M.J. 97 (C.M.A.) (drafters never intended that the prosecution be barred from introducing expert testimony about the accused's sanity unless the defense introduced expert testimony), *cert. denied*, 488 U.S. 849 (1988); *see also* *United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982).

96. MCM, *supra* note 3, MIL. R. EVID. 302(b)(1). *But see Bledsoe*, 26 M.J. 97 (door was not opened to the accused's statements when a defense expert testified about stress and financial problems that the accused was experiencing).

97. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988). The trial judge in *Benedict* admitted the findings of a sanity board which concluded that the accused was mentally responsible for offenses involving indecent liberties with a young girl. *See also supra* note 36. The CMA held that the report should not have been admitted as it was not a report of a regularly conducted activity. *Benedict*, 27 M.J. at 260-61 (citing MIL. R. EVID. 803(6)). The court first looked at the 1969 Manual, which was in effect at the time of trial, and a line of cases which expressly rejected admission of the sanity board report as a hearsay exception. *Id.* at 260 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 122c (1969); *United States v. Smith*, 47 C.M.R. 952 (A.C.M.R. 1973); *United States v. Rausch*, 43 C.M.R. 912, 917 n.3 (A.F.C.M.R. 1970); *United States v. Parmes*, 42 C. M.R. 1010 (A.F.C.M.R. 1970)). The court then addressed the government's contention that the Military Rules of Evidence, adopted in 1980, superseded this position. The CMA held that a sanity board report is not a "regularly conducted business activity" and that it is not the "regular practice" to prepare such a report. *Benedict*, 27 M.J. at 261 (citing MIL. R. EVID. 803(6)). The court noted that the sanity board is appointed ad hoc, in connection with possible criminal prosecution. Psychiatric opinions are complex and speculative, and the admission of those opinions without the benefit of cross-examination would cause confrontation clause concerns. *Id.*

98. *Id.* at 262.

99. *See, e.g., United States v. Combs*, 39 M.J. 288 (C.M.A. 1994) (holding that a forensic psychiatrist should have been allowed to testify that the accused did not form the intent to kill or to inflict great bodily harm when he shook his 17 month-old son).

100. *See* MCM, *supra* note 3, MIL. R. EVID. 101(b) (courts should apply the rules of evidence generally recognized in United States district courts); *Id.* R.C.M. 1102 (amendments to the Federal Rules of Evidence apply to the military rules 180 days after the effective date of such federal rules).

101. *Id.* MIL. R. EVID. 704 analysis, app. 22, at A22-48.

102. *Id.* R.C.M. 916(k)(3)(A).

103. UCMJ art. 50a(b) (1994). Prior to the Military Justice Act Amendments of 1986, *supra* notes 25-32 and accompanying text, once insanity was placed in issue, the prosecution had to prove that the accused was sane beyond a reasonable doubt. 1984 MANUAL, *supra* note 9, R.C.M. 916(k)(3)(A) discussion; *United States v. Morris*, 43 C.M.R. 286, 289 (C.M.A. 1971) (government's burden of proof extends not only to elements of charge, but also to accused's sanity). Shifting the burden of proof to the defense has withstood constitutional challenge. *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986).

104. BLACK'S LAW DICTIONARY 251 (6th ed. 1990).

105. MCM, *supra* note 3, R.C.M. 921(c)(4). *See also* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 6-7 (30 Sept. 1996) [hereinafter BENCHBOOK].

106. MCM, *supra* note 3, R.C.M. 921(c)(4) and discussion. For most offenses, two-thirds of the members are required for a finding of guilty. *Id.* R.C.M. 921(c)(2)(B). For any offense which carries a mandatory death penalty, a unanimous vote of guilt is required. *Id.* R.C.M. 921(c)(2)(A).

107. *Id.* R.C.M. 921(c)(4).

accused is found not guilty only by reason of lack of mental responsibility.¹⁰⁸ Otherwise, the verdict is guilty.

As with any affirmative defense,¹⁰⁹ the military judge must instruct the members on the defense if it is reasonably raised by the evidence.¹¹⁰ This duty to instruct arises *sua sponte*. Because the instructions in a mental responsibility case are so complicated, the judge may want to give instructions in writing.¹¹¹

Disposition When the Accused is Found Not Guilty by Reason of Lack of Mental Responsibility

If the accused is found not guilty by reason of lack of mental responsibility, new procedures described in Article 76b of the UCMJ provide for civil commitment.¹¹² The code now allows the military to rely on procedures already available in federal courts and to transfer the accused to the custody of the Attorney General. Before doing so, however, certain steps must be taken. First, a sanity board must be conducted after the court-martial. Then, within forty days of the verdict, the court-martial must conduct a hearing.¹¹³ At the hearing, the burden of proof is on the accused to show that "his release would not create a substantial risk of bodily injury or serious damage to property of another due to a mental disease or defect."¹¹⁴ The standard is either clear and convincing evidence or preponderance, depending on the type of crime of which the accused has been found not guilty by reason of lack of mental responsibility.¹¹⁵ If the accused fails to meet the appropriate burden, the

GCMCA may commit him to the Attorney General. The Attorney General then turns the person over to the state where the person is domiciled or was tried, if such a state will accept him. Otherwise, the Attorney General will hospitalize the person in a suitable facility until either a state will accept the person or his release would not create a substantial risk of bodily injury to another or damage to property.¹¹⁶

These new procedures were designed to fill a vacuum in the *Manual for Courts-Martial*, which had no provision for an accused who was found not guilty by reason of lack of mental responsibility. Such an accused was free to walk away from a courtroom, unlike his civilian counterpart tried in federal district court. The command had to deal with the soldier through either medical or administrative channels.¹¹⁷

Presentencing Phase

If the accused is convicted, evidence of the accused's mental condition may play a significant role during the presentencing phase of the court-martial. Rarely will psychological problems rise to the level of lack of mental responsibility, but the evidence may be useful as extenuation or mitigation. Information of this nature may be admitted as extenuating evidence when it tends to explain why a crime was committed.¹¹⁸ Even if unrelated to the accused's crimes, it can be offered as mitigating evidence.¹¹⁹ Since the rules of evidence are relaxed during the

108. UCMJ art. 50a(e)(1) (West Supp. 1996); MCM, *supra* note 3, R.C.M. 921(c)(4). In a trial by judge alone, the judge would conduct the same type of analysis. See UCMJ art. 50a(e)(2).

109. An affirmative or special defense is one in which the accused admits he committed the offense but denies criminal liability. BENCHBOOK, *supra* note 105, para. 5-1.

110. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1991) (instruction that defense may or may not have been raised was in error, as it allowed the members to decide whether an issue was raised). When deciding whether a defense has been raised, no consideration should be given to its source or credibility. MCM, *supra* note 3, R.C.M. 920(e) discussion; see also *United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982) (holding that the trial judge erred in excluding evidence of duress on the grounds that it was insufficient to warrant an instruction); *United States v. Coleman*, 11 M.J. 856 (N.M.C.M.R. 1981) (holding that the trial judge erroneously excluded evidence of insanity by ruling that it would not raise the issue of mental responsibility and that the members were entitled to weigh the evidence); but see *United States v. Hensler*, 44 M.J. 184 (1996) (holding that the trial judge was not required to incorporate evidence of voluntary intoxication into a mental responsibility instruction).

111. In addition to being read orally, all instructions may be given in writing, and if both parties agree, portions of the instruction may be in writing. MCM, *supra* note 3, R.C.M. 920(d).

112. UCMJ art. 76b (West Supp. 1996). Section 133 of the National Defense Authorization Act for Fiscal year 1996 added Article 76b to the UCMJ. Pub. L. No. 104-106, 110 Stat. 186 (1996). The act was signed by President Clinton on 10 February 1996. Article 76b became effective for all courts-martial referred after 11 August 1996, six months after the enactment of the new law. *Id.* For a general discussion of all the 1996 amendments to the UCMJ, including Article 76b, see Joint Service Committee, *supra* note 13, at 138.

113. UCMJ art. 76b(2) (citing 18 U.S.C. § 4242). Apparently, this sanity inquiry is in addition to any sanity inquiry that may have been completed prior to trial.

114. 18 U.S.C. § 4243(d) (1994).

115. If the accused has been found not guilty by reason of lack of mental responsibility of an offense involving bodily injury to another or serious damage to property of another, or substantial risk of such injury or damage, the standard is clear and convincing evidence. If the accused has been found not guilty by reason of lack of mental responsibility of any other offense, the standard is preponderance of the evidence. *Id.*

116. *Id.* § 4243(e) (1994).

117. See generally AR 635-200, *supra* note 46, chs. 5, 13, 14; U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, ch. 3 (30 Aug. 1995); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, ch. 4 (21 July 1995); U.S. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATIONS FOR RETENTION, RETIREMENT, OR SEPARATION, chs. 3, 4 (1 Sept. 1990).

presentencing phase, defense counsel have wide latitude in the types of evidence that can be admitted.¹²⁰

Such evidence could include testimony that an accused suffers from a personality disorder, post-traumatic stress disorder, alcoholism, or a substance abuse disorder, or that the accused was sexually abused as a child. Counsel should be careful so that any information offered follows their presentencing strategy. In *United States v. Bono*,¹²¹ the defense introduced a report of the accused's mental status that had been prepared by a military psychiatrist while the accused was in pretrial confinement.¹²² Among other things, the report: described disciplinary problems the accused experienced when he was first confined; diagnosed the accused as having a sociopathic personality disorder; and mentioned that, as a juvenile, the accused had a history of petty crimes and psychiatric commitment.¹²³ As the appellate court pointed out, the report was not helpful to the defense case, as it indicated that past attempts at reform measures had failed and that the accused was not amenable to rehabilitation.¹²⁴ These and other mistakes resulted in a finding of ineffective assistance of counsel.¹²⁵ Counsel in such a situation should consider redacting the negative information, asking opposing counsel to stipulate to certain conclusions in the report, or annotating the case file to explain why the report was not introduced.

Post-Trial Phase

The accused's mental condition can also become an issue during the post-trial phase. A convening authority may not approve a sentence while the accused lacks the mental competency to cooperate in and to understand post-trial proceedings.¹²⁶ Counsel who are faced with a client who becomes mentally unbalanced after the trial should request that the convening authority order a sanity board.¹²⁷ Depending on the results of that board, counsel may want to request a post-trial hearing to determine whether the accused is competent to participate in the post-trial proceedings.¹²⁸ At the hearing, the same standard for competency applies as competency to stand trial.¹²⁹

Conclusion

As Major Sugna begins winding down, he says to you, "Dealing with issues involving an accused's mental condition can be challenging. The burden of proof and special procedures associated with the litigation of mental responsibility and competency can ensnare the unwary." You close your notebook, thank your boss for his time and leave his office, realizing that SSG Johnson's case offers you an excellent opportunity to gain experience with this fascinating area of military criminal practice.

118. MCM, *supra* note 3, R.C.M. 1001(c)(1)(A). The rule provides that: "[A] matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse." *Id.*

119. *Id.* R.C.M. 1001(c)(1)(B). The rule provides, in part: "[A] matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency." *Id.* The rules also state that "[e]vidence relating to any mental impairment or deficiency of the accused" is an additional matter that may be considered by the court-martial. *Id.* R.C.M. 1001(f)(2)(B).

120. *Id.* R.C.M. 1001(c)(3).

121. 26 M.J. 240 (C.M.A. 1988).

122. *Id.* at 241. The accused, a Marine, had been convicted by judge alone of unauthorized absence and larceny of a car from another Marine. *Id.* at 240-41.

123. *Id.* at 241. The report noted that after his initial problems adjusting to confinement the accused behaved satisfactorily in the brig. It also indicated that no emotional or mental illness existed "that should be taken into consideration for extenuation and mitigation when considered for punishment for his alleged crimes." *Id.*

124. *Id.* at 242. The court noted that the American Psychiatric Association describes a sociopathic personality disorder as an "Antisocial Personality Disorder which is manifested by continuous and chronic antisocial behavior in which the rights of others are violated." *Id.* at 241.

125. *Id.* The defense counsel failed to object to the admission of the accused's confession to the Naval Investigative Service, which included numerous acts of uncharged misconduct. *Id.*

126. MCM, *supra* note 3, R.C.M. 1107(b)(5). Likewise, an appellate authority may not affirm the findings when the accused lacks the ability to understand and cooperate in post-trial proceedings. *Id.* R.C.M. 1203(c)(5).

127. *Id.* R.C.M. 1203(c)(5). The sanity board may limit its examination to determining the accused's competency to understand and participate in the post-trial process. *Id.*

128. *See id.* R.C.M. 1102(d) (judge may conduct a post-trial session at any time up until authentication of the record of trial). After authentication, such a request would have to go to the convening authority.

129. *Id.* R.C.M. 1107(b)(5); *see also id.* R.C.M. 909.

Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions

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Introduction

As you return from a Continuing Legal Education course in estate planning, you pick up your luggage and notice that the suitcase in which you packed your government-issued laptop is damaged. You plug in the laptop, only to find that it does not work. You kick yourself for packing it and file a claim with the airline. On the trip home, you wonder whether you can accept the check the airline will be sending you to repair the laptop.

The following Monday, you discover several phone messages from the head of Friends of the United States,¹ an international private organization (IPO). You know from past experience that this is not a group you want to deal with when you have the laptop question on your mind. The IPO wants to buy six new Pentium computers with the “works” and donate them to the General and his staff.

Both of the scenarios above involve fiscal law. Although most military and civilian attorneys have been able to avoid fiscal law issues, it is clear that the law of money is extremely important to the accomplishment of the mission in the high operations tempo and continued draw-downs of today. Understanding and dealing with fiscal law issues are much less com-

plicated than one might think. As with other areas of the law, there is a basic framework upon which to build.

Three statutes that serve as an important part of the framework for the proper use of the appropriations made by Congress are the Purpose Statute,² the Anti-Deficiency Act (ADA),³ and the Miscellaneous Receipts Statute (MRS).⁴ While the Purpose Statute and the ADA have both been the subject of several articles, neither of these statutes is widely understood. The MRS is an equally important part of the framework of appropriations, yet even less attention has been paid to the MRS and the issue of augmentation of appropriated funds. Indeed, many military practitioners are unfamiliar with the issues in fiscal law governed by these three fiscal law principles, until they find themselves facing an ADA investigation⁵ or an augmentation issue.⁶

One of the most difficult challenges in dealing with an MRS issue is that there is no single reference source.⁷ The exceptions to the MRS are scattered throughout the United States Code and Public Law. Another problem is that this area of the law changes constantly. Not only must one keep up with the impact of the statutory changes, but one must keep up with recent General Accounting Office (GAO) decisions. While it is impossible for this article to cover every exception to the MRS,⁸ the

1. This is a fictitious organization.

2. 31 U.S.C. § 1301(a) (1994).

3. *Id.* § 1341; *see id.* §§ 1342, 1517.

4. *Id.* § 3302(b). There are other statutes that are equally important in analyzing fiscal law issues. *See* The Bona Fide Needs Statute, *id.* § 1502(a); The Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1997); 31 U.S.C. § 1512(c)(2) (1994). The facts involved in each specific issue will determine what parts of the framework practitioners must use to answer the particular question asked.

5. For example, an ADA investigation is required when an agency's officer or employee makes or authorizes an obligation or expenditure that exceeds the amount available in an appropriation or fund. *See* 31 U.S.C. § 1341(a)(1)(A). Another example of when an ADA investigation would be required is when an agency's officer or employee involves the government in a contractual obligation for payment of money before an appropriation is made, unless otherwise authorized by law. *See id.* § 1341(a)(1)(B).

6. An augmentation occurs when an agency takes an action which increases the amount of funds available in an agency's appropriation. This normally occurs in one of two ways, which are discussed later in this article. *See infra* notes 13-14 and accompanying text.

7. There are two references that may be used for starting points in analyzing an MRS problem. The GAO discusses augmentation of funds in one of its publications. *See* 2 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6, § E (2d Ed. 1992) [hereinafter RED BOOK] (This book is often referred to as the GAO “Red Book.”). The Army Judge Advocate General's School, Contract Law Department's Fiscal Law Deskbook is another excellent resource when confronted with an MRS issue. *See* CONTRACT L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-506, FISCAL LAW COURSE DESKBOOK (May 1996).

8. For example, there is an MRS exception at 10 U.S.C. § 423 (1994) that deals with the use of proceeds from counter-intelligence operations of the military departments to fund those types of operations until the funds are no longer needed.

first goal is to familiarize the military practitioner with the MRS and the exceptions that are most common to military practice.

The second goal of this article is to suggest a four-step process military practitioners may use as a framework for analyzing MRS issues they may encounter in everyday practice. This four-step process can serve as a general template when trying to analyze an MRS augmentation issue. The four-step process begins with determining what appropriation is being augmented. Second, determine if there is a specific statutory exception granted by Congress which allows the money to be retained in that appropriation rather than returning the money to the Treasury as a miscellaneous receipt. Third, if there is no specific statutory authorization, determine whether there are any GAO decisions creating an exception to the MRS. Fourth, when no exception can be found, look to see if there is any alternative to receiving money.

Background

In the United States government, Congress has the power of the purse.⁹ “No money shall be drawn from the treasury except in consequence of appropriations made by law.”¹⁰ Therefore, it is Congress that determines what level of appropriations any given agency shall receive. A basic principle of fiscal law is that augmentation of appropriations is not permitted. An augmentation of an appropriation occurs when an agency takes an action which increases the amount of funds available in an

appropriation.¹¹ This can result in the agency spending more money than was originally appropriated by Congress.¹²

It is possible to have an augmentation of funds resulting from either a violation of the Purpose Statute or the MRS. A Purpose Statute augmentation occurs when one appropriation is used to pay the costs associated with the purposes of another appropriation.¹³ An augmentation in violation of the MRS occurs when an agency receives and retains funds from a source outside the appropriations process rather than forwarding the funds to the General Fund of the U.S. Treasury as miscellaneous receipts.¹⁴

Legislative History and Purpose of the MRS

Prior to the enactment of the MRS in 1849, government officials would collect money owed to the United States and use the funds to pay various expenses, including their own salaries in some instances, rather than forwarding the money and drawing against a fund established for payment of salaries and expenses.¹⁵ By passing the MRS, Congress was reasserting control over the public purse and preventing unchecked spending on the part of the Executive Branch. Today, the MRS is codified at 31 U.S.C. § 3302(b) and provides that “all money received by government agents or officials from any source must be deposited in the Treasury as soon as practicable.”¹⁶

There are penalties associated with violating the statute, such as “removal from office or forfeiture of money, in any amount, to the Government held by the official or agent to

9. For an excellent article on Congress' power of the purse, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

10. U.S. CONST. art. I, § 9, cl. 7.

11. Availability of Receipts from Synthetic Fuels Projects for Contract Admin. Expenses of the Dep't of Treasury, Office of Synthetic Fuels Projects, B-247644, 72 Comp. Gen. 164 (Apr. 9, 1993).

12. This may lead to a violation of the Antideficiency Act. 31 U.S.C.A. §§ 1341, 1517 (1996). See Gary L. Hopkins and Robert M. Nutt, *The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51 (1978).

13. For example, the nonreimbursable use of a sending agency's employees, whose wages are paid by the sending agency, by a receiving agency results in an improper use of the sending agency's funds and an unlawful augmentation of the receiving agency's appropriations. Department of Health and Human Servs.—Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (Mar. 20, 1985). See Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (June 9, 1986) (statutory authority did not allow the transfer of 15 to 20 National Labor Relations Board administrative law judges on a nonreimbursable basis); U.S. Gov't Printing Office, B-247348, 1992 WL 152986 (Comp. Gen. June 22, 1992) (nonreimbursable detail of Government Printing Office (GPO) employee pursuant to a settlement agreement made under Title VII of the Civil Rights Act violates statutory prohibition against using GPO employees to do work other than public printing and binding and illegally augments another agency's appropriation). *But see*, 3 U.S.C. § 112 (1994) (providing authority for nonreimbursable details to the White House); Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 WL 101529 (Comp. Gen. Jan. 30, 1987) (detailing of Schedule C employees to an agency other than the one to which they have been appointed); Details to Cong'l Comms., B-230960, 1988 WL 227433 (Comp. Gen. Apr. 11, 1988) (detail of agency employees to Congressional committee is appropriate, provided that the detail furthers the purposes for which the agency's appropriations are available).

14. For example, the “interest earned on unauthorized loans made by an agency pursuant to a grant program become receipts that should be forwarded to the treasury.” Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (May 11, 1992). See Use of Appropriated Funds by the Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (June 9, 1988) (payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must be deposited in the Treasury as miscellaneous receipts).

15. The Act of March 3, 1849, 9 Stat. 398 (providing that all funds received from customs, sale of public lands, and all miscellaneous sources be paid to the Treasury). For example, the legislative history discusses customs officers who had authority to collect various customs and import duties and retained the money to pay their salaries and expenses.

which they may be entitled.”¹⁷ The money collected under this provision must be deposited into the General Fund of the United States Treasury as a miscellaneous receipt, absent any exception.

Over the years, the GAO has interpreted the MRS and its application. The GAO repeatedly has held that it is money, not other types of property, received by governmental agencies that triggers the prohibition.¹⁸ It is critical in analyzing an MRS problem to remember that, in most instances, the augmentation issue arises when dealing with the acceptance of money.

