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# The History of Military Assistance for Domestic Natural Disasters: The Return to a Primary Role for the Department of Defense in the Twenty-First Century?

Captain William A. Osborne\*

## Introduction

The primary responsibility of the U.S. military is to provide for the common defense of the United States.<sup>1</sup> The traditional role of the military has been to fight wars and conduct combat missions.<sup>2</sup> The Department of Defense (DOD) is responsible for providing a standing military needed to deter war and maintain the security of the nation.<sup>3</sup> In furtherance of providing for the common defense and at the direction of Congress<sup>4</sup> or the Commander-in-Chief,<sup>5</sup> a properly trained and equipped military can act quickly and move massive amounts of personnel and equipment to a troubled area, as was the case in Operations Desert Shield and Desert Storm.<sup>6</sup> It is not a surprise that the inherent military chain of command and the structure of functional specialized units within the military are ideal “for the kinds of tasks which emerge during natural disasters.”<sup>7</sup> The media has increased public awareness of the military’s demonstrated “capability for rapid response,”<sup>8</sup> which has led to a greater interest in a bigger role for the military in non-combat missions.<sup>9</sup> One of the most visible recent non-combat roles of the military was the provision of disaster relief assistance in the aftermath of Hurricane Katrina.<sup>10</sup>

For the most part, the after-action reports and formal in-depth assessments, which measure and assess the military’s role in handling the Hurricane Katrina disaster relief effort, will be forthcoming over the next few years.<sup>11</sup> It appears, however, that once again the military has not only demonstrated the capability to respond quickly to a natural disaster but also the ability to execute excellent consequence management.<sup>12</sup> The history of U.S. natural disasters is rich with examples of military assistance.<sup>13</sup> A continued support role for the military in domestic natural disaster relief missions seems to be certain. What remains unclear, however, is whether the military should play a lead role in federal domestic disaster relief for the twenty-first century.

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<sup>1</sup> See U.S. CONST. art. I, § 8.

<sup>2</sup> See INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES FOR THE U.S. MILITARY IN THE POST-COLD WAR ERA 5 (James Graham ed., 1993) [hereinafter INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES].

<sup>3</sup> See U.S. DEP’T OF DEFENSE, DIR. 5100.1, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS (1 Aug. 1998) [hereinafter DOD DIR. 5100.1].

<sup>4</sup> See U.S. CONST. art. I, § 8.

<sup>5</sup> See *id.* art. II, § 2.

<sup>6</sup> See generally U.S. Transportation Command, United States Transportation Command: A Short History (Apr. 2005), <http://www.transcom.mil/history/history.cfm>.

<sup>7</sup> William Anderson, *Social Structure and the Role of the Military in Natural Disaster*, 53 SOC. & SOC. RES.: AN INT’L J. 242, 244 (1969).

<sup>8</sup> *Id.* at 244.

<sup>9</sup> See generally Robert Burns, *Military May Play Bigger Relief Role*, PHILLYBURBS.COM, Sept. 17, 2005, available at <http://www.phillyburbs.com/pb-dyn/news/1-09172005-542866.html>; Tucker Carlson, *Military Relief in Disasters: Should Troops Be More Involved in All Natural Disaster Relief?*, MSNBC, Oct. 3, 2005, available at <http://www.msnbc.msn.com/id/9518835/>.

<sup>10</sup> See generally Lolita Baldor, *Military Launches Hurricane Rescue Relief*, SFGATE.COM, Sept. 25, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/09/25/national/a153512D95.DTL>.

<sup>11</sup> See generally Pam Zubeck, *NorthCom Official Lists Katrina Lessons*, COLORADO SPRINGS GAZ., Oct. 22, 2005.

<sup>12</sup> See generally Burns, *supra* note 9; Carlson, *supra* note 9.

<sup>13</sup> See generally GAINES M. FOSTER, CENTER OF MILITARY HISTORY, U.S. ARMY, THE DEMANDS OF HUMANITY: ARMY MEDICAL DISASTER RELIEF (1983).

## Defining Military Domestic Operations

The role of the military in domestic operations can encompass many scenarios outside the traditional combat role.<sup>14</sup> If the traditional role of the military is to fight the nation's wars, then non-traditional military roles must include the long-standing practice of domestic operations.<sup>15</sup> Therefore, it is important to define and narrow the subject parameters of this article since domestic operations is a broad term and includes many topics.

As the name suggests, domestic operations are limited to the fifty geographical United States.<sup>16</sup> Generally, domestic operations for the military are termed Military Assistance to Civilian Authorities (MACA) missions<sup>17</sup> and include the following: support for domestic civil disasters (natural and man-made), civil disturbances, counterterrorism operations, sensitive support operations (which include radiological accidents and weapons of mass destruction (WMD) incidents and terrorist incidents involving chemical and biological agents), and counter-drug operations.<sup>18</sup>

Until recently, the Secretary of the Army, as the executive agent of the Secretary of Defense for civil emergencies, was responsible for MACA missions.<sup>19</sup> However, this responsibility was transferred in 2003 to the Assistant Secretary of Defense for Homeland Defense.<sup>20</sup> The Assistant Secretary of Defense for Homeland Defense is specifically charged with executing consequence management. Consequence management is defined as "those essential services and activities required to manage and mitigate problems resulting from disasters and catastrophes. Such services and activities may include transportation, communication, public works and engineering, fire fighting, information planning, mass care, resources support, health and medical services, urban search and rescue, hazardous materials, foods and energy."<sup>21</sup>

Although it exceeds the scope of this article, domestic operations may also include military support to law enforcement—Military Support to Civilian Authorities.<sup>22</sup> Direct federal military support to civilian law enforcement is limited by the Posse Comitatus Act of 1878<sup>23</sup> (and by the DOD<sup>24</sup>) and is otherwise illegal unless specifically authorized by Congress or the U.S. Constitution.<sup>25</sup> This article, however, will focus exclusively on those domestic operations that do not include or contain a primary or supporting law enforcement role by the military.

