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The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal
Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?
Captain Glenn R. Schmitt

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The Military Extraterritorial Jurisdiction Act :The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?

Captain Glenn R. Schmitt¹
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Introduction

The problem of American civilians who commit crimes while accompanying the Armed Forces abroad has long plagued the United States government. America's federal criminal jurisdiction generally ends at the nation's borders, and so it is left to host nation countries to use their own laws to prosecute Americans who commit crimes while accompanying our armed forces. In many cases, however, these countries decline prosecution of crimes committed by American civilians, even very serious ones. This is especially true if the crime is committed only against another American or American property.² It seems that, in most instances, the host nation decides not to expend resources to prosecute crimes that do not affect any of its citizens. While the U.S. government often asserts some administrative sanction against the person committing the crime—such as barring them from American military installations—more often than not, the perpetrators receive no real punishment.

United States v. Gatlin

This problem was recently highlighted in *United States v. Gatlin*,³ a case decided by the United States Court of Appeals for the Second Circuit. In *Gatlin*, the civilian defendant was

charged with sexually abusing his teenaged step-child, the daughter of his soldier wife, while living in military housing in Germany.⁴ However, the allegations did not come to light until the defendant, his wife, and step-daughter returned to the United States where the stepdaughter revealed that she was pregnant with his child.⁵ The defendant was charged with sexual abuse of a minor⁶ and plead guilty, but before the plea was accepted, he moved to dismiss the indictment for lack of jurisdiction.⁷

The district court ruled that it had jurisdiction to try the defendant, finding that the American military housing area in Germany where the acts occurred was within the "special maritime and territorial jurisdiction of the United States," as defined in § 7 of Title 18.⁸ The Court of Appeals reversed, holding that it was clear from the legislative history that Congress intended § 7(3) to apply exclusively to the territorial United States, and therefore the overseas military housing area was not within the special maritime and territorial jurisdiction.⁹ Accordingly, § 2243(a) did not apply to the defendant's acts and the district court lacked jurisdiction to try him.¹⁰

In his opinion, Judge José Cabranes of the Second Circuit traced the history of criminal prosecutions of civilians accompanying the military overseas. He noted that various commen-

1. The author is the Chief Counsel of the Subcommittee on Crime of the Committee on the Judiciary of the U.S. House of Representatives. In that capacity he was one of the drafters of and played a key role during the drafting of the House version of The Military Extraterritorial Jurisdiction Act of 2000, H.R. 3380, 106th Cong. (2000) (enacted into law as 18 U.S.C. §§ 3261-3267 (2000)), and the amendment process of the bill as it passed through the House. He also was the staff person principally responsible for drafting of the House Committee on the Judiciary's report on House Bill 3380, H.R. REP. NO. 106-778, pt. 1 (2000). As such, the author wishes to note that any similarity between the language of the House Report and this article is unintended, although perhaps unavoidable.

2. Richard Roesler, *Civilians in Military World Often Elude Prosecution*, STARS & STRIPES, Apr. 10, 2000, at 3. In his report, Roesler notes recent incidents of rape, arson, drug trafficking, assaults, and burglaries that went unpunished when the host nation declined to prosecute.

3. 216 F.3d 207 (2d Cir. 2000).

4. *Id.* at 209-10.

5. *Id.*

6. 18 U.S.C. § 2243(a) (Supp. IV 1999).

7. 216 F.3d at 210.

8. Section 7(3) of Title 18 defines the "special maritime and territorial jurisdiction of the United States" to include:

any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3) (2000).

9. 216 F.3d at 220.

tators “have urged Congress for over four decades to close the jurisdictional gap by extending the jurisdiction of Article III courts to cover offenses committed on military installations abroad and elsewhere by civilians accompanying the armed forces.”¹¹ He emphasized that the inaction by Congress could hardly be blamed on a lack of awareness of the jurisdictional issue; therefore the court’s decision to overturn the defendant’s conviction was “only the latest consequence of Congress’s failure to close the jurisdictional gap.”¹² Because of the significance of this problem, Judge Cabranes took “the unusual step of directing the Clerk of the Court to forward a copy of [the] opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees.”¹³

The Congressional Response

Coincidentally, at the same time *Gatlin* was making its way through the courts, Congress was working to close the jurisdictional gap that had set *Gatlin* free. On 22 November 2000, the President signed into law Senate Bill 768, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA or Act).¹⁴ The Act creates a new federal crime which makes punishable conduct outside the United States that would constitute a felony under federal law if engaged in within the special maritime and territorial jurisdiction of the United States.¹⁵ The new criminal pro-

vision applies only to two groups of people: persons employed by or accompanying the armed forces outside of the United States, and persons who are members of the armed forces.¹⁶ The punishment for committing the new crime is that which would have been imposed under federal law had the crime been committed in the United States.¹⁷

The MEJA was first introduced by Senator Jeff Sessions (Republican-Alabama) on 13 April 1999 as Senate Bill 768.¹⁸ Although the Senate did not hold hearings on the bill, it considered it on the floor of the Senate on 1 July 1999, where it was slightly amended¹⁹ and passed by unanimous consent.²⁰

After the bill passed the Senate, the Departments of Justice and Defense raised concerns about aspects of the bill.²¹ In response to these concerns, Representative Saxby Chambliss (Republican-Georgia) rewrote the legislation, together with Representative Bill McCollum (Republican-Florida), the Chairman of the House Subcommittee on Crime, and introduced it in the House on 16 November 1999 as a separate bill.²² The House Committee on the Judiciary, through its Subcommittee on Crime, held a hearing on that bill, House Bill 3380, on 30 March 2000, at which representatives of the Departments of Defense and Justice testified in support of the House bill.²³ House Bill 3380 was then substantially amended during debates in the Subcommittee on Crime and the full Judiciary

10. *Id.*

11. *Id.* at 221-22 (citing several articles, including: Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT’L & COMP. L. REV. 277 (1995); Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273 (1967); Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment – Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F. L. REV. 184 (1971); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995); Gregory A. McClelland, *The Problem of Jurisdiction over Civilians Accompanying the Forces Overseas – Still with Us*, 117 MIL. L. REV. 153 (1987)).

12. *Id.* at 222-23. Judge Cabranes also noted that numerous bills to close the gap had been introduced in Congress over the last forty years, but none of them had become law. For a representative sample of the bills that have been introduced for this purpose, see S. 2083, 104th Cong. (1996); H.R. 5808, 102d Cong. (1992); S. 147, 101st Cong. (1989); H.R. 255, 99th Cong. (1985); H.R. 763, 95th Cong. (1977); S. 1, 94th Cong. (1975); S. 2007, 90th Cong. (1967).

13. 216 F.3d at 223.

14. 18 U.S.C. §§ 3261-3267 (2000).

15. *Id.* § 3261(a).

16. *Id.*

17. *Id.*

18. S. 768, 106th Cong. (1999).

19. 146 CONG. REC. S8197 (daily ed. July 1, 1999) (statement of Senator Leahy).

20. *Id.*

21. Letter from Judith A. Miller, General Counsel, Department of Defense, to Sen. John W. Warner, Chairman, Committee on Armed Services, United States Senate (Sept. 3, 1999); Letter from Robert Rabin, Assistant Attorney General for Legislative Affairs, Department of Justice, to Rep. Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives (Oct. 13, 1999) (both letters on file with the Subcommittee on Crime). The letters expressed the respective views of those departments on Senate Bill 768 in the form it was first passed by the Senate. In those letters, both departments opposed enactment of the provision that would have extended court-martial jurisdiction over civilians.

22. H.R. 3380, 106th Cong. (1999).

Committee²⁴ and passed by the House by voice vote on 25 July 2000.²⁵ By agreement among Senator Sessions, Representative Chambliss, and Representative McCollum (who oversaw the amendment process of the legislation), instead of sending House Bill 3380 to the Senate, the House substituted the text of the bill as passed by the House (that is, as it had been revised by the House Judiciary Committee) for the text of Senate Bill 768. The House passed the revised Senate bill and sent it back to the Senate.²⁶

On 25 October 2000, the Senate voted on the amended version of Senate Bill 768 and once again passed the bill by unanimous consent.²⁷ The President signed the bill into law on 22 November 2000.²⁸

The Military Extraterritorial Jurisdiction Act of 2000

The MEJA enacted new chapter 212 to Title 18 of the United States Code, entitled “Military Extraterritorial Jurisdiction.” The new chapter consists of seven sections, each of which is discussed below.

Section 3261. Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States

Section 3261 is the heart of the new chapter, and states the new offense created by the Act. It creates a new federal crime

involving conduct engaged in outside the United States by members of the armed forces or by persons employed by or accompanying the armed forces abroad that would be a felony if committed within the United States.²⁹ While the language of the Act uses the jurisdictional phrase “if committed within the special maritime and territorial jurisdiction of the United States,” the House Report on House Bill 3380 states that conduct that would be a federal crime regardless of where it takes place in the United States, such as the drug crimes in Title 21, also falls within the scope of § 3261.³⁰

As discussed above, prosecutions for violations of the MEJA may be brought only against persons who fall within two broad categories, both defined in the statute: (1) persons who are employed by or accompanying the armed forces outside the United States; or (2) persons who are members of the armed forces and subject to the Uniform Code of Military Justice (UCMJ) at the time the conduct occurs.³¹ The maximum punishment for the crime is determined by cross referencing the maximum punishment provided for in the federal statute that makes the same conduct an offense if committed in the United States.³²

In some cases, conduct may violate both § 3261 and another federal statute having extraterritorial application. In such cases, according to the House Report, the government may proceed under either statute.³³ The House Report also noted that:
it may be helpful in charging violations of § 3261 for prosecutors to make some reference

23. *Military Extraterritorial Jurisdiction Act of 1999: Hearings on H.R. 3380 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 9 (2000) [hereinafter *Hearings*].

24. See H.R. REP. NO. 106-778, pt. 1 (2000); see also 146 CONG. REC. H6930-32 (daily ed. July 25, 2000) (prepared statement of Rep. Bill McCollum introduced into the record during the House debate on H.R. 3380).

25. 146 CONG. REC. H6932 (daily ed. July 25, 2000). The Clinton Administration reiterated its support for the amended bill. See Office of Management and Budget, Statement of Administration Policy on H.R. 3380 (July 25, 2000), at <http://www.whitehouse.gov> (OMB, legislative, sap, 06-2).

26. 146 CONG. REC. H6940 (daily ed. July 25, 2000); see also 146 CONG. REC. H6931-32 (prepared statement of Rep. McCollum).

27. 146 CONG. REC. S11184 (daily ed. Oct. 26, 2000). The author of the original Senate bill and the ranking minority member of the Senate Committee on the Judiciary also noted their agreement with the analysis of the bill contained in the House Report and stated that the report reflected the intentions of the Senate. *Id.* at S11183 (statements of Sen. Sessions and Sen. Leahy).

28. The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488.

29. 18 U.S.C. § 3261(a) (2000).

30. H.R. REP. NO. 106-778, at 14-15 & n.27 (2000).

31. 18 U.S.C. § 3261(a).

32. *Id.* The House Report on House Bill 3380 provides an example of how the maximum punishment under § 3261 would be determined:

If a person described in subsection (a) were to engage in conduct outside the United States that would violate section 2242 of title 18 (relating to sexual abuse) were it to have occurred on Federal property within the United States, that conduct will violate new section 3261 and may be punished by a United States court in the same manner provided for in section 2242. The offense to be charged, however, is a violation of section 3261, not section 2242. Section 2242 only determines the maximum punishment that may be imposed for the violation of section 3261. A violation of section 2242 would not be charged.

H.R. REP. NO. 106-778, at 15.

to the statute that would have been violated had the act occurred within the United States, so as to put the defendant on notice of the elements of the crime that the government will attempt to prove and the maximum punishment that may be imposed for the violation of section 3261.³⁴

Section 3261(b) limits prosecutions under the MEJA if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting the suspect for the conduct that constitutes the offense, unless the Attorney General or Deputy Attorney General, or a person acting in either of those capacities, approves otherwise.³⁵ In short, this provision allows the United States a “second bite at the apple” in order to prosecute the defendant a second time, presumably when it believes that the punishment meted out by the host nation is insufficient.

Subsection 3261(c) recognizes and maintains the possible concurrent jurisdiction of courts-martial, or other military courts, commissions, or tribunals in appropriate cases.³⁶ This is an important provision, but should be distinguished from subsection (d), which prohibits prosecutions under § 3261 of members of the armed forces.³⁷ Whereas § 3261(c) provides for concurrent jurisdiction over civilians in limited circumstances, § 3261(d) confers exclusive jurisdiction to the military over

members of the armed forces, unless the person is no longer subject to the UCMJ or is alleged to be the codefendant of one or more civilians.³⁸ Because properly discharged service members may not be recalled to duty, the government was, prior to enactment of the MEJA, powerless to prosecute them under the UCMJ or federal law, for acts they committed outside the United States, a problem that has plagued the military for some time.³⁹ Section 3261(d) cures this jurisdictional defect, enabling the government to prosecute soldiers who commit crimes but are discharged before their conduct is discovered. It may also allow the government to prosecute a person who commits a crime while in federal service as a member of a reserve component but then returns to civilian life and is no longer subject to the UCMJ.⁴⁰

As noted above, the limitation on prosecution of military members of subsection (d) also does not apply if the military member is charged for the offense together with at least one other person who is not subject to the UCMJ.⁴¹ According to the House Report, the provision “is designed to allow the Government to try the military member together with a non-military co-defendant in a United States Court.”⁴² In such a case, concurrent jurisdiction would exist to try the person under either the UCMJ or the MEJA.