Application of the MRS—Statutory Exceptions

Over the years, Congress, for a variety of reasons, recognized that it was desirable to provide executive agencies with some statutory exceptions to the MRS. These exceptions allow the agencies to keep the money rather than forwarding it to the General Fund of the United States Treasury.¹⁹

Several of the statutory exceptions enacted by Congress have an impact on the contracting practices of the Department of Defense (DOD). Every day, military attorneys use two of the exceptions to the MRS discussed in the following paragraphs, the Economy Act and the Project Order Statute, without much thought as to the underlying MRS issue.

Appropriated Funds Contracts

The Economy Act. The Economy Act provides statutory authority for interagency orders.²⁰ Using the Economy Act, any governmental agency may order goods or services from any other governmental agency.²¹ The statute requires the ordering agency to reimburse the servicing agency for the goods or services provided.²² The servicing agency may retain the money, depositing it into the same appropriation which was used to obtain the goods or services. If the servicing agency is unable to deposit the money into the appropriation which was used to perform the Economy Act order, the agency must forward the money to the Treasury.²³ To deposit the money into an appropriation which had not been used for the order would result in an improper augmentation.²⁴

Project Orders. The Project Order Statute, which is similar to the Economy Act, provides authority for the ordering of goods or services between the military departments and government-owned and government-operated establishments within the DOD.²⁵ In passing the Project Order Statute, Congress gave the departments and agencies within the DOD the authority to conduct business with each other, allowing the servicing agency to retain funds in its appropriation paid by the ordering agency without violating the MRS.²⁶

16. 31 U.S.C. § 3302(b) (1994) (“Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”). 31 U.S.C. § 3718(b) provides authority for agencies to contract for collection services. These contracts can be for the recovery of indebtedness or to locate or to recover assets of the United States. This does not cover any debts owed to the Internal Revenue Service. Section (d) provides that the fee for this contract can be paid from the amount recovered. *See* GSA Transp. Audit Contracts, B-198137, 64 Comp. Gen. 366 (Mar. 20, 1985) (use of proceeds recovered from carriers and freight forwarders for services to recover delinquent amounts owed to the United States). *See also* Acceptance of Payment by Commercial Credit Card, B-177617, 67 Comp. Gen. 48 (Nov. 6, 1987) (credit card company commissions must be paid from agency’s current operating appropriations, rather than be deducted from the credit card transaction itself).

17. 31 U.S.C. § 3302(d).

18. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 1988).

19. It should be noted that what Congress giveth, Congress can taketh away. For example, in 1992, Congress added a provision to the Arms Export Control Act that allowed the DOD to use money received from the sales of tanks, infantry fighting vehicles, and armored personnel carriers for upgrades to those vehicles. *See* 22 U.S.C. § 2761(j) (Supp. IV 1992). This provision worked as an exception to the miscellaneous receipts statute until it was deleted. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 112, 110 Stat. 206 (1996).

20. 31 U.S.C. § 1535.

21. *Id.* § 1535(a).

22. *Id.* § 1535(b). *See* Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1 CPD ¶ 287.

23. For example, this might occur if the money is to be deposited into a closed appropriation. Since the closed appropriation is no longer available for use, the money must be forwarded to the General Fund of the Treasury as a miscellaneous receipt.

24. Hypothetically, the Air Force (a DOD agency) places an order with the NASA (a non-DOD government agency) for the purpose of obtaining some research. The Air Force would reimburse the NASA for the services procured, and the NASA would deposit the money into the appropriation used to pay for the services. The GAO has held that the Economy Act, not the Project Order Statute, applies to DOD orders to non-DOD agencies. *See* General Counsel, Library of Congress, B-246773, 72 Comp. Gen. 172 (May 5, 1993).

25. 41 U.S.C. § 23 (1994). Project Order authority for the Coast Guard is found at 14 U.S.C. § 151 (1988). Government-owned and government-operated establishments are also referred to as GOGOs.

The New Kid in Town. A new exception to the MRS appeared in the 1997 National Defense Authorization Act (NDAA).²⁷ The NDAA adds a new code section, 10 U.S.C. § 2482a, which appears to create the equivalent of the Project Order Statute and the Economy Act for the Defense Commissary Agency and Nonappropriated Fund Instrumentalities (NAFIs). This new section allows NAFIs to enter into contracts or agreements with other agencies and instrumentalities within the DOD or with another federal department, agency, or instrumentality to provide or obtain goods or services that are beneficial to the efficient management and operation of the exchange system or the morale, welfare, and recreation system.²⁸ While the new section does not specifically mention reimbursement of the costs to the servicing agency, it makes sense only if it is read and interpreted as an exception to the MRS just like the Economy Act and the Project Order Statute.²⁹

Revolving Funds. Revolving Funds were created by Congress to provide agencies with a management tool in the form of “working capital funds”³⁰ or “management funds”³¹ that provide for the operation of certain activities. Revolving funds are normally established with an initial appropriation from Congress. Once the revolving fund is established, any payment

received for goods or services provided through the revolving fund are then deposited back into the revolving fund.³² The Defense Business Operating Fund (DBOF)³³ is an example of a working capital revolving fund. Customer agencies place their orders with the DBOF and pay the DBOF for the goods or services upon receipt.³⁴ Since these revolving funds are authorized by Congress, they may be terminated at any time by Congress.³⁵

A Problem Area for Appropriated Funds Contracting: Nonappropriated Funds Contracts

Normally, the MRS applies only to appropriated funds contracting. However, there are some “cross-over”³⁶ nonappropriated funds (NAF) contracts for services which are impacted by the MRS. How can this happen? It can happen through the combining of appropriated and nonappropriated fund needs for services into a single solicitation.³⁷ In *Scheduled Airline Traffic Offices, Inc. v. Department of Defense*,³⁸ a DOD agency’s appropriated fund contracting officer attempted to combine requirements for both official and unofficial travel services into one solicitation.³⁹ The solicitation required the concession fee paid for official travel to be forwarded to the General Fund of

26. Hypothetically, the Army (a DOD agency) may contract with the Air Force (a DOD agency) to provide some maintenance for its helicopters. Assuming the project order is properly completed, the Army pays the Air Force for the maintenance performed and the Air Force places the money into the appropriation used for obtaining such services. Again, if for some reason they cannot deposit the funds into the appropriation that was charged to obtain the service, then the money must be forwarded to the Treasury for deposit as a miscellaneous receipt. The GAO has held that the Project Order Statute applies between DOD and DOD GOGOs. See *General Counsel, Library of Congress*, B-246773, 72 Comp. Gen. 172 (May 5, 1993).

27. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 341, 110 Stat. 2488-2489 (1996).

28. *Id.*

29. To interpret the new section otherwise would render it unusable. The whole idea behind this new provision was to give these entities the tools to allow more efficient management and to promote efficiency in their operations. See H.R. REP. NO. 104-563, at 278, 110 Stat. 2989 (1996). The statute also appears to authorize NAFIs to sell to appropriated fund activities. Normally, NAFIs are not subject to the requirements of the MRS, and selling goods or services to appropriated fund activities should not cause them to fall within the requirements of the MRS.

30. 10 U.S.C. § 2208 (1994).

31. *Id.* § 2209.

32. *Id.* § 2208(h).

33. The DBOF was established by Congress on 1 October 1991, by combining nine different stock and industrial funds into the one fund. The DBOF was codified as an entity in 1996 at 10 U.S.C. § 2216. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 371, 110 Stat. 186 (1996).

34. There are numerous other revolving funds scattered throughout the United States Code. See 31 U.S.C. § 3720 (1988) (authorizing agency heads to establish a Cash Management Improvements Fund for collection of payments); 42 U.S.C. § 10601 (1994) (authorizing the Crime Victims Fund). See also National Technical Information Serv.—Use of Customer Advance Deposits For Operating Expenses, B-243710, 71 Comp. Gen. 224 (Feb. 10, 1992) (discussing the National Technical Information Service’s use of money deposited into a revolving fund created by 15 U.S.C. § 1526 (1994)) and Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (Dec. 13, 1960) (discussing the Veterans Administration’s use of funds deposited into a revolving supply fund created by 38 U.S.C. § 5011 (1994)).

35. For example, the Panama Canal Commission Fund was terminated, and the unappropriated balance was transferred to the Panama Canal Revolving Fund. See 22 U.S.C. § 3712(a)(2) (1994). While the Panama Canal Commission Fund was not named a revolving fund, it was a fund used to obligate appropriations. The same principle would apply to the Panama Canal Revolving Fund, which will no longer be needed at some point in the future.

36. The term “cross-over” is used to identify those nonappropriated funds (NAF) contracts that are solicited and/or administered by an appropriated fund contracting officer. This is required by some service regulations when the NAF contract exceeds a certain dollar threshold or when the NAF contracting officer does not feel he has the expertise to compete the contract in question. See U.S. DEP’T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND CONTRACTING, paras. 1-8d and 3-11 (10 Oct. 1990); U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 64-301, NONAPPROPRIATED FUND CONTRACTING, para. 5 (18 Apr. 1994); U.S. DEP’T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. 5301.602-1 (May 1, 1996). This term should not be read to imply that appropriated funds are used to fund the NAF contract.

the Treasury and the concession fees for the unofficial travel would be deposited into the local morale fund.⁴⁰ The court stated, "we have no doubt that concession fees for unofficial travel constitute money for the Government within the meaning of the statute."⁴¹ As a result, the court held the money was a miscellaneous receipt and that it was being improperly diverted from the General Fund of the Treasury. The court ordered that the funds be deposited into the Treasury and remanded the case to the district court.⁴²

Other Areas of Application in Government Practice

Most military practitioners would reason that since the MRS is a fiscal principle, it must impact only on contracting issues. Nothing could be further from the truth. In fact, the MRS impacts on many areas of military practice. Congress has given executive agencies numerous statutory exceptions to handle underlying MRS issues in handling claims issues, gifts, property law issues, environmental law, and foreign relations.

Claims

Recovering Health Care Expenditures. Most attorneys who have been claims officers have dealt with the health care recov-

ery program. In enacting 10 U.S.C. § 1095,⁴³ Congress recognized the need to recover military health care expenditures from third party payers. In order to provide incentives for the military services to engage in more aggressive recovery of money spent for health care, Congress created an exception to the MRS under 10 U.S.C. § 1095(g).⁴⁴ This provision of the statute allows "the military medical facility to retain amounts collected from third party insurers⁴⁵ for medical treatment provided to eligible recipients and credit them to the facility's operation and maintenance appropriation."⁴⁶

A New Day in Recovering Pay? A new exception was created by Congress in the 1997 NDAA in the area of claims recoveries. An amendment to 42 U.S.C. § 2651 allows the United States "to [recover] from a third party the pay of members of the uniformed services as a result of tortious infliction of injury or disease."⁴⁷ As a result:

[The] United States has an independent right to recover from the third party, the third party's insurer, or both, the amount equal to the total amount of pay that accrues or is accrued for the period that the member is unable to perform duties as a result of the

37. With the continuation of budget and personnel down-sizing, it is tempting to become creative in generating additional funds for very important morale, welfare, and recreation quality of life programs. However, great care should be taken in the mixing of the appropriated and nonappropriated funds needs for service. The courts have found these types of arrangements to be a violation of the MRS in the past. It is wise to consult the appropriate agency regulation and to seek guidance from higher headquarters before issuing the solicitation. See also *Reeve Aleutian Airways, Inc. v. Donald E. Rice*, 789 F. Supp. 417 (D.D.C. 1992) (failing to cite any statutory authority, solicitation requiring contribution to morale fund violated the MRS); *Motor Coach Industry, Inc. v. Dole*, 725 F.2d 958 (4th Cir. 1984) (holding that the Federal Aviation Administration's diversion of airport-user fees to purchase buses violated the MRS).

38. 87 F.3d 1356 (D.C. Cir. 1996).

39. Initially, Scheduled Airline Traffic Offices (SATO) filed two protests with the GAO. The GAO denied both of these protests. See *SATO, Inc.*, B-257292.5, Sept. 21, 1994, 94-2 CPD ¶ 107 (SATO challenge to solicitation); *SATO, Inc.*, B-253856.7, Nov. 23, 1994, 95-1 CPD ¶ 33 (SATO challenge to award). The GAO's decisions were upheld in an unreported decision by the United States District Court for the District of Columbia. See *SATO v. Department of Defense*, Civ. A. No. 94-2128 (JHG), 1994 WL 715608, at *1 (D.D.C. Dec. 9, 1994).

40. See *Scheduled Airline Traffic Offices, Inc.*, 87 F.3d 1356.

41. *Id.* at 1362. The court focused on the fact that the fees generated for the morale, welfare, and recreation account were derived from a government procurement contract where travel agents paid fees in consideration for government resources (i.e., the right to occupy agency office space, to utilize government services associated with that space, and to serve as the exclusive on-site travel agent).

42. The district court ordered the DOD to deposit all unofficial travel money received after 5 July 1996 into the United States Treasury. The district court further enjoined the DOD from considering, in the solicitation of a contractor for official travel services, the amount of concession fees offered or paid for unofficial travel services. See *Scheduled Airline Traffic Offices v. Department of Defense*, C.A. No. 94-2128 (JHG) (D.D.C. Nov. 25, 1996).

43. 10 U.S.C. § 1095 (Supp. V 1993). See *Collection From Third Party Payers of Reasonable Costs of Healthcare Services*, 32 C.F.R. § 220 (1996).

44. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 727(a)(2), 103 Stat. 1480-81 (1989).

45. The definition of third party insurer has been expanded to include workers' compensation programs or plans. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 735(b), 110 Stat. 2598-99 (1996) (amending 10 U.S.C. § 1095(h)(1)). See also Affirmative Claims Note, *Medical Payments Coverage and 10 U.S.C. § 1095*, ARMY LAWYER, Dec. 1996, at 37.

46. 10 U.S.C. § 1095(g) (Supp. I 1989). See U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS, para. 5.20 (1 Mar. 1997) (providing guidance on depositing collections). If the military treatment facility recovers more than the amount demanded, the excess should be forwarded as miscellaneous receipts. If 10 U.S.C. § 1095 is not the basis for recovery, the money must be forwarded as a miscellaneous receipt.

47. National Defense Authorization Act for Fiscal Year 1997, § 1075, 110 Stat. at 2661-63.

injury or disease and is not assigned to perform other military duties.⁴⁸

Any money that the United States recovers under this provision “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned at the time of the injury or illness, as determined under regulations prescribed by the Secretary concerned.”⁴⁹ This change means that the unit suffering the loss of the services of the member may now recover the costs of the loss and retain it in the appropriate appropriation.

Gifts

Most military practitioners are familiar with the DOD guidance and service regulations concerning gifts.⁵⁰ However, many practitioners do not stop to think about the fiscal implications of accepting a gift.⁵¹

Defense Cooperation Account. Normally, “agencies are not allowed to accept gifts absent statutory authority because it

would constitute an improper augmentation of funds.”⁵² In enacting 10 U.S.C. § 2608,⁵³ Congress provided authority for the Secretary of Defense “to accept monetary gifts or real or personal property for defense programs, projects, and activities from any person, foreign government, or international organization.”⁵⁴ “Any money that is given as gifts may not be expended until appropriated by Congress.”⁵⁵ However, “property that is given may be used in the form in which it was given, sold or otherwise disposed of, or converted into a more usable form.”⁵⁶ The statute was recently amended to allow the Secretary to “accept from any foreign government or international organization any contribution of services made by such foreign government or international organization for use by [the] DOD.”⁵⁷

The Handling of Property

Occasionally, an MRS issue arises when dealing with the replacement of damaged government property or the proceeds from the rental of government property.

48. *Id.* at 2661-62. A new subsection (b) is added to 42 U.S.C. § 2651. The old subsection (b) is redesignated as subsection (d).

49. *Id.* § 1075(f)(2), 110 Stat. at 2662. As of the date of the submission of this article, the author had been unable to find any published guidance on this issue from the offices of the Secretary of Defense or of the service secretaries. However, the United States Army Claims Service (USARCS) has provided some guidance on this statutory change. See Affirmative Claims Note, *Lost Wages Under the Federal Medical Care Recovery Act*, ARMY LAW., Dec. 1996, at 38. The USARCS has taken the position that the recovered money goes into the installation operations and maintenance account, even though the money used to pay the soldier came from the Army Military Pay Account. While this means that the money goes into a different account, this interpretation appears to be consistent with the intent of the statute—to reimburse the affected command.

50. See U.S. DEP’T OF ARMY, REG. 1-100, ADMINISTRATION, GIFTS AND DONATIONS (15 Dec. 1983); U.S. DEP’T OF ARMY, REG. 1-101, ADMINISTRATION, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 June 1981); U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE (19 July 1994); U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (21 July 1994). These regulations cover gifts to the agency and to the individual. Nonappropriated Fund Instrumentalities have different rules, and practitioners should consult the appropriate agency NAFI regulation or instruction.

51. A gift, donation, or bequest has been defined by the GAO as a gratuitous conveyance or transfer of ownership in property without any consideration. See Secretary of the Interior, B-56153, 25 Comp. Gen. 637 (Mar. 7, 1946). The GAO has also defined what is not a gift. See Federal Communication Commission—Acceptance of Rent-Free Space and Servs. at Expositions and Trade Shows, B-210620, 63 Comp. Gen. 459 (June 28, 1984) (free exhibit space and appurtenant services at industry trade shows, exhibitions, conventions, and other similar events does not involve an augmentation, because there is no donation of funds).

52. Chairman, United States Civil Serv. Comm’n, B-128527, 46 Comp. Gen. 689 (Mar. 7, 1967). See Edward P. Borland, Chairman, Subcomm. on HUD-Independent Agencies—Comm. on Appropriations, House of Representatives, B-225986, 1987 WL 101592 (Comp. Gen. Mar. 2, 1987).

53. 10 U.S.C. § 2608 (Supp. III 1991). This statute was enacted as part of a joint resolution continuing appropriations for fiscal year 1991. The same resolution contained a supplemental appropriation for Operation Desert Shield for fiscal year 1990, as well as addressing other issues. The statute replaced 50 U.S.C. § 1151, which was repealed. The old act had allowed the acceptance of conditional gifts to further defense efforts. See 22 U.S.C. § 2697 (1988) (gift acceptance authority for the Secretary of State). The authority to administer the account, to receive payments and contributions to the account, and to deposit money into and to pay from the account have been delegated to the Under Secretary of Defense (Comptroller)/Chief Financial Officer. See U.S. DEP’T OF DEFENSE, DIR. 5118.3, DELEGATIONS OF AUTHORITY, para. 1j (1997).

54. 10 U.S.C. § 2608(a) (Supp. III 1991). The Department of the Air Force has issued instructions for handling gifts from foreign governments under 10 U.S.C. § 2608. See U.S. DEP’T. OF AIR FORCE, AIR FORCE INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE, para. 1.8 and ch. 4 (19 July 1994).

55. 10 U.S.C. § 2608(c).

56. *Id.* at § 2608(d).

57. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1063, 110 Stat. 2652-53 (1996). However, the amendment does not appear to provide authority for the Secretary to accept services from an individual person. Acceptance of voluntary services are generally prohibited, absent specific statutory authority. See 31 U.S.C. § 1342 (1994). However, in some instances, Congress has granted some agencies the authority to accept both gifts and voluntary and uncompensated services. See 15 U.S.C. § 2076(b)(6) (1994) (giving the Consumer Product Safety Commission the authority to accept gifts and voluntary and uncompensated services).

Real Property Rental. Historically, any money received from real property leases was forwarded to the Treasury as miscellaneous receipts. Congress changed this practice by enacting 10 U.S.C. § 2667(d)(1).⁵⁸ This provision allows the military to deposit into special accounts all money received from the leasing of any non-excess real property.⁵⁹ The money deposited from rentals shall be used for facility maintenance, repair, or environmental restoration.⁶⁰

*Real Property Damage Recovery.*⁶¹ If a military member causes damage to DOD real property, an exception to the MRS allows the service “to deduct the money from the member’s pay to repair or replace the property.”⁶² But what about damage caused by someone who is not a member of the armed forces? Congress addressed this issue by providing another exception to the MRS. Now “any amount recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.”⁶³

Personal Property. Prior to the enactment of 10 U.S.C. § 2575,⁶⁴ the proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation were considered miscellaneous receipts that had to be forwarded to the Treasury. Now these proceeds may be deposited into the installation operations and maintenance (O&M) account.⁶⁵ The proceeds should first be used “to pay for any costs associated with

collecting, storing, and disposing of the property.”⁶⁶ Any funds remaining after reimbursement of costs may be deposited into the accounts of morale, welfare, and recreation activities.⁶⁷

The Environment

Environmental considerations impact the practice of law in the DOD every day. Again, many military practitioners do not think about how the MRS impacts various environmental programs and how they may be accomplished.⁶⁸

Turning Garbage Into Money. In an effort to provide the DOD with incentives to establish aggressive recycling programs, Congress created an exception to the MRS at 10 U.S.C. § 2577.⁶⁹ Paragraph (b)(1) allows the installation to take the proceeds from these programs and deposit them into their O&M accounts to cover the costs of operations, maintenance, and overhead associated with processing recyclables. Further provisions allow for the use of up to fifty percent of these funds to pay for installation projects for pollution abatement, energy conservation, or occupational health and safety. The remaining proceeds go into installation morale, welfare, and recreation funds.⁷⁰ However, should any military installation accumulate a balance at the end of any fiscal year in excess of \$2 million,

58. 10 U.S.C. § 2667(d)(1) (Supp. II 1990). This authority also applies to any personal property that is under the control of the department in question. The use of proceeds resulting from the transfer, sale, or use of excess property is governed by the provisions of 40 U.S.C. § 485(h) (Supp. II 1990).