Additionally, it is necessary to distinguish between federal military forces and state military forces when discussing domestic operations. Generally, the federal military includes those forces in a federal active duty status.<sup>26</sup> For purposes of military domestic operations, federal active duty forces are distinguished from military forces that are performing *state* active duty missions and who are not on federal active duty status.<sup>27</sup> It is important to recognize that not all disaster response missions by the military necessarily include a federal response since most states depend on their respective National Guard units, acting in a state military status,<sup>28</sup> to respond to state and local emergencies.<sup>29</sup> For purposes of this article, unless otherwise noted, the term "military" will refer only to those military forces in a federal active duty status.

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<sup>14</sup> See generally CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, 1 DOMESTIC OPERATIONAL LAW (DOPLAW) HANDBOOK FOR JUDGE ADVOCATES 1-8 (2005) [hereinafter CLAMO, DOPLAW].

<sup>15</sup> See INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES, *supra* note 2, at 4.

<sup>16</sup> See CLAMO, DOPLAW, *supra* note 14, at 1.

<sup>17</sup> See U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVILIAN AUTHORITIES (18 Feb. 1997) [hereinafter 1997 DOD DIR. 3025.15].

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* para. 4.7.5.5.

<sup>20</sup> See Message, 141916Z May 03, Joint Staff Washington DC//JDOMS//, subject: Transfer of the Army Director of Military Support Mission to the Joint Staff [hereinafter Transfer Military Support Mission Message] (on file with author).

<sup>21</sup> 1997 DOD DIR. 3025.15, *supra* note 17, para. E2.1.5.

<sup>22</sup> See U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVILIAN AUTHORITIES (15 Jan. 1993) [hereinafter 1993 DOD DIR. 3025.1].

<sup>23</sup> See 18 U.S.C. § 1385 (2000).

<sup>24</sup> See U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986) [hereinafter DOD DIR. 5525.5].

<sup>25</sup> See 18 U.S.C. § 1385.

<sup>26</sup> See 10 U.S.C. § 101.

<sup>27</sup> See generally 32 U.S.C. § 101 (defining active duty for National Guard forces).

<sup>28</sup> See *id.*

<sup>29</sup> See RONALD SORTOR, RAND ARROYO CENTER, ARMY FORCES FOR OPERATIONS OTHER THAN WAR 21 (1997).

## The History of Military Assistance

Natural disaster relief includes responding with assistance to the hazards associated with earthquakes, hurricanes, flood or dam failure, tornados, and fires.<sup>30</sup> Military assistance and support play an important role in the DOD's mission. For example, in fiscal year 1999, there were 283 instances of military support to civil authorities.<sup>31</sup> Such a large and active military participation in domestic disaster assistance, however, was not always the case. The following examples of domestic natural disasters illustrate the major historical instances of military assistance to civilian authorities in the overall development of domestic disaster history.

### Disaster Relief Missions Prior to the Twentieth Century

Initially, during the early years of the nation, the federal government's response to provide disaster relief to states was limited.<sup>32</sup> The federal government was small in size, and many viewed federal disaster relief as a "dangerous exercise of power," unauthorized by the Constitution.<sup>33</sup> Most Presidents turned down state requests for federal aid in keeping with the philosophy of the time that "maintenance of order within the nation belongs primarily to state and local authorities, and only ultimately to the central government."<sup>34</sup> The prevalent political view also considered a large standing army as dangerous.<sup>35</sup> As authors Sam Sarkesian and Robert Connor note,

[t]he historical aversion to standing armies evolving from the revolutionary period and the cautions expressed by the Founding Fathers about the dangers of large standing armies are deeply rooted in the American psyche. When faced with major conflicts, the US military, composed of a small number of regulars, was expanded by the influx of citizen-soldiers. These episodic surges of the US military were quickly followed by demobilization and reduction of the military.<sup>36</sup>

Because the early standing peacetime Army was small and widely disbursed, even if the Army had the ability to offer assistance, there was no rapid transportation to "dispatch troops to the scene of a calamity in time to be of real help."<sup>37</sup> When the Army was called upon to fulfill a domestic operations role, generally the role was limited to suppressing domestic disorders<sup>38</sup> (which was ultimately limited in 1878 with the passing of the Posse Comitatus Act<sup>39</sup>). Congressional support to enact relief authorization did not begin in earnest until after the Civil War.<sup>40</sup> One of the first congressional acts authorizing the military to assist in a non-combat or law enforcement role was in the form of civil works. Congress tasked the Army Corps of Engineers (ACE) to survey and improve the navigation of the Ohio and Mississippi Rivers in 1824.<sup>41</sup>

Despite the lack of an active, direct role in domestic disaster assistance early in the nineteenth century, the military contributed indirectly in disaster planning. During the War of 1812, the Army began to record daily weather.<sup>42</sup> The act of

<sup>30</sup> See FEDERAL EMERGENCY MANAGEMENT AGENCY, STATE AND LOCAL GUIDE (101) FOR ALL-HAZARD EMERGENCY OPERATIONS PLANNING (1996).