33. *Id.* at 15 n.28 (citing *United States v. Batchelder*, 442 U.S. 114 (1979)).

34. *Id.* at 15 n.29.

35. 18 U.S.C. § 3261(b). The House Report notes that in most instances, this recognition will occur through a status of forces agreement entered into by the United States and the host nation. H.R. REP. NO. 106-778, at 16.

36. 18 U.S.C. § 3261(c). The concurrent jurisdiction referred to in § 3261(c) is “with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.” *See, e.g.*, UCMJ arts. 2(a) (7) -(12), 18 (2000).

37. 18 U.S.C. § 3261(d).

38. *Id.*; *see* UCMJ art. 2(c). Under current law, persons entitled to receive retired pay (generally paid only to those who served for twenty years or more on active duty) may be recalled to active duty for the purpose of being tried for an offense under the UCMJ after they are discharged. Retired members of a reserve component who are receiving hospitalization from an armed force also may be recalled to active duty and tried by court-martial. UCMJ art.2(a)(4) and (5). But generally, once properly discharged, service members are no longer subject to courts-martial jurisdiction. MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 202(a) discussion (2000) [hereinafter MCM].

39. *See, e.g.*, *Toth v. Quarles*, 350 U.S. 11 (1955); *Smith v. Vandebush*, 47 M.J. 59 (1997). *See also* Everett & Hourcle, *supra* note 11; Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970)

40. Members of the military who serve in one of the reserve components are subject to the UCMJ only when serving in a federal duty status. *See* UCMJ arts. 2(a)(1), 2(a)(3), 2(d). In order to use the UCMJ to prosecute members of the Reserves or National Guard who commit illegal acts abroad while in federal service, the member must be called to active duty. *Id.* art. 2(d)(1). The language of § 3261(d) permits federal prosecution of military members when they “cease[] to be subject to” the UCMJ. According to the House Report, this section of the Act now “gives the government concurrent jurisdiction with the military over members of the reserve components who commit crimes overseas.” H.R. REP. NO. 106-778, at 11 n.23 .Of course, because reservists remain subject to recall for crimes committed while in federal service, some may view the language of the statute as barring a prosecution under § 3261, yet this interpretation does not appear to be the position of the drafters of the Act, as reflected in the report.

41. 18 U.S.C. § 3261(d)(2).

42. H.R. REP. NO. 106-778, at 16.

Section 3262. Arrest and Commitment

This section of the MEJA authorizes Department of Defense (DOD) personnel serving in law enforcement positions to arrest and detain persons who are suspected of violating § 3261.⁴³ While military police and criminal investigators do arrest and detain civilians who commit crimes and infractions (such as traffic violations) on military property, this authority is limited and the arrested individuals are promptly turned over to local civilian authorities.⁴⁴ Section 3262 broadens military authorities' power to arrest and hold civilians who commit crimes while accompanying the armed forces abroad. To exercise this power, the DOD law enforcement personnel must be designated and given authority by the Secretary of Defense.⁴⁵ The section also requires a normal probable cause determination for making arrests, that is, probable cause exists to believe that a person has violated § 3261(a).⁴⁶ Once arrested, military officials must deliver the person arrested to the custody of civilian law enforcement authorities of the United States as soon as practicable, unless doing so would require removal to the United States without prior order from a federal magistrate or the Secretary of Defense in accordance with § 3264, or if the person is to be tried under the UCMJ.⁴⁷

Section 3263. Delivery to Authorities of Foreign Countries

In the event that a host nation chooses to use its own laws to prosecute a person for acts that also violate § 3261, American military officials must deliver the accused to the custody of "appropriate authorities of [the] foreign country" pursuant to section 3263.⁴⁸ Delivery to foreign authorities is not automatic, however. Appropriate foreign officials, as determined by the Secretary of Defense, in consultation with the Secretary of State, must first request that the accused be delivered to them.⁴⁹

Additionally, the accused may only be handed over if delivery is authorized by a treaty or other international agreement to which the United States is a party.⁵⁰ In most cases, this will be a status of forces agreement.

Sections 3264 and 3265. Overview

The MEJA contains an unusual and complex pair of sections, one that limits the power of the government to return a defendant to the United States until certain conditions have been met, and another that requires some of the initial proceedings in a case under the Act to be held before the defendant is returned to the United States. These provisions were added during House deliberations on House Bill 3380, principally to address the concerns of the American Civil Liberties Union (ACLU) and the Federal Education Association (FEA), the union that represents teachers in DOD schools.⁵¹ At the hearing on House Bill 3380, the FEA representative expressed concern that the bill, as it was introduced, would have allowed the Government to forcibly return a person to the United States based solely on an allegation, before any real investigation into the merits, with the potential that an innocent defendant might have to bear the expensive costs of returning to a far away duty station if charges were later dismissed.⁵²

In response to these concerns, Representative McCollum offered an amendment to the bill that added two new sections. The first limits the power of military and civil law enforcement authorities to forcibly return a defendant to the United States. The second provides for some of the initial proceedings in the criminal case to occur prior to the defendant being returned to the United States and affords the defendant some control over whether and when he is returned.

43. 18 U.S.C. § 3262.

44. See Matthew J. Gilligan, *Opening the Gates?: An Analysis of the Military Law Enforcement Authority Over Civilian Lawbreakers On and Off the Federal Installation*, 161 MIL. L. REV. 1, 18 (1999). See also U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS, para. 4-8 (1 June 1978); U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATIVE ACTIVITIES, para. 3.21 (30 Oct. 1985).

45. *Id.* § 3262(a).

46. *Id.*

47. *Id.* § 3262(b). See *infra* notes 49 through 63 and accompanying text.

48. *Id.* § 3263.

49. *Id.* § 3263(a)(1) and (b).

50. *Id.* § 3263(a)(2).

51. *Hearings, supra* note 23, at 27-31 (statement of Jan Mohr, President, Federal Education Association).

52. *Id.* In light of the responsive changes to the bill, both the ACLU and the FEA supported the passage of House Bill 3380. Letter from Mary Elizabeth Teasley, Director of Government Relations, National Education Association, and Rachel King, Legislative Counsel, American Civil Liberties Union, to Rep. Bill McCollum, Chairman, Subcommittee on Crime, U.S. House of Representatives, and Rep. Bobby Scott, Ranking Minority Member, Subcommittee on Crime, U.S. House of Representatives (July 12, 2000) (on file with the Subcommittee on Crime).

Section 3264. Limitation on Removal

Section 3264 addresses the due process concerns of the ACLU and the FEA by limiting the power of military and civil law enforcement officials to remove a person arrested for or charged with a violation of § 3261 from the country in which they are arrested or found.⁵³ According to the House Report, the phrase “arrested for or charged with” was used “to make it clear that the limitation applies to situations where the person has been arrested and also where the person has not been arrested but has been charged by indictment or the filing of an information.”⁵⁴

Section 3264(a) sets forth the general limitation that a person arrested or charged with a violation of § 3261 may not be forcibly returned to the United States or taken to any foreign country other than a country in which the person is believed to have committed the crime or crimes for which they have been arrested or charged.⁵⁵ This provision means that once American authorities arrest a person for a violation of § 3261, whether based on a citizen’s complaint or after an information or indictment is returned against the person, the defendant must be held in the country in which he was arrested or in the country in which the crime is believed to have been committed. If a person commits a crime in one country and then flees that country, military authorities have the option of returning him to the country in which the crime was committed.⁵⁶

Section 3264(b) establishes five exceptions to the general limitation on forced removals. The first two exceptions relate to pretrial detention proceedings in federal courts.⁵⁷ Sections 3264(b)(1) and (2) allow a federal magistrate judge to order

removal of a defendant to the United States to appear at a detention hearing⁵⁸ or to be detained pending trial.⁵⁹ For the latter to occur, the defendant must waive physical presence at the detention hearing, as the magistrate judges are in the United States.⁶⁰

The third exception to § 3264(a) allows removal to the United States to allow the defendant’s presence, unless waived, at a preliminary examination held pursuant to the Federal Rules of Criminal Procedure (FRCP).⁶¹ While a defendant is not entitled to such a hearing if an indictment is returned or information filed against him, the Act requires that if such a hearing is to take place it must occur within the time limits set forth in the rules, and the defendant must be removed to the United States in time to attend the hearing.⁶²

Finally, § 3264(b) contains two additional catch-all exceptions to the Act’s limitation on forced removal of a defendant to the United States. First, a federal magistrate judge has blanket authority to order a defendant’s removal at any time.⁶³ The House Report notes that while “removal of a person for a reason other than [those discussed above] would be rare, paragraph (b)(4) grants judges the discretion to order such removal.”⁶⁴ Second, DOD officials may remove the defendant from the place where he or she is arrested if the Secretary of Defense determines that removal is required by military necessity.⁶⁵ As explained in the House Report, this authority is to be used sparingly, such as “in situations where the person is arrested in an ‘immature theater’ or in such other place where it is not reasonable to expect that the initial proceedings required by section 3265 can be carried out.”⁶⁶ Thus, under this authority, a defendant may be transferred to a place other than where the crime was committed or where the person was arrested, but only to the

53. 18 U.S.C. § 3264(a); H.R. REP. NO. 106-778, at 17 (2000).

54. H.R. REP. NO. 106-778, at 17.

55. 18 U.S.C. § 3264(a).

56. *Id.*

57. See 18 U.S.C. § 3142. Sections 3142(e) and (f) are the federal equivalent to the military’s pretrial confinement rules. See MCM, *supra* note 38, R.C.M. 305.

58. 18 U.S.C. § 3264(b)(1). If a Federal magistrate orders a defendant removed pursuant to this subsection, the MEJA requires that he be returned to the United States in time for the detention hearing. H.R. REP. NO. 106-778, at 17.

59. 18 U.S.C. § 3264(b)(2). Subsection (b)(2) requires prompt removal of the defendant to the United States in order to serve the detention. A defendant ordered into pretrial detention may not be held by military authorities. H.R. REP. NO. 106-778, at 17.

60. See *infra* notes 64-79 and accompanying text.

61. See FED. R. CRIM. P. 5, 5.1.

62. 18 U.S.C. § 3264(b)(3); H.R. REP. NO. 106-778, at 17.

63. 18 U.S.C. § 3264(b)(4).

64. H.R. REP. NO. 106-778, at 18 (2000).

65. 18 U.S.C. § 3264(b)(5). The Secretary of Defense may delegate his authority to make this determination as necessary. See 10 U.S.C. § 113(b) (2000).

66. H.R. REP. NO. 106-778, at 18.

“nearest United States military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings described in section 3265.”⁶⁷

Section 3265. Initial Proceedings

Section 3265 is the second provision added to the bill by the McCollum amendment, and is intended to harmonize the extra-territorial arrest authority of § 3262 with the preliminary proceedings procedures of the FRCP.⁶⁸ It governs the initial appearance under FRCP 5 of a person arrested for or charged with a violation of § 3261 and not delivered to foreign authorities for prosecution.⁶⁹ Section 3265(a)(1) requires that the initial appearance be conducted by a federal magistrate judge, and allows the magistrate judge to conduct the initial appearance of the defendant before the court by telephone “or such other means that enables voice communication among the participants”⁷⁰ Although these procedures are not required by the statute, and the judge retains the discretion to order the defendant’s return to the United States,⁷¹ as a practical matter most initial appearances under the Act will probably occur by this means. Given the perfunctory nature of the initial appearance, there would be little benefit to the judge requiring the defendant to be physically present. Congress clearly expected that this provision would be used routinely. As the House Report states, “in the vast majority of cases, the initial appearance of a person arrested or charged under section 3261 will be conducted by

telephone or other appropriate means so that the defendant may remain in the country where he or she was arrested or was found.”⁷² The report also notes that while the appearance may be conducted by telephone, the preferred means is by video teleconference or similar means whenever possible.⁷³

Section 3265(b) governs any detention hearing held under § 3142(f) of Title 18. As with the initial appearance, detention hearings must be conducted by federal magistrate judges.⁷⁴ If a detention hearing is held, the judge may also conduct this hearing by telephone or such other means that allow all parties to participate and to be heard by all other participants.⁷⁵ Unlike the initial appearance, however, the detention hearing may only be conducted in this manner if requested by the defendant.⁷⁶ The act treats this hearing differently from the initial appearance because defendants have the right to testify and present witnesses and other information and to confront witnesses against them at detention hearings; rights that have constitutional dimensions.⁷⁷ Therefore, if the defendant does not request that the hearing be conducted by electronic means, he must be returned to the United States in time for the hearing.⁷⁸ Even if the defendant requests that the hearing be conducted in this manner, the judge retains the discretion to deny the request.⁷⁹

Section 3265(c), which provides for the appointment of military counsel to represent defendants accused of violating § 3261 during the initial proceedings described in the Act, is sure

67. 18 U.S.C. § 3264(b)(5). The House Report also provides that “[w]hile new section 3264(b)(5) states that the installation must be adequate to ‘facilitate the initial appearance described in section 3265(a),’ as a practical matter, it should also be adequate to facilitate the proceedings described in 3265(b).” H.R. REP. NO. 106-778, at 19 n.36.