59. Money received under a lease that are amounts paid for utilities and services furnished lessees by the Secretary; under agricultural or grazing leases; or at bases earmarked for closure under the Defense Base Closure and Realignment Act of 1990 may not be deposited into the special account. *See* 10 U.S.C. §§ 2667(d)(1)(A), (d)(4)-(5); Pub. L. No. 104-106, § 2831(a)(2), 110 Stat. 558 (1996).

60. 10 U.S.C. § 2667(d)(1)(B) states that 50 percent of the amount available shall be allocated to the military installation where the leased property is located and the other 50 percent shall be available to the military department concerned.

61. Currently, there is no statutory exception to the MRS to allow the retention of funds to replace or to repair government-owned personal property. *See infra* notes 94-96, 104-106 and accompanying text.

62. 10 U.S.C. § 2775 (1994). Service regulations should be consulted to determine the extent of a member’s individual liability.

63. *Id.* § 2782. The statute specifically excepts the provisions set forth in 10 U.S.C. § 2775 for recovery from a member of the armed forces. *Id.*

64. *Id.* § 2575, as amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 374(a)(1), 110 Stat. 281 (1996).

65. *Id.* § 2575(b)(1).

66. *Id.* § 2575(b)(1)(a).

67. *Id.* § 2575(b)(1)(b).

68. One issue that is not covered in this article is whether the creation of Supplemental Environmental Projects (SUPs) diverts money from the Treasury in violation of the MRS. These SUPs are normally created as part of a settlement relating to fines and penalties associated with violating certain environmental statutes such as the Clean Water Act and the Clean Air Act. *See* Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789 (1995); Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 VILL. ENVTL. L.J. 243 (1995); *see also* Michael Paul Stevens, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. 757 (1994); Elizabeth R. Thagard, *The Rule That Clean Water Penalties Must Go to the Treasury and How to Avoid It*, 16 HARV. ENVTL. L. REV. 507 (1992).

69. 10 U.S.C. § 2577 (1994).

70. *Id.* § 2577(b)(2)-(3).

all money in excess of \$2 million shall be forwarded as miscellaneous receipts.⁷¹

Separate Environmental Restoration Accounts. In the 1997 NDAA, Congress established separate environmental restoration accounts for each military department.⁷² In addition, Congress addressed the issue of credits for amounts recovered. "Any amounts that are recovered under a CERCLA⁷³ response action or any amounts recovered from a contractor, insurer, surety or other person to reimburse the military department for any expenditure for environmental response activities, shall be credited to the appropriate environmental restoration account."⁷⁴

Foreign Relations

The impact of recent world events and changing foreign policies have had an impact on the practice of military law. Deployments are numerous, as the United States projects its military presence around the world to fulfill its foreign policy objectives. The MRS impacts on some of these operational issues, and military practitioners must remember that the MRS still applies. In order to assist the DOD in accomplishing its mission, Congress has provided numerous exceptions to the MRS.⁷⁵

Host Nations Help Defray Expenses. In order to safeguard United States interests, the armed forces have been deployed with increasing frequency. In 10 U.S.C. § 2350k,⁷⁶ Congress provides an exception to the MRS that allows a nation hosting United States forces to contribute to the costs of the relocation of those forces within the host country. "[T]he Secretary of Defense may now accept contributions from any nation of or in support of the relocation of elements of the armed forces from or to any location within the nation."⁷⁷

To Transfer or Not To Transfer? That is The Question. In an effort to further the intent of the Foreign Assistance Act (FAA), Congress created numerous exceptions to the MRS. One such exception is found at 22 U.S.C. § 2392.⁷⁸ This exception gives the President the authority to transfer State Department funds to other government agencies, including the DOD. Such "reimbursement shall be in an amount equal to the value of the defense articles or the defense services, or other assistance as furnished, plus any incidental expenses arising from or incident to operations."⁷⁹ Based upon this authority, augmentation of an appropriation will not be considered a violation of the MRS.⁸⁰

Application of the MRS—Exceptions Recognized By The Comptroller General

71. *Id.* § 2577(c). This means that any funds in excess of a \$2 million balance is to be forwarded to the General Fund of the Treasury.

72. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 321, 110 Stat. 2477-79 (1996).

73. CERCLA stands for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. This act is found at 42 U.S.C. §§ 9601-75 (1994).

74. National Defense Authorization Act for Fiscal Year 1997, § 321, 110 Stat. at 2477-79.

75. Congress has also provided statutory exceptions for the DOD to carry out its mission and to avoid augmentation issues that violate the Purpose Statute. Numerous exceptions have been created which allow the detailing of any agency's personnel in an effort to further the aims of the Foreign Assistance Act. For example, 22 U.S.C. § 2387 (1994) allows the detail of officers and employees to foreign governments or foreign government agencies so long as there is no oath of allegiance to, or compensation from, the foreign country. *See also id.* § 2388 (detailing officers or employees to serve with international organizations, or to serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organization); *id.* § 1451 (allowing details of United States employees to provide scientific, technical, or professional advice to other countries with the exception of assistance to the training of the armed forces of those countries); *id.* § 712 (allowing detail of members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or any other country during a war or declared national emergency).

76. 10 U.S.C.A. § 2350k (West Supp. 1997).

77. *Id.* § 2350k(a). It is this authority which allows the Secretary of Defense to enter into discussions with the host nation concerning the costs of relocating United States troops within the host country. As a result of the terrorist bombing of the Khobar Towers compound near Dhahran, Saudi Arabia, it was decided that United States troops needed to be relocated within the host nation of Saudi Arabia. The cost splitting agreement, which then Secretary of Defense Perry negotiated with Saudi Arabian Minister of Defense Prince Sultan, could be based upon this gift acceptance authority. *See* CNN with Associated Press, *U.S. and Saudis to Share Cost of Moving Troops* (visited July 31, 1996) <<http://www.cnn.com/world>>.

78. 22 U.S.C. § 2392.

79. *Id.* § 2392(d).

80. Another exception is found at 22 U.S.C. § 2357, which allows any governmental agency to furnish commodities or services on a reimbursable basis to friendly foreign countries and to international organizations for purposes consistent with Subchapter I of the FAA. Reimbursement under this provision cannot be waived. Under this provision, whether or not an appropriation is allowed to be reimbursed or the money is required to be forwarded to the Treasury depends on when the reimbursement is received. Initially, reimbursements will be deposited into the agency account. Funds that are received within 180 days of the end of the fiscal year may be deposited into the current account. However, funds received outside that 180-day period will be forwarded to the General Fund of the Treasury as a miscellaneous receipt. *See* GAO REP. NO. GAO/NSIAD-94-88, *COST OF DOD OPERATIONS IN SOMALIA*, Mar. 1994.

Case law from the GAO has created numerous exceptions to the MRS. Many of these exceptions focus on contracting. However, the GAO also recognizes the need for exceptions in the handling of government property.

In The Contracting Arena

Replacement Contracts. The GAO recognizes an exception allowing an agency “to retain recovered excess procurement costs to fund replacement contracts.”⁸¹ This allows the agency to maintain the funds and to use them to fund replacement contracts whether the money is reimbursement for damages due to defective workmanship or the government is terminating the contract for default. There is a caveat to this exception; “[t]he agency may only retain the amount of funds necessary to procure the goods or services that would have been provided under the original contract.”⁸² “Any excess money will be considered miscellaneous receipts and must be deposited into the Treasury.”⁸³

Refunds. Occasionally an agency will be entitled to a refund.⁸⁴ As a general rule, in the absence of express statutory authority, agencies must credit refunds to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired.⁸⁵ There may be times when the agency decides not to retain the refund for various

reasons. If that is the case, the agency may forward the refund to the General Fund as a miscellaneous receipt.⁸⁶

Erroneous Payments, Overpayments, or Advance Payments. A number of GAO cases discuss when an agency may retain an erroneous payment, overpayment, or advance payment. In *Department of Justice—Deposit of Amounts Received from Third Parties as Payment for Damage for Which Government Has Already Compensated Plaintiff*,⁸⁷ the GAO determined that “it was proper for the agency to retain the amount recovered from carriers or insurers up to the amount spent in advance payment to an employee due to damage or loss of the employee’s personal property.”⁸⁸ In *International Natural Rubber Organization—Return of United States Contribution*,⁸⁹ the GAO held that “repayments to the United States, which were actually excess or overpayments made to the International Natural Rubber Organization, could be retained in the appropriation from which those dues are paid.”⁹⁰

False Claims Act Recovery. In *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*,⁹¹ the GAO held that agencies may retain certain portions of a damage award or settlement made pursuant to the False Claim Act (FCA).⁹² The agency may “retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses.”⁹³ If “treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts.”⁹⁴

81. Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sept. 28, 1983, 62 Comp. Gen. 678, 84-1 CPD ¶ 91.

82. *Id.* at 682-83. See also Army Corps of Engineers—Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 (Sept. 8, 1986) (agency may retain money recovered as additional costs to reimburse appropriation).

83. Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action, 62 Comp. Gen. at 678, 683.

84. In this context, refunds are amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, to include authorized advances. See RED BOOK, *supra* note 7, at 6-109. Embezzled funds which are recovered are also considered refunds. See Appropriation Accounting Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130. The rule on refunds also applies when dealing with a credit. For example, a refund in the form of a “credit” for utility overcharges. See RED BOOK, *supra* note 7, at 6-111.

85. Secretary of War, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944). There are also statutory provisions for various agencies on this point. See Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-52, § 625, 109 Stat. 502 (1995); Department of the Interior—Disposition of Liquidated Damages Collected for Delayed Performance, B-242274, 1991 WL 202596 (Comp. Gen. Aug. 27, 1991) (liquidated damages may only be credited to the appropriation charged with the contract that resulted in the damages).

86. Accounting for Rebates from Travel Management Center Contractors, B-217913.3, 73 Comp. Gen. 210 (June 24, 1994).

87. B-205508, 61 Comp. Gen. 537 (July 19, 1982).

88. *Id.* at 540.

89. B-207994, 62 Comp. Gen. 70 (Dec. 6, 1982).

90. *Id.*

91. B-230250, 69 Comp. Gen. 260 (Feb. 16, 1990).

92. 31 U.S.C. § 3729 (1994). See 18 U.S.C. § 287 (1994) (concerning criminal penalties associated with false claims act prosecutions).

93. *Federal Emergency Management Agency*, 69 Comp. Gen. at 264.

Other Areas of Application in Governmental Practice

The most common noncontracting issues impacted by the exceptions created by the GAO are those involving the handling of damaged government property. In *Defense Logistics Agency—Disposition of Funds Paid In Settlement of Contract Action*,⁹⁵ the GAO examined the disposition of funds recovered by an agency for damage to government property. The GAO concentrated on the definitions of “refund” and “receipt” of money from sources outside the appropriations process. The GAO ruled that the “funds received could not be credited to the appropriation charged, as the damage was unrelated to the contract’s performance.”⁹⁶ The fact that the agency received a check in the amount of \$114,934.14 from the insurer, which resulted in the check being treated as money received by the agency, was crucial to the GAO’s decision. Since money could not be credited to an appropriation, the money had to be forwarded as miscellaneous receipts.⁹⁷

So what happens if an agency receives property instead of cash for damaged property? May the agency keep property offered in lieu of cash to replace government property damaged by a negligent third party? The GAO has held that “when the agency receives replacement property for damaged government property, the agency may retain the property.”⁹⁸ It is important to remember, as the GAO points out,⁹⁹ that the MRS applies to augmentation of an appropriation with money from a source outside the appropriations process. Therefore, the agency may keep the property replaced in this instance. In practice, it makes no difference whether it is the negligent third party or his insurer who is replacing the damaged government property.

Analyzing MRS Issues

So, where does a military practitioner start in trying to determine the appropriate course of action in the scenarios described at the beginning of this article? The four-step process proposed in the introduction can assist the military practitioner in analyzing MRS augmentation issues. First, determine what appropri-

ation is being augmented. Next, is there a specific statutory exception granted by Congress which allows the money to be retained in the appropriation to be augmented rather than requiring the money to be forwarded to the Treasury as a miscellaneous receipt? Third, if there is no specific statutory authorization, are there any GAO decisions which create an exception to the MRS? Fourth, when no exception can be found, is there any alternative to receiving money?

Damage to a Government Computer

What about the traveler who discovered the damaged government laptop, filed the claim, and agreed to accept a check? Is it really in the government’s best interest to accept a check if the goal is to get the laptop repaired or replaced?

First, identify the appropriation that will be augmented by acceptance of the check. In this instance, assume that installation O&M funds have been used to purchase the laptop.¹⁰⁰ Does the traveler have authority to augment the installation O&M account? Remember that the money cannot be retained in the installation O&M account to repair or to replace the laptop without an exception to the MRS. Absent an exception, any amount received should be treated as a miscellaneous receipt and forwarded to the Treasury.

The next two steps are to determine whether there is a statutory or GAO-created exception to the MRS available so that the unit may retain the money in its O&M appropriation. Based upon the discussion of the statutory and GAO-created exceptions for handling property, above,¹⁰¹ practitioners should quickly conclude that there is no statutory or GAO-created exception to receive money in this instance.

Finally, if there is no exception allowing the retention of the money, is there an alternative for replacing or repairing the laptop? Until Congress sees fit to allow the retention of money paid for personal property damage, the answer here must be a creative “yes.” The GAO has repeatedly held that the MRS applies only to the receipt of money. How does the traveler manage to avoid the problem of receiving a check? He should

94. *Id.*

95. B-226553, 67 Comp. Gen. 129 (Dec. 11, 1987).

96. *Id.* at 130.

97. This is true of any funds received as a result of a pro-government claim against any third party for damage to government-owned personal property. See U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS, para. 4.14 (1 Mar. 1997).

98. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 1988).

99. *Id.*

100. For the purpose of illustrating this problem, assume the computer was properly purchased with O&M funds.

101. See *supra* notes 61-63, 95-99 and accompanying text.

work a settlement with the airline or its insurer which allows the traveler to take the computer to an authorized repair shop and to have the repair shop bill the airline directly. Another solution would be for the airline to replace the unit's computer by purchasing another computer and providing it in settlement for the damage.

Use of Gifts Provided by International Private Organizations

How should one handle the offer made by the Friends of the United States to purchase and donate six new Pentium computers? Normally, the first step would be to identify the appropriation that the unit is seeking to augment. However, because of the statutory exception that will apply in this instance, the local unit's appropriation is not a factor.

Next, practitioners should look to see if there is either a statutory or GAO-created exception available to justify the acceptance of the gifts from the IPO. In this instance, research should lead to the statutory exception provided at 10 U.S.C. § 2608 discussed previously in this article.¹⁰² After coordination through appropriate channels, it is possible for the DOD to accept the gift of the six computers. Remember, this authority allows the Secretary of Defense to accept gifts of money or real or personal property for use in defense programs, projects, or activities.

Proposed Changes for the Future?

Many contracting officers believe that Congress should consider changing the law to allow "cross-over" nonappropriated contracts to be combined by appropriated fund contracting

officers when needed.¹⁰³ In this time of down-sizing and doing more with less, it makes no sense to require separate contracts and administration when time and money may be saved by joint solicitation and administration. A statutory change would allow an appropriated fund contracting officer to solicit and to administer certain types of contracts that overlap some services paid for by appropriated funds.¹⁰⁴ This would provide an exception to the MRS. Congress could add safeguards against potential abuse by adding restrictions to the percentage of commission that would be passed through the contract to the morale, welfare, and recreation fund.¹⁰⁵

As to damage to government property, Congress has provided the DOD with many exceptions that have allowed the DOD to recover for damage to its real property and, in some instances, personal property, in the form of equipment and furniture when associated with damaged real property. Indeed, under the Report of Survey system, government employees and members of the armed forces are required to reimburse the government for any lost, damaged, or stolen property.¹⁰⁶ It is time for Congress to take the next step and to allow the DOD an exception which would enable local units who suffer damage to accept funds to repair or to replace government-owned personal property.¹⁰⁷ Any concerns for potential abuses can be dealt with by simply providing statutory language requiring any funds not used to repair or to replace the damaged or destroyed property to be forwarded as miscellaneous receipts.¹⁰⁸

Changes also appear likely in the area of procurement fraud. "Congress has asked the Secretary of Defense to report on the possibility of allowing the DOD to retain a portion of any recovery made under the procurement fraud statutes to provide the incentive to encourage more aggressive procurement fraud recovery programs."¹⁰⁹ "It has been suggested that the DOD

102. *See supra* notes 52-57 and accompanying text.

103. As a result of a district court order, a working group was formed to propose draft legislation to amend 10 U.S.C. Chapter 147. The proposed draft legislation would allow the Secretary of Defense to procure official and unofficial travel services in a single solicitation. It would also allow any commissions or fees received to be deposited in the respective appropriated or nonappropriated fund account. Additionally, based upon the recommendations of the working group, the Office of the Undersecretary of Defense for Acquisition and Technology issued interim guidance in March 1997 concerning the procurement of travel services.

104. This would squarely address the court's concern in *Scheduled Airline Traffic Offices*, as Congress would be basically authorizing appropriated fund support to the NAF by providing: free space and services for the contractor, the time of the appropriated funds contracting officer, and the ability to be the exclusive on-site travel agency.

105. For example, they could mandate a fixed NAF concession fee of no more than two or three percent. This would take the NAF concession fee out of the equation in considering the awarding of a contract; it would be the same for all bidders, and there would be no "incentive" for awarding the contract to someone whose bid included a higher concession fee for NAF. The focus would still be who provided the best deal for the dollar on the appropriated fund solicitation. There is no language in the draft legislation to address this concern, which was articulated by the court in *Scheduled Airline Traffic Offices*.

106. *See* U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY FOR AIR FORCE PERSONNEL, para. 16.2.13 (1 July 1996). *See also* U.S. DEP'T OF DEFENSE, DEFENSE FINANCE AND ACCOUNTING SERVICE-DENVER CENTER REG. 177-102, COMMERCIAL TRANSACTIONS AT BASE LEVEL, pt. V (31 Jan. 1996).

107. This is the next logical step, given the newly-expanded authority provided under 10 U.S.C. § 2575. If an installation can retain the proceeds from the sale of lost, abandoned, or unclaimed nongovernment personal property, the installation should be able to accept and to retain funds to repair or to replace damaged government-owned personal property. New authority in this area could serve as an additional incentive for aggressive pro-government claims collection, as has been seen in both the hospital recovery and recycling programs.

108. If the unit decides not to have the item repaired or replaced, the unit should not be allowed a windfall, and the money should be considered a miscellaneous receipt.

retain three percent of single damage funds or \$500,000, whichever is less, recovered in fraud cases which would be retained in the installation O&M appropriation.”¹¹⁰ This would be similar in concept to the program that is currently in place for the hospital recovery program and would be more than sufficient incentive to energize these programs in a fashion similar to the hospital recovery program. Additionally, this would allow the retention of a part of the costs associated with the fraud programs which are mandated by Congress in the first place.¹¹¹

Conclusion

The MRS impacts much more of military practice than contracts and claims. It is an important part of the fiscal law framework and the practice of military law. The exceptions to the MRS, both statutory and GAO-created, make it much easier for the DOD and its departments to perform their missions without running afoul of the MRS. Every military practitioner should be familiar with the basics of the MRS, its applications, and the exceptions that impact many areas of their practice. From contracts to claims, and in fulfilling the military’s assigned missions in the foreign relations arena, the MRS can have an impact on the way the mission is accomplished and its success.

109. Major Timothy J. Pendolino et al., *The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?*, ARMY LAW., Apr. 1996, at 19 (citing the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1052, 110 Stat. 186, 440 (1996)). See S. REP. NO. 104-112, at 218 (1995).

110. *Id.*

111. This would allow for fraud recoveries in concert with, and in addition to, the use of the False Claims Act. See *supra* notes 91-94 and accompanying text.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

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

Consumer Law Notes

Watch Out for Reaffirmation in Bankruptcy

The National Consumer Law Center (NCLC) reports that the number of reaffirmations of debts in bankruptcy is on the rise as a result of aggressive practices on the part of creditors.¹ While legal assistance practitioners do not normally handle bankruptcies for soldiers, reaffirmations are an important topic for preventive law and initial bankruptcy counseling before referral to a civilian practitioner.

A reaffirmation is “[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable” in bankruptcy.² In essence, the debtor is agreeing that the reaffirmed debt will survive the bankruptcy and will not be discharged. In order to protect debtors from reaffirming unadvisedly, the agreement

must meet statutory requirements in the bankruptcy code before it will be enforceable.³ First, the agreement must be made before the discharge in bankruptcy.⁴ Second, the agreement must contain clear and conspicuous notices that it may be rescinded at any time before discharge and that the law does not require the debtor to enter into the agreement.⁵ Third, the creditor must file the agreement with the bankruptcy court.⁶ If the debtor was represented by an attorney in the negotiation of the agreement, that attorney must file an affidavit with the agreement which states that “[the] agreement represents a fully informed and voluntary agreement by the debtor; . . . [the] agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and . . . the attorney fully advised the debtor of the legal effect and consequences of [a reaffirmation agreement and] . . . any default under such an agreement.”⁷ If the debtor was not represented by an attorney during the negotiations, the agreement cannot be approved unless the bankruptcy court finds that the agreement will not be an undue hardship on the debtor or a dependent and that the agreement is in the debtor's best interest.⁸

Reaffirmations have attracted attention through the abusive practices of some established and reputable major consumer creditors.⁹ For example, the Federal Trade Commission (FTC) recently reached a settlement with Sears, Roebuck, and Company (Sears).¹⁰ The FTC claims that Sears “induced consumers who filed for bankruptcy protection to agree to reaffirm their Sears credit account debts, in order to keep their Sears credit card or merchandise.”¹¹ The FTC also alleged that in many of

1. *Abusive Creditor Reaffirmation Practices Require Strong Response*, 15 NCLC Reports, Bankruptcy and Foreclosures Edition 17 (Mar./Apr. 1997) [hereinafter NCLC Reports].