<sup>31</sup> See UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN AND RANKING MEMBER, SUBCOMMITTEE ON MILITARY PERSONNEL, COMMITTEE ON ARMED SERVICES, U.S. SENATE, MILITARY PERSONNEL: FULL EXTENT OF SUPPORT TO CIVIL AUTHORITIES UNKNOWN BUT UNLIKELY TO ADVERSELY IMPACT RETENTION 7 (Jan. 2001) [hereinafter U.S. GAO REPORT FULL EXTENT OF SUPPORT].

<sup>32</sup> See FOSTER, *supra* note 13, at 7 (opining that the small size of the federal government and lack of a means discouraged federal disaster assistance).

<sup>33</sup> *Id.* at 8.

<sup>34</sup> U.S. ARMY WAR COLLEGE & U.S. ARMY MILITARY HISTORY INSTITUTE, THE CONSTITUTION AND THE U.S. ARMY 37 (1988) [hereinafter CONSTITUTION AND U.S. ARMY].

<sup>35</sup> See SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 144 (1957).

<sup>36</sup> SAM SARKESIAN & ROBERT CONNOR, JR., THE U.S. MILITARY PROFESSION INTO THE TWENTY-FIRST CENTURY: WAR, PEACE AND POLITICS 79 (1999).

<sup>37</sup> FOSTER, *supra* note 13, at 7.

<sup>38</sup> See generally ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878 (1988).

<sup>39</sup> See 18 U.S.C. § 1385 (2000). Some early examples in U.S. history when federal military forces were used to support domestic operations include President George Washington's use of federal forces to suppress the Whiskey Rebellion in 1794 and President John Adams's use of federal forces to quell the Fries Rebellion in 1798. See CONSTITUTION AND U.S. ARMY, *supra* note 34, at 36.

<sup>40</sup> See FOSTER, *supra* note 13, at 12.

<sup>41</sup> See WILLIAM W. EPLEY, CENTER FOR MILITARY HISTORY, U.S. ARMY, ROLES AND MISSIONS OF THE UNITED STATES ARMY 87 (1991).

<sup>42</sup> See HURRICANE! COPING WITH DISASTER: PROGRESS AND CHALLENGES SINCE GALVESTON, 1900, at 40 (Robert Simpson, ed., 2003) [hereinafter HURRICANE!].

tracking weather was initially recognized for its military value but later served as the basis for the establishment and development of the weather services by the U.S. Army Signal Services in 1870.<sup>43</sup>

After the Civil War, the military, especially the Army, found itself with an increased role in civil matters.<sup>44</sup> Post-Civil War occupation by federal troops in the south generated several federal assistance programs administered by the military, most notably the Freedmen's Bureau.<sup>45</sup> The Bureau of Refugees, Freedmen, and Abandoned Property Act of 1865 created The Freedmen's Bureau, and the War Department was responsible for "supervise[ing] all relief and educational activities relating to refugees and freedmen, including issuing rations, clothing and medicine."<sup>46</sup> As federal aid to domestic disasters increased after the Civil War, Congress became more "depende[nt] on the Army"<sup>47</sup> to administer disaster relief.

[The U.S. Army] still maintained more of a presence throughout the nation than did any other federal agency. In addition, it held stockpiles of rations, clothing, and tentage—the staples of government grants to victims of disasters. Even when it did not have stores on hand, the Army—again more than any other government agency—had [an] established purchasing and transportation system. Finally, the military chain of command facilitated quick response. Once the Army had undertaken the task of relief in a few instances, its role became so fixed that Congress rarely questioned its use during the remainder of the century.<sup>48</sup>

Another post-civil war example of military domestic assistance occurred after the Great Fire of Chicago on 8 October 1871.<sup>49</sup> In a telegram on 9 October 1871, Lieutenant General (LTG) P. H. Sheridan reported to Secretary of War W. W. Belknap, "[t]he city of Chicago is almost utterly destroyed by fire."<sup>50</sup> Calling it a "national calamity,"<sup>51</sup> LTG Sheridan requested and the government provided "rations from St. Louis, tents from Jeffersonville, and two companies of infantry from Omaha"<sup>52</sup> to accommodate the estimated 100,000 homeless.<sup>53</sup>

Overall, the U.S. Army assisted in over seventeen domestic relief operations associated with fires, epidemics, floods, storms, tornadoes, and a locust plague between 1868 and 1898,<sup>54</sup> including disaster relief for a massive earthquake that destroyed most of Charleston, South Carolina in August of 1886.<sup>55</sup> The ACE undertook its first formal disaster relief mission during the Mississippi Flood of 1882 when it supported the Army Quartermaster Corps' efforts to rescue people and property.<sup>56</sup> The ACE also played a critical role in responding to the Johnstown, Pennsylvania flood of 1889.<sup>57</sup>

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<sup>43</sup> See *id.* at 40 (explaining the nation's first advisory on a tropical weather system was issued in 1873 by this service, and in 1890, Congress transferred the weather function to the Department of Agriculture, becoming a civilian service known as the Weather Bureau).

<sup>44</sup> See COAKLEY, *supra* note 38, at 268.

<sup>45</sup> See FOSTER, *supra* note 13, at 13.

<sup>46</sup> See Freedmen's Bureau Online, <http://freedmensbureau.com/> (last visited Oct. 2, 2006).

<sup>47</sup> FOSTER, *supra* note 13, at 15 (explaining why the U.S. Army was the agency of preference in oversight of domestic disaster relief).