68. See FED. R. CRIM. P. 3-5.1.

69. 18 U.S.C. § 3265(a)(1).

70. *Id.* § 3265(a)(1)(A) and (B).

71. See *supra* notes 61-62 and accompanying text.

72. H.R. REP. NO. 106-778, at 19.

73. *Id.*

74. 18 U.S.C. § 3265(b)(1).

75. *Id.* § 3265(b)(2).

76. *Id.*

77. See, e.g., *United States v. Smith*, 79 F.3d 1208 (D.C. Cir. 1996). Of course, if the defendant chooses to remain in the foreign country, he will effectively waive his right to be physically present before the judge. H.R. REP. NO. 106-778, at 20.

78. H.R. REP. NO. 106-778, at 20.

79. *Id.* The House Report suggests several factors that the judge should consider in making this decision:

whether the Government opposes the defendant's request (to include considerations based on military exigencies or special circumstances bearing on the issue), the likelihood from information presented at the initial appearance that the defendant will be ordered detained, and whether the parties intend to present live witness testimony at the hearing and the place of residence of any witnesses.

Id. at 20. It is clear from the report that this is not intended to be an exhaustive list of the factors that the judge should consider.

to cause some concern in military circles. The terms of the MEJA provide for the appointment of “qualified military counsel” to defendants “entitled to have counsel appointed for purposes of such a proceeding.”⁸⁰ Such appointments, however, should be limited only to cases in which the defendant is financially unable to retain counsel, or if no qualified civilian counsel is available in the country where the initial proceeding will be held.⁸¹ The judge may appoint only those members of the military designated for that purpose by the Secretary of Defense.⁸² Neither the Act or the House Report state which officers must be so designated (except that they must be judge advocates) or how the fact of their designation is to be made known to the non-military magistrate judge. Clearly, this issue will have to be addressed in the implementing regulations for the Act, and perhaps also in regulations relating to military law in general. Representation by appointed military counsel is limited to only the initial proceedings described in § 3265, and then only if the defendant is not removed to the United States for those proceedings.⁸³

Section 3266. Regulations

Section 3266 of the Act requires the Secretary of Defense to prescribe regulations governing the apprehension, detention, delivery, and removal of persons under the MEJA.⁸⁴ The regulations are also to provide for the facilitation of the initial proceedings prescribed in § 3265.⁸⁵ Additionally, the regulations require that, to the fullest extent practicable, notice be given to those civilians subject to the statute who are not U.S. nationals, that they are potentially subject to the criminal jurisdiction of the United States.⁸⁶

The Act requires the Secretary of Defense to consult with the Secretary of State and the Attorney General in developing the regulations required by § 3266.⁸⁷ As an indication that Congress intends to use its oversight power to monitor the way in which the military implements the Act, it took the unusual step of requiring the Secretary of Defense to submit a report containing the proposed regulations, and such other information as the Secretary may determine appropriate, to the House and Senate Committees on the Judiciary.⁸⁸

Section 3267. Definitions

Section 3267 defines several key words and phrases used throughout the new chapter. Most important among them are the phrases “employed by the Armed Forces outside the United States” and “accompanying the Armed Forces outside the United States.” The act defines the former to mean a DOD civilian employee, including a nonappropriated fund instrumentality employee, a DOD contractor or subcontractor of any level, or an employee of such contractor or subcontractor.⁸⁹ It specifically excludes from this definition persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily resident there.⁹⁰ The phrase “accompanying the Armed Forces outside the United States” is defined as persons who are dependents of and reside with military members, DOD civilian employees or NAF employees, or DOD contractors and subcontractors or their employees outside the United States.⁹¹ As with the prior definition, this term also does not include persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily resident there.⁹² Finally, the House

80. 18 U.S.C. § 3265(c)(1). Qualified military counsel are those who have graduated from an accredited law school or are members of the bar of a federal court or the highest court of a state that are certified by their respective Judge Advocate Generals as competent to perform the required duties. *Id.* § 3265(c)(2).

81. H.R. REP. NO. 106-778, at 21-22.

82. *Id.*

83. *Id.*

84. 18 U.S.C. § 3266(a).

85. *Id.*

86. *Id.* § 3266(b). Failure to provide this notice does not defeat the jurisdiction of the United States over the person or provide a defense to any proceeding arising under the MEJA. *Id.* § 3266(b)(2).

87. *Id.* § 3266(a) and (b).

88. *Id.* § 3266(c). In fact, the Act prohibits the regulations from taking effect until ninety days have passed from the date the report is submitted to those committees, and any amendments to the regulations also must first be submitted to the committees before they may take effect.

89. 18 U.S.C. § 3267(1)(A) and (B).

90. *Id.* § 3267(1)(C).

91. *Id.* § 3267(2)(A) and (B).

92. *Id.* § 3267(2)(C).

Report also makes it clear that juveniles are included within this term.⁹³

Issues Not Addressed in the Act

As thorough as the MEJA is, there are several issues that it does not address, but which must be examined in order to properly implement the statute. While most of these gray areas likely will be addressed through regulations or memorandums of agreement between the Departments of Defense and Justice, some may require further congressional action.

The Military's Role After a Defendant is Arrested

One gray area involves what role the military will play once a person is arrested for a suspected violation of the MEJA. Will military authorities contact a U.S. Attorney directly and present the evidence they have collected so far, or will officials at the Justice Department in Washington take on that responsibility? Will military officials continue to investigate the case and collect evidence against the defendant after the initial arrest? While the Act does authorize military officials to arrest and detain a civilian who may have violated § 3261, it is silent as to whether military officials are to investigate the case any further. The Act clearly indicates a preference that civilian authorities take charge of the defendant at the earliest possible time, and so it seems reasonable that Congress did not intend military authorities to actively investigate cases. If so, it is also unlikely that Congress intended that the military have any role in making the decision as to when and where a case would be presented to a U.S. Attorney for prosecution. The likely resolution of this issue is that the military will communicate the fact of an arrest under the act to the Department of Justice (DOJ) in Washington. The DOJ will then conduct any further investigation (or at least take the lead in a joint investigation with military criminal investigators), and will decide if and where to proceed against the defendant.

Assignment of a Case to a United States Attorney

Another related gray area is how to determine which U.S. Attorney's office will handle the prosecution of a case under the act. Usually, law enforcement authorities in the judicial district where the crime occurred approach the U.S. Attorney there with evidence of the crime and ask for an indictment of the person suspected of committing the crime. It is unclear under the

MEJA which U.S. Attorney is responsible for proceeding against alleged offenders. If one U.S. Attorney declines to seek an indictment, could DOJ officials approach other U.S. Attorneys until they find one who is willing to indict? As discussed below, determining where the initial proceedings will take place in advance of any prosecution could solve this problem, but until that occurs, the DOJ will have to develop some internal protocol to decide this question.

Venue for the Initial Proceedings of a Case Under the MEJA

The most significant issue left open by the Act is how Federal magistrate judges will be appointed to preside over the initial proceedings that are required for prosecutions under the Act. As discussed above, the drafters of the Act envisioned that most often, proceedings will occur before the defendant is returned to the United States, yet the Act does not specify the venue for these proceedings. The FRCP provide that venue for the "prosecution" of an offense is to be the district in which the offense is committed.⁹⁴ For offenses that are not committed in any judicial district, however, § 3238 of Title 18 determines the place of trial for the offense.⁹⁵ However, judges might not construe § 3238 to apply to the initial proceedings under the Act because the statute, by its terms, only determines the place of trial and nothing else. Unlike FRCP 18, the statute does not speak in terms of the "prosecution" of the offense.

Even if a court did look to the statute for guidance, its application could lead to conflicting decisions as to the jurisdiction in which the proceedings will be conducted. Under the MEJA, initial proceedings will often occur after the person is arrested but before the person is brought to the United States and, in many cases, also before any indictment is filed. Under § 3238, in such a case, venue would lie only in the District of Columbia. The government may, however, bring the defendant to the United States for trial at a place other than the District of Columbia (as there is no airport actually in that judicial district). In that circumstance, venue for trial would lie in the district to which the defendant was actually brought, that is, where the airplane first lands in the United States. Thus, applying the Federal venue statute to the Act might result in two different districts having jurisdiction over different portions of the case; clearly an unsatisfactory result.

In order to avoid this confusion, the government could simply use its best guess as to where the defendant might enter the United States and seek out a magistrate in that district to preside over the initial proceedings. Even so, no rule or statute specif-

93. H.R. REP. NO. 106-778, at 21-22. If the person committing the crime is a juvenile, however, the federal juvenile delinquency procedures apply. See 18 U.S.C. §§ 5031-5042 (2000).

94. FED. R. CRIM. P. 18.

95. 18 U.S.C. § 3238. This section provides that venue for trial lies in the place where the defendant is "arrested or first brought." If the person is not arrested or brought, then an indictment or information is to be filed in the district of the offender's last known residence. And if that is not known, then venue lies in the District of Columbia. *Id.*

ically authorizes a magistrate there to preside over those proceedings, and some magistrates may be reluctant to act without being able to rely on at least some authority. And, of course, if the government guessed wrong, the result might again be that a judge in one district would conduct the initial proceedings and a judge in another district would preside over the defendant's trial.

While this gray area is certainly not a fatal defect to prosecutions under the Act, the issue could be addressed by revising FRCP 18, or by promulgating a new rule that would apply to prosecutions brought under the Act. Because Congress generally allows the Judicial Conference of the United States and its various rules committees to propose changes in the several sets of rules of procedure, Congress could, instead, amend the statutory venue provision to address the unique procedures under the Act. For example, since prosecutions under this Act are not likely to be common, a single district could be established for all such prosecutions. Another approach could be that one of several districts would be identified for this purpose, and assigned based on where the alleged crime occurred (for exam-

ple, the Southern District of New York for crimes in Europe, the Southern District of Florida for crimes in Central and South America, and the District of Hawaii for crimes occurring in the Pacific rim countries).⁹⁶

Conclusion

The Military Extraterritorial Jurisdiction Act of 2000 is a significant development in America criminal law. It closes a jurisdictional gap in the law that has been a concern to DOD and DOJ officials for decades. By doing so, it will help the military instill confidence in its personnel and their families that the government is doing all it can to protect them when it sends them abroad in defense of the nation's interests. The passage of the Act will also build trust with our allies who will know that America can now more effectively police the actions of its personnel who are deployed to a foreign country. And, most importantly, the Act will help to ensure that justice is done whenever a member of our military or a person accompanying it abroad commits a crime.

96. The House Report on House Bill 3380 noted that the:

committee expects that the Department of Justice will develop a procedure for initiating proceedings under chapter 212, which will include some means for selecting the federal judicial district in which such proceedings will be commenced. The bill does not require, nor does it prohibit, that the initial proceedings of all cases brought under chapter 212 be held in the same judicial district. The committee notes that venue for the trial of a violation of section 3261 is governed by section 3238 of title 18. Nothing in the bill changes that. The committee also notes that, in some cases, initial proceedings under section 3265 may be conducted by a judge who does not sit in the judicial district in which a trial of the person arrested or charged may take place. That fact has no bearing on the determination of venue under section 3238.

H.R. REP. NO. 106-778, at 20.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Tax Law Note

Update for 2000 Federal Income Tax Returns

The wisdom of man never yet contrived a system of taxation that would operate with perfect equality.

Andrew Jackson¹

[A tax loophole is] something that benefits the other guy. If it benefits you, it is tax reform.

United States Senator Russell B. Long²

For the past two years, the President and Congress have had a divergence of opinion on tax reform and legislation. The result has been a lack of comprehensive tax legislation since 1998. Therefore, most of the tax changes taking effect for 2000 are the effects of legislation from several years ago, annual adjustments for inflation, or regulatory changes by the Internal Revenue Service (IRS). The following article is a brief update of tax changes that are important for taxpayers in the military community. This article is not intended to serve as an in-depth review or explanation of each topic discussed. Rather, its intent is to inform legal assistance attorneys of updates in tax nomenclature and changes for the upcoming tax season.

Key Changes for 2000

Savings Bonds³

Since 1990, the Series EE US Savings Bonds have had an added feature that will allow owners to entirely exclude interest accrued on the bonds if used to pay for qualified educational expenses. There are four basic restrictions to the qualified Savings Bond exclusion program.⁴ First, the exclusion is available only for bonds purchased on or after January 1, 1990.⁵ Bonds purchased before this date will not qualify. Second, the bond must be issued to an individual who is at least twenty-four years old.⁶ Third, the exclusion is phased-out as the adjusted gross income of the taxpayer exceeds certain levels depending on the owner's filing status.⁷ Fourth, the amount of the interest on the redeemed bonds must be lower than qualified higher educational expenses of the child, the taxpayer, or a spouse.⁸

The limits are higher in 2000 for the exclusion of interest from income for Series EE Savings Bonds used for education.⁹ The ability to exclude interest from savings bonds used for educational purposes phases out on joint returns beginning at a modified adjusted gross income of \$81,100 and ending at \$111,100 (\$79,650 to \$109,650 in 1999).¹⁰ For single taxpayers the ability to exclude interest from savings bonds used for educational purposes begins at \$54,100 and terminates at \$69,100 (\$53,100 to \$68,100 in 1999).¹¹

1. GERALD F. LIEBERMAN, 3,500 GOOD QUOTES FOR SPEAKERS (1983).

2. JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS (1988).

3. For more information on the use of U.S. Savings Bonds for educational purposes, see I.R.S. Pub. 970, TAX BENEFITS FOR HIGHER EDUCATION (2000); ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 269, FEDERAL TAX INFORMATION SERIES (Dec. 2000) [hereinafter JA 269].