2. 11 U.S.C.A. § 524(c) (West 1997).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* § 524(c)(6)(A). It should be noted that this court approval provision does not apply to the extent that the debt is secured by real property. *Id.* § 524(c)(6)(B). Additionally, it is difficult to think of circumstances where reaffirmation will be in the debtor's best interest. The National Consumer Law Center (NCLC) suggests that:

[O]ne situation in which reaffirmation might be in the debtor's best interest arises when a creditor agrees to compromise a secured claim or agrees to restructure it in order to allow the debtor an opportunity to get payments back on track . . . [T]here are very few other situations in which a consumer legitimately benefits from a reaffirmation.

NCLC Reports, *supra* note 1, at 17 n.1.

9. See NCLC Reports, *supra* note 1, at 17.

these instances Sears misrepresented that the agreements would be properly filed with the bankruptcy court, as required, when in fact they were never filed.¹² The result was that Sears would be collecting money based on agreements that were not legally binding.¹³

This case presents three points which legal assistance practitioners should keep in mind. First, even reputable companies may conduct themselves in a manner that does not comply with the law. Second, this conduct often occurs outside the presence of an attorney. In the context of bankruptcy, this absence of representation gives rise to certain additional protections for the debtor—namely, court approval of the agreement.¹⁴ Third, the bankruptcy code provides “important consumer protections . . . designed to give consumers in dire financial circumstances a fresh start.”¹⁵ By coercing consumers to pay debts they do not legally owe, creditors undermine this important provision of the law.

What should a legal assistance office do about this situation? Primarily, attorneys should be vigilant in their preventive law efforts and put in the hands of soldiers information about bankruptcy rights and obligations. Additionally, legal assistance offices should establish standardized preliminary bankruptcy counseling that includes cautionary advice about the reaffirmation of debts. The advice could contain language such as: “Should you decide to file for bankruptcy, you may be approached by creditors asking you to enter into agreements with them reaffirming your debts. You should not enter into any agreements without consulting with the attorney who is advising you on the bankruptcy.” Providing this advice should minimize the number of soldiers who fall victim to the aggressive reaffirmation efforts of creditors. Major Lescault.

More Bad News on Delinquent Student Loans

A recent issue of *The Army Lawyer* contained a practice note which referred to a report by the NCLC on the increasing use of tax intercepts to collect student loans.¹⁶ The NCLC also reports that the Department of Education (DOE) is mandating wage garnishment for certain delinquent student loans.¹⁷ The DOE mandates that administrative garnishment be sought from the borrower no later than the 225th day after the guaranty agency pays a default claim on a borrower’s loan.¹⁸

The DOE regulations limit the amount that may be garnished to ten percent of the borrower’s disposable pay.¹⁹ “Disposable pay” means “that part of the borrower’s compensation from an employer remaining after the deduction of any amounts required by law to be withheld.”²⁰ Additionally, federal law limits administrative garnishment to twenty-five percent of disposable pay or the amount by which disposable income exceeds thirty times the current minimum wage, whichever is less.²¹ Attorneys, therefore, should use these numbers to calculate the limit that best protects the client.

There are other protections built into the DOE’s administrative garnishment procedure as well. Borrowers who have been involuntarily separated from employment, for example, are protected from wage garnishment until they have been reemployed continuously for a period of twelve months.²² In initiating the procedures for garnishment, the agency must give the borrower at least thirty days notice,²³ the opportunity to inspect the agency’s records concerning the debt,²⁴ and an opportunity for a hearing regarding the debt.²⁵ Perhaps most important, the agency is required to offer the borrower a repayment agreement “under terms agreeable to the agency.”²⁶ This may be an area

10. *Id.* See also Federal Trade Commission News Release, *FTC Settlement with Sears, Roebuck to Safeguard \$100 Million Redress to Consumers* (visited 14 July 1997) <<http://www.ftc.gov/opa/9706/sears.htm>> [hereinafter FTC News]. Note also that the full text of the FTC’s agreement with Sears is available at <<http://www.ftc.gov/os/9706/searsroe.htm>>.

11. FTC News, *supra* note 10.

12. *Id.*

13. *Id.*

14. See *supra* note 8 and accompanying text.

15. FTC News, *supra* note 10.

16. Major Maurice A. Lescault, Jr., *The IRS Helps to Collect Student Loans*, *ARMY LAW.*, July 1997, at 30.

17. *Guaranty Agencies to Begin Wholesale Wage Garnishments*, 15 NCLC Reports, Deceptive Practices & Warranties Edition 14 (Jan./Feb. 1997).

18. *Id.*, citing 34 C.F.R. § 682.410(b)(6)(vii)(A) (1996).

19. 34 C.F.R. § 682.410(b)(10)(i)(A) (1997).

20. *Id.*

21. 15 U.S.C.A. § 1573 (West 1997).

22. 34 C.F.R. § 682.410(b)(10)(i)(G).

where legal assistance practitioners can produce positive outcomes for clients by negotiating effectively with the guaranty agency.

The bottom line is that ignoring obligations based upon student loans is more and more dangerous. Legal assistance practitioners should remain abreast of developments in student loan collections and use the information in their preventive law programs. Moreover, attorneys must know proper procedures for all avenues that a guaranty agency may use to collect from a client. This is the only way that the attorney can properly protect the client's interests. Major Lescault.

Family Law Note

Louisiana First State to Pass Covenant Marriage Statute

On 23 June 1997, the Louisiana State Legislature overwhelmingly passed a bill prescribing a new form of marriage known as "covenant marriage."²⁷ After 15 August 1997, anyone applying for a marriage license in Louisiana must choose between a license for a traditional marriage or a covenant marriage.²⁸ A covenant marriage is defined by the bill as one entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship.²⁹ A covenant marriage restricts the grounds for divorce, should the marriage run into trouble later, to fault grounds of adultery, abuse, abandonment, and imprisonment for a felony.³⁰ The covenant marriage does not completely eliminate the no fault grounds, but the length of separation required for a cove-

nant marriage to dissolve on no fault grounds is two years, as opposed to the six month requirement for a traditional marriage in Louisiana. If there are no children of the marriage, the covenant marriage can also be terminated if the parties are legally separated for one year. The legal separation, however, must be based on one of the fault grounds (adultery, abandonment, abuse, or imprisonment for a felony) with the additional grounds for legal separation of "habitual intemperance" or "cruel treatment."³¹

Couples who choose the covenant marriage must also agree to premarital counseling by a clergy member or other counselor. This counseling must include a discussion of the restrictions of the covenant. Likewise, should a covenant marriage fail, the couple must agree to go through counseling prior to a divorce.³²

Louisiana is the first state to adopt such a statute.³³ Similar attempts to reform the no fault divorce statutes in other states have failed in recent years.³⁴ According to the bill's sponsor, the statute's goal is to reduce the divorce rate by not only making it tougher to get divorced, but also making couples think about and discuss their expectations of marriage prior to taking their marriage vows.³⁵ There is no requirement for counseling prior to marriage or divorce for couples who opt for the traditional marriage license.

The statute is not limited to new marriages entered after the effective date of 15 August 1997. The statute allows for those who already were married under a Louisiana license to convert their traditional marriage to a covenant marriage.³⁶

23. *Id.* § 682.410(b)(10)(i)(B).

24. *Id.* § 682.410(b)(10)(i)(C).

25. *Id.* § 682.410(b)(10)(i)(E).

26. *Id.* § 682.410(b)(10)(i)(D).

27. H.B. 756, H.L.S. 97-1817, Reg. Sess. (La. 1997). The bill passed the House 98-0 and the Senate 37-1.

28. Governor Mike Foster has already indicated that he will sign the bill into law.

29. H.B. 756, H.L.S. 97-1817, § 272 A.

30. *Id.* § 307.

31. *Id.* § 308.

32. The covenant marriage license must include a declaration of intent to enter a covenant marriage which must set out in writing that the relationship is lifelong, that counseling emphasizing the nature and purpose of marriage was received, and that each party commits to seeking marital counseling if marital difficulties arise. This declaration of intent must be signed and notarized.

33. Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bond*, N.Y. TIMES, June 24, 1997, at A1.

34. *Id.*

35. *Id.*

36. H.B. 756, H.L.S. 97-1817, § 275A. This provision requires a married couple to present a declaration of intent which meets the statutory requirements to the office where the original marriage license is filed. Each month, those declarations of intent will be forwarded to the state registrar of vital records.

Whether high divorce rates in the United States result from the ease of divorce under no fault systems remains the subject of heated debate. How the new Louisiana covenant marriage statute works over the next several years will undoubtedly add to that debate. Although the statute makes a covenant marriage voluntary, several religious denominations have already indicated that they will only marry couples who obtain the covenant marriage license.

How will this statute potentially impact on couples where one or both of the parties is a member of the military? Anyone electing to marry in Louisiana after 15 August 1997 may enter a covenant marriage. Military life is certainly one of the most transient of society. If the termination of the marriage is later undertaken in another state, after duly meeting the residency and jurisdictional requirements of that state, the covenant entered into in Louisiana will not prevent the divorce. The divorce under those circumstances may be based on no fault grounds, and couples may file for divorce without the counseling contained in the covenant marriage. Therefore, the greatest impact will be the requirement to carefully consider the responsibilities of marriage before applying for the marriage license. Major Fenton.

Tax Note

Indemnity Payment Must be Included in Gross Income

The Internal Revenue Service (IRS) has privately ruled that a taxpayer must include in his gross income money received from a malpractice claim against his attorney. The attorney incorrectly advised the taxpayer that payments the taxpayer was required to make to his former spouse would qualify as alimony.³⁷ As a result, the taxpayer thought that the payments would be deductible from his gross income. In fact, the payments did not qualify as alimony because the payments did not terminate at the death of the payee spouse.

The taxpayer obtained a divorce from his wife, and the divorce settlement required him to pay his wife a monthly amount of support for a fixed period of time. The agreement also provided that if the former spouse died the payments would be payable to her estate. The taxpayer's attorney incorrectly advised him that the payments would be deductible as alimony.³⁸

The taxpayer filed his tax returns, claimed the alimony deduction, and was audited. The IRS disallowed the alimony deduction because the payments did not qualify as alimony. The taxpayer paid the taxes and sought indemnity from his former attorney's malpractice insurer. The question presented to the IRS was whether the indemnity payment would be included in the taxpayer's gross income.

The taxpayer argued that the payments should not be included in his gross income. In support of this proposition, the taxpayer cited *Clark v. Commissioner*³⁹ and Revenue Ruling 57-47.⁴⁰ Both *Clark* and the revenue ruling found that an indemnification payment was not included in the taxpayer's gross income. The IRS distinguished both *Clark* and the revenue ruling and found that this taxpayer would have to include the indemnification payment in his gross income.

In *Clark*, the taxpayers made an irrevocable election to file a joint return based on the advice of their tax return preparer. If they had filed separate returns, their combined tax liability would have been \$19,941.10 less than the amount they paid by filing joint returns. The Board viewed the excess tax paid as a result of the preparer's negligence to be a loss and held that the indemnification payment was a nontaxable recovery of capital rather than income.⁴¹ Thus, the indemnification payment was not included in their gross income.

In Revenue Ruling 57-47, the tax preparer made an error in calculating the amount of taxes that the taxpayer had to pay. By the time the taxpayer discovered the error, the statute of limitations for amending the return had passed. The IRS concluded that the taxpayer did not have to include the amount recovered from the preparer in his gross income and cited *Clark* for its authority.⁴²

In its private letter ruling, the IRS distinguished both *Clark* and Revenue Ruling 57-47. In *Clark* and Revenue Ruling 57-47 the taxpayers were reimbursed for the taxes they paid that were in excess of the minimum proper federal income tax. In this taxpayer's case, however, he paid the minimum proper federal income tax. This taxpayer's problem relates to the underlying transaction, which is the divorce settlement.

The private letter ruling illustrates once again that in order to qualify for alimony treatment, spousal support payments must, among other requirements, terminate at the death of the payee spouse. Attorneys who do not understand this basic tenet are

37. Priv. Ltr. Rul. 97-28-052 (July 11, 1997).

38. The payments are not entitled to alimony treatment because they do not terminate on the death of the payee spouse as required by I.R.C. § 71(b)(1)(D).

39. 40 B.T.A. 333 (1939), *acq.*, 1957-1 C.B. 4.

40. 1957-1 C.B. 23.

41. *Clark*, 40 B.T.A. 333.

42. Rev. Rul. 57-47, 1957-1 C.B. 23.

probably guilty of malpractice. In cases where a client received incorrect advice concerning the tax treatment of spousal support payments, the client should be advised of the possibility of recovering the amount of any excess taxes, interest, and penalties paid as a result of that incorrect advice. The client should also be advised that any recovery similar to the one in this case will most likely be included in his gross income. Lieutenant Colonel Henderson.

Labor Law Note

Merit Systems Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act

In the past year, the Merit Systems Protection Board (MSPB) has dealt with the first four cases⁴³ in which federal employees seek reemployment rights as the result of prior military service pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴⁴ Two of the four cases involved probationary status federal employees.⁴⁵

The USERRA provides specific rights to federal workers who have been activated to military duty. These rights include reinstatement to their civilian jobs, accrued seniority, continuation of civilian employment status, employer provided health insurance and nonseniority benefits, training, and special protection against discharge except for cause.⁴⁶ The USERRA also protects federal workers and potential federal workers against discrimination because of their active or reserve military membership.⁴⁷

The federal government cannot deny federal employment, reemployment, retention in employment, promotion, or any benefit of employment to a federal employee because he is a member of, applies to be a member of, or has been a member of a uniformed service or because the federal employee performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.⁴⁸ The USERRA also makes it unlawful for a federal agency to seek any reprisal against a federal employee for taking action to enforce his rights under the USERRA. The protection against reprisal also extends to anyone who assists the aggrieved employee in asserting his USERRA rights by testifying or assisting in an investigation involving the agency.⁴⁹

The USERRA sets up a standard which is favorable to federal employees for proving discrimination based upon military status. If a protected activity, such as service in the reserve components, was a motivating factor (not necessarily the only factor) in an adverse personnel action taken by the agency (or in the withholding of a favorable personnel action) against the employee, such action is unlawful, unless the employer can prove that the adverse action (or withholding) would have been taken even in the absence of the protected activity.⁵⁰ Proof can be direct evidence of discriminatory intent or acts or circumstantial evidence similar to that used in Title VII discrimination cases.⁵¹

The USERRA provides that the Veterans' Employment and Training Service (VETS) of the U.S. Department of Labor will assist federal employees in investigating federal agencies accused of USERRA violations. The VETS has subpoena and contempt powers to gain access to agency witnesses and documents to complete its investigations.⁵² If a federal employee

43. *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997); *Petersen v. Department of Interior*, 71 M.S.P.R. 227 (1996).

44. Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994) (codified at 38 U.S.C. §§ 4301-33). See also *Restoration to Duty From Uniformed Service*, 60 Fed. Reg. 45,650 (1995) (to be codified at 5 C.F.R. pts. 353, 870, 890).

45. *Jasper*, 73 M.S.P.R. 367; *Wright*, 73 M.S.P.R. 453. Probationary and temporary federal employees are covered under the USERRA. 38 U.S.C.A. §§ 4303(4)(A)(ii), 4311(a), 4324(b) (West 1996). See also 5 C.F.R. § 353.103 (1997).

46. 38 U.S.C.A. §§ 4312-18. See also 5 C.F.R. §§ 353.107-08, 353.207, 353.209, 890.303-05, and 890.501-02.

47. 38 U.S.C.A. § 4311. See also 5 C.F.R. § 353.202.

48. 38 U.S.C.A. §§ 4301-18. "Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, inactive duty training [Reserve Component weekend drill], full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty." *Id.* § 4303(13). See also 5 C.F.R. § 353.102.

49. 38 U.S.C.A. § 4311. See also 5 C.F.R. § 353.202.

50. 38 U.S.C.A. § 4311(b). See also *Gummo v. Village of Depew*, 75 F.3d 98, 104-07 (2d Cir. 1996); *Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996); *Novak v. Mackintosh*, 919 F. Supp. 870 (D.S.D. 1996); *Hansen v. Town of Irondequoit*, 896 F. Supp. 110, 114 n.3 (W.D.N.Y. 1995); *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997); *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Petersen v. Department of Interior*, 71 M.S.P.R. 227(1996); H.R. REP. No. 103-65, at 21 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2457.

51. *Wright*, 73 M.S.P.R. at 455; *Jasper*, 73 M.S.P.R. at 371.

52. 38 U.S.C.A. §§ 4321-22, 4326. See also 5 C.F.R. § 353.210.

requests help from the VETS regarding a potential USERRA violation the VETS will attempt to contact the agency to explain the law. If the VETS investigator's explanation of the law does not cause the agency to comply with the law, the VETS may initiate an investigation of the agency.⁵³ If the investigation establishes a probable violation and the agency refuses to comply, the VETS will refer the case to the Office of Special Counsel (OSC).⁵⁴ If the OSC finds that the case has merit, it will represent the federal employee before the MSPB at no charge to the employee.⁵⁵

Federal employees can also submit their complaints directly to the MSPB, *pro se*, even if they have not sought assistance from the VETS in investigating their complaints, have been turned down by the OSC for representation for "lack of merit," or have not requested representation by the OSC.⁵⁶ There is no requirement that the employee exhaust all of his remedies; thus, investigation by the VETS and representation by the OSC are not prerequisites to filing a complaint with the MSPB.⁵⁷ Currently, there are also no time limits for filing a USERRA complaint with the MSPB. Administrative rules have not been published yet, and the USERRA provides no MSPB filing time limits.⁵⁸ Congress has explicitly stated that the USERRA protections and rights are to be "broadly construed and strictly enforced."⁵⁹

The USERRA establishes a new area of jurisdiction for the MSPB. The Board has the authority to hear military reemployment and discrimination cases involving federal employees who normally would not have a jurisdictional right to present a case before the Board (for example, temporary and probationary employees).⁶⁰ In light of the expansion of the MSPB's jurisdiction, the USERRA requires the Secretary of Defense to inform federal employees and agency managers of the rights, benefits, and obligations created by the USERRA.⁶¹ Furthermore, Congress has designated the federal government as a "model employer" under the USERRA.⁶²

If the MSPB determines that a federal agency violated the USERRA, the MSPB "shall enter an order requiring the agency or employee to comply [with the USERRA] and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance."⁶³ If the employee chose to employ private counsel to represent him in the matter before the MSPB and wins, the attorney may also petition the MSPB for reasonable attorney fees, expert witness fees, and "other litigation expenses."⁶⁴ If the agency prevails, the federal employee, or the OSC (if the OSC represented the worker before the Board), may appeal the decision to the United States Federal Circuit Court of Appeals.⁶⁵ The USERRA does not allow the employer agency to appeal an adverse MSPB decision regarding USERRA rights.⁶⁶

53. 38 U.S.C.A. § 4322(e).

54. *Id.* § 4324 (a)(1).

55. *Id.* § 4324 (a)(2). *See also* 5 C.F.R. § 353.210.

56. 38 U.S.C.A. § 4324 (b)-(c)(1). *See also* 5 C.F.R. § 353.211.

57. *Petersen v. Department of Interior*, 71 M.S.P.R. 227, 233 (1996).

58. *See, e.g., Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997) (eight months between last request for reemployment to agency and MSPB filing); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997) (two and one-half months between separation and MSPB filing); *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997) (less than three months between separation and MSPB filing); *Petersen*, 71 M.S.P.R. at 227 (one month between last request to agency for reemployment and MSPB filing). As of this date, the MSPB has not promulgated regulations regarding USERRA appeals submitted to the Board under its appellate jurisdiction, except as to attorney fees. The Board has the authority to initiate such regulations under its enabling legislation (5 U.S.C. § 1204(h)) and under the USERRA (38 U.S.C.A. § 4331(b)(2)(A)). Agency counsel may be able to argue the equitable defense of laches in extremely untimely cases. *See Jordan v. Kenton County Board of Education*, No. 95-6569, 1996 U.S. App. LEXIS 25304, at *4 (6th Cir. Sept. 6, 1996) (holding that laches barred reemployment rights claim in case of ten-year delay); *Farries v. Stanadyne/Chicago Division*, 832 F.2d 374, 380-82 (7th Cir. 1987) (holding that laches barred reemployment rights claim in case of nine-year delay).

59. *Petersen*, 71 M.S.P.R. at 236. H.R. REP. No. 103-65, pt. 1, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2454, 2456.

60. *See supra* text accompanying note 45.

61. 38 U.S.C.A. § 4333 (West 1996). *See also* 5 C.F.R. § 353.104 (1997) (Federal agencies must notify employees of their rights and obligations under the USERRA).