<sup>48</sup> *Id.* at 16.

<sup>49</sup> See Report Made By Lieutenant General P. H. Sheridan of The Conditions of Affairs in The City of Chicago Occasioned by The Great Fire of Oct. 8th and 9th, 1871, <http://www.chicagohs.org/FIRE/rescue/military.html> (last visited Oct. 2, 2006).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See *id.*

<sup>54</sup> See FOSTER, *supra* note 13, at 16 (listing the following examples: the Chicago fire (1871); yellow fever epidemics in Memphis and Shreveport (1873); locust plague in the Southwest (1874-75); storms in Texas and Mississippi (1880); flood along the Missouri River (1881); flood along the Ohio River (1884); the Johnstown flood and Seattle fire (1889); drought in Oklahoma (1890); forest fires in Missouri (1894); and tornadoes in St. Louis (1896).

<sup>55</sup> See generally Avery Parker, South Carolina Genealogy, History of Charleston, <http://www.southcarolinagenealogy.org/2005/09/20/history-of-charleston/> (last visited Oct. 2, 2006).

<sup>56</sup> See U.S. Army Corps of Engineers, The Corps' Response to Natural Disasters, <http://www.hq.usace.army.mil/history/brief2.htm> (last visited Oct. 2, 2006).

<sup>57</sup> See *id.*

During these relief operations, the War Department typically received funds from Congress and detailed the Army to purchase and deliver the relief supplies to the disaster area.<sup>58</sup> By the end of the nineteenth century, the U.S. military was firmly embedded in domestic disaster relief missions, and the Army became the “primary agent for disaster relief.”<sup>59</sup>

### Disaster Relief Missions in the First Half of the Twentieth Century

At the beginning of the twentieth century, a new sense of federal government activism in disaster assistance and relief operations replaced the reluctance that was once so prevalent during the early nineteenth century.<sup>60</sup> This change may be explained, in part, because of the shift from an agrarian nation to an industrial metropolitan nation and the subsequent emergence of a society with a “greater sense of interdependence.”<sup>61</sup>

Even the once constitutionally-cautious Congress was prepared to expand the role of federal disaster relief not only at home but also overseas.<sup>62</sup> As Congress became more tolerant of supporting disaster assistance, a new sense of an affirmative obligation to provide disaster assistance domestically and abroad characterized the nature of how the federal government was prepared to address disaster assistance.<sup>63</sup> In 1902, Congress approved \$200,000 for emergency relief to the West Indian islands of Martinique and St. Vincent after several volcano eruptions killed almost 1350 people and created severe food shortages.<sup>64</sup> President Theodore Roosevelt directed the War Department to assist in the delivery of the supplies and both the Army and the Navy helped to oversee the relief mission.<sup>65</sup> Additionally, Congress chartered the Red Cross in 1905 to “maintain a system of domestic and international disaster relief,”<sup>66</sup> as acceptance of federal disaster relief assistance became the norm.

The military continued its role in disaster relief and was called upon almost immediately at the beginning of the twentieth century. In September 1900, a deadly hurricane destroyed most of the city of Galveston, Texas and the military provided disaster relief.<sup>67</sup> In 1906, both the Navy<sup>68</sup> and the Army<sup>69</sup> responded with assistance<sup>70</sup> following the earthquake and subsequent fire that devastated San Francisco, California.<sup>71</sup> Even when the Army offered to relinquish control to the newly chartered Red Cross, the Red Cross director on the scene declined, explaining later that “[t]he Army had the organization, the

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<sup>58</sup> See FOSTER, *supra* note 13, at 17.

<sup>59</sup> *Id.* at 22.

<sup>60</sup> *See id.* at 50.

<sup>61</sup> *Id.* at 53 (suggesting the growing concentrations of population in the cities, crowded building practices, and mass communications and transportation all helped create the need for interdependence between local, state, and federal officials).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 50.

<sup>64</sup> *See id.* at 49.

<sup>65</sup> *See id.*

<sup>66</sup> American Red Cross, Museum—Explore Our History, A Brief History of the American Red Cross, <http://www.redcross.org/museum/history/brief.asp> (last visited Oct. 2, 2006).

<sup>67</sup> *See generally* Suburban Emergency Management Project, *Why the 1900 Galveston Hurricane Was Not a Disaster*, Sept. 25, 2005, available at [http://www.semp.us/biots/biot\\_269.html](http://www.semp.us/biots/biot_269.html).

<sup>68</sup> *See generally* Letter from Commander Charles J. Badger, U.S. Navy, to the Commander-in-Chief, Pacific Squadron (May 31, 1906), available at <http://www.sfmuseum.net/quake/navy.html> (detailing plans to dispatch the U.S. Flagship Chicago, the U.S.S. Boston and U.S.S. Princeton to San Francisco to aid in the disaster relief).

<sup>69</sup> *See generally* Frederick Funston, *How the Army Worked to Save San Francisco*, COSMOPOLITAN MAG., July 1906, <http://www.sfmuseum.net/1906/cosmo.html>. For a more detailed account of Army relief efforts see National Park Service U.S. Dep’t of the Interior, Relief Efforts, Presidio of San Francisco, at <http://www.nps.gov/prsf/history/1906eq/relief.htm> (last visited Oct. 2, 2006).