4. I.R.C. § 135 (LEXIS 2000).

5. *Id.* § 135(c)(1)(A).

6. *Id.* § 135 (c)(1)(B).

7. I.R.C. § 135(b)(2)(A).

8. *Id.* § 135(b)(1)(A).

9. *Id.*; Rev. Proc. 99-42, 1999-2 C.B. 568.

10. Rev. Proc. 99-42, 1999-2 C.B. 568.

11. *Id.*

Individual Retirement Arrangements (IRAs)

More service members will be eligible to make deductible contributions to a traditional IRA for the 2000 tax year due to an increase in the phase-out limitations.¹² The phase-out limits for IRA deductions increase this year for employees covered by qualified retirement plans.¹³ Because service members are active participants and have coverage by a pension or retirement plan, deductible IRA contributions are subject to limitations.¹⁴ The adjusted gross income (AGI) limits are gradually increasing over the next several years. For 2000, married filing jointly, the phase-out begins at \$52,000 and tops out at \$62,000.¹⁵ In 2007 and thereafter the maximum range will be from \$80,000 to \$100,000.¹⁶ For single filers (including head of household), the phase-out begins at \$32,000 and ends at \$42,000.¹⁷ In 2005 and thereafter the maximum range will be from \$50,000 to \$60,000.¹⁸ For married filing separately, the limit remains \$10,000.¹⁹

New regulations became effective in 2000 that limit tax-saving ploys of investors who convert traditional IRAs to Roth IRAs.²⁰ The intent of the new regulations is to close a loophole in the tax law where investors could undo Roth IRA conversions and then redo them simply to lower their tax bill. Before 2000, taxpayers converting to a Roth IRA could later undo the conversion by rolling the money back into a traditional IRA and then immediately reconvert back to a Roth IRA. The redoing of a Roth IRA conversion was a lucrative tax-saving move if the value of an IRA had dropped since the time of the conversion because the funds converted to a Roth IRA are subject to tax based on the value of the assets at the time of the conver-

sion. If the conversion of a Roth IRA was performed when the value decreased, then the taxpayer paid tax on the lower value. By redoing a Roth conversion, the investor could take advantage of a downturn in stock prices to reduce the tax bite on a Roth conversion. There are now more restrictions on reconverting a traditional or regular IRA back to a Roth IRA. Beginning in 2000, taxpayers that convert to a Roth IRA will have to wait until the next tax year following the conversion to reconvert. In addition, the regulations require a minimum thirty day waiting period between the time the taxpayer undoes a Roth IRA conversion and conversion back to a Roth IRA.²¹

Student Loan Interest Deduction

The student loan interest deduction is more valuable for tax-year 2000.²² For 2000, taxpayers can deduct up to \$2000 of student loan interest and in 2001 the amount increases to \$2500 (was \$1500 in 1999).²³ The Student Loan Interest Deduction is not an itemized deduction, and taxpayers do not have to itemize to qualify for this deduction. However, the deduction declines for couples with an adjusted gross income of \$60,000 to \$75,000. For single taxpayers, the deduction decreases with an adjusted gross income of \$40,000 to \$55,000.²⁴

Household Employment ("Nanny") Tax²⁵

If a taxpayer pays a housekeeper or household helper less than \$1200 in 2000, the taxpayer will not have to pay Social Security or Medicare taxes on behalf of the employee.²⁶ The

12. I.R.C. § 219(g). For more information on IRAs in general, see I.R.S. Pub. 590, *INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAs) (2000)*; JA 269, *supra* note 3, at 28-37.

13. Rev. Proc. 99-42, 1999-2 C.B. 568.

14. I.R.C. 219(g); I.R.S. Notice 87-16, 1987-1 C.B. 446; *Morales-Caban v. Commissioner*, 66 T.C.M. (CCH) 995 (1993).

15. I.R.C. § 219(g)(2)(A)(ii).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Treas. Reg. § 1.408A-5 (2000).

21. *Id.*

22. For more information on the Student Loan Interest Deduction, see Major Richard Rousseau, TJAGSA Practice Notes, *Internal Revenue Service Restructuring and Reform Act of 1998*, ARMY LAW., Nov. 1998, at 40-41; Major Richard Rousseau, TJAGSA Practice Notes, *Update for 1998 Federal Income Tax Returns*, ARMY LAW., Nov. 1998, at 44-45; Major Richard Rousseau, TJAGSA Practice Notes, *Update for 1999 Federal Income Tax Returns*, ARMY LAW., Dec. 1999, at 30.

23. I.R.C. § 221(b)(1).

24. I.R.C. § 221(b)(1)(B).

25. For more information on the taxation of household employees, see I.R.S. Pub. 926 *HOUSEHOLD EMPLOYER'S TAX GUIDE FOR WAGES PAID IN 2000* (2000).

threshold is up from \$1100 in 1999. The “Nanny tax” threshold will increase to \$1300 for 2001. The threshold is adjusted for inflation each year based on increases in average wages.²⁷ However, the federal unemployment tax (FUTA) limit for household employees does not change because this tax is not indexed for inflation. The FUTA applies whenever a domestic employee is paid \$1000 or more in a calendar quarter in the current or prior tax year.

*Earned Income Credit (EIC)*²⁸

The refundable EIC is available to certain low-income individuals who have earned income, meet adjusted gross income thresholds, and do not have more than a certain amount of disqualified income.²⁹ Beginning in 2000, the EIC is denied if the aggregate amount of disqualified income exceeds \$2400 (\$2350 in 1999).³⁰

Those who seek to include eligible foster children in their households for purposes of the EIC face additional requirements. Previously, a child was an eligible foster child for the EIC if the taxpayer cared for the child as they would their own child and the child lived with the taxpayer for the whole year (except for temporary absences). Beginning in 2000, in addition to the prior rules mentioned, the child must be a brother, sister, stepbrother, or stepsister (or a descendant of your brother, sister, stepbrother, or stepsister) or have been placed with the taxpayer by an authorized placement agency.³¹

Tax Form Changes

The Alternative Minimum Tax (AMT) line (Form 1040, line 51 (1999)) has moved to a different section on the tax form

(Form 1040, line 41 (2000)). For 2000, the AMT line appears after the line for calculating the regular tax instead of in the section for other taxes. The change is designed to simplify the AMT calculation of the offset for personal credits for dependent care, education, and the child tax credit.

Beginning in 2000, certain capital gain distributions may be reported on line 10 of IRS Form 1040A. Because of this change, there is a conflict with the “Caution” included in the instructions on the back of Copy B of the 2000 Form 1099-DIV. The caution tells recipients if there is an amount in box 2a (total capital gain distributions), they must file Form 1040 and cannot use Form 1040A. However, because of the addition of line 10 on the 2000 Form 1040A, a recipient of Form 1099-DIV with an amount in box 2a may be able to file Form 1040A. In addition, for 2000, the instructions for Form 1040A will contain a Capital Gain Tax Worksheet to figure the tax. The worksheet is similar to the one in the 1999 Form 1040 instructions.

Near the end of the tax forms (1040EZ, 1040A, 1040), there is a new checkbox to give permission to the IRS to talk to the tax return preparer and bypass the individual tax filer to discuss questions or issues regarding processing related matters on the returns.³² In the past, tax practitioners (attorneys, CPAs, and enrolled agents) and other paid preparers needed a power of attorney in order to discuss tax return preparation, refunds, and payment issues with the IRS. Under this new option, the taxpayer’s designee has the ability to speak directly to the IRS Customer Service representatives over the telephone and in person in response to math error notices or to receive information about a refund or payment.³³ Each military tax assistance program will have to decide whether to use this new checkbox. However, military tax assistance programs need to keep in mind that the IRS could attempt to contact a military tax preparer several years after the filing of the tax return. Many mil-

26. I.R.C. §§ 3121(a)(7)(B), 3121(x).

27. Section 2 of the Social Security Domestic Employment Reform Act of 1994 increased the threshold for coverage of a domestic employee’s wages paid per employer from \$50 per calendar quarter to \$1000 per annum in calendar year 1994. Pub. L. No. 103-387, 108 Stat. 4071. The statute held the coverage threshold at the \$1000 level for 1995 and then increased the threshold in \$100 increments for years after 1995. Section 3121(x) of the Internal Revenue Code provides the formula for increasing the threshold. Under the formula, the domestic employee coverage threshold amount for 2000 shall be equal to the 1995 amount of \$1000 multiplied by the ratio of the national average wage index for 1998 to that for 1993. If the amount so determined is not a multiple of \$100, it shall be rounded to the next lower multiple of \$100. The ratio of the national average wage index for 1998, \$ 28,861.44, compared to that for 1993, \$ 23,132.67, is 1.2476485. Multiplying the 1995 domestic employee coverage threshold amount of \$1000 by the ratio of 1.2476485 produces the amount of \$1247.65, which must then be rounded to \$1,200. Accordingly, the domestic employee coverage threshold amount is determined to be \$1200 for 2000. 64 Fed. Reg. 57,506-512 (Oct. 20, 1999).

28. I.R.C. § 32. For more information on the Earned Income Credit, see I.R.S. Pub. 596, EARNED INCOME CREDIT (2000).

29. I.R.C. §§ 32(a), 32(i). Disqualified income includes an individual’s capital gain net income and net passive income in addition to interest, dividends, tax-exempt interest, and non-business rents or royalties. *Id.*

30. I.R.C. § 32(j)(1); Rev. Proc. 99-42, 1999-2 C.B. 568.

31. I.R.C. § 32(c)(3)(B)(iii).

32. I.R.S. Pub. 17, YOUR FEDERAL INCOME TAX (2000).

33. *Id.* It should be noted that the authorization cannot be revoked by the taxpayer. Nevertheless, the authorization will automatically end no later than the due date (without regard to extensions) for filing a 2001 tax return.

itary tax assistance programs are only seasonal operations and only a few maintain the same personnel from year to year. Therefore, most military tax assistance programs may not want to check the box.

Mailing Locations for Tax Returns

Some taxpayers will mail their tax returns to a different IRS Service Center this year because the IRS changed the filing location for several areas. Taxpayers should mail tax returns to the address on the envelope received with their tax package, or note the proper mailing address in the Form 1040 Instruction Booklet. Major Rousseau.

2000 Numerology³⁴

Tax Rates

The 2000 federal income tax rates are: 15%, 28%, 31%, 36%, and 39.6% .

The 2000 tax rates by filing status are:

Married Filing Jointly and Qualifying Widow(er):

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 43,850	15%
43,850 - 105,950	28%
105,950 - 161,450	31%
161,450 - 288,350	36%
over 288,350	39.6%

Single:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 26,250	15%
26,250 - 63,550	28%
63,550 - 132,600	31%
132,600 - 288,350	36%
over 288,350	39.6%

Head of Household:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$0 - 35,150	15%
35,150 - 90,800	28%
90,800 - 147,050	31%
147,050 - 288,350	36%
over 288,350	39.6%

Married Filing Separately:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 21,925	15%
21,925 - 52,975	28%
52,975 - 80,725	31%
80,725 - 144,175	36%
over 144,175	39.6%

34. Rev. Proc. 99-42, 1992-2 C.B. 568.

Estates and Trusts:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 1750	15%
1750 - 4150	28%
4150 - 6300	31%
6300 - 8650	36%
over 8650	39.6%

Standard Deduction

Married filing jointly or qualifying widow(er) - \$7350 (\$7200 in 1999; Projected for 2001 \$7600).

Single - \$4400 (\$4300 in 1999; Projected for 2001 \$4550).

Head of household - \$6450 (\$6350 in 1999; Projected for 2001 \$6650).

Married filing separately - \$3675 (\$3600 in 1999).

Reduction of Itemized Deductions

Otherwise allowable itemized deductions are reduced if AGI in 2000 exceeds:

Married filing separately - \$64,475.

All other returns - \$128,950.

Personal Exemptions

Personal exemption deduction - \$2800 (\$2750 in 1999; Projected for 2001 \$2900).

Phase Out of Personal Exemptions:

<u>Taxpayer</u>	<u>Begins After</u>
Married filing jointly	\$193,400
Single	\$128,950
Head of household	\$161,150
Married filing separately	\$ 96,700

Foreign Earned Income Exclusion³⁵

Higher exclusion for 2000: \$76,000 (was \$74,000 in 1999; will be \$78,000 in 2001; and \$80,000 in 2002 and thereafter.³⁶

35. I.R.C. § 911. For more information on Foreign Earned Income Exclusion see I.R.S. Pub. 54, TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD (2000); I.R.S. Pub. 516, TAX INFORMATION FOR U.S. GOVERNMENT CIVILIAN EMPLOYEES STATIONED ABROAD (2000); I.R.S. Pub. 593, INCOME TAX BENEFITS FOR CITIZENS WHO GO OVERSEAS (2000); JA 269, *supra* note 3, at 64-70.