62. 38 U.S.C.A. § 4301(b).

63. *Id.* § 4324(c).

64. Attorney Fee Rules-MSPB, 62 Fed. Reg. 17,045 (1997) (to be codified at 5 C.F.R. §§ 1201.202(a)(7), 2301.203).

65. 38 U.S.C.A. § 4324(d).

66. *Id.*

The case of *Petersen v. Department of the Interior* best illustrates the USERRA's impact on federal employees. The plaintiff asserted that he was unfairly discriminated against by the Department of the Interior because of his disabled Vietnam veteran status.⁶⁷ He alleged that he was removed from his prestigious park ranger law enforcement position to an office desk job because of the antimilitary attitude of his superiors; that he was subjected to a "hostile work environment" by his coworkers and supervisors; and that he was regularly called names such as "psycho," "babykiller," and "platehead," despite his complaints to his superiors to stop such comments.⁶⁸ The MSPB found that Mr. Petersen had provided sufficient factual allegations to raise the issue that he was denied a "benefit of employment" when the agency removed his law enforcement status and that the broad antimilitary discrimination language of the USERRA provided sufficient basis to allow allegations of a hostile work environment.⁶⁹

In the other three recent cases,⁷⁰ the MSPB held that it had expanded jurisdiction under the USERRA to hear prior military service discrimination cases, including those involving probationary federal employees. All three of the cases were remanded to hearing officers to further develop the factual basis of the plaintiffs' claims. The OSC did not represent the plaintiffs in any of the four reported cases.⁷¹

The USERRA adds another means for federal employees to challenge adverse agency personnel decisions. Federal labor counsel and legal assistance attorneys who advise reserve members should take note of this new and potentially powerful statute which protects the rights of federal employee citizen-soldiers to employment, reinstatement, promotion, and employee benefits. The number of MSPB cases in this area is very likely to grow rapidly as reserve soldiers, sailors, and airmen are called more often to mobilize and to leave their federal employment⁷² for temporary periods of active duty and as federal employee reservists become more aware of their USERRA

rights. Labor counselors should also look for new USERRA regulations which will be promulgated by the Office of Personnel Management, the MSPB, and the OSC. Lieutenant Colonel Conrad.

Operational Law Note

Educating the Soldier-Lawyer: Introducing the Two-Week Operational Law Seminar

"If the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice."⁷³

"Operational law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior SJAs may be as close to the commander as his operations officer or his chief of staff . . . Operational Law and International Law are the future."⁷⁴

Introduction

On 27 October 1997, The Judge Advocate General's School, U.S. Army (TJAGSA), Charlottesville, Virginia, will unveil the first two-week version of the Operational Law Seminar. The current one-week course, taught three times a year, is already considered to be one of the finest and most comprehensive courses on operational law offered anywhere in the world. The fundamental goal of the new course is to expose students to the many facets of operational law⁷⁵ and to develop practical skills through seminars and practical exercises; the time spent in seminars is nearly quadrupled in the new course. Overall, the two-

67. *Petersen v. Department of Interior*, 71 M.S.P.R. 227 (1996).

68. *Id.* at 235.

69. *Id.* at 236.

70. *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997).

71. The OSC, although granted regulatory authority to draft regulations regarding USERRA representation of federal employees, has not promulgated any regulations at this time and has not represented any federal employee in a reported case before the MSPB or the Federal Circuit. See 38 U.S.C.A. § 4331(b)(2)(B).

72. As of 1997, one out of every eight Reserve Component members was a federal employee. Also, 11.6% of the DOD civilian workforce are reservists. John Pulley, *A Role in Reserve*, FED. TIMES, Mar. 31, 1997, at 1, 12, 15-24.

73. Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 36, 37 (1996).

74. Lieutenant General Anthony C. Zinni, *The SJA in Future Operations*, MARINE CORPS GAZETTE, Feb. 1996, at 15, 17, quoted in Warren, *supra* note 73, at 73.

75. Operational law is defined as "that body of domestic, foreign, and international law that impacts specifically upon the activities of U.S. forces across the entire operational spectrum." INTERNATIONAL AND OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 1-1 (June 1997). This is a deliberately broad definition which accommodates the interdisciplinary, interservice, interagency, international, and interesting practice of law in which judge advocates resolve legal issues stemming from the use of U.S. military forces to accomplish the missions of the nation.

week course will be a solid stepping stone for students to develop expertise in the areas of legal practice that have become essential components of operational success in every recent operation. This note summarizes the development of operational law as a formal part of the curriculum for developing judge advocates, and will describe the structure of the two-week course as it relates to the ongoing evolution of operational law as a discipline.

History

Since the term “operational law” became recognized as an essential component of the military legal community’s lexicon, the development of this broad body of law has been firmly linked to commentary and instruction produced at TJAGSA.⁷⁶ In July 1987, TJAGSA faculty published the first meaningful literature regarding operational law.⁷⁷ In his seminal article, *Operational Law—A Concept Comes of Age*, Colonel David E. Graham defined operational law and explained its future.⁷⁸ Colonel Graham observed that the art of operational law transcends “normally defined legal disciplines,” but he reminded judge advocates that operational law is a “comprehensive, yet structured” approach to serving the needs of the Army.⁷⁹

Even before the publication of Colonel Graham’s article, TJAGSA’s International Law Division⁸⁰ began the complex task of integrating operational considerations into its traditional legal curriculum. In 1987, the International Law Division revised its graduate level program to offer an entire quarter of instruction devoted entirely to operational law.⁸¹ The instruction within the graduate course was centered on a model that featured “five distinct forms of overseas deployments”⁸² and which focused on the discrete areas of law that become applicable during each form of deployment.

In addition to the changes made to the graduate course, the International Law Division developed a new continuing legal education course referred to as the Judge Advocate and Military Operations Overseas (JAMO) Seminar. The faculty designed the course to provide junior judge advocates with the knowledge and materials they would need in the five operational settings which had been integrated into the graduate course curriculum. Using a seminar and practical exercise format, the faculty introduced students to topics such as combat claims, combat contracting, low-intensity conflict, security assistance, and the role of the International Committee of the Red Cross.

After seven JAMO courses, TJAGSA changed the name of the course to the “Operational Law Seminar” in October 1990.⁸³ The name change signified the transition of operational law from a loose collection of legal regimes to an independent discipline of practice and study, but it was not accompanied by any significant substantive change in course structure or content. Shortly thereafter, the course began to change dramatically. In the aftermath of Operations Desert Shield and Desert Storm, the International Law Division added to the seminar additional material which mirrored legal practice in actual operations. By June 1993, the chair of the International and Operational Law Department noted that the seminar had become the only course of its kind in the world. It offered instruction in nearly every area of legal practice within the contemporary operational setting.

Faculty from the International and Operational Law Department surveyed judge advocates and commanders during recent operations to determine their needs. The primary strength of the Operational Law Seminar has been the faculty’s ability to incorporate into the course curriculum the product of these surveys and to adapt the course to meet the needs of judge advocates in contemporary operational settings.

76. The lead role played by TJAGSA in developing and expanding the formal curriculum associated with operational law as a discipline in no way denigrates the contributions of judge advocates in the field. Judge advocates have had critical operational responsibilities since the beginning of the nation. See Warren, *supra* note 73, at 36-42; see also U.S. DEP’T OF ARMY, *THE ARMY LAWYER: A HISTORY OF THE JAGC, 1775-1975* (1975); MAJOR GENERAL GEORGE S. PRUGH, U.S. DEP’T OF ARMY, *VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973* (1975); Colonel Ted B. Borek, *Legal Services During War*, 120 MIL. L. REV. 19 (1988).

77. Lieutenant Colonel David E. Graham, *Operational Law—A Concept Comes of Age*, ARMY LAW., July 1987, at 9.

78. *Id.*

79. *Id.*

80. Now known as the International and Operational Law Department.

81. The graduate course at TJAGSA is a one year Master of Laws program which is accredited by the American bar Association and is offered to career judge advocates. The program includes courses offered by four teaching departments: the International and Operational Law Department, the Criminal Law Department, the Administrative Law Department, and the Contract Law Department.

82. Graham, *supra* note 77, at 11. Colonel Graham described the five types of deployments as follows: (1) U.S. forces stationed overseas (under a stationing arrangement); (2) deployment for conventional combat missions; (3) deployment for security assistance missions; (4) deployment for overseas exercises; and (5) deployment for nonconventional missions.

83. The name change was approved by The Assistant Judge Advocate General in July 1988, based upon the recognition that operational law had received as a “stand alone” body of law. See Memorandum from Major Mark D. Welton, Senior Instructor, International Law Division, to Commandant, The Judge Advocate General’s School, U.S. Army, subject: Program of Instruction, 8th Operational Law Seminar (17 October 1990) (on file with the International and Operational L. Dep’t, TJAGSA).

Since the closing day of Operation Desert Storm,⁸⁴ however, military operations have become increasingly complex. Much has been written regarding the difficulty of properly preparing commanders and legal advisors for these operations.⁸⁵ The greatest challenge is the diversity of the operations themselves and the importance of the law to nearly every decision made within and about the operational setting.

The Operational Law Seminar kept pace with this challenge by continually adding new material to the curriculum of the course. From August 1994 to January 1997, instruction was added to the seminar in the areas of: (1) civil military operations, (2) intelligence law, (3) environmental law aspects of overseas operations, (4) peace operations, (5) domestic operations, (6) civilian protection law, (7) funding U.S. military operations, (8) the Center for Law and Military Operations Watch, and (9) noncombatant evacuation operations. Additionally, instruction was expanded in the areas of rules of engagement, international legal basis for the use of force, operation plans review, and deployment planning and preparation.

The goal of the seminar is to prepare judge advocates to serve effectively and confidently within the operational setting as operational multipliers. The changes, modifications, and additions to the seminar enabled the faculty to achieve this goal during the past five years. The seminar reached a critical point in the past year as commanders came to rely ever more on the advice of attorneys in operational settings. During this period, the fast-paced operational tempo of the United States Army forced the Judge Advocate General's Corps to deploy many of its junior officers into demanding operational settings. Diverse and complex legal issues confronted these young officers. Frequently, their previous education and experience had done little more than introduce them to such issues. Even the highly regarded Operational Law Seminar could not and had not dealt with these issues in sufficient detail to give these judge advocates the competence and confidence required in the operational setting. In fact, the continuous evolution of the course

content forced the International and Operational Law Department to remove most of the seminars and practical exercises that were critical to a clear understanding of the complex legal issues that were raised during the course lectures. Deciding not to abandon its original goal and charter, the faculty carefully crafted a new course.

The New Two-Week Operational Law Seminar

The most dramatic change between the original seminar and the new seminar is not its length; it is the approach. The new Operational Law Seminar will have nearly a four-hundred percent increase in the number of seminar and practical exercise hours.⁸⁶ The idea is to provide students with more than the academic concepts, rules, and school solutions. As always, the faculty will teach general legal principles, but the seminars and practical exercises will begin where the lectures stop. The practical exercises will be based upon real world scenarios from recent operations. In almost every instance, the formal lecture does not immediately precede the associated seminar. The intent is to allow time for students to interact with each other and the faculty, to complete some assigned readings in preparation for the seminar, and to reflect on the materials presented during the class.

For example, after providing detailed instruction on the Standing Rules of Engagement (SROE),⁸⁷ the faculty will provide each student with a complete copy of the classified SROE, along with electronic messages which are identical to the messages received by staff officers at each level of command before and during an actual deployment. The students will be assigned to small staff groups and tasked to work their way through problems that have surfaced during recent operations. Instead of merely understanding the legal principles that support rules of engagement, each student will understand the judge advocate's role in drafting, changing, and publishing rules of engagement. Students will also learn how to develop and to execute the situational training exercises which have proven to

84. Operation Desert Storm officially came to a close on 28 February 1991, after the signing of a cease-fire by General Norman H. Schwarzkopf. Operation Desert Storm, an international armed conflict, is now regarded as an aberrational operation. Of the dozens of operations executed since that day, all have been characterized as military operations other than war.

85. See Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3.

In the last decade, however, the most frequent application of United States power occurred in diverse operations that repeatedly defied the application of the traditional law of armed conflict. During the course of each of these operations, military lawyers have experienced difficulty finding the overall regime or structure of laws that provides answers for the complex legal issues generated by these new age and nuanced operations.

Id. See also Major Mark S. Martins, *Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff*, ARMY LAW., Aug. 1995, at 5.

86. Seminars and practical exercises have been added or dramatically expanded in the following areas: legal basis for the use of force, status of forces agreements, intelligence law, civilian protection law, deployment claims, OPLAN development, rules of engagement development and training, rules of engagement and staff integration, funding U.S. military operations, and practicing expeditionary law.

87. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) (classified as a SECRET document, including an unclassified portion, Enclosure A, which is intended for wide distribution).

be critical for preparing deploying units in numerous recent operations.

The new course also concentrates instruction and seminar time on areas of practice that have received the greatest attention during recent operations. For example, the after action reports from Operations Restore Hope (Somalia), Uphold Democracy (Haiti), and Joint Endeavor (Bosnia) all demonstrate the extreme importance of competency regarding fiscal, procurement, and funding law. Accordingly, the new course focuses more than an entire day on these issues.

The course will continue the tradition of providing judge advocates with the most useful and comprehensive materials available. Each student will receive the current versions of the Operational Law Handbook, the Operational Law Briefing Papers and Materials Book, and a Handbook on Intelligence Law. Faculty members will use these books as the textbooks during the course and explain how to use these resources during an actual deployment. Seminars and practical exercises will reinforce the utility of the resources provided. The intent is to teach the students not only legal principles, but also where to find the law and how to interpret and to apply it.

Conclusion

The pace, scope, and complexity of current operations demand that judge advocates have the tools required to function effectively on any staff in any type of operation anywhere in the world. Operational law is not a distinct specialty within a potpourri of other legal areas. It is a discipline which incorporates other areas of law and requires competence in a wide range of specific judge advocate missions. The effective practice of operational law requires attorneys who can integrate knowledge of claims, military justice, administrative law, contract law, fiscal law, legal assistance, international law, and the law of armed conflict with the core skills of professional soldiers.⁸⁸ The United States Army is an increasingly expeditionary service. If the Army exists to accomplish a broad spectrum of assigned missions throughout the world, operational law in a deployed environment is the essence of military legal practice. The two-week Operational Law Seminar will provide attorneys with the knowledge, deployable materials, and skills required to serve commanders and soldiers. Major Whitaker and Major Newton.

88. In the words of Lieutenant Colonel Warren, "Operational law also includes proficiency in military skills. It is the *raison d'être* of the uniformed judge advocate. Every judge advocate must be an operational lawyer." Warren, *supra* note 73, at 37.

USALSA Report

United States Army Legal Services Agency

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 about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically in the Environmental files area of the Legal Automated Army-Wide System Bulletin Board Service. The latest issue, volume 4, number 10, is reproduced in part below. The *Bulletin* is also available on the Environmental Law Division Home Page (<http://160.147.194.12/eld/eldlink2.thm>) for download as a text file or in Adobe Acrobat format.

EPA Addresses DOD's Concerns Over New Ozone and Particulate Matter Standards

On 17 July 1997, Environmental Protection Agency (EPA) Administrator Carol Browner sent a letter to the Department of Defense (DOD)¹ which addressed the DOD concerns raised during informal discussions with the EPA regarding the impact of the new Ozone and Particulate Matter standards on DOD training and readiness. Among other concerns raised, the DOD questioned whether the new standards would adversely affect training exercises, such as those that use obscurants.

Administrator Browner replied in her letter that, while obscurants would not be exempted under the rule, the EPA will not require states to count particulates from obscurants in its attainment demonstration. Consequently, states will not have to regulate obscurants to meet the new ozone and particulate matter standards. The EPA's policy, however, will not prevent states from regulating obscurants if they so choose. A state may regulate obscurants if they pose a health risk, since obscurants could, under the right conditions, cause an area to exceed the daily limit for particulate matter imposed by the EPA regulations. The EPA asserts that these health-based particulate matter standards protect sensitive populations.

The EPA letter also stated that military activities are among the smallest sources of fine particulates, and, in its implementation guidance, the EPA will advise states to target what the EPA feels are the primary sources for fine particulates, such as

power plants and large combustion sources. Therefore, it appears, at least for the moment, that the EPA is serious about addressing the DOD's concerns about the impact the new standards will have on military training and readiness. A state could, however, choose to regulate military activities that produce fine particulates, such as dust-producing field exercises. Lieutenant Colonel Olmscheid.

Clinton Privilege Decision Provides Timely Reminder for Commanders and Managers

On 23 June 1997, the Supreme Court denied certiorari to review the Eighth Circuit's decision that lawyers in the White House counsel's office must disclose notes of their private conversations with First Lady Hillary Rodham Clinton.² The Eighth Circuit decision, which received considerable press coverage, reinforces the need to remind commanders and environmental program managers about attorney-client and deliberative process privileges. In light of recent stiffening by the EPA and state agencies in their enforcement policies, installation attorneys should review these issues with commanders and environmental program managers.

The Eighth Circuit's decision involved two sets of notes taken by White House attorneys which were subpoenaed by Kenneth Starr, the Whitewater independent counsel. The notes concerned Mrs. Clinton's activities following the suicide of her friend, Deputy Counsel to the President Vince Foster, and the unexplained reappearance last year of some of Mrs. Clinton's billing records from her Little Rock law firm from the 1980's; the billing records had long been sought under subpoena in the investigation.

The White House counsel argued that these conversations were protected by attorney-client privilege. The attorney-client privilege under Federal Rule of Evidence 501 "is governed by the principles of common law," and is considered to be the oldest privilege recognized by common law.³ The position of White House counsel is intuitive for many attorneys, considering the purpose of the privilege—protection of a person's right to private, candid discussion with her lawyers. But the Eighth Circuit ruled 2-1 against the White House counsel and granted the Office of the Independent Counsel's motion to compel production of the notes.

1. The ELD's homepage (<http://160.147.194.12/eld/eldlink2.htm>) contains a copy of Ms. Browner's letter.

2. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert denied*, Office of President v. Office of Independent Counsel, No. 96-1783, 1997 WL 274825 (June 23, 1997).

3. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Many in the legal community view the Eighth Circuit decision with skepticism. New York University law professor Stephen Gillers opined:

This is a very dangerous precedent and very unwise for the long term. I fear this is driven by anti-Clinton sentiment or people who just want to get to the bottom of this Whitewater business. But long after we have forgotten about Whitewater, this precedent is going to be on the books.⁴

Installation attorneys should consider discussing with their commanders two points regarding the attorney-client privilege and the Eighth Circuit decision. First, the Eighth Circuit carefully distinguished the unprivileged communications between Mrs. Clinton and White House attorneys from the privileged nature of any communications between Mrs. Clinton and her *personal* attorney, who was also present at the meetings.⁵ Commanders should understand who is a judge advocate's client. In the majority of discussions between an Army commander and an Army judge advocate, the client is the Army, not the commander.⁶ Commanders must understand that the type of attorney-client protection Mrs. Clinton may have had with her personal attorney would apply only to communications between an Army attorney and an individual client. This type of relationship typically exists in either a legal assistance or trial defense context.

Second, the court distinguished the White House (the Office of the President), which cannot be held criminally liable for the conduct of its employees, from a corporation (or federal agency like the DOD), which can theoretically be criminally liable. The court explained that: "corporate attorneys [whose corporations can be criminally liable] have a compelling interest in ferreting out any misconduct by its employees. The White House simply has no such interest with respect to the actions of Mrs. Clinton."⁷ When an Army attorney collects materials relevant to his representation of the installation concerning possible criminal activity by the command, these documents would likely fall outside the scope of the Eighth Circuit's holding and would be deemed privileged.

Judge advocates should also remind commanders and managers about the difference between the attorney-client privilege and the deliberative process privilege under the Freedom of Information Act (FOIA). The FOIA's deliberative process privilege is unique to the government and is intended to protect open and candid communication within government agencies.⁸ The privilege establishes the fifth of nine exemptions under the FOIA and exempts from release "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency."⁹

While commanders should not discourage the flow of communication through command channels concerning the installation's compliance status, they should be aware of two points which establish the somewhat narrow scope of the deliberative privilege. First, the privilege applies only to predecisional, mental, or deliberative processes, and to governmental evaluations, expressions of opinion, and recommendations on policy and decision-making matters.¹⁰ Thus, only documents that are prepared to assist a commander in making a decision, such as decision memoranda containing fact synthesis and analysis, are privileged; purely factual materials are not privileged. Thus, final Environmental Compliance Assessment System reports are not privileged and would have to be disclosed under a proper FOIA request. Second, the deliberative privilege is "qualified," not absolute. The court must consider the following factors when applying the privilege: (1) the relevance of the evidence to be protected, (2) the availability of other evidence, (3) the seriousness of the litigation and issues involved, (4) the role of the government in the litigation, and (5) the possibility of disclosure's chilling effect on other employees.¹¹ By discussing these limitations with commanders, attorneys can alleviate the commanders' anxiety over whether their communications with "their lawyer" are protected from disclosure to the public. Captain Anders.

New Guidance From the Council on Environmental Quality for the National Environmental Policy Act and Transboundary Effects

On 1 July 1997, the Council on Environmental Quality (CEQ) issued guidance for agencies regarding the applicability

4. David Savage, *Privilege Ruling Disturbs Lawyers, Courts: Attorneys Fear Foundation on Which Appellate Panel Built its Ruling Against First Lady Could Have a Serious Effect on a Key Legal Tradition*, L.A. TIMES, May 18, 1997, at A11.