<sup>70</sup> Upon witnessing the destruction first-hand, the acting commander of Division of the Pacific, Brigadier General Frederick Funston, mobilized his troops without a request from any local or state official and without any federal direction or authorization. *See* FOSTER, *supra* note 13, at 55 (citing ADOLPHUS W. GREELY, EARTHQUAKE IN CALIFORNIA, APR. 18, 1906: SPECIAL REPORT OF MAJ[OR] GEN[ERAL] ADOLPHUS W. GREELY, U.S.A. COMMANDING THE PACIFIC DIVISION, ON THE RELIEF OPERATIONS CONDUCTED BY THE MILITARY AUTHORITIES OF THE UNITED STATES AT SAN FRANCISCO AND OTHER POINTS WITH ACCOMPANYING DOCUMENTS 5-6 (1906)).

<sup>71</sup> *See Earthquake and Fire: San Francisco in Ruins*, CALL-CHRON.-EXAMINER, Apr. 19, 1906, available at <http://www.sfmuseum.net/1906/callchronex.html>.

equipment, the trained officers and men for dealing with the situation, and no one else had it or could create it except at enormous expense, and with inevitable waste.”<sup>72</sup>

In April 1908, tornados swept through several southern states, and the destruction and subsequent flooding resulted in nearly 33,000 homeless.<sup>73</sup> After Congress appropriated \$250,000 in disaster relief funds and charged the War Department with administering the issuance of supplies, the Chief of Staff decided the appropriated funding could be spent for medical relief as well.<sup>74</sup> As a result, both Navy and Army personnel helped establish relief hospitals in Hattiesburg, Mississippi, and medical doctors and supplies were brought in from as far as St. Louis and Washington, DC.<sup>75</sup> For the first time in a disaster operation, the Navy constructed a tent hospital that “boasted electricity, water pipes, water closets, operating tents, dining tents, and five patient tents, all connected by boardwalks.”<sup>76</sup>

Flooding along the Mississippi River in 1912 was so massive that in some locations it covered land up to sixty miles wide.<sup>77</sup> President William Taft looked to the War Department as the only organization with adequate resources to respond immediately.<sup>78</sup> The Army assisted in the rescue of stranded people and livestock and delivered food, tents, and clothing. More than in previous floods, however, “the Army also participated in the erection of refugee centers.”<sup>79</sup> President Taft convinced the War Department to act without congressional authority and later convinced Congress to ratify the action and appropriate \$1,240,000 to reimburse the Army’s costs.<sup>80</sup>

In some instances, the Army responded without explicit presidential or congressional authorization or approval. Consider, for example, the assistance provided after the March 1913 tornados, which severely damaged Omaha, Nebraska.<sup>81</sup> The post commander of Fort Omaha, who had served during the 1906 San Francisco earthquake, ordered direct immediate assistance to the city of Omaha and opened the post supplies and hospital for disaster relief.<sup>82</sup> Apparently, the local community who wrote the War Department commending “most highly the quick response of [the post commander]”<sup>83</sup> overlooked any concerns about the propriety of dispatching federal troops and unauthorized disbursement of military supplies in an emergency.

The same week of the Omaha tornadoes, extensive flooding along the Dayton and Ohio rivers prompted President Woodrow Wilson to direct the Secretary of War, Lindley Garrison, to render military assistance.<sup>84</sup> When Secretary Garrison voiced concerns as to the legality to act without congressional approval (despite a longstanding practice of military disaster assistance *without* prior congressional approval), President Wilson directed the assistance nonetheless.<sup>85</sup>

Whether Secretary Garrison’s concerns signaled an emerging change in national politics or simply his own conscience, the War Department issued *Special Regulation Sixty-Seven*<sup>86</sup> in 1917 which, among other things, addressed disaster assistance by the military without the approval of Congress as, “not contemplated . . . unless the overruling demands of

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<sup>72</sup> FOSTER, *supra* note 13, at 60.

<sup>73</sup> *See id.* at 66.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 67.

<sup>76</sup> *Id.* at 68.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* at 69. While some of the refugee centers had Army commanders, typically, the Army would erect the camps and turn the camp administration over to the National Guard or Red Cross. *See id.* at 69 (citing Memo for the Chief of Staff by Quartermaster General, 8 Apr. 12, file 1897542, Record Group 94, NA; James E. Normoyle, *Flood Sufferers in the Mississippi and Ohio Valleys, Rep. of James E. Normoyle in Charge of Relief Operations, Apr., May, June, July, 1912* (Washington: GPO, 1913); *Flood Sufferers of the Mississippi River*, 1912, entry 31C, Record Group 192, WNRC; Bicknell, *Pioneering*, at 164).

<sup>80</sup> *See* FOSTER, *supra* note 13, at 68.

<sup>81</sup> *See id.* at 72.

<sup>82</sup> *See id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 73.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 78.

humanity compel immediate action to prevent starvation and extreme suffering and local resources are clearly inadequate to cope with the situation.”<sup>87</sup>

During World War I, the military was supporting the war effort in Europe while the nation experienced over 675,000 deaths attributed to the influenza epidemic of 1918 to 1919.<sup>88</sup> In the military’s absence, the Red Cross and the U.S. Public Health Service (PHS) rendered most of the relief.<sup>89</sup> Despite the severity of the influenza epidemic, the Red Cross and the PHS performed well during the crisis.<sup>90</sup> The emergence of both the Red Cross and the PHS as capable disaster management agencies during the military’s absence ultimately influenced the course of the military’s role in future disaster assistance.<sup>91</sup>