36. I.R.C. § 911(b).

Earned Income Credit

Number of Children	Maximum Amount of the Credit	Earned Income Amount	Threshold Phaseout Amount	Completed Phaseout Amount
1	\$2353	\$6920	\$12,690	\$27,413
2	\$3888	\$9720	\$12,690	\$31,152
None	\$353	\$4610	\$5,770	\$10,380

Auto Standard Mileage Allowances

If a taxpayer can use an automobile for business, medical, charity, and/or moving purposes, the taxpayer is allowed a standard mileage deduction rate. For 2000, the rates are:

Business: 32.5 cents per mile.

Charity: 14 cents per mile.

Medical or Moving: 10 cents per mile.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at <http://www.jagcnet.army.mil>.

Ninth Circuit Holds that “Disposal” Includes Passive Migration Under CERCLA Section 107

The Ninth Circuit has ruled that passive migration of hazardous substances from one part of a contaminated site to another is sufficient to establish the “disposal” element of a CERCLA¹ cost recovery action. The Ninth Circuit joins the Fourth Circuit as the only two circuit courts of appeal to take this position.

*Carson Harbor v. UNOCAL Corp.*² was a cost recovery action stemming from the clean up of a trailer park located in the Dominguez Oil Field in Los Angeles County. The plaintiff, Carson Harbor, was a partnership that owned the trailer park.³ While trying to refinance the property in 1993, Carson Harbor learned of a significant deposit of slag and tar in seventeen acres of wetlands that ran through the property and abutted a nearby highway storm water runoff area.⁴ Once plaintiffs had cleaned up the site, they filed a cost recovery action against several persons, alleging that they were potentially responsible parties under CERCLA.⁵

A cost recovery action under CERCLA section 107 has four major elements. To prevail, a private party plaintiff must prove that:

- (1) there was a release or threatened release of a hazardous substance;
- (2) the release was from a “facility” as defined by CERCLA;
- (3) the release or threatened release caused the plaintiff to incur necessary response costs that were consistent with the National Contingency Plan; and,
- (4) the defendant is within one of four statutory classes of potentially responsible parties.⁶

The four statutory classes are: current owners and operators of a facility; persons who were owners or operators of the facility “at the time of disposal of any hazardous substance;” persons who arranged for the disposal of hazardous substances that ended up at the facility; and those who transported hazardous substances to the facility, if the transporter selected the facility.⁷ Interestingly, CERCLA adopts several definitions from the Resource Conservation and Recovery Act (RCRA),⁸ including the definition for the term “disposal.”⁹ The RCRA definition provides:

The term “disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that such solid or hazardous waste or any constituent thereof may enter into the environment or be emitted into the air or discharged into any waters, including ground waters.¹⁰

The defendants in *Carson Harbor* included local governments, an oil company that had leased the property years before, and two men who owned and operated the trailer park

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2000).

2. *Carson Harbor Village, Ltd. v. UNOCAL Corp.*, 227 F.3d 1196 (9th Cir. 2000).

3. *Id.* at 1199.

4. *Id.* at 1199-1200.

5. *Id.* at 1201.

6. *Id.* at 1202 (citing 42 U.S.C. § 9601(a) and 9607(a)). The United States, Indian tribes, and individual states must prove the same elements as a private party plaintiff when seeking recovery, except that they may recover without a showing that costs were consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(A).

7. 42 U.S.C. § 9607(a)(1) to (4).

8. *Id.* §§ 6901-6991(h).

9. *Id.* § 9601(29) (adopting RCRA definitions for “disposal,” “hazardous waste” and “treatment”).

10. *Id.* § 6903(3).

in a partnership from 1977 to 1983 (the “Partnership Defendants”).¹¹ Plaintiffs alleged, *inter alia*, that the Partnership Defendants were liable under CERCLA as past owners and operators of the site.¹² They had to show, therefore, that during the period 1977 to 1983, there was a “disposal” of hazardous substances at the site.¹³

All parties filed comprehensive motions for summary judgment.¹⁴ They agreed that the tar and slag were hazardous substances,¹⁵ that the plaintiffs had incurred costs to clean up the site,¹⁶ and that the partnership defendants were prior owners of the site.¹⁷ One of the contested issues was whether or not there was a “disposal” during the period of the Partnership Defendants’ ownership.¹⁸ The slag and tar that Carson Harbor cleaned up on the site had been in place since before the Partnership Defendants purchased the property.¹⁹ The plaintiffs’ theory was that passive migration of the contaminants in the groundwater and the release of lead from the tar and slag met the statutory definition of “disposal” of hazardous substances.²⁰ The Partnership Defendants argued that there was no “disposal” of hazardous substances during their ownership, as the tar, slag and lead had been there for decades before they purchased it.²¹

The district court agreed with the Partnership Defendants, and granted their motion for summary judgment.²² The court found no evidence that the tar and slag were “disposed” on the property during the relevant ownership period—1977 to 1983.²³ The court reviewed the statutory definition of “disposal” and concluded that it requires some form of human action causing a release of hazardous substances.²⁴ Mere passive migration of preexisting hazardous substances is insufficient.²⁵ Ultimately, the district court found for the various defendants on all but one count, allowing a state law nuisance and trespass claim against UNOCAL.²⁶

Plaintiffs appealed, and the Ninth Circuit reversed and remanded.²⁷ Regarding the CERCLA claims against the Partnership Defendants, the Ninth Circuit acknowledged a split in the circuits on the passive migration issue.²⁸ It held, however, that the district court erroneously decided that passive migration was not a “disposal” under CERCLA.²⁹

The Ninth Circuit began its analysis by noting “the argument that [the definition of disposal] encompasses passive migration

11. *Carson Harbor*, 227 F.3d at 1199.

12. *Id.* at 1202, 1205-06.

13. Liability of past owners and operators attaches to “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” 42 U.S.C. § 9607 (a)(2).

14. *Carson Harbor*, 227 F.3d at 1201.

15. *Carson Harbor Village, Ltd. v. UNOCAL Corp.*, 990 F. Supp. 1188, 1194 (C.D. Calif. 1997).

16. *Id.*

17. *Id.*

18. *Id.* at 1194. In a separate part of its opinion, the district court ruled that Plaintiffs’ response costs were not “necessary.” It found no evidence that the local water authority had directed the remediation and reasoned that CERCLA was not intended to cover costs incurred to enhance the economic value of private property. *Id.* at 1193.

19. *Id.*

20. *Id.*

21. *See id.* at 1194-95.

22. *Id.* at 1194-95, 1199.

23. *Id.* at 1194-95.

24. *Id.*

25. *Id.*

26. *Id.* at 1199.

27. *Carson Harbor Village, Ltd. v. UNOCAL Corp.*, 227 F.3d 1196 (9th Cir. 2000).

28. *Id.* at 1206. There is a circuit split on the question of whether the statutory definition of disposal encompasses passive migration of hazardous substances. *Compare, e.g., Nurad, Inc. v. William Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992) (“disposal” includes passive migration) *with United States v. 150 Acres of Land*, 204 F.3d 698, 705-06 (6th Cir. 2000) (“disposal” requires active human conduct), *ABB Indus. Sys. Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 357-59 (2d Cir. 1997) (same), *and United States v. CDMG Realty Co.*, 96 F.3d 706, 713-18 (3d Cir. 1996) (same).

is straightforward.”³⁰ It then observed that definitions of several terms included in the statute had well-established passive meanings, including “discharge,” “spill,” and “leak.”³¹ Next, the court explicitly adopted other courts’ rejection of what it called a “strained reading” of the term “disposal” in both a RCRA case and a CERCLA case.³² The court felt that an expansive reading of the term would serve CERCLA’s remedial purposes.³³ Next, the court found that “including the passive meaning of the statutory definition coheres with the structure and purpose of CERCLA’s liability provisions,” which, the court found, were to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”³⁴

Finally, the Ninth Circuit addressed several arguments, as contained in *United States v. CDMG Realty, Co.*,³⁵ against its decision to include passive migration in the definition of disposal.³⁶ The court acknowledged that Congress could have included passive terms like “leaching” in the statutory definition of disposal but chose not to, and that the court’s interpretation would render the term “disposal” synonymous with the term “release,” which is explicitly defined in CERCLA to include leaching.³⁷

The Ninth Circuit failed convincingly to address some troubling aspects of its holding. For example, there is a helpful distinction between applying passive terms to releases of hazardous substances which are known to be present and under an owner’s control and those which are neither known nor con-

trollable. For example, in *Southfund Partners III v. Sears*,³⁸ the court found an owner liable where hazardous waste containers on the property filled with rainwater and leaked onto the soil. There, the court distinguished cases such as *Carson Harbor* where unseen passive migration of contaminants through the ground water occurred during a period of ownership.³⁹ In *Carson Harbor*, The Ninth Circuit failed to recognize that there is a difference between foreseeable passive releases into the environment and unknown passive releases from one part of the environment to another. Arguably, imposing liability in the latter case does not serve CERCLA’s laudable purpose of affixing liability on those responsible for causing contamination.

With its decision in *Carson Harbor*, the Ninth Circuit has joined the Fourth Circuit as the only circuit to consider passive migration “disposal” sufficient to establish liability under CERCLA section 107.⁴⁰ As a consequence, many more former owners of property now face potential liability for unseen contamination they did not cause, and may not even have been aware of. Now that there is a definitive split in the circuit courts, the Supreme Court is likely to decide whether that reading comports with CERCLA’s language and purpose. Lieutenant Colonel Connelly.

Penalties and the Defense Authorization Act for FY 2001

This is a postscript to an article published in last month’s *The Army Lawyer*⁴¹ that surveyed the impacts of section 8149 of the Department of Defense (DOD) Appropriations Act, FY 2000.⁴²

29. *Carson Harbor*, 227 F.3d at 1210.

30. *Id.* at 1206.

31. *Id.*

32. *Id.* at 1207-10.

33. *Id.* at 1207.

34. *Id.* at 1207 (citing the court’s prior decision in *3550 Stevens Creek Ass’n v. Barclays Bank of California*, 915 F.2d 1355, 1357 (9th Cir. 1990)).

35. 96 F.3d 706 (3d Cir. 1996).

36. *Carson Harbor*, 227 F.3d at 1208-10 (citing to *CDMG Realty*, 96 F.3d 706, 714-17).

37. *Id.* at 1208.

38. 57 F. Supp. 2d 1369 (N.D. Ga. 1999).

39. *Id.* at 1377.

40. 42 U.S.C. §§ 9607 (200). See *Nurad, Inc. v. William Hooper & Sons*, 966 F.2d 837 (4th Cir. 1992).

41. See Lieutenant Colonel Richard A. Jaynes, *Assessing the Aftermath of Section 8149*, ARMY LAW., Nov. 2000, at 54.

42. Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (2000). Section 8149 directs that none of the funds appropriated for FY 2000 “may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law.” *Id.* 113 Stat. 1271-72. For background on the Department of Defense Appropriations Act, 2000 and DOD and Army policy implementing it, see Major Robert Cotell, *Show Me the Fines! EPA’s Heavy Hand Spurs Congressional Reaction*, ENVTL. L. DIV. BULL., Oct. 1999; *Section 8149 Update*, ENVTL. L. DIV. BULL., Nov. 1999.

On October 30, 2000, the President signed the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (NDAA FY01),⁴³ an Act that closed the chapter on Section 8149 but opened a new chapter of congressional interest in how environmental regulators pursue enforcement actions. This article notes key aspects of the NDAA FY01 which emerged from the Conference of Joint House-Senate Conferees with significant statutory text and report language that addressed environmental penalties and federal facilities.

The Joint Conferees removed from the NDAA FY01 a provision that would have generally discouraged settlements with the Environmental Protection Agency (EPA) if fines and supplemental environmental projects totaled \$1.5 million or greater.⁴⁴ That provision was replaced with section 314—text that prohibits DOD and the Army from paying more than \$2 million in fines or penalties to conclude the enforcement action against Fort Wainwright, Alaska.⁴⁵ This is a fitting post script to last year's section 8149, which was enacted out of congressional concern over EPA's attempt to impose a \$16 million penalty at Fort Wainwright that was based almost entirely on "business" penalty criteria.⁴⁶ With section 314, Congress is sending a very clear message that it disapproves of the strong-arm tactics of EPA in the Fort Wainwright case. This conclusion is unmistakable from the text itself, and is resoundingly amplified in the Senate Armed Service Committee's (SASC) report that is part of the NDAA FY01's legislative history.⁴⁷ The SASC's report condemns EPA for its handling of the enforcement action at Fort Wainwright and rejects EPA's new ~~enforcement policy that encourages~~ EPA Regions to include "business" penalty assessments in fines against federal facilities.⁴⁸

The SASC's report is even more compelling in light of concerns articulated by the Joint Conferees over the manner in which environmental regulators pursue enforcement actions against federal facilities. As the report states:

The conferees note that a number of questions have been raised about the manner in which environmental compliance fines and penalties are assessed by state and federal enforcement authorities. Therefore, the conferees direct the Secretary of Defense to submit a report to the congressional defense committees no later than March 1, 2002, that includes an analysis of all environmental compliance fines and penalties assessed and imposed at military facilities during fiscal years 1995 through 2001. The analysis shall address the criteria or methodology used by enforcement authorities in initially assessing the amount of each fine and penalty. Any current or historical trends regarding the use of such criteria or methodology shall be identified.⁴⁹

From the perspective of Army installations, this requirement to analyze and report enforcement practices must be focused on EPA. That is, Army installations have not encountered state regulators who have vigorously sought to apply business penalties to Army installations. Certainly, this report will be a unique and welcome opportunity to explain many of the frustrations DOD facilities have experienced in recent years in their dealings with EPA Regions' attempts to impose unlawful business penalties against Army installations. The ELD will be assembling the information for the Army's input to this report

43. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000) (NDAA FY01). This Authorization Act is the enacted version of House Bill 4205, 106th Congress (2000), which is a one-page bill that adopts and enacts the provisions of House Bill 5408, 106th Congress (2000), the designation of the bill as it emerged from the Joint Conference. See H.R. CONF. REP. NO. 106-945 (2000). Consequently, references herein to sections 314 and 315 of the NDAA FY01 apply equally to House Bill 4205 and House Bill 5408. The President's signing statement did not include any comment on either of the Authorization Act's penalties provisions (that is, sections 314 and 315).