5. *Grand Jury Subpoena*, 112 F.3d at 917.

6. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.13 (1 May 1992).

7. *Grand Jury Subpoena*, 112 F.3d at 933.

8. *Badhwar v. United States Dep't of the Air Force*, 622 F. Supp. 1364, 1367 (D.C. Cir. 1985).

9. 5 U.S.C.A. § 552(b)(5) (West 1996).

10. *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 164 (E.D.N.Y. 1994).

11. *Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979).

of the National Environmental Policy Act (NEPA) to transboundary effects.¹² The guidance will impact installations near the Mexico and Canadian borders and should be followed when such installations examine a proposed federal action in a NEPA analysis.

The CEQ guidance requires a federal agency to conduct an analysis of reasonably foreseeable transboundary effects of a proposed action which occurs in the United States.¹³ It applies only to actions which are currently covered by the NEPA and which occur within the United States or its territories. The guidance is not intended to expand the range of actions to which the NEPA applies.

Under the CEQ guidance, the NEPA analysis must include consideration of the reasonably foreseeable effects of a proposed federal action across international boundaries.¹⁴ Possible examples include an action that may result in increased water usage that would affect an aquifer shared by another country or the siting of a hazardous air pollutant source on the installation that could impact individuals in the foreign country.

The CEQ recommends using the scoping process to identify actions that could have transboundary effects.¹⁵ The guidance recommends that analysts pay particular attention to actions that could affect migratory species, air quality, watersheds, and other ecosystem components that cross borders.¹⁶ Analysts should also consider interrelated social and economic effects, although social and economic effects alone will not be enough to trigger an Environmental Impact Statement analysis.

The agency has the discretion to determine how much information is needed to satisfy the new guidance. The CEQ notes that agencies must “undertake a reasonable search for relevant, current information associated with an identified potential

effect,”¹⁷ and are not required to address remote or highly speculative consequences. Major Polchek.

Migratory Bird Treaty Act—Litigation Update

Courts continue to wrestle with the applicability of the Migratory Bird Treaty Act (MBTA) to federal agencies.¹⁸ Some public advocacy groups allege that the MBTA’s prohibitions apply to federal agencies, but two circuit courts recently ruled that the MBTA does not apply to the actions of federal agencies.¹⁹ To avoid potential MBTA litigation, practitioners should coordinate with the U.S. Fish and Wildlife Service for all actions that may adversely affect migratory birds. Major Ayres.

Sikes Act Reauthorization Efforts

Despite two consecutive years of unsuccessful efforts, it appears that Congress will pass a revised, updated, and strengthened Sikes Act.²⁰ Currently, the Sikes Act authorizes the Department of Defense (DOD) to enter into cooperative plans with the Department of Interior and state fish and game agencies to manage fish and wildlife on military installations. Two bills under consideration in Congress would alter the permissive nature of the Sikes Act and would create a statutory requirement for military installations to prepare integrated natural resources management plans (INRMPs).²¹ In anticipation of the reauthorization of the Sikes Act, and pursuant to DOD instruction,²² the Department of the Army recently issued guidance on preparing INRMPs.²³

Both of the Sikes Act reauthorization bills currently being considered by Congress also detail mandatory contents of the

12. Memorandum from Kathleen McGinty, Chair, Council on Environmental Quality, to heads of federal agencies (July 1, 1997) (on file with author). Practitioners can obtain the CEQ guidance from the Environmental Law forum of the LAAWS BBS.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. The Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1994).

19. *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997); *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997).

20. The Sikes Act, 16 U.S.C. § 670a-f (1997). Congress initially enacted the Sikes Act in 1960 and has amended the act five times; the most recent amendments were added in 1986.

21. See H.R. Res. 374, 105th Cong. (1997); H.R. Res. 1119, 105th Cong. (1997).

22. U.S. DEP’T OF DEFENSE, INSTR. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996).

23. See *Integrated Natural Resources Management Plan (INRMP) Guidance Released*, ARMY LAW., June 1997, at 57.

INRMPs. The contents required by each bill, however, differ slightly. It is likely that a compromise version of the two bills will be incorporated into the National Defense Authorization Act for Fiscal Year 1998.²⁴ Major Ayres.

Air Force Environmental Law Courses

The Air Force will sponsor three environmental law courses at Maxwell Air Force Base, Montgomery, Alabama. The courses scheduled are: the Advanced Course, 1-3 December 1997; the Update Course, 23-25 February 1998; and the Basic Course, 4-8 May 1998. The courses are free, but travel and TDY are the attendee's responsibility. The Advanced Course has a very limited number of seats, and the MACOM ELS must nominate a person before that person can attend the course. For the Update and Basic courses, Army attorneys can enroll by contacting Ms. Mary Nixon at the Environmental Law Division, FAX: (703) 696-2940; Voice: (703) 696-1230; or e-mail: nixonmar@otjag.army.mil. Mr. Nixon.

Litigation Division Notes

Recent Military Personnel Law Decisions

The case of *Burkins v. United States*

Introduction

On 22 April 1997, the United States Court of Appeals for the Tenth Circuit decided a case which recognized the exclusive jurisdiction of the United States Court of Federal Claims over cases in which a plaintiff's prime objective is the recovery of more than \$10,000 in monetary damages, even when the plaintiff frames his complaint as a request for injunctive, declaratory, or mandatory relief. In *Burkins v. United States*,²⁵ the Tenth Circuit applied the "prime objective" or "essential purpose" test and determined that, although the plaintiff did not explicitly seek monetary relief, his prime objective was to recover more than \$10,000 in disability benefits and/or retired pay from the federal government; thus, the exclusive jurisdiction of the Court of Federal Claims was triggered. The Tenth Circuit concluded that the district court lacked jurisdiction and ordered that the case be transferred to the Court of Federal Claims.

24. Interview with Anne Mitemeyer, General Counsel to the Senate Armed Services Committee, in Wash., D.C. (July 1, 1997).

25. 112 F.3d 444 (10th Cir. 1997).

26. The ABCMR is authorized to correct military records in the event that such a change is "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a) (1994).

27. *Burkins v. United States*, 914 F.Supp. 408, 415 (D. Colo. 1996).

28. 28 U.S.C. §§ 1346, 1491 (1994).

29. *Id.* § 1491.

Background

The plaintiff, a Vietnam veteran and former enlisted soldier in the Hawaii National Guard, sought correction of his military records from the Army Board for Correction of Military Records (ABCMR)²⁶ to reflect that he received a disability discharge instead of an honorable discharge when he left active duty on 4 November 1970. The plaintiff argued that he was entitled to a retroactive disability discharge because he had suffered from Post-Traumatic Stress Disorder (PTSD) as a result of his active duty service in Vietnam. The ABCMR granted partial relief to the plaintiff in the form of a determination that he was entitled to a fifty-percent disability rating retroactive to 18 March 1987.

The plaintiff filed suit in federal district court in Colorado, alleging that the decision of the ABCMR was arbitrary, capricious, and contrary to law, and seeking a writ of mandamus ordering the ABCMR to correct his military records retroactive to 4 November 1970. The district court subsequently remanded the case to the ABCMR to consider newly-discovered evidence, but, after consideration, the ABCMR denied the plaintiff any further relief. The district court ultimately concluded that the decision of the ABCMR was arbitrary and capricious, and the court ordered the ABCMR to correct the plaintiff's military records to reflect that he suffered from 100% disabling PTSD retroactive to 4 November 1970.²⁷ The ABCMR complied with the district court's order. The United States appealed and asserted, inter alia, that the district court lacked jurisdiction.

Jurisdiction

Jurisdiction over monetary claims against the United States is exclusively defined by the Tucker Act,²⁸ the provisions of which confer original concurrent jurisdiction on district courts and the Court of Federal Claims for non-tort civil actions or claims against the United States not exceeding \$10,000 which are based upon the Constitution, statutes, regulations, or contracts. The Court of Federal Claims has exclusive jurisdiction over such claims which exceed \$10,000.²⁹ In the exercise of its jurisdiction, the Court of Federal Claims has the authority to grant complete and appropriate relief for claims not otherwise barred; the Court may issue "orders directing restoration to office or position, placement in appropriate duty or retirement

status, and correction of applicable records” in order to provide an entire remedy.³⁰

In *Burkins*, the Court of Appeals noted that under Tenth Circuit law, a plaintiff cannot avoid the exclusive jurisdiction of the Court of Federal Claims by “framing a complaint in the district court as one seeking injunctive, declaratory, or mandatory relief when, in reality, the thrust of the suit is one seeking money damages from the United States.”³¹ The court then reiterated its adoption of the “prime objective” or “essential purpose” test, under which the exclusive jurisdiction of the Court of Federal Claims is triggered if the plaintiff’s prime objective or essential purpose is to recover money in excess of \$10,000 from the federal government.³² Applying the test to *Burkins*, the court held that it was clear that his prime objective was to obtain benefits in excess of \$10,000 in the form of retirement pay from the Army, disability pay from the Department of Veterans Affairs, or both, despite the fact that he had not framed his complaint as a request for monetary relief.³³ The Court noted that the plaintiff failed to articulate how the correction of his military records represented any significant prospective effect or considerable value beyond entitling him to retroactive monetary benefits.³⁴ The Tenth Circuit concluded that *Burkins* was required to pursue his military records correction claim in the Court of Federal Claims, pursuant to that court’s exclusive Tucker Act jurisdiction, and vacated the judgment of the district court.³⁵

Conclusion

The Tenth Circuit’s decision in *Burkins* serves as a reminder that jurisdiction is an issue that must be raised by the government at every level. Despite the lengthy and tortured procedural history of the *Burkins* case and an adjudication on the merits in plaintiff’s favor by the district court, the Court of Appeals properly applied the law when it determined that the Court of Federal Claims was the only Court with jurisdiction to hear the plaintiff’s case. Captain Tetreault.

The case of *Norris v. Dep’t of Defense*

Introduction

On 29 October 1996, the United States District Court for the District of Columbia rejected a plaintiff’s claim for treble damages against the United States and certain named government officials under the Racketeer Influenced and Corrupt Organizations Act (RICO).³⁶ In *Norris v. Department of Defense*,³⁷ the D.C. district court granted the defendants’ motion to dismiss on sovereign immunity grounds as against the United States and the named officials in their official capacities, and for failure to articulate sufficient facts to support the plaintiff’s claims as against the named officials in their individual capacities.³⁸

Background

Proceeding pro se, the plaintiff, a medical doctor and former colonel in the United States Army, filed a 153-page complaint against, inter alia, the Department of Defense, the Secretary of Defense, the Surgeon General, and the Executive Secretary of the Army Board for Correction of Military Records (ABCMR), alleging RICO violations. The plaintiff served on active duty with the Army Medical Department (AMEDD) from 1981 to 1988 and held the ranks of major, lieutenant colonel, and colonel. The plaintiff’s specialty was nuclear medicine.

Beginning in 1986, the plaintiff’s difficulties in following military regulations and relating to other staff members, particularly subordinates, were documented in assessments of her performance. In 1987, the plaintiff’s clinical privileges were suspended pending an investigation into allegations that the plaintiff had allowed her temporary secretary-receptionist to administer radionuclides into a patient at the Nuclear Medicine Clinic. Though her clinical privileges were later restored, the plaintiff continued to have performance problems. She ignored her chain of command, harassed her subordinates, and demonstrated complete disregard for military authority. In 1988, the plaintiff was suspended from all duties in the Nuclear Medicine Clinic after she directed a housekeeper to clean the “hot lab” at the clinic, in violation of federal law, licensing guidelines, and

30. *Id.* § 1491(a)(2).

31. *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997) (citations omitted).

32. *Id.*

33. *Id.*

34. *Id.* at 449-50.

35. *Id.* at 450-51.

36. 18 U.S.C. §§ 1961-68 (1994).

37. No. 95-2392 (D.D.C. Oct. 29, 1996) (Memorandum Opinion and Order).

38. *Id.* slip op. at 3-4.

Army regulations. The plaintiff was honorably discharged from the Army on 14 July 1988, at the expiration of her term of service.

From 1987 to 1995, the plaintiff submitted twenty-nine requests and letters to the ABCMR concerning the correction of her personnel records. The ABCMR denied all but one of the plaintiff's requests for relief and correction of her military records. In December 1995, the plaintiff filed suit against the defendants in the D.C. district court. She based her RICO claims on alleged acts of mail fraud, wire fraud, bribery, obstruction of justice, and violation of military regulations.³⁹ The gravamen of the plaintiff's complaint was that the defendants fired her, defamed her, and falsified her military personnel records for the purpose of perpetuating a fraudulent scheme by which the defendants created an artificial shortage of Army doctors in order to persuade Congress to approve higher salaries and larger bonuses for the remaining doctors.⁴⁰ The plaintiff asserted that the "enterprise" at issue for RICO purposes was the AMEDD.⁴¹

Sovereign Immunity

The United States, its agencies, and its officers acting in their official capacities are immune from suit absent a waiver of sovereign immunity.⁴² In order to maintain her action against agencies and officers of the United States, the plaintiff was required to establish that the United States had waived its sovereign immunity. The district court found that the plaintiff had failed to establish such a waiver, stating: "The RICO statute

contains no express waiver of sovereign immunity, and every court that has considered the issue has recognized that the United States has not waived its sovereign immunity for claims brought under RICO."⁴³ Accordingly, the district court dismissed the complaint as against the United States, the Department of Defense, the AMEDD, the ABCMR, all other federal governmental entities named by the plaintiff, and all individual defendants in their official capacities.⁴⁴ With respect to the individual defendants sued in their personal capacities as well as their official capacities (the Secretary of Defense, the Surgeon General, and the Executive Secretary of the ABCMR), the district court held that the plaintiff failed to allege sufficient facts to support her RICO claims against these defendants individually.⁴⁵ Accordingly, the district court granted the defendants' motion to dismiss.

Conclusion

The plaintiff appealed the district court's dismissal of her case. On 5 May 1997, the United States Court of Appeals for the District of Columbia Circuit granted the government's motion for summary affirmance, finding that the merits of the parties' positions were so clear as to warrant summary action.⁴⁶ The circuit court's decision reaffirms that RICO claims against the federal government, its agencies, and its officers acting in their official capacities are barred by the doctrine of sovereign immunity. Captain Tetreault.

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 5, n.3.

42. See generally *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949).

43. *Norris*, slip op. at 3 (citations omitted).

44. *Id.* at 3-4.

45. *Id.* at 4.

46. *Norris v. Department of Defense*, No. 96-5326, 1997 WL 362495 (D.C. Cir. May 5, 1997) (Order and Per Curiam Memorandum).

Claims Report

United States Army Claims Service

Affirmative Claims Note

Medical Care Recovery Worksheets

To support requests to terminate, to compromise, or to waive medical care recovery claims which exceed its authority,¹ a field claims office must send a copy of its claim file to the Affirmative Claims Branch, U.S. Army Claims Service (USARCS), for decision. The file must contain a memorandum from the recovery attorney which gives her assessment of the case and her recommendation with regard to approval or denial of the claim.² The memorandum must include detailed information concerning the reasonable value of the injured party's claim for permanent injury, pain and suffering, decreasing earning power, pension rights, present and prospective assets, income, and the obligations of the injured party.³

In 1995, the Affirmative Claims Branch created the Medical Care Recovery Worksheet to simplify and to standardize the information required for requests for compromise, waiver, and termination. Since 1995, the USARCS has requested that all requests for compromise, waiver, or termination be accompanied by a completed Medical Care Recovery Worksheet. The new edition of Department of the Army Pamphlet 27-162 will make this requirement even more explicit.⁴

When the injured party's counsel represents the government through an attorney representation agreement, the injured party's counsel can fill out the Medical Care Recovery Worksheet. Private counsel is usually in the best position to give

detailed information about the availability of insurance, residual damages, problems proving the case at trial, and other matters. If the injured party's counsel fills out the Medical Care Recovery Worksheet, however, the recovery attorney must thoroughly review the completed worksheet before sending it to the USARCS for a compromise decision. The recovery attorney, not the injured party's attorney, must fill out block twelve ("Field Office's Recommendation and Justifications").

Claims office personnel can get a copy of the Medical Care Recovery Worksheet by sending a computer disk to the Affirmative Claims Branch, USARCS, Fort George G. Meade, Maryland 20755. The worksheet is also available for downloading from the LAAWS Bulletin Board System under Files (Claims). Recovery attorneys should save the document on their word processing programs for future use.

This worksheet provides an orderly method of setting forth the facts and the law regarding the claim as well as a recommendation for action. By thoroughly completing the Medical Care Recovery Worksheet, claims personnel will ensure that the Affirmative Claims Branch has all of the necessary information to make a prompt and final decision on requests to terminate, to compromise, or to waive medical care claims. Additionally, the worksheet provides all of the information required by the Department of Justice on cases which exceed \$100,000,⁵ and it eliminates the need for further inquiry on the claim. Captain Beckman.

1. For delegation of authority limits, see U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 14-4 (1 Aug. 1995), [hereinafter AR 27-20]. See also, 32 C.F.R. § 537.24(c) (1996). Generally, unless limited by the Commander, USARCS, or the chief of a command claims service, the head of an area claims office has the authority to compromise up to \$15,000 in claims asserted for \$25,000 or less and to waive or to terminate collections on claims asserted for \$15,000 or less.

2. U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS, para. 9-6(d) (15 Dec. 1989); see also, 32 C.F.R. § 537.24(d)(4) (1996).

3. 32 C.F.R. § 537.24(d)(3)(ii).

4. The new requirement will be in the new version of *Department of the Army Pamphlet 27-162, Claims*, at paragraph 14-16c.

5. The Department of Justice (DOJ) has the sole authority to approve: (1) the compromise, waiver, or termination of a medical care claim asserted for more than \$100,000; (2) final actions on claims previously referred by the USARCS to the DOJ for action; and (3) settlement where a third party has filed suit against the United States or the injured party for the same incident which gave rise to the claim of the United States. AR 27-20, *supra* note 1, para. 14-4(g). See 28 C.F.R. pt. 43 (1996).

Professional Responsibility Notes

Office of The Judge Advocate General

Department of the Army Standards of Conduct Office

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

The following two Committee opinions, which apply the Army's Rules of Professional Conduct for Lawyers (Army Rules)¹ and other regulatory standards² to cases involving allegations of attorney personal and professional misconduct, are intended to promote an enhanced awareness of personal and professional responsibility and to serve as authoritative guidance for Army lawyers. To stress education and to protect privacy, the SOCO edited the Committee opinions.³ Mr. Eveland.

Professional Responsibility Opinion 96-1

The Judge Advocate General's Professional Responsibility Committee

Army Rule 1.6
(Confidentiality)

Army Rule 8.4
(Misconduct)

No ethics violation proven against attorney who invoked privilege, where criminal investigators sought attorney's statement concerning his sexual involvement with client, a physically abused wife of an enlisted soldier.

Army Rule 8.4
(Criminal Acts, Conduct Involving Dishonesty, and Conduct
Prejudicial to the Administration of Justice)

Attorney obstructed justice when he asked witness to withdraw her statement detailing attorney's admissions of adultery with physically abused wife of an enlisted soldier.

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

2. See U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE (3 Feb. 1995) (The 15 September 1989 edition of AR 27-1 was in effect at the time of the events.); U.S. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995) [hereinafter AR 27-3] (The 30 September 1992 edition of AR 27-3 was in effect at the time of the events.).

3. Sequentially numbered footnotes have been added to both Committee opinions.

Facts

Captain *W* was a member of the Judge Advocate General's Corps serving as an administrative law attorney. Although a married man, Captain *W* frequented NCO clubs by himself, where he met a married woman, Mrs. *Z*, the victim of physical abuse by her spouse, Specialist *Z*. As the evening progressed, Captain *W* and Mrs. *Z* engaged in small talk, and Captain *W* revealed to Mrs. *Z* that he was a lawyer. When that club closed, they went to another club. After the second club closed, the two drove to the SJA office, where they engaged in further conversation for approximately twenty minutes before engaging in sexual intercourse and sodomy. A few weeks later, Captain *W* and Mrs. *Z* again met at a military club. When it was time to go home, Mrs. *Z* asked Captain *W* for a ride. He took her instead to the Legal Assistance Office, where they engaged in sexual intercourse.

Over the next two months Captain *W* and Mrs. *Z* talked from time to time, both in person and on the phone. The exact content of those conversations is unknown. However, Captain *W* told one witness, while watching the Superbowl at a bar, that he was giving Mrs. *Z* "legal advice for marital problems."

Specialist *Z* assaulted his wife four times after she began her relationship with Captain *W*. As a result of his assaults, court-martial charges were preferred against Specialist *Z*. During the course of the criminal investigation against Specialist *Z*, Mrs. *Z* told U.S. Army Criminal Investigation Command (CID) investigators that she and Captain *W* had engaged in sexual intercourse and sodomy. As a result of Mrs. *Z*'s statements, Captain *W* was apprehended by the CID, advised of his article 31, Uniform Code of Military Justice (UCMJ) rights, and given an opportunity to make a statement. Captain *W* invoked his rights and refused to answer the investigators' questions because of "attorney-client privilege." Captain *W* also wrote on the rights advisement form, "I have advised Mrs. *Z* on legal matters I believe gave rise to the complaint."