After World War I, the military “usher[ed] in a new era of civil-military relations.”<sup>92</sup> The Navy undertook greater roles in providing international disaster assistance, and in 1923 the Secretary of the Navy “claimed that the Navy’s work in humanitarian causes justified its existence even if it never fired another shot.”<sup>93</sup> In 1924, *Army Regulation (AR) 500-60*<sup>94</sup> replaced *Special Regulation Sixty-Seven*<sup>95</sup> in an attempt to define the Army’s role in domestic disaster relief.<sup>96</sup> *Army Regulation 500-60* legitimized the Army’s “de facto . . . business of aiding civilian disaster victims.”<sup>97</sup> The newly created Army Air Corps<sup>98</sup> provided airplanes to deliver supplies and transport patients following a tornado in Texas in 1927.<sup>99</sup> Just when the military seemed to be settling into a defined post-World War I role in disaster assistance, however, the nature of disaster relief response management was about to enter a transitional period.<sup>100</sup>

In 1927, extensive flooding in the Mississippi Valley caused several states to seek federal disaster assistance.<sup>101</sup> Breaking precedence, President Calvin Coolidge appointed then Secretary of Commerce Herbert Hoover to oversee federal relief.<sup>102</sup> Secretary Hoover chaired a committee of department heads and for the first time “a civilian official and the Red Cross directed relief operations, not the War Department and its corps area commanders.”<sup>103</sup> For the most part, the Army played the part of supply agent and loaned over \$2.6 million dollars in equipment, most of which was never returned.<sup>104</sup> When the Red Cross refused to be held accountable for the property, the War Department had to seek a supplemental appropriation from Congress to cover some of the costs of the relief operation.<sup>105</sup> Thereafter, the Army’s participation in

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<sup>87</sup> *Id.* This regulation appears to be the precursor to *Department of Defense Directive 3025.1*, which allows military commanders immediate response authority to save lives, prevent human suffering, or mitigate great property damage when such conditions exist and time does not permit prior approval. *See* 1993 DOD DIR. 3025.1, *supra* note 22, para. 4.5.

<sup>88</sup> *See* FOSTER *supra* note 13, at 99.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> HUNTINGTON, *supra* note 35, at 282.

<sup>93</sup> *Id.* at 285.

<sup>94</sup> *See id.* at 104 (listing the complete title of AR 500-60 as *Employment of Troops: Relief Work by the War Dep’t, in Cases of Flood, Earthquake, or Other Great Catastrophe* and included the same immediate response authority as contained in *Special Regulation Sixty-Seven*).

<sup>95</sup> *See* FOSTER, *supra* note 13, at 78.

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* at 77.

<sup>98</sup> *See* Air Corps Development 1919-1935 Era, United States Air Force Museum, at [www.nationalmuseum.af.mil/factsheets/factsheet.asp?id=724](http://www.nationalmuseum.af.mil/factsheets/factsheet.asp?id=724) (last visited Jan. 24, 2007).

<sup>99</sup> *See* FOSTER *supra* note 13, at 109.

<sup>100</sup> *See generally id.* at 99-126.

<sup>101</sup> *See id.* at 110.

<sup>102</sup> *See id.*

<sup>103</sup> *Id.* at 111.

<sup>104</sup> *See id.* at 112.

<sup>105</sup> *See id.* at 113.

disaster relief was limited to engineer support or distribution of supplies.<sup>106</sup> For approximately the next ten years, the military's continued to experience difficulty receiving reimbursement or funding for military assistance in disaster relief.<sup>107</sup>

By 1929, the frequent practice of the Red Cross and other agencies to use military supplies without reimbursement created serious shortages of "items held for war reserve."<sup>108</sup> Despite attempts for reimbursement by the Secretary of War, Congress provided no reimbursement appropriations, thus prompting then Army Chief of Staff General Douglas MacArthur to conclude that both President Herbert Hoover and Congress would not support the practice of loaning Army supplies for disaster assistance without any assurance of reimbursement.<sup>109</sup> Adopting "a strict observance of the law regarding the use of public property,"<sup>110</sup> the War Department issued a directive to corps area commanders directing that no supplies were to be dispensed without prior approval from the War Department, and only after the borrowing agency promised to reimburse the Army for such items.<sup>111</sup> The only exception was in the event a disaster required immediate response authority as outlined in *AR 500-60*.<sup>112</sup> In the years thereafter, the Army continued disaster assistance only when immediate response required military intervention and "then quickly withdrew when other agencies could take charge."<sup>113</sup>

By May 1938, relations between the Red Cross and the military began to improve and the Army revised *AR 500-60* to reflect that the American Red Cross was "the nation's primary disaster relief agency, though [the Army's] corps area commanders retained the prerogative of committing Army personnel and resources."<sup>114</sup> Even the problem of funding or reimbursement to the military for disaster assistance appeared to improve when President Franklin Roosevelt authorized reimbursement to the War Department for several flooding assistance missions during 1936 and 1937.<sup>115</sup>

By the end of the 1930's, the nation had departed from the path of relying solely upon the military for disaster relief management.<sup>116</sup> Although the military served a lead role in providing domestic disaster assistance from the post-Civil War era to the post-World War I era, by end of the 1920's the Army had been relieved by the Red Cross and the respective state National Guards to provide the "first line of defense in disaster."<sup>117</sup> A senior Army official outlined the Army's role in domestic disaster relief as follows: "the Army should remain only so long as necessary. As soon as possible, civilian authorities must take control."<sup>118</sup> The military continued to play a significant role in domestic disaster assistance for the rest of the twentieth century, although it served in a secondary support role to civilian authorities.