44. 146 CONG. REC. S 6538 (daily ed. July 12, 2000).

45. H.R. CONF. REP. NO. 106-945, at 760. The full text of section 314 follows:

SEC. 314. PAYMENT OF FINES AND PENALTIES FOR ENVIRONMENTAL COMPLIANCE AT FORT WAINWRIGHT, ALASKA.
The Secretary of Defense, or the Secretary of the Army, may pay, as part of a settlement of liability, a fine or penalty of not more than \$2,000,000 for matters addressed in the Notice of Violation issued on March 5, 1999, by the Administrator of the Environmental Protection Agency to Fort Wainwright, Alaska.

H.R. 5408, 106th Cong (2000).

46. "Business" penalties include the economic benefit of noncompliance and size-of-business fines. See Lieutenant Colonel Richard A. Jaynes, *Assessing the Aftermath of Section 8149*, ENVTL. L. DIV. BULL., Oct. 2000 (discussing the Fort Wainwright case), and, *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL., Sept. 1999 (discussing business penalties); *New Resource on Economic Benefit Available*, ENVTL. L. DIV. BULL., Aug. 2000.

47. S. REP. NO. 106-292, at 265-67 (2000).

48. *Id.* Because of its tremendous relevance to section 314, an excerpt from the SASC's report dealing with Fort Wainwright and business penalties is appended to this article.

49. *Id.*

to Congress. The format for reporting details of enforcement cases will be worked out in the coming months with other DOD Services and the Office of the Secretary of Defense.

Finally, and unsurprisingly, the Act includes a provision intended to carry out the requirements of section 8149 with regard to the legislative package DOD submitted to Congress for approval. Section 315 of the NDAA FY01 approved all six enforcement action settlements the Army had submitted.⁵⁰ As noted in last month's article, the precise legal and fiscal impacts of Section 315 are unclear and warrant further examination. In

any event, the Joint Conferees added in their report that they "are pleased with the Army's most recent efforts to reduce the level of fines and penalties received."⁵¹ Army installations can take this as a word of encouragement as they continue their efforts to negotiate the minefield of environmental regulations. Hopefully the overall impact of section 8149, and now sections 314 and 315, will be to encourage environmental regulators and Army installations to work cooperatively to achieve and maintain compliance, and avoid becoming mired down in contentious enforcement-related issues. Lieutenant Colonel Jaynes.

50. NDAA FY01, Pub. L. No. 106-398, section 315. The Joint Conference Report for House Bill 5408 states that the purpose of this legislation is to implement "section 8149 of the Department of Defense Appropriations Act for Fiscal Year 2000." H.R. CONF. REP. NO. 106-945, at 760. It further states that "[t]he Secretary of the Army would be specifically authorized to pay following supplemental environmental projects carried out in satisfaction of an assessed fine or penalty: (1) \$993,000 for Walter Reed Army Medical Center, Washington, D.C.; (2) \$377,250 for Fort Campbell, Kentucky; (3) \$20,701 for Fort Gordon, Georgia; (4) \$78,500 for Pueblo Chemical Depot, Colorado; (5) \$20,000 for Deseret Chemical Depot, Utah." *Id.* at 760-61. Section 315 also includes authorization for a fine of \$7975 for Fort Sam Houston, Texas. NDAA FY01, Pub. L. No. 106-398, section 315.

51. H.R. CONF. REP. NO. 106-945, at 761.

Appendix

Senate Armed Services Committee Report 106-292 to Accompany Senate Bill 2549, National Defense Authorization Act for FY 2001 (May 12, 2000)

Payments of Fines and Penalties for Environmental Compliance Violations (section 342)

The committee recommends a provision that would require the Secretary of Defense or the secretaries of the military departments to seek congressional authorization prior to paying any fine or penalty for an environmental compliance violation if the fine or penalty amount agreed to is \$1.5 million or more or is based on the application of economic benefit or size of business criteria. Supplemental environmental projects carried out as part of fine or penalty for amounts \$1.5 million or more and agreed to after the enactment of this Act would also require specific authorization by law.

The committee recommends this provision as a result of concerns that stem from a significant fine imposed at Fort Wainwright, Alaska, (FWA), a related policy established by U.S. Environmental Protection Agency (EPA), and an apparent need for further congressional oversight in this area. On March 5, 1999, EPA Region 10 sent FWA a notice of violation (NOV) and on August 25, 1999, EPA sent a settlement offer of \$16.07 million: (1) \$155,000 for the seriousness of the offenses; (2) \$10.56 million for recapture of economic benefit for noncompliance; and (3) an additional \$5.35 million because of the "size of business" at FWA.

According to EPA, the \$16.07 million fine was imposed to correct excessive emissions of particulate matter from an aging coal-fired central heat and power plant (CHPP) at FWA, and to impose a penalty for years of violations under the Clean Air Act (CAA). The EPA policy or rule that directs the application of economic benefit or "size of business" penalty assessment criteria to federal facilities is based on memoranda dated October 9, 1998, and September 30, 1999, issued by the EPA headquarters Federal Facilities Enforcement Office (FFEO). Notice and comment procedures were not used to promulgate these memoranda.

The compliance and enforcement history of the CHPP provides some insight into this committee's concerns regarding the EPA NOV. In the mid 1980s, EPA delegated its CAA program authority to the State of Alaska. In order to comply with opacity requirements, FWA purchased opacity monitors in 1988 and installed them in 1989, however, the monitors had a high failure and maintenance rate. In March 1994, the Alaska Department of Environmental Conservation (ADEC) issued an NOV for opacity violations at the FWA CHPP that identified a need for PM emission reductions. In response, FWA negotiated a compliance schedule with ADEC for the construction of a full-steam baghouse for each of the boilers in the CHPP.

FWA continued to work with ADEC from March 1994 to 1999 to: accomplish about \$15.3 million worth of numerous CHPP upgrades for controlling air emissions; resolve Department of Defense (DOD) privatization issues; conduct a baghouse feasibility study; and seek military construction authorization for a \$15.9 million baghouse project. In the interim, FWA received a CAA Title V Permit completeness determination from the state on February 19, 1998. As a result, FWA continues to operate the CHPP under a CAA Title V permit application, which contains schedules for compliance that were the result of careful coordination with ADEC.

The \$15.9 million baghouse was programmed for fiscal year 2000 and was authorized and appropriated by Congress in fiscal year 2000. As planned, the baghouse design complies with all applicable CAA requirements, including compliance assurance monitoring. When the EPA NOV was issued, FWA was in compliance with the Title V schedules for implementing air emission control technologies agreed to with ADEC.

First, the committee questions EPA's regulatory judgment in assessing fines and penalties despite the fact that the installation was operating in good faith under a Title V permit application that is overseen by a state with delegated authority. Second, it is the committee's view that the application of economic benefit or "size of business" penalty assessment criteria to the DOD is inconsistent with the statutory language and the legislative history under section 7413 of title 42, United States Code.

The terms economic benefit and "size of business" suggest market-based activities, not government functions subject to congressional appropriations. In addition, the statement of managers accompanying the Clean Air Act Amendments of 1990 (Public Law 101 549, 104 Stat. 2399 (October 27, 1990)) provides that with respect to the economic benefit criterion: "Violators should not be able to obtain an economic benefit vis-à-vis their competitors as a result of their noncompliance with environmental laws." The committee is not aware that the DOD has competitors.

As a practical matter, the functions of DOD facilities are not analogous to private business. The DOD, unlike private sector, must fund all of its operations, to include environmental compliance, through congressional appropriations. "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." (U.S. Constitution, Article 1, Section 9, Clause 7; Anti-Deficiency

Act (ADA) 31 U.S.C. § 1501). Moreover, the expenditure of federal funds must be consistent with authorization and appropriation acts--Congress and the Office of Management and Budget oversee apportionment of funds to agencies during the fiscal year to avoid overspending—DOD allocates funds to the military departments, which in turn issue allotments to command and staff organizations. (31 U.S.C. § 1341(a)(1); Department of Defense Directive 7200.1, Administrative Control of Appropriations (1984)).

The committee has concluded that DOD payment of fines or penalties based on economic benefit or size of business criteria would interfere with the management power of the Federal Executive Branch and upset the balance of power between the Federal Executive and Legislative Branches, exceeding the immediate objective of compliance. Therefore, the committee recommends a provision that would prohibit the Secretary of Defense and the secretaries of the military departments from paying such fines and penalties without specific authorization by law.

Claims Report

United States Army Claims Service

Tort Claims Note

Are Contractor Health Care Providers “Employees of the Government”?

Claims attorneys and investigators must be alert to the fact that many of the health care providers (HCP) within the military medical care system are neither active duty service members nor government civilian employees. These non-government HCPs provide medical services to Department of Defense (DOD) health care beneficiaries through a variety of programs and contracts established or authorized by Congress, the most important of which are the following: Military-Civilian Health Services Partnership Program,¹ PRIMUS HCPs,² Residents in Training,³ and Personal and Nonpersonal Services Contract HCPs.⁴ The focus of this note will be on the most difficult category—personal services contract (PSC) HCPs.

Depending on the specific facts of a particular case, a non-government HCP may be considered either an independent contractor or a United States employee. Tests similar to the “strict control” test applied to other contractors and their employees have been applied to physician groups and to individual physicians providing medical services to the United States. There are two basic tests that have been developed for physicians who contract with the government: the “strict control” test, which comes from *Logue v. United States*,⁵ and the “strict control aside from professional judgment” test, which is discussed in *Lurch v. United States*.⁶

As a general rule, the federal circuit courts of appeal have held that non-personal services contract (NPSC) physicians either in private practice or associated with an organization under contract to provide medical services to facilities operated by the federal government are independent contractors, and not employees of the government for Federal Tort Claims Act (FTCA) purposes.⁷ Therefore, the employee status of NPSC

1. The Military-Civilian Health Services Partnership Program (HSPP) is established under U.S. DEP’T OF DEFENSE INSTR. 6000.12, HEALTH SERVICES OPERATIONS AND READINESS (29 Apr. 1996) [hereinafter DODI 6000.12]. The Partnership Program is not a contract and need not follow the requirements set forth in the Federal Acquisition Regulation, GENERAL SERVICES ADMIN. ET. AL., FEDERAL ACQUISITION REGS. (June 1997) [hereinafter FARs]. The most commonly used “internal” partnership agreement allows military treatment facility (MTF) commanders to enter into formal agreements whereby civilian HCPs utilize government facilities to treat beneficiaries eligible under TRICARE. The basic purpose of the program is to encourage TRICARE eligible beneficiaries to seek care in an MTF rather than in a more costly civilian medical facility. The advantages to the beneficiaries are greater access to care and no TRICARE cost share or deductible. Partnership Providers are paid only for treatment of TRICARE eligible beneficiaries receiving TRICARE authorized care, and their payment is through the TRICARE fiscal intermediary. They are subject to credentialing and hospital peer review procedures. The HSPP providers are not government employees, nor are they technically speaking, “contractors” because there is no nonpersonal contracting under the FARs. However, the relationship created between a government treatment facility and a HSPP provider is similar to that of an independent contractor. As with independent contractors, HSPP providers are non-government, civilian HCPs whose negligent acts should not create vicarious liability on the part of the United States. Inherent in their relationship with the United States is the critical fact that government employees do not exercise day-to-day duty supervision and control of the contractor or Partnership Provider; in the Partnership Program, Army personnel should not be supervising the Partnership Provider or vice versa.

2. Primary Care for the Uniformed Services (PRIMUS) Clinics are private, freestanding, medical facilities which provide health care to DA beneficiaries under contractual agreements. The HCPs who work at PRIMUS clinics are considered employees of an independent contractor and are not government employees. DODI 6000.12, *supra* note 1.