Mrs. *Z* was reinterviewed, and denied having an attorney-client relationship with Captain *W*. However, she did disclose that at some point during her affair with Captain *W*, she had asked for his advice, to "get another person's point of view,"

because she wasn't getting along with her husband. Specifically, Mrs. Z said she asked Captain W, "If you were in my situation would you leave your husband?"

Ms. Wit, an acquaintance of Mrs. Z and Captain W, told the CID that both, on separate occasions, had admitted their sexual relationship to her. Captain W found out about this statement. According to Ms. Wit, she went to the bowling alley parking lot when told that Captain W wanted to see her. Although Captain W knew he was under investigation by the CID and that Ms. Wit was a key witness against him, he joined her in the parking lot to talk with her. Captain W asked if she told the CID that he had slept with Mrs. Z. When Ms. Wit admitted that she had told the CID about his sexual relationship with Mrs. Z, Captain W told her that she would have to change her statement because he was going to get in trouble. Captain W told Ms. Wit to call the CID, tell them her prior statement was a lie, and tell them that Mrs. Z had asked her to lie to get her husband out of trouble. Ms. Wit advised Captain W that she could not do what he asked because she did not want to start lying. Captain W told her that she could not get into trouble for lying because she was a civilian. Ms. Wit told her friend, Ms. Second, that Captain W had asked her to change her statement to the CID, and Ms. Wit reported the conversation with Captain W to the CID.

Court-martial charges were preferred against Captain W for the offenses of sodomy, housebreaking, and conduct unbecoming an officer and a gentleman (adultery, false official statement, and obstruction of justice). Captain W submitted a request for resignation for the good of the service. That request was approved.

The Chief of the Standards of Conduct Office advised Captain W of the allegations of professional impropriety that had been referred to that office for action under *Army Regulation (AR) 27-1*.

In his rebuttal to assertions of professional misconduct, Captain W asserts that on numerous occasions Mrs. Z sought his advice as an attorney regarding domestic violence issues. He also asserts that at the time he refused to answer the CID investigator's questions, he considered these consultations to be privileged and confidential. Finally, Captain W asserts that he did not ask to talk with Ms. Wit, but that a friend, without his knowledge, had her come and talk to him. He asserts that Ms. Wit told him that she was coerced by Mrs. Z to tell the CID that he and Mrs. Z had engaged in a sexual relationship. He also asserts that Ms. Wit told him that she only made the allegation after she had previously denied it and the CID had threatened

her with deportation. Captain W asserts that he did not ask Ms. Wit to change her original statement. However, in a memorandum written in support of his request to resign for the good of the service, Captain W admitted that he never should have spoken to Ms. Wit.

Rules of Professional Conduct for Lawyers

The Army's Rules of Professional Conduct for Lawyers (Army Rules), are applicable to this case.⁴

Army Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

...

(e) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on the behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.⁵

Army Rule 8.4 states:

It is professional misconduct for a lawyer to:

...

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

4. In the preamble to the *Army Rules*, their scope is stated as being applicable to all lawyers as defined in the rules. Lawyer is defined as:

[A] person who is a member of the bar of a Federal court, or the highest Court of a State or Territory, or occupies a comparable position before the courts of a foreign jurisdiction and who practices law under the disciplinary jurisdiction of the Army. This includes all Army lawyers and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial.

AR 27-26, *supra* note 1, at 35.

5. *Id.* Rule 1.6.

(d) engage in conduct that is prejudicial to the administration of justice.⁶

Discussion

The record supports a finding that Captain *W* and Mrs. *Z* did have a colorable attorney-client relationship, although the relationship existed for a limited time and purpose.⁷ Both parties agree that Mrs. *Z* approached Captain *W* at a time when she knew that he was a lawyer. They both agree that she sought his advice regarding domestic violence in the *Z* home. As a military family member, Mrs. *Z* was eligible for such legal assistance, and Captain *W* was authorized by regulation to provide it. The record also establishes that Captain *W* did provide family law advice to Mrs. *Z* during their illicit relationship.⁸

When Captain *W* was questioned as a suspect, he had no official duty to answer the investigator's questions. In fact, he had an absolute right to remain silent under Article 31, UCMJ,⁹ and the Fifth Amendment.¹⁰ He also had an obligation to protect the confidences of his client under the legal assistance regulation¹¹ and Army Rule 1.6(a).¹²

In this case, the charge that Captain *W*'s statements regarding attorney-client privilege were false appears to be based upon the opinion of Mrs. *Z* that an attorney-client relationship did not exist between her and Captain *W*. In the Committee's opinion, Mrs. *Z*'s subjective belief is not controlling as to whether Captain *W*'s assertion of the attorney-client privilege was justified. Also, the Committee was not persuaded that Captain *W*'s assertion of the attorney-client privilege was intended to, or had the effect of, deceiving or impeding the criminal investigation.¹³

The Committee also determined that, with respect to the allegation of obstruction of justice, a preponderance of the evidences establishes that Captain *W* did in fact attempt to obstruct the CID investigation by attempting to have Ms. *Wit* change her statement to the CID. Ms. *Wit*'s account of this incident was found to be more credible than Captain *W*'s for several reasons. First, Mrs. *Z* advised the CID that Captain *W* had revealed his sexual relationship with her to Ms. *Wit*. Next, according to a statement made by Ms. *Wit* to the CID, Captain *W* alluded to his sexual relationship with Mrs. *Z*. Finally, Ms. *Wit* promptly reported Captain *W*'s request that she change her statement only one day after it occurred. All of these facts lend credibility to Ms. *Wit*'s allegation that Captain *W* attempted to obstruct justice by having her change her previous testimony.¹⁴

6. *Id.* Rule 8.4.

7. "Any authorized contact with a service soldier seeking his or her services as . . . an attorney for himself or herself results in at least a colorable attorney-client relationship, although the relationship may be for a limited time or purpose." U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, app. C, para. C-1b(1) (8 Aug. 1994). The Committee finds this statement of the law persuasive and equally applicable to eligible persons seeking legal assistance from Army judge advocates.

8. As a judge advocate on active duty, Captain *W* was authorized to provide family law advice to Mrs. *Z*. AR 27-3, *supra* note 2, paras. 2-2a, 2-2a(1), 2-5a(1), 3-6a. Indeed, unless providing this assistance was inconsistent with superior orders or his other duties and responsibilities, Captain *W* had a duty to provide Mrs. *Z* such assistance. *Id.* para. 2-3a. Such assistance can be provided at any time. *Id.* para. 2-3b. In this regard, the Committee notes that the record contains no evidence that Captain *W*'s superiors prohibited him from providing such assistance.

9. UCMJ art. 31 (1988).

10. U.S. CONST. amend. V.

11. Once a colorable attorney-client relationship forms, an Army attorney is required to protect the confidentiality of all privileged communications with the client. AR 27-3, *supra* note 2, para. 4-8a (The 10 March 1989 version of AR 27-3, which was in effect at the time of events, was reissued 30 Sept. 1992 and 10 Sept. 1995.).

12. AR 27-26, *supra* note 1, Rule 1.6(a).

13. Making a false official statement—under circumstances that dishonor or disgrace the person making the statement as an officer, or seriously compromise the officer's character as a gentleman—is a violation of Article 133 of the Uniform Code of Military Justice. UCMJ art. 133 (1988); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶¶ 59c(2), 59c(3) (1995). In particular, the Army Court of Military Review has held that:

[I]ntentional deception of a criminal investigator on the subject matters of an official inquiry amounted to conduct unbecoming an officer. Lying to the military official on a matter of official concern completely compromised appellant's status as an officer and gentleman. Even though making a false statement to a criminal investigator generally is no offense, absent an independent duty to account, . . . the special status of an officer and the position of trust he occupies makes the intentional deceit a crime under Article 133.

United States v. Lindsay, 11 M.J. 550, 552 (A.C.M.R. 1981).

14. The elements of obstructing justice are that: (1) the accused wrongfully did a certain act; (2) the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending; (3) the act was done with the intent to influence, to impede, or otherwise to obstruct the due administration of justice; and (4) the conduct of the accused was prejudicial to good order and discipline. UCMJ art. 134 (West. Supp. 1996). This offense may be based on conduct that occurs before prefferal of charges. Captain *W*'s conduct satisfies the elements of this offense because he approached a witness in a criminal investigation against him and tried to get her to change her prior statement concerning his misconduct with Mrs. *Z*.

Captain *W*'s assertions, on the other hand, are not credible. By his own admission, he was an experienced trial counsel, and knew that it was inadvisable for him to talk to a key witness in a criminal investigation in which he was the subject. His assertions that he played no role in the procuring of Ms. Wit, that she voluntarily admitted to him that she had lied to the CID, and that she was eager to change her statement once she realized the trouble he was in, ring hollow in light of the corroborative evidence in support of Ms. Wit's allegations concerning this offense.

Captain *W*'s criminal conduct violated Article 134, UCMJ, and was committed while he was a member of the Judge Advocate General's Corps. Accordingly, his attempt to obstruct justice clearly reflected adversely on his honesty and fitness as a lawyer, was deceitful, and was prejudicial to the administration of justice.

Findings

The Committee finds that:

- a. Captain *W* did not violate Army Rule 8.4¹⁵ by asserting the attorney-client privilege during custodial interrogation.
- b. Captain *W* did violate paragraphs (b), (c), and (d) of Army Rule 8.4¹⁶ by attempting to obstruct justice.

Recommendations

In light of the above findings, the Committee recommends that The Judge Advocate General:

- a. Notify Captain *W*'s State bar of this professional misconduct so that the bar may take such proceedings as the bar deems appropriate.
- b. Revoke Captain *W*'s certification as counsel under Article 27(b), UCMJ,¹⁷ and suspend him from practice before Army Courts-Martial and the U.S. Army Court of Criminal Appeals.

Professional Responsibility Opinion 96-2 The Judge Advocate General's Professional Responsibility Committee

Army Rule 1.1 (Competence)

Attorney's improper relationship with criminal defense client did not result in a lack of thoroughness or preparation.

Army Rule 1.15 (Safekeeping Property)

Attorney not ethically required to safeguard drivers license of former client where attorney acquired drivers license in the course of a personal relationship not connected with legal representation.

Army Rule 1.7(b) (Conflict of Interest: Lawyer's Own Interests)

Army Rule 2.1 (Exercising Independent Professional Judgment)

Army Rule 8.4(b) (Committing a Criminal Act that Reflects Adversely on the Lawyer's Honesty, Trustworthiness, or Fitness as a Lawyer)

Lawyer's cocaine use with client—triggering client's parole revocation—breached ethical obligations to exercise independent professional judgment, to avoid conflicts of interest, and to avoid criminal activity.

Army Rule 8.4(b) and (d) (Criminal Acts and Conduct Prejudicial to the Administration of Justice)

Interstate transportation of revolver with obliterated serial number reflected adversely on fitness of Army Reserve attorney.

Facts

Captain *B*, a lawyer assigned to the U.S. Army Trial Defense Service (TDS), represented Private *Y* at the latter's court-martial on charges that included wrongful possession and distribution of cocaine. *Y* was sentenced, inter alia, to be confined for four years. While *Y* was incarcerated in the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, Captain *B* visited him at least twenty-five times. A year after *Y*'s incarceration, Captain *B* listed *Y* as a beneficiary on Captain *B*'s Serviceman's Group Life Insurance. From January through April of the second year of *Y*'s imprisonment, Captain *B* visited *Y* seventeen times, listing himself on the visitor record as a friend.

15. AR 27-26, *supra* note 1, Rule 8.4.

16. *Id.* Rule 8.4, paras. (b), (c), (d).

17. UCMJ art. 27(b) (West Supp. 1996).

On November 14, over two years after the court-martial, *Y* was released on parole and returned home. On the day he returned home, *Y* was visited by Captain *B*. Within two weeks of his return, *Y* states that he used cocaine with Captain *B*. *Y* stated that he and Captain *B* used cocaine together on at least four or five occasions while *Y* was out on parole. Captain *B* provided the money and *Y* made the purchases.

As a condition of his parole, *Y* was required to submit urine specimens for drug testing. His specimen given on December 6, three weeks after release, tested positive for cocaine. After initially denying using cocaine, *Y* admitted using cocaine to his U.S. Probation Officer. *Y*'s parole was suspended on January 8, about seven weeks after it began. As requested by the U.S. Army Clemency and Parole Board, *Y* was given a preliminary interview by his U.S. Probation Officer. Captain *B* contacted the U.S. Probation Officer and offered to have *Y* reside with him if parole would not be revoked. On February 3, the U.S. Army Clemency and Parole Board ordered *Y*, as a further condition of his parole, to reside in a halfway house and to participate in a drug abuse therapy program.

Captain *B* called parole authorities at Fort Leavenworth to complain about the handling of *Y*'s parole. Captain *B* also spoke on "a couple of occasions" to *Y*'s probation officer, at times representing himself as *Y*'s lawyer and at other times as a friend.

On two occasions while *Y* was living at the halfway house, Captain *B* picked him up from the house, and they used cocaine together. According to Ms. *G*, a female acquaintance of *Y*, Captain *B* provided her cocaine and used it with her while *Y* was in the halfway house. While *Y* was at the halfway house, Captain *B* also listed *Y* on his auto insurance policy and authorized *Y* to use his late model automobile.

On February 12, 22, and 25, *Y* submitted specimens that all tested positive for cocaine. On February 28, *Y* was apprehended and placed in the local county jail, and Captain *B* visited him on that date. Captain *B* advised *Y* of his legal rights, typed a letter for *Y* to send to the U.S. Army Clemency and Parole Board seeking to have the revocation hearing held at the local military installation, and contacted the U.S. Marshal Service and parole authorities seeking to get *Y* released. In a letter addressed to the U.S. Army Clemency and Parole Board dated March 1, on TDS stationery, *Y* requested legal representation and stated that he had already consulted with a local TDS attorney, Captain *B*. Captain *B* requested permission from his Regional Defense Counsel (RDC) to represent *Y* in the parole

revocation matter. Although such representation was an extra duty and it was an unusual request, the RDC approved. *Y* was transferred to the installation detention facility on March 3, where Captain *B* visited him three times the next day, listing his relationship to the prisoner as "attorney." *Y* was returned to Fort Leavenworth on March 5.

On April 6, *Y* had a parole revocation hearing. Captain *B*, who visited *Y* on April 4, 5, and 6, testified at the parole revocation hearing as a personal friend on *Y*'s behalf and offered financial assistance to *Y* if parole would not be revoked. Captain *B* testified that he would ensure that *Y* received paralegal training, as he intended to hire *Y* as a paralegal in a private law practice that he intended to set up. *Y*'s parole was revoked. While *Y* was back in prison, Captain *B* retained some of *Y*'s personal property, including his car, cellular telephone, beeper, compact disks, clothing, waterbed, microwave oven, diamond earring, billfold, credit card, drivers license, and television. Captain *B* paid the storage fees on other property owned by *Y*.

On June 26, the Assistant Judge Advocate General for Civil Law and Litigation issued a letter of reprimand to Captain *B* for exercising poor judgment in his personal relationship with *Y*. On June 30, Captain *B* was released from active duty. On July 10, the local office of the U.S. Army Criminal Investigation Command (CID) completed a report of investigation that titled Captain *B* for wrongful possession, distribution, and use of cocaine with *Y*, Ms. *G*, and Ms. *H* (who also provided a statement that she had used cocaine with Captain *B*). He was also titled for selling cocaine to Ms. *G*.

Nearly eighteen months later, on December 10, while still a commissioned officer in the Individual Ready Reserve, U.S. Army Reserve, but not performing military duties, Captain *B* was stopped by the police in a town in New York for operating a vehicle that appeared to have overly-tinted windows. A check of the vehicle's registration indicated that the registration was suspended.¹⁸

The vehicle was impounded, and an inventory of the vehicle was conducted. *Y*'s drivers license and a loaded .22 caliber revolver with the serial numbers removed were discovered in the middle console of the car. Captain *B* stated, through counsel, that he had purchased the weapon several years earlier in another state when he was doing much traveling and felt a need for personal protection. At the time of his traffic stop, he had forgotten that the weapon was in his vehicle.

All five counts of a county grand jury indictment were dismissed at trial. The dismissal included three traffic and two

18. A five-count grand jury indictment also charged Captain *B* with one count of "Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree." New York Vehicle and Traffic Law section 511(1)(a) makes the operation of a motor vehicle when the operator knows or has reason to know that the license or privilege of operating the vehicle has been suspended, revoked, or otherwise withdrawn, the crime of aggravated unlicensed operation of a motor vehicle in the third degree. N.Y. VEH. & TRAF. LAW § 511(1)(a) (Consol. 1994). This misdemeanor is punishable by a fine of not less than \$200 nor more than \$500, imprisonment of not more than 30 days, or both. *Id.* Section 512 of the New York statute makes the operation of a motor vehicle while the certificate of registration of such vehicle or privilege of operation is suspended or revoked punishable by a fine of not less than \$50 nor more than \$100 or by imprisonment for not more than 30 days or both, for a first offense. N.Y. VEH. & TRAF. LAW § 512 (Consol. 1994).

firearms charges. The two firearms charges were that Captain *B* engaged in criminal possession of a weapon in the third degree in violation of the Penal Laws of the State of New York, sections 265.02(4) (having a loaded firearm in his possession at a place other than his home or place of business) and 265.02(3) (knowingly possessing a firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such weapon).

Rules of Professional Conduct for Lawyers

Army Rule 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."¹⁹

Army Rule 1.7(b) states, "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: . . . the client consents after consultation."²⁰

Army Rule 1.15(a) states, "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property . . ."²¹

Army Rule 2.1 states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice . . ."²²

Army Rule 8.4 states, "It is professional misconduct for a lawyer to . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; . . . (d) engage in conduct that is prejudicial to the administration of justice; . . ."²³

Discussion

The Committee reviewed the allegations enumerated in the notice from the Army Standards of Conduct Office to Captain *B* and evaluated them in the following discussion.

Violations of Army Rule 8.4 Arising from Captain B's New York Traffic Arrest

The Committee is convinced that Captain *B* knowingly transported a weapon in interstate commerce with the serial number removed, obliterated, or altered in violation of federal law.²⁴

At the time of the traffic stop, Captain *B* was the owner, operator, and sole occupant of the vehicle in which a loaded firearm with the serial number removed was discovered. Through his attorney, Captain *B* admits that a handgun was found and avers that he purchased the firearm in another "jurisdiction" at a time when he engaged in considerable travel. While Captain *B* claims that there was no evidence that the weapon had been "defaced for the purpose of concealing a crime," he does not deny that the serial number was defaced as alleged in the police report, which the Committee credits for the purpose of this inquiry. The Committee concludes that, contrary to Captain *B*'s assertion through counsel that he had simply "forgotten" that the weapon was in the vehicle, it is more likely than not that Captain *B* knew that he possessed the firearm and knew that the serial number had been removed.

The Committee cannot conclude that New York law was violated because there is insufficient evidence in the file to indicate that the serial number was defaced for either the *purpose* of concealment or prevention of the detection of a crime or the *purpose* of misrepresenting its identity. New York, unlike other states, requires *knowledge* that defacing was for the *purpose* of concealment.²⁵ Because Captain *B* admits not only that the weapon was purchased in another jurisdiction, but also that he had the weapon "[w]hen he returned to the state of New York," the Committee concludes that the weapon had to have been

19. AR 27-26, *supra* note 1, Rule 1.1.

20. *Id.* Rule 1.7(b).

21. *Id.* Rule 1.15(a).

22. *Id.* Rule 2.1.

23. *Id.* Rule 8.4.

24. 18 U.S.C. § 922(k) (1994).

It shall be unlawful for any person knowingly to transport, [to] ship, or [to] receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered, or to possess or [to] receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

Id.

25. *People v. Burgos*, 468 N.Y.S.2d 712 (N.Y. App. Div. 1983). New York statute makes the knowing possession of a firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime, or misrepresenting the identity of such firearm, the crime of criminal possession of a weapon in the third degree, a class D felony. N.Y. PENAL LAW § 265.02(3) (Consol. 1994).

transported in interstate commerce, thereby violating federal law.²⁶

Lacking the additional element found in the New York statute, the federal statute at most requires *simple knowledge* that the serial number was defaced.²⁷ The Committee concludes that Captain *B* could not possess a single weapon for a sustained period of time without such knowledge.

The Committee concludes that paragraphs (b) and (d) of Army Rule 8.4²⁸ are violated by unlawful possession of a firearm, at least where the serial number is defaced. Defacing a serial number conceals the origin of a weapon and thereby frustrates the administration of justice should the weapon be used in a crime. Captain *B* either defaced the serial number himself, thereby engaging in deceptive conduct potentially injurious to the administration of justice, or obtained it from another who earlier defaced it. In the latter circumstance, the Committee has concluded that the defacement would have been obvious and considers that (for the purposes of Army Rule 8.4²⁹) knowing purchase would amount to culpable indifference to the obvious potential harm to the administration of justice. Accordingly, his conduct is inimical to that expected of an attorney.

Crediting the evidence in Captain *B*'s affidavit and provided by his attorney, the Committee is not convinced that Captain *B* operated a motor vehicle while his drivers license was suspended, revoked, or withdrawn or while the vehicle registration was suspended.