During the 1940's, the military provided limited assistance to domestic disasters.<sup>119</sup> This was due, in part, to the transition of control from the military to the Red Cross and other federal agencies charged with domestic disaster assistance during the years following World War I. Additionally, the United States entry into World War II also limited military assistance to domestic disasters. Wartime technology during World War II, however, contributed indirectly to disaster relief planning.<sup>120</sup> One example of wartime technology that later contributed to disaster planning and assistance is the first aircraft flight into the eye of a hurricane in 1943 by Colonel Joseph B. Duckworth.<sup>121</sup> After several more flights, both the Army Air Corps (later the Air Force) and the Navy began "a formal program of daily reconnaissance of Atlantic hurricanes,"<sup>122</sup> which

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<sup>106</sup> See *id.* at 114.

<sup>107</sup> See *id.* at 115.

<sup>108</sup> *Id.*

<sup>109</sup> See *id.*

<sup>110</sup> *Id.* at 116.

<sup>111</sup> See *id.*

<sup>112</sup> See *id.* at 117.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 121.

<sup>115</sup> See *id.* (noting that the reimbursement would come from other economic relief funds).

<sup>116</sup> See *id.* at 123.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 122 (referencing a 1938 letter from Major General George Moseley, Commander 4th Corps Area, to civilian relief officials in Tennessee).

<sup>119</sup> See *id.* at 127.

<sup>120</sup> See HURRICANE!, *supra* note 42, at 51.

<sup>121</sup> See *id.* at 53. The flight was actually unauthorized and later characterized by Colonel Duckworth as "a lark to satisfy my curiosity." *Id.*

<sup>122</sup> *Id.*

helped understand and improve predictions of hurricanes.<sup>123</sup> Another example is the development of radio detection and ranging (commonly known as RADAR).<sup>124</sup> The use of RADAR continues today as a necessary tool for weather research, warning, and relief operations.<sup>125</sup>

### **Changing Disaster Relief Assistance and Management**

After World War II, the nation had grown to expect federal government aid for domestic disasters.<sup>126</sup> With the military no longer a lead agency in domestic disaster response, Congress actively created “a civilian bureaucracy to coordinate [continuing federal disaster assistance].”<sup>127</sup> These emerging civilian agencies changed how the nation managed domestic disaster relief assistance.

### **The Emergence of Civilian Agencies**

The first significant act to create civilian coordination of federal disaster assistance occurred in 1947 with the enactment of the Surplus Property Law.<sup>128</sup> The Surplus Property Law created a Federal Works Administrator and empowered the Administrator with the ability to use all federal agencies and departments to cooperate in disaster assistance and to use surplus property held by the War Assets Administrator.<sup>129</sup> Twice in the immediate years after 1947, however, Congress had to authorize supplementary appropriations, prompting many to call for new legislation.<sup>130</sup> Accordingly, Congress responded with the Federal Disaster Relief Act of 1950.<sup>131</sup>

#### *Federal Disaster Relief Act of 1950*<sup>132</sup>

The Federal Disaster Relief Act of 1950<sup>133</sup> was a comprehensive domestic disaster plan intended to fund and coordinate all federal disaster relief efforts.<sup>134</sup> The Act allowed the President to declare major disaster areas authorized for federal relief “in the cases of flood, fire, hurricane earthquake, drought, and storm.”<sup>135</sup> In granting this authority to the President, the Act provided an automatic federal response without Congress having to act.<sup>136</sup> Initially, President Harry Truman assigned federal disaster relief responsibilities to the Housing and Home Finance Agency, but he later reassigned federal disaster relief responsibilities to the Federal Civil Defense Administration.<sup>137</sup> By 1961, the Office of Emergency Planning assumed this responsibility.<sup>138</sup>

Additionally, the Federal Disaster Relief Act of 1950<sup>139</sup> designated the Red Cross and the Public Health Service as the federal agencies to respond in the event of a major disaster and empowered increasing responsibilities on state organizations,

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<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See generally id.*

<sup>126</sup> *See FOSTER, supra* note 13, at 127.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 132.

<sup>129</sup> *See id.*

<sup>130</sup> *See id.* at 133 (presumably because the Surplus Property Law was not adequately funded).

<sup>131</sup> *See* Federal Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See FOSTER, supra* note 13, at 133.

<sup>135</sup> TED STEINBERG, ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA 181 (2000).

<sup>136</sup> *See FOSTER, supra* note 13, at 133.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.* at 134.

<sup>139</sup> *See* Federal Disaster Relief of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

such as the state National Guard and local civil defense.<sup>140</sup> As a result, “the civilian relief bureaucracy rarely had to request regular Army assistance.”<sup>141</sup> On those rare occasions when the military was utilized, the Act also provided several mechanisms to reimburse the military for supplies in support of disaster relief.<sup>142</sup>

While the Red Cross and other federal, state, and local agencies were the primary disaster relief organizations, the Army was still the primary military service<sup>143</sup> for military disaster relief assistance.<sup>144</sup> Accordingly, the Army assigned command responsibility for providing disaster assistance to the newly created Continental Army Command.<sup>145</sup>

Even though civilian relief agencies were finding less need for reliance on the military after the Federal Disaster Relief Act of 1950,<sup>146</sup> the emergence of the military helicopter in the 1950s offered an additional asset for disaster relief, and Army helicopters participated in at least two disaster relief missions in the late 1950s.<sup>147</sup> The practice of using helicopters as air ambulances in the Korean War proved to be a valuable resource for domestic disasters.<sup>148</sup>