3. Frequently, civilian medical institutions will send their interns, residents, and other medical trainees to government treatment facilities for training purposes. Similarly, the United States may send its own medical trainees to civilian medical institutions for training purposes. The United States may be responsible for the tortious acts of a non-government employee of a civilian medical institution who is training in an MTF. Civilian interns, residents and other medical trainees in MTFs may be treated as “student volunteers” pursuant to 5 U.S.C. § 3111 (2000). On the flip side, federal employees who act as “borrowed servants” on loan to non-federal entities may still retain their status as federal employees for purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000) [hereinafter FTCA]. See *Palmer v. Flaggman*, 93 F.3d 196 (5th Cir. 1996); *Perry v. United States*, 936 F. Supp. 867 (S.D. Ala. 1996). The Military Claims Act, 10 U.S.C. § 2733 (2000), may also be used to process a claim against the United States for the actions of Army medical trainees training at civilian medical facilities under training agreements. For a thorough discussion of this issue see U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES, para. 3-8 (1 Apr. 1998) [hereinafter DA Pam 27-162]. Whether the borrowing MTF is liable may depend upon how the State interprets the borrowed or loaned servant doctrine, which purports to shift vicarious liability from the master of a negligent servant to the borrowing master. All cases involving health care trainees in MTFs should be thoroughly investigated to determine the nature and extent of day-to-day supervision and control of the trainee by government employees. Additionally, state law on agency should be researched to ascertain the elements required to assert or refute a borrowed or loaned servant defense.

4. Contracting for HCPs is authorized under 10 U.S.C. § 1091 (2000), as amended by The Floyd D. Spence National Defense Authorization Act for Fiscal 2001, Pub. L. No. 106-398, § 1, 114 Stat. 1654, which authorizes the Department of Defense to contract for provision of direct health services. All contracts under this statute are subject to the FARs, the U.S. DEP’T OF DEFENSE ACQUISITION REG. SUPP. (Apr. 1, 1984) [hereinafter DFARS], and the U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPPL. (Dec. 1, 1984). A “services contract” is a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A “nonpersonal services contract” is one in which personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the government and its employees. A “personal services contract” however, is one in which, either by its express terms or as administered, makes contractor personnel appear to be, in effect, government employees. 48 C.F.R. ch. 1, subpart 37.1 (2000).

HCPs is usually clear-cut, and not as confusing as the employee status of PSC HCPs. Nevertheless, claims attorneys and investigators should not assume that an NPSC physician will be considered an independent contractor in the event of litigation. Accordingly, claims attorneys and investigators should always conduct a thorough factual investigation in order to determine the exact nature and extent of any government supervision or control of an NPSC HCP, and should also research applicable state law to rule out potential liability on the part of the United States for the actions of an NPSC HCP under theories of “ostensible agency,” “apparent authority,” “equitable estoppel,” “borrowed servant,” or negligent hiring or credentialing.⁸

The issue of whether or not a PSC HCP is an employee of the United States for FTCA purposes is very complicated. In the early 1980s, when Congress first authorized DOD to hire PSC HCPs, DOD considered PSC HCPs to be independent con-

tractors and required them to carry their own medical malpractice liability coverage.⁹ However, in 1995, DOD changed its position and revised the personal services contracts, stating that PSC HCPs were federal employees entitled to the immunities provided military and DOD civilian HCPs.¹⁰ The effect of DOD’s policy was that PSC HCPs hired by the Department of the Army were not required to carry personal malpractice insurance, nor did DA purchase an overall malpractice insurance policy for its PSC HCPs.

Unfortunately, prior to 18 November 1997, the Department of Justice’s (DOJ) position on PSC HCPs differed from that of DOD. The DOJ believed that a PSC, or any other contract for that matter, could not, by its terms, expand the Government’s waiver of sovereign immunity under the FTCA, nor expand the scope of its liability for the tortious acts of a contract employee.¹¹ Therefore, even though a PSC contained language

5. 412 U.S. 521 (1972). The test for determining whether an individual is an employee of the United States or an independent contractor was set out by the Supreme Court in *Logue* as the “absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.” *Id.* at 527. In *Logue*, a Federal prisoner was placed in a county jail pursuant to contractual arrangement. *Id.* at 522-25. Due to the alleged negligence of the county jailers, the prisoner committed suicide. *Id.* The Supreme Court refused to hold the United States liable for the negligence of the jailers because an examination of their relationship showed that federal employees did not run the day-to-day activities of the jail; instead, such activities were conducted and supervised by county employees in accordance with the terms of the government contract. *Id.* at 530, 533. The cases that have followed in the wake of *Logue* have applied its “strict control test,” that is, whether the United States exerts day-to-day supervision and control over the “detailed physical performance of the contractor.” *Id.* at 528; *United States v. Orleans*, 425 U.S. 807, 814 (1976). With respect to the federal employment status of physicians, an important case is *Wood v. Standard Products Co., Inc.*, 671 F.2d 825 (4th Cir. 1982). In *Wood*, a descendant of *Logue* and *Orleans*, a private physician who contracted with the U.S. Public Health Service to provide medical services to seamen in a remote and little-used port was held to be an independent contractor because there was no evidence that the government supervised or controlled the physician’s day-to-day practice or treatment of patients. *Id.* at 829-32. The facts which the Court in *Wood* found to be significant in reaching its holding included the following: the physician was referred to as a “contract physician” in the contract; the contract specified that the physician was to provide outpatient medical care in the same manner and of the same high quality as he provided for his private patients; the contract did not specify the physician’s hours, the physician had the right to refuse to treat patients; the Public Health Service provided no office space, support, services, supplies, or equipment to the physician; the physician’s billings, made to the Public Health Service, were made under a predetermined fee schedule; and, finally, site visits by the Public Health Service were meant only to check the adequacy of the physician’s facilities and not to “oversee” his practice. *Id.*

6. 719 F.2d 333 (10th Cir. 1983). In *Lurch*, the court created a variation of the strict control test. The *Lurch* court stated in dicta that the strict control test for determining employee or contractor status for FTCA purposes is inappropriate for cases involving doctors because doctors, due to their training and ethical obligations, can never be “controlled.” *Id.* at 337. The court believed that a doctor must always be free to exercise independent professional judgment as to what is best for each patient. *Id.* However, the *Lurch* court did not analyze the facts in light of their modified test because their holding was based on an examination of the contract with the doctor, which specified that the doctor would not be considered an employee of the Veterans Administration for any purposes. *Id.* at 338.

It should be noted that unlike contract physicians, a contract nurse can sufficiently be under the direct supervision and control of a government employee such that the nurse will also be considered a government employee, even if the nurse is individually credentialed, such as a nurse midwife or certified registered nurse anesthetist (CRNA). For example, in the case of *Bird v. United States*, the Tenth Circuit Court of Appeals found that a CRNA was an employee of the United States because state law placed the CRNA under the control and supervision of government physicians; the CRNA was required to work with patients designated by others; the CRNA had no separate office; the CRNA used hospital equipment exclusively; and the CRNA was under the same degree of control and supervision by the government surgeon as any government nurse in the hospital. 949 F.2d 1079, 1084-88 (10th Cir. 1993).

7. See, e.g., *Robb v. United States*, 80 F.3d 884 (4th Cir. 1996); *Carrillo v. United States*, 5F.3d 1302 (9th Cir. 1993); *Broussard v. United States*, 989 F.2d 171 (5th Cir. 1993); *Leone v. United States*, 910 F.2d 46 (2d Cir. 1990); *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989); *Lurch v. United States*, 719 F.2d 333 (10th Cir. 1983); *Bernie v. United States*, 712 F.2d 1271 (8th Cir. 1983). See also UNITED STATES ARMY CLAIMS SERVICE, FEDERAL TORT CLAIMS ACT HANDBOOK, para. II.B.2c (Sept. 1998) [hereinafter FTCA Handbook].

8. See *supra* note 7 and the cases cited therein.

9. Need citation.

10. See U.S. DEP’T OF DEFENSE INSTR. 6025.5, PERSONAL SERVICES CONTRACT (PSCs) FOR HEALTH CARE PROVIDERS (HCPs) (6 Jan. 1995) [hereinafter DODI 6025.5].

The existence of an employer-employee relationship created by a PSC shall result generally in the treatment of a PSC HCP [health care provider] similar to a DOD employee for many purposes. Included in this similar treatment is that Federal Tort Claims Act...claims alleging negligence by a PSC HCP shall be processed by the Department of Defense as claims alleging negligence by DOD military or civil service employees. As a result, the PSC HCP is not required to maintain medical malpractice liability insurance.

Id.

to the effect that a Government contract physician “shall” be treated as a Government employee for the purposes of the FTCA, a PSC physician was not treated as such by DOJ unless the physician was, in fact, an “employee of the Government” as determined by factual investigation and research of applicable federal case law.¹² If investigation indicated that a PSC HCP was not an “employee of the Government,” then DOJ would not represent the PSC HCP, and would assert the independent contractor defense if suit were brought against the United States.

The positions of the DOD and DOJ were reconciled, at least prospectively, after President Clinton signed the National Defense Authorization Act for Fiscal Year 1998,¹³ on 18 November 1997. Section 736 of that law amended the Gonzalez Act,¹⁴ to add PSC contract physicians described in 10 U.S.C. § 1091.¹⁵ The effect of this amendment was to make PSC HCP “employees of the United States.”

However, DOJ does not believe that the 1997 amendment is retroactive. Therefore, different procedures apply to claims arising before and after 18 November 1997. Accordingly, claims attorneys and investigators should be particularly alert to the following:

(1) For incidents occurring on or after 18 November 1997, any claims involving PSC HCPs should be investigated as if those HCPs were, in fact, U.S. employees and not independent contractors. From the litigation perspective, PSC HCPs are now protected from personal liability for malpractice claims. Claims attorneys and investigators should be aware that PSC HCPs finding themselves sued in their individual capacity for PSC-related incidents on or after 18 November 1997 may request representation or substitution from DOJ through Litigation Division, Office of The Judge Advocate General.

(2) For incidents occurring before 18 November 1997, USARCS should be notified immediately of the involvement of any PSC HCP. It is imperative that the facts be quickly and thoroughly investigated to determine the exact nature and extent of day-to-day government supervision and control of the PSC HCP, as well as to rule out any direct tortious activity on the part of a government employee in addition to that of the PSC HCP. If a PSC HCP is the sole tortfeasor, then the claim may be disposed of under the provisions of the Military Claims Act (MCA),¹⁶ and Chapter 3, Army Regulation 27-20.¹⁷ If both PSC HCPs and Government employees (for example, active duty military members or civilian Government employees) are involved, then a determination will be made by United States Army Claims Service (USARCS) and DOJ on a case-by-case basis with respect to whether the claim should be handled under the FTCA or the MCA. Following completion of the factual investigation, USARCS will determine whether to process the claim under the MCA, or to consult with DOJ with respect to whether DOJ will make an exception and permit USARCS to settle the claim under the FTCA in lieu of risking a suit for breach of contract brought by a PSC HCP who has an adverse judgment rendered against him.

The newest twist to the PSC HCP saga is whether the United States, after the amendment to the Gonzalez Act, will recognize as an employee a PSC physician who is employed under a contract between the U.S. Army and a corporation,¹⁸ rather than a contract directly between the U.S. Army and the PSC physician.

11. See TORTS BRANCH, CIVIL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, TORTS BRANCH MONOGRAPH: FEDERAL AGENCIES AND EMPLOYEES FOR PURPOSES OF THE FEDERAL TORT CLAIMS ACT (1997). The DOJ believes its position is supported by the federal court’s holding in *Deshaw v. United States*, 704 F. Supp. 186 (D.Mont. 1988). In *DeShaw*, a case involving a PSC, the federal district court held that the Gonzalez Act, 10 U.S.C. § 1089 (2000), did not expand the tort liability of the United States under the FTCA, nor did it abrogate the “independent contractor” exception to the FTCA with respect to medical personnel performing services for agencies designated in the Gonzalez Act. 704 F. Supp. At 189-90. Instead, the court found that the immunity provisions of the Gonzalez Act apply only to “those medical personnel who provide services to the federal government under contract, but whose physical performance of their duties are supervised and controlled on a day-to-day basis by the federal Government. *DeShaw*, 704 F. Supp. 186, 190.

12. 28 U.S.C. § 2671 (2000).

13. Pub. L. 105-85, 111 Stat. 1629.

14. 10 U.S.C. § 1089.

15. Pub. L. No. 105-85, § 376, 111 Stat. 1814.

16. 10 U.S.C. § 2733.

17. U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS (1 Apr. 1998).

18. For example, NES, Coastal Services, and others.

The 1997 amendment to the Gonzalez Act states that the exclusive remedy for suits for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician “serving under a personal services contract entered into under section 1091” is the Federal Tort Claims Act.¹⁹ Section 1091(c)(1) states that the service secretary “shall establish by regulation procedures for entering into personal services contracts with individuals under subsection (a).”²⁰ The Federal Acquisition Regulations (FARS) allow PSCs to be made between an agency and a corporation that will provide the physician rather than requiring the contract be made directly with the physician.²¹ The Gonzalez Act²² does not expressly require that a PSC be made directly with the agency and the physician in order for the exclusive remedy to lie under the FTCA. Instead, it states that the PSC physician must be “serving under” a PSC contract in order to be covered.²³ While 10 U.S.C. § 1091(c)(1) uses the term “individuals” when referring to establishing PSCs, the statute directs the Secretary of Defense to establish by regulations procedures for entering into PSCs.²⁴ The regulations that have been established allow PSCs between the agency and corporations.²⁵

Claims attorneys should be aware that DOJ still questions the employee status of individual HCPs hired by a corporation under a PSC between the United States and the corporation because “personal services” contracts, by their nature, cannot be made with a corporation. However, DOJ has recognized the employee status of such HCPs, on a case-by-case basis only, based upon its interpretation of subsection (f) of the Gonzalez Act:²⁶ that individual PSC HCPs should be held harmless because they were not required to have any liability insurance of their own. Claims attorneys need to recognize this potential pitfall; they need immediately alert the respective USARCS Area Action Officers (AAO); and they need to immediately investigate the underlying facts. Such action by claims attorneys will help USARCS to consult with DOJ on an expedited basis regarding whether or not DOD will recognize a particular PSC HCP hired by a corporation as a United States employee for administrative claims settlement purposes. While investigating the underlying facts, questions to be addressed include, but are not limited to, the following:

(1) Does the corporation provide physician coverage to other MTFs and/or to

civilian hospitals? (Obtain a copy of all relevant contract documents, to include the solicitation, the winning bid, and the actual contract with the government).