Violation of Army Rule 1.15(a) Arising from Captain B's Possession of Y's License

The Committee concludes that there is insufficient evidence to find a violation of Army Rule 1.15(a). No facts connect Captain *B*'s possession of *Y*'s property with the representation. Captain *B* and *Y* established a personal relationship that arose out of, but became separate at some point from, the representation. However inappropriate that relationship may have been, the Committee cannot conclude that Captain *B* became obliged

to act with the care of a fiduciary for property he may have acquired in the course of that personal relationship which has no apparent connection with the subject matter of the representation.

Violation of Army Rule 8.4 Arising from Captain B's Purchase and Use of Cocaine

The Committee concludes that Captain *B* purchased and used cocaine on several occasions. That conduct constituted criminal activity under the UCMJ,³⁰ not to mention other federal and state laws.

While Army Rule 8.4 suggests that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice,"³¹ illicit drug use has been found to be a violation without additional aggravating factors. Possession of illegal drugs "indicates an inevitable contact with the chain of distribution and trafficking of illegal drugs . . . the impact [of which] is of such severity that it affects adversely the public's perception of Respondent's fitness to be an officer of the Court."³²

Captain *B*'s cocaine involvement with *Y*—while the latter was still on parole from the cocaine conviction which occurred during the earlier representation—provides an additional aggravating element reflecting adversely upon Captain *B*'s fitness as a lawyer. Captain *B*'s conduct was also arguably prejudicial to the administration of justice under the peculiar facts of this case because it contributed to *Y*'s parole revocation. The attorney-client relationship does not continue indefinitely, but however uncertain its duration may be, the Committee concludes that an attorney has a continuing duty to his client—at least with respect to the subject matter of the representation. Hence, having represented *Y* at trial, Captain *B* was obliged to do nothing that would compromise *Y*'s parole. By committing acts similar to those for which *Y* was convicted and which could and did result in parole revocation, Captain *B* breached a continuing duty, providing the nexus necessary to establish a violation of Army Rule 8.4³³ (even if one were to assume, *arguendo*,

26. The Committee notes that all that is necessary for "interstate" transportation is that the firearm was manufactured outside the state in which it is possessed. See *United States v. Coleman*, 22 F.3d 126 (7th Cir. 1994).

27. *United States v. Hooker*, 997 F.2d 67 (5th Cir. 1993).

28. AR 27-26, *supra* note 1, Rule 8.4, paras. (b), (d).

29. *Id.* Rule 8.4.

30. UCMJ, art. 112a (1994) (making it a crime for any person subject to the UCMJ wrongfully to use, to possess, or to distribute cocaine).

31. AR 27-26, *supra* note 1, Rule 8.4.

32. *In re Wright*, 648 N.E.2d 1148, 1149 n. 3 (Ind. 1995); *In re Jones*, 515 N.E.2d 855, 856 (Ind. 1987). Of separate concern is illicit drug use associated with dependency. As the court noted in *Wright*: "an attorney who suffers a chemical dependency may be unfit to represent clients, because such an attorney may be incapable of keeping his client's secrets, giving effective legal advice, fulfilling his obligation to the courts, and so on." *Wright*, 648 N.E.2d at 1150, quoting *In re Stults*, 644 N.E.2d 1239 (Ind. 1994). See also *In re Schaffer* 140 N.J. 148, 657 A.2d 871 (1995); *In re Smith*, No. SB-95-0074-D, 1996 LEXIS 15 (Ariz. 1996).

that mere cocaine purchase and use in another case might not constitute violations).

Moreover, as discussed below, the Committee concludes that Captain *B* undertook to represent Captain *Y* at some point during the latter's parole. The offenses committed by Captain *B* were close in time and appear to have overlapped this representation, providing additional cause to find them to be violations of the rule. Last, Army Rule 8.4's comment that judge advocates assume legal responsibilities going beyond those of other citizens suggests that the offenses should constitute a violation.³⁴

Violations of Army Rules 1.1, 1.7(b), and 2.1 Arising from Captain B's Relationship with Y

The Committee concludes that Captain *B* undertook to represent *Y* at some point during *Y*'s parole. He communicated with parole authorities several times concerning *Y*, intermittently represented himself as *Y*'s lawyer, apparently obtained a statement from *Y*'s drug counselor, advised *Y* of his legal rights when he was apprehended, typed a letter for *Y* to have the revocation hearing held at the local Army installation, requested and received permission from his RDC to represent *Y* in the parole revocation, and listed his relationship to *Y* as "attorney" when he visited him in confinement several times. Moreover, *Y* said in his letter to the Parole Board seeking representation, typed on TDS stationery, that he had already consulted with Captain *B*. The evidence leads to the conclusion that even if representation ceased during *Y*'s initial incarceration, it resumed again once *Y* returned to military custody and, more likely than not, extended to most of the period of *Y*'s parole.

Captain *B*'s personal relationship with *Y* violated Army Rule 1.7(b)³⁵ because his own interests regarding his own criminal conduct materially limited his representation concerning *Y*'s parole. Captain *B*'s criminal acts—purchasing cocaine for *Y* and using it with him on several occasions—created interests manifestly adverse to *Y*'s. Like any criminal suspect facing the potential threat of apprehension or prosecution for acts committed with or on behalf of another suspect, Captain *B*'s personal interest in avoiding detection and prosecution by concealing or distorting facts unfavorable to him would necessarily limit his

ability to represent *Y*. His loyalty to *Y* was impaired, and he could not fully and freely represent *Y*'s interests, given his own. In this regard, we note the comment to Army Rule 1.7 that "[i]f the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."³⁶ Captain *B* could not reasonably believe the representation would not be adversely affected, and there is no evidence that *Y* consented after consultation, although the facts were obviously known to him.

The Committee also concludes that Captain *B*'s inappropriate relationship led to a violation of Army Rule 2.1, which requires the exercise of judgment independent from the client.³⁷ While independent judgment refers in the narrow sense to the advice given the client, the Committee concludes that it refers as well to the exercise of independent judgment in all aspects of the representation. Captain *B* impermissibly and repeatedly blurred his personal and official relationships, representing himself at one time as a friend and another time as *Y*'s lawyer. Captain *B* and *Y* themselves were likely unsure from one time to another what role Captain *B* was playing. Captain *B*'s independence was inevitably compromised, resulting in harm to *Y*'s interests.

The Committee does not find a violation of Army Rule 1.1,³⁸ which requires an attorney to provide competent representation. The Committee concludes that Army Rule 1.1 intends competence to be read in the narrow sense as expertise and skill. Absent additional evidence that Captain *B* lacked the requisite expertise and skill, or that his representation in fact suffered from lack of thoroughness or preparation, the Committee finds no violation.

Findings

Recognizing that dismissal of charges in a criminal prosecution or failure to prosecute should not vel non bar disciplinary action against an attorney,³⁹ the Committee finds that:

- a. Captain *B* violated paragraphs (b) and (d) of Army Rule 8.4⁴⁰ by knowingly transporting a weapon in interstate commerce with the serial number removed, obliterated, or altered, in violation of federal law.

33. AR 27-26, *supra* note 1, Rule 8.4.

34. *Id.* Rule 8.4 comment.

35. *Id.* Rule 1.7(b).

36. *Id.* Rule 1.7(b) comment.

37. The comment to *Army Rule* 2.1 observes, "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." *Id.* Rule 2.1.

38. *Id.* Rule 1.1.

39. See Robert A. Brazener, Annotation, *Effect of Acquittal or Dismissal in Criminal Prosecution as Barring Disciplinary Action Against Attorney*, 76 A.L.R.3d 1028 (1995).

b. Captain *B* violated Army Rule 8.4(b)⁴¹ by purchasing and using cocaine for and with a former client while that client was still on parole in connection with a cocaine conviction that was the subject of the representation.

The Committee further concludes that:

a. Captain *B* violated Army Rule 1.7(b)⁴² because his own interests regarding the criminal conduct he committed materially limited his representation of *Y* in the parole matter.

b. Captain *B* violated Army Rule 2.1⁴³ because he did not exercise independent judgment during the period of *Y*'s parole.

Recommendations

In light of the Committee's findings, the Committee recommends that The Judge Advocate General withdraw Captain *B*'s certification as counsel under Article 27(b); suspend him from practice before Army courts-martial and the Army Court of Criminal Appeals; and notify Captain *B*'s state bar of this professional misconduct for such proceedings as it deems appropriate.

40. AR 27-26, *supra* note 1, Rules 8.4(b), 8.4(d).

41. *Id.* Rule 8.4(b).

42. *Id.* Rule 1.7(b).

43. *Id.* Rule 2.1.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office (LAAWS) and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riveraju@otjag.army.mil. Major Rivera.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

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Ms. Sandra Foster,fostersa@otjag.army.mil
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Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE
1997-1998 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	
27-28 Sep	Pittsburgh, PA 99th RSC Pittsburgh Airport Marriott 100 Aten Road Corapolis, PA 15108 (412) 788-8800	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	COL Joseph Barnes BG John F. DePue MAJ Janet Fenton LTC Lawrence Morris Dr. Mark Foley/ MAJ Juan Rivera
17-19 Oct	San Antonio, TX 1st LSO Hilton Airport Hotel 611 NW Loop 410 San Antonio, TX 78216 (210) 340-6060	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Gregory Coe MAJ Geoffrey Corn COL Keith Hamack
1-2 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55425 (612) 854-3411	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ John Moran LTC Karl Ellcessor COL Thomas Tromeay
15-16 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Jacqueline Little MAJ Kay Sommerkamp MAJ Juan Rivera
10-11 Jan 98	Long Beach, CA 78th MSO	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue MAJ Martin Sitler CDR Mark Newcomb MAJ Juan Rivera

31 Jan-1 Feb	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Criminal Law Contract Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara MAJ Charles Pede MAJ David Wallace COL Thomas Tromeay	LTC David F. Morado 909 1st Avenue, #200 Seattle, WA 98199 (206) 220-5190, ext. 3531 email: david_morado@hud.gov
7-8 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue CPT Stephanie Stephens MAJ Marsha Mills MAJ Juan Rivera	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: tdonne2947@aol.com
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ Stephen Parke LTC James Lovejoy COL Keith Hamack	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
28 Feb- 1 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara LTC Mark Henderson MAJ John Einwechter COL Thomas Tromeay	COL Robert P. Johnston Office of the SJA, 12th LSO Bldg. 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Michael Marchand BG John F. DePue MAJ Stewart Moneyemaker MAJ Scott Morris COL Thomas Tromeay	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Thoms W. Eres MAJ Christopher Garcia MAJ Norman Allen Dr. Mark Foley	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol.com
21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John Cooke BG John F. DePue MAJ Thomas Hong LTC Richard Jackson Dr. Mark Foley	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60008 (312) 443-6064

28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran COL Thomas Trome	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows Dr. Mark Foley	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364

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 confirmed reservations. 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 nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZHA-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 Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's 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.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1997

September 1997

3-5 September USAREUR Legal Assistance
CLE (5F-F23E).

8-12 September USAREUR Administrative Law
CLE (5F-F24E).

8-19 September 8th Criminal Law Advocacy
Course (5F-F34).

October 1997

1-14 October 144th Basic Course (Phase 1, Fort
Lee) (5-27-C20).

6-10 October 1997 JAG Annual CLE
Workshop (5F-JAG).

14-17 October 4th Ethics Counselors Workshop
(5F-F201).

15 October-
19 December 144th Basic Course (Phase 2,
TJAGSA) (5-27-C20).

20-21 October USAREUR Criminal Law CLE
(5F-F35E).

20-24 October 41st Legal Assistance Course
(5F-F23).

21-25 October USAREUR Trial Advocacy
Course (5F-F34E)

27-31 October 49th Fiscal Law Course (5F-F12).

27 October-
7 November 28th Operational Law Seminar
(5F-F47).

November 1997

3-7 November 144th Senior Officers Legal
Orientation Course
(5F-F1).

17-21 November 21st Criminal Law New
Developments Course
(5F-F35).

17-21 November 51st Federal Labor Relations
Course (5F-F22).

17-21 November 67th Law of War Workshop
(5F-F42).

December 1997

1-5 December 145th Senior Officers Legal
Orientation Course
(5F-F1).

1-5 December USAREUR Operational Law
CLE (5F-F47E).

8-12 December	Government Contract Law Symposium (5F-F11).	23-27 March	2d Contract Litigation Course (5F-F102).
15-17 December	1st Tax Law for Attorneys Course (5F-F28).	23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).
	1998	30 March-3 April	147th Senior Officers Legal Orientation Course (5F-F1).
January 1998			
5-16 January	JAOAC (Phase 2) (5F-F55).	April 1998	
6-9 January	USAREUR Tax CLE (5F-F28E).	20-23 April	1998 Reserve Component Judge Advocate Workshop (5F-F56).
12-15 January	PACOM Tax CLE (5F-F28P).		
12-16 January	USAREUR Contract Law CLE (5F-F15E).	27 April-1 May	9th Law for Legal NCOs Course (512-71D/20/30).
20-22 January	Hawaii Tax CLE (5F-F28H).	27 April-1 May	50th Fiscal Law Course (5F-F12).
20-30 January	145th Basic Course (Phase 1, Fort Lee) (5-27-C20).	May 1998	
21-23 January	4th RC General Officers Legal Orientation Course (5F-F3).	4-22 May	41st Military Judges Course (5F-F33).
26-30 January	146th Senior Officers Legal Orientation Course (5F-F1).	11-15 May	51st Fiscal Law Course (5F-F12).
		June 1998	
31 January-10 April	145th Basic Course (Phase 2, TJAGSA) (5-27-C20).	1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
February 1998			
9-13 February	68th Law of War Workshop (5F-F42).	1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).	1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
23-27 February	42nd Legal Assistance Course (5F-F23).	1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
March 1998			
2-13 March	29th Operational Law Seminar (5F-F47).	8-12 June	28th Staff Judge Advocate Course (5F-F52).
2-13 March	140th Contract Attorneys Course (5F-F10).	15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
16-20 March	22d Admin Law for Military Installations Course (5F-F24).	29 June-1 July	Professional Recruiting Training Seminar.

July 1998

6-10 July 9th Legal Administrators Course (7A-550A1).

6-17 July 146th Basic Course (Phase 1, Fort Lee) (5-27-C20).

7-9 July 29th Methods of Instruction Course (5F-F70).

13-17 July 69th Law of War Workshop (5F-F42).

18 July-25 September 146th Basic Course (Phase 2, TJAGSA) (5-27-C20).

22-24 July Career Services Directors Conference.

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

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

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

August 1998

3-14 August 10th Criminal Law Advocacy Course (5F-F34).

3-14 August 141st Contract Attorneys Course (5F-F10).

10-14 August 16th Federal Litigation Course (5F-F29).

17-21 August 149th Senior Officer Legal Orientation Course (5F-F1).

17 August 1998-28 May 1999 47th Graduate Course (5-27-C22).

24-28 August 4th Military Justice Managers Course (5F-F31).

24 August-4 September 30th Operational Law Seminar (5F-F47).

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

September 1998

9-11 September 3d Procurement Fraud Course (5F-F101).

9-11 September USAREUR Legal Assistance CLE (5F-F23E).

14-18 September USAREUR Administrative Law CLE (5F-F24E).

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 22041-3202
(703) 379-2900

For further information on civilian courses in your area, please contact one of the institutions listed below:

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, D.C. 20006-3697

(202) 638-0252

(713) 747-NCDA

FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557 (702) 784-6747
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, D.C. 20052 (202) 994-5272	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837	TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516	UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100	UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380	VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 229054.

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction

Reporting Month

Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
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	31 December 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 1997, *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. DOD Contracting Regulations (<http://www.dtic.mil/contracts/>).

Search DOD acquisition regulations and view open FAR and DFAR cases. This site gives a good explanation of the Defense Acquisition Regulation System. It contains the most current Federal Acquisition Regulations, Forms, and DFAR Supplements as well as an archive of Director of Defense Procurement letters. It also has a forum for frequently asked questions.

b. Thomas (<http://thomas.loc.gov/>).

Search the congressional record for bills, committee information, historical documents, and proposed legislation.

c. Law Library of Congress (<http://lcweb2.loc.gov/glin/lawhome.html>).

The Law Library of Congress provides an online database with information on the national laws of more than 35 countries. The searchable database contains legal abstracts in English and some full texts of legislation in the original languages. You will find useful links to other free sites on law and government.

d. Library of Congress catalogs (<http://lcweb.loc.gov/homepage/online.html#command>).

Perform word, author, and subject searches of the largest library catalog in the world.

e. Federal Court Locator (<http://www.law.vill.edu/Fed-Ct/fedcourt.html>).

This is the self-described "Home of Federal Courts on the Internet" which contains indexed decisions of the Supreme Court, Federal Courts of Appeal, and some District Courts. This site also contains links to related federal agencies such as the Department of Justice, the U.S. Sentencing Commission and the Federal Judicial Center.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and 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 the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$6, \$11, \$41, and \$121. The majority of documents cost either \$6 or \$11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1, or send an e-mail to bcorders@dtic.mil.

Contract Law

JA-234-95 (268 pgs).

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A311351 Defensive Federal Litigation, JA-200-96 (846 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

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

AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-96 (45 pgs).

Legal Assistance

AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).

Labor Law

AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (59 pgs).

AD A323692 The Law of Federal Employment, JA-210-97 (288 pgs).

AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

*AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

*AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

Developments, Doctrine, and Literature

AD A282033 Preventive Law, JA-276-94 (221 pgs).

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

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

Criminal Law

AD A297426 Wills Guide, JA-262-97 (150 pgs).

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

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

AD A302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A322684 Tax Information Series, JA 269-97 (110 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

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

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

Administrative and Civil Law

*AD A327379 Military Personnel Law, JA 215-97 (174 pgs.)

International and Operational Law

AD A310157 Federal Tort Claims Act, JA 241-97 (136 pgs).

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

AD A301061 Environmental Law Deskbook,

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 is also available through the 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.

3. 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 St. Louis, Missouri, 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
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(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 Personnel and Administrative Center (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 Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655

Woodson Road, St. Louis, MO 63114-6181. 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, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*).

(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 Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (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) *Army Reserve National Guard (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 Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (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 Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. 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 St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPDC, ATTN: ASQZ-LM, 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 St. Louis USAPDC at (314) 263-7305, extension 268.

(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 the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to US-APDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

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

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

(f) All DOD personnel dealing with military legal issues;

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

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

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):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>			
			CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
			CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
			CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
			CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
			CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.			
			EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advances Evidence, March 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.			
			FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.			
			FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>The Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.			
			FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, (Part 1), November 1995.
			FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview, (Part 2), November 1995.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA of actual class instructions presented at the school in Word 6.0, May 1997.			
			FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.			
			21ALMI.EXE	April 1997	Administrative Law for Military Installations Deskbook, March 1997.

50FLR.EXE	June 1997	50th Federal Labor Relations Deskbook, May 1997.	JA263.ZIP	October 1996	Family Law Guide, May 1996.
			JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.			
			JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.			
JA210DOC.ZIP	April 1997	Law of Federal Employment, May 1997.	JA267.ZIP	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.	JA269.DOC	December 1996	Tax Information Series, December 1996.
JA215.EXE	June 1997	Military Personnel Law Deskbook, June 1997.	JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.	JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA230.EXE	April 1997	Morale, Welfare, Recreation Operations, August 1996.	JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA231.ZIP	January 1996	Reports of Survey and Line Determinations—Programmed Instruction, September 1992 in ASCII text.	JA275.EXE	June 1997	Model Income Tax Assistance Guide, June 1997.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.	JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA235.EXE	January 1997	Government Information Practices, August 1996.	JA281.EXE	February 1997	15-6 Investigations, December 1996.
JA241.EXE	June 1997	Federal Tort Claims Act, May 1997.	JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.
JA250.EXE	April 1997	Readings in Hospital Law, January 1997.	JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA260.ZIP	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.			
JA262.ZIP	June 1997	Legal Assistance Wills Guide, June 1997.			

JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.	JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
			JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/Reference), February 1997.	JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
			JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.	JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.	JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.	JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.	JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.	JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.	JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.	1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.	1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.	1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.	1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.	1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.	1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.

JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.	YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.	YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.	YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.	YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.	YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.	YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.	YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.	YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.	YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.			
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.			
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.			
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.			

YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 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, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (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, SSG James Stewart, 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

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

- (1) Access the LAAWS BBS "Main System Menu" window.
- (2) Double click on "Files" button.
- (3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).
- (4) At the "Find Files" window, click on "Clear,"

then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
 PKZIP110.EXE
 PKZIP.EXE
 PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\:" prompt.

For example: c:\wp60\wpdocs
 or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP SEPTEMBER.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. Articles

The following information may be useful to judge advocates:

Royce Lamberth et al., *Modern Discovery Practice: Search for Truth or Means of Abuse?* 41 N.Y.L. SCH. L. REV. 453 (1997).

Richard A. Primus, *When Democracy is not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Justice*, 18 CARDOZO L. REV. 1417 (1997).

8. TJAGSA Information Management Items

a. The Judge Advocate General's School, United States Army has upgraded its network server to improve capabilities for the staff and faculty, and many of the staff and faculty have received new pentium computers. These initiatives have greatly improved overall system reliability and made an efficient and capable staff and faculty even more so! The transition to Windows 95 is almost complete and installation of Lotus Notes is underway.

b. The TJAGSA faculty and staff are accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling the IMO.

c. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

9. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS 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.

b. Law librarians having resources purchased by ALLS available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.