(2) Does the corporation provide physician coverage to other departments or services within the MTF involved in the claim? (Obtain a copy of all relevant contract documents).

(3) Does the corporation have any malpractice coverage? If not, why not? If so, what is the name, address, and a point of contact of the insurer? (Obtain a copy of all relevant insurance policies).

(4) How does the corporation hire and assign physicians to the MTF(s)?

(5) Does the corporation recruit and hire nationwide? (Obtain a copy of the corporation’s hiring agreement with the physician).

(6) Does the physician hired by the corporation have any individual insurance coverage?

(7) How long has the physician hired by the corporation worked at the MTF? (How long has the MTF contracted with the corporation, and how many times has the individual physician’s contract with the corporation been renewed?)

(8) Does the physician hired by the corporation work only at the MTF, or does the physician work at other MTFs or civilian medical facilities?

(9) If the physician works at other MTFs or civilian medical facilities, what is the additional employer information (i.e.,

19. 10 U.S.C. § 1089(a).

20. *Id.* § 1091(c)(1).

21. FAR, *supra* note 1, at 37.104; DFARS, *supra* note 4, at 237.104(b)(ii)(A)(1) and (B).

22. 10 U.S.C. § 1089.

23. *See id.* § 1089(a).

24. *Id.* § 1091 (c)(1).

25. FAR, *supra* note 1, at 37.104; *see also* DFARS, *supra* note 4, at 237.104(b)(ii)(A)(1) and (B).

26. 10 U.S.C. § 1089(f).

employer name, address, dates of employment of physician, supervisor's name, etc.)?

(10) What are the terms of that physician's employment at the MTF? What are that physician's duty days and duty hours at the MTF? What is the physician's chain of supervision? Does he or she work alone (e.g., the only emergency room physician covering on weekends or nights)?

(11) Is the entire department or service operation (e.g., emergency department) contracted out?

(12) Do government physicians work in that department or service along with the physician hired by the corporation and involved in the claim? If so, is the latter physician treated the same as or different from the government staff?

(13) What was the nature of the day-to-day supervision and control by a government employee or employees of the physician hired by the corporation and involved in the claim? Does the physician need to consult with anyone before treating a patient in the MTF? Who, if anyone, reviews the physician's charts? How many charts are reviewed, and when? What is the purpose of the review?

(14) What is the credentialing/decredentialing procedure for physicians hired by corporations to work in MTFs?

(15) Were there any signs or notices posted that a non-government physician was providing care to the claimant?

(16) Did the physician hired by the corporation wear the same, or a different uniform? Did the physician wear a nametag identifying him as a contract employee?

(17) Were there any SOPs regarding staffing or supervision in the MTF department or service involved? (If so, obtain copies).

(18) What is the statute of limitations in the applicable state with respect to bringing suit against the corporation and the individual physician hired by the corporation?

In view of the obvious complexity of this government employee issue, it is imperative that all claims attorneys and investigators do the following as soon as possible:

(1) Obtain a complete set of medical records;

(2) Organize the records and prepare a detailed chronology of care, not only delineating the care provided, but also identifying the care provider and the employee status of the care provider;

(3) Immediately notify the appropriate USARCS AAO of any HCPs who may not be government employees, particularly NPSC and PSC providers;

(4) Promptly investigate the facts to determine the nature and extent of any day-to-day supervision and control of the suspected non-government HCPs;

(5) Promptly put the claimant's attorney on notice of any non-government HCPs involved in the claimant's treatment.

In every case involving non-Government HCPs, timely and thorough investigation is imperative. Claims attorneys and investigators should never assume employee or non-employee status of HCPs involved in their claims. Moreover, even in cases involving independent contractors, that is, NPSC physicians, claims attorneys should also research applicable state law to determine if there is potential liability on the part of the United States for the acts of the independent contractors under theories such as "ostensible agency," "apparent authority," or "equitable estoppel." Also, claims attorneys should be alert for potential government liability exposure under the theories of negligent hiring or credentialing, particularly if the independent contractor has a "track record" of complaints or adverse events. Finally, claims attorneys should research state law to determine the availability to the United States of the defense of "Captain of the Ship," for example, in cases such as those involving an independent contract surgeon who could potentially be held liable for the tortious acts of government operating room personnel (for example, retained sponge cases). Ms. Byczek.

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-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys 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 that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, 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

2001

December 2000

4-8 December 2000 Government Contract Law Symposium (5F-F11).

4-8 December 2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).

4-8 December- 2000 USAREUR Operational Law CLE (5F-F47E).

11-15 December 4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January 2001 USAREUR Tax CLE (5F-F28E).

8-12 January 2001 PACOM Tax CLE (5F-F28P).

8-12 January 2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).

8 January-27 February 4th Court Reporter Course (512-71DC5).

9 January-2 February 154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

16-19 January 2001 Hawaii Tax CLE (5F-F28H).

17-19 January 7th RC General Officers Legal Orientation Course (5F-F3).

21 January-2 February 2001 JOAC (Phase II) (5F-F55).

29 January-2 February 164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

2 February-6 April 154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

5-9 February 75th Law of War Workshop (5F-F42).

12-16 February 2001 Maxwell AFB Fiscal Law Course (5F-F13A).

26 February-2 March 59th Fiscal Law Course (5F-F12).

26 February-9 March 35th Operational Law Seminar (5F-F47).

March 2001		11-15 June	31st Staff Judge Advocate Course (5F-F52).
5-9 March	60th Fiscal Law Course (5F-F12).	18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).	18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
26-30 March	3d Advanced Contract Law Course (5F-F103).	18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1)	25-27 June	Career Services Directors Conference.
April 2001		29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
2-6 April	25th Admin Law for Military Installations Course (5F-F24).	July 2001	
9-13 April	3d Basics for Ethics Counselors Workshop (5F-F202).	8-13 July	12th Legal Administrators Course (7A-550A1).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).	9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
30 April-4 May	12th Law for Legal NCOs Course (512-71D/20/30).	16-20 July	76th Law of War Workshop (5F-F42).
30 April-11 May	146th Contract Attorneys Course (5F-F10).	16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).
May 2001		16 July-31 August	5th Court Reporter Course (512-71DC5).
7 - 25 May	44th Military Judge Course (5F-F33).	30 July-10 August	147th Contract Attorneys Course (5F-F10).
14-18 May	48th Legal Assistance Course (5F-F23).	August 2001	
June 2001		6-10 August	19th Federal Litigation Course (5F-F29).
4-7 June	4th Intelligence Law Workshop (5F-F41).	13 August-23 May 02	50th Graduate Course (5-27-C22).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).	20-24 August	7th Military Justice Managers Course (5F-F31).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).	20-31 August	36th Operational Law Seminar (5F-F47).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).	September 2001	
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	5-7 September	2d Court Reporting Symposium (512-71DC6).
6-8 June	Professional Recruiting Training Seminar		

5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23E).	10-14 December	5th Tax Law for Attorneys Course (5F-F28).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).		2002
		January 2002	
10-21 September	16th Criminal Law Advocacy Course (5F-F34).	2-5 January	2002 Hawaii Tax CLE (5F-F28H).
17-21 September	49th Legal Assistance Course (5F-F23).	7-11 January	2002 PACOM Tax CLE (5F-F28P).
18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).	7 January-26 February	7th Court Reporter Course (512-71DC5).
October 2001			
1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).	8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
1 October-20 November	6th Court Reporter Course (512-71DC5).	15-18 January	2002 USAREUR Tax CLE (5F-F28E).
12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).	20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
29 October-2 November	61st Fiscal Law Course (5F-F12).	28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).
November 2001		February 2002	
12-16 November	25th Criminal Law New Developments Course (5F-F35).	1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
26-30 November	55th Federal Labor Relations Course (5F-F22).	4-8 February	77th Law of War Workshop (5F-F42).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).	4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).	25 February-1 March	62d Fiscal Law Course (5F-F12).
December 2001		25 February-8 March	37th Operational Law Seminar (5F-F47).
		March 2002	
3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).	4-8 March	63d Fiscal Law Course (5F-F12).
3-7 December	2001 Government Contract Law Symposium (5F-F11).	18-29 March	17th Criminal Law Advocacy Course (5F-F34).

25-29 March	4th Contract Litigation Course (5F-F103).	24-26 June	Career Services Directors Conference.
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).	28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
April 2002		July 2002	
1-5 April	26th Admin Law for Military Installations Course (5F-F24).	8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).	8-12 July	13th Legal Administrators Course (7A-550A1).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).	15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).	15-19 July	78th Law of War Workshop (5F-F42).
29 April-10 May	148th Contract Attorneys Course (5F-F10).	15 July-30 August	8th Court Reporter Course (512-71DC5).
29 April-17 May	45th Military Judge Course (5F-F33).	29 July-9 August	149th Contract Attorneys Course (5F-F10).
May 2002		August 2002	
13-17 May	50th Legal Assistance Course (5F-F23).	5-9 August	20th Federal Litigation Course (5F-F29).
June 2002		12 August-May 2003	51st Graduate Course (5-27-C22).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).	19-23 August	8th Military Justice Managers Course (5F-F31).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).	19-30 August	38th Operational Law Seminar (5F-F47).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).	September 2002	
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
10-14 June	32d Staff Judge Advocate Course (5F-F52).	9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).	9-20 September	18th Criminal Law Advocacy Course (5F-F34).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).	11-13 September	3d Court Reporting Symposium (512-71DC6).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).	16-20 September	51st Legal Assistance Course (5F-F23).

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:**

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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

GICLE: The Institute of Continuing Legal
Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

ALIABA: American Law Institute-American Bar
Association
Committee on Continuing Professional
Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

LSU: Louisiana State University
Center on Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street

Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers'
Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of
Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

3. Civilian-Sponsored CLE Courses

18 January ICLE	Trial Advocacy Statewide Satellite Re-Broadcast
19 January ICLE	Jury Selection & Persuasion Statewide Satellite Re-Broadcast
9 February ICLE	Motion Practice Marriott Center Hotel Atlanta, Georgia
16 February ICLE	Advocacy & Evidence Sheraton Colony Square Hotel Atlanta, Georgia
22 February ICLE	Electronic Discovery (PM) Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
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

Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June 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**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually

Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September 2000 issue of *The Army Lawyer*.

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2001**, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group **NLT 2400, 30 November 2001**. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact Major Dan Culver, telephone (800) 552-3978, extension 357, or e-mail Daniel.Culver@hqda.army.mil. LTC Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

<u>DATE</u>	<u>TRAINING SITE AND HOST UNIT</u>	<u>AC GO/RC GO</u>	<u>SUBJECT</u>	<u>ACTION OFFICER</u>
6-7 Jan	Long Beach, CA 63rd RSC, 78th LSO	MG Altenburg COL(P) Pietsch	Criminal Law; International Law	POC: CPT Paul McBride (714) 229-3700 Sandiegolaw@worldnet.att.net
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU	BG Romig COL(P) Walker	Civil/Military Operations; Administrative Law; Contract Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO	MG Altenburg COL(P) Pietsch	Criminal Law; International Law	POC: MAJ James Schaefer (513) 946-3038 jschaefer@prosecutor.hamilton-co.org ALT: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com
10-11 Feb	Seattle, WA 70th RSC, 6th MSO	MG Huffman COL(P) Arnold	Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG	BG Barnes COL(P) Arnold	Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Francisco, CA 63rd RSC, 75th LSO	MG Huffman COL(P) Pietsch	RC JAG Readiness (SRP, SSCRA, Operations Law)	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com
10-11 Mar	Washington, D.C. 10th LSO			POC: MAJ Silas Deroma (202) 305-0427
24-25 Mar	Charleston, SC 12th LSO	BG Barnes COL(P) Walker	Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsibility	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	
28-29 Apr	Newport, RI 94th RSC	MG Huffman COL (P) Walker	Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Military Justice	POC: LTC Bill Kumphe (314) 991-0412, ext. 1261

8-9 Sept.	Park City, UT UTARNG		Western States JA Senior Leadership Workshop	POC: COL Mike J. Christensen (801) 366-6861
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2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available Through DTIC, see the September 2000 issue of *The Army Lawyer*.

3. Regulations and Pamphlets

For detailed information, see the September 2000 issue of *The Army Lawyer*.

4. Article

The following information may be useful to judge advocates:

Cory L. Wade, *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. (Summer, 2000).

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at <http://www.jagcnet.army.mil/tjagsa>. Click on directory for the listings.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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CONTRACTS (see also PROCUREMENT)

Contract and Fiscal Law Developments of 1999—The Year in Review, Contract and Fiscal Law Department, Jan. 2000, at i.

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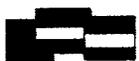
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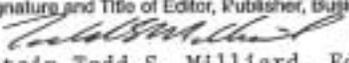
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