When Hurricane Camille slammed into the Gulf Coast in 1969, it became clear quickly that civilian agencies would be overwhelmed. Accordingly, the DOD contributed over 16,500 personnel and provided helicopters, assisted in rescue missions, helped clear and reopen debris covered roads, and donated much needed food, water and medical supplies.<sup>149</sup> Additionally, Army aviators flew over 600 medical evacuation missions.<sup>150</sup>

Congress continued to reshape the civilian relief establishment, and in 1969 renamed the Office of Emergency Planning the Office of Emergency Preparedness (OEP).<sup>151</sup> In 1973, President Richard Nixon created a new agency to assume responsibility for the federal government in disaster relief by “transferr[ing] relief operations from OEP to the Department of Housing and Urban Development . . . [and creating] the Federal Disaster Assistance Administration.”<sup>152</sup> Shortly thereafter, Congress passed the Federal Disaster Relief Act of 1974.<sup>153</sup>

#### *Federal Disaster Relief Act of 1974*<sup>154</sup>

The Federal Disaster Relief Act of 1974 continued to build upon the Federal Disaster Relief Act of 1950<sup>155</sup> and firmly established the process of Presidential disaster declarations. However, after hazards “associated with nuclear power plants and the transportation of hazardous substances were added to natural disasters, more than 100 federal agencies were involved

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<sup>140</sup> See FOSTER, *supra* note 13, at 134.

<sup>141</sup> *Id.* at 136.

<sup>142</sup> See *id.* at 134 (explaining that in the event the President *did not* declare a major disaster, the military was reimbursed directly from the Red Cross for any supplies the Red Cross obtained from the military. In the event the President *did* declare a major disaster, the military’s costs were refunded from specific disaster relief funds.).

<sup>143</sup> See National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947). The DOD was established on 26 July 1947 to coordinate the activities of all of the U.S. military services and replaced the War Department.

<sup>144</sup> See FOSTER, *supra* note 13, at 135.

<sup>145</sup> See U.S. DEP’T OF DEFENSE, DIR. 3025.1, RESPONSIBILITIES FOR CIVIL DEFENSE AND OTHER DOMESTIC EMERGENCIES (14 July 1956).

<sup>146</sup> See Federal Disaster Relief of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

<sup>147</sup> See William Vance, *Disaster and Emergency Relief Operations*, 4 U.S. ARMY AVIATION DIG. 26, 26-27 (Mar. 1958).

<sup>148</sup> See FOSTER, *supra* note 13, at 136 (detailing the role of Army helicopters as ambulances to evacuate victims of a flood along the Rio Grande River in Texas in 1954, as well as deliver supplies to stranded individuals).

<sup>149</sup> See ROGER A. PIELKE, JR., CHANTAL SIMONPIETRI, & JENNIFER OXELSON, HURRICANE CAMILLE PROJECT REP., THIRTY YEARS AFTER HURRICANE CAMILLE: LESSONS LEARNED, LESSONS LOST (1999), [http://sciencepolicy.colorado.edu/about\\_us/meet\\_us/roger\\_pielke/camille/report.html](http://sciencepolicy.colorado.edu/about_us/meet_us/roger_pielke/camille/report.html).

<sup>150</sup> See FOSTER, *supra* note 13, at 141.

<sup>151</sup> See *id.* at 143.

<sup>152</sup> *Id.*

<sup>153</sup> See Federal Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974).

<sup>154</sup> See *id.*

<sup>155</sup> See Federal Disaster Relief of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

in some aspect of disasters, hazards and emergencies.”<sup>156</sup> While the government intended the Disaster Relief Act of 1974<sup>157</sup> to provide assistance to states and localities that were overwhelmed by disasters, management of federal disaster relief efforts actually became more complex, thereby creating the need for a single central federal agency.<sup>158</sup> As a result, in 1979 President Jimmy Carter created the Federal Emergency Management Agency (FEMA),<sup>159</sup> and Congress amended the Federal Disaster Relief Act of 1974.<sup>160</sup>

### *Federal Emergency Management Agency and the Robert T. Stafford Disaster Relief Act of 1979*

In 1979, President Jimmy Carter issued Executive Order 12,148,<sup>161</sup> which created FEMA. The Federal Disaster Assistance Administration (formerly within the Department of Housing and Urban Development) was transferred, along with other agencies,<sup>162</sup> and consolidated under FEMA.<sup>163</sup> Additionally, Congress passed an amendment to the Federal Disaster Relief Act of 1974,<sup>164</sup> which renamed the amended act the Robert T. Stafford Disaster Relief Act of 1979 (Stafford Act).<sup>165</sup> The creation of FEMA and the amendments to the Stafford Act were attempts to improve the federal government’s disaster response. The Stafford Act continues to be a current source of authority in federal disaster relief assistance.

The Stafford Act redefined major disasters as “natural catastrophes (hurricane, tornado, tsunami, earthquake, volcanic eruption, and others) and, regardless of cause, a fire, flood or explosion.”<sup>166</sup> Additionally, the Stafford Act distinguished between a major disaster and emergency.<sup>167</sup> Once a major disaster or emergency declaration has been made, federal resources may be provided under the control and coordination of FEMA.<sup>168</sup> Military participation in support of domestic disasters under the Stafford Act include the following: “debris removal and road clearance, search and rescue, emergency medical care and shelter, provision of food, water, and other essential needs, dissemination of public information and assistance regarding health and safety measures, and the provision of technical advice to state and local governments on disaster management and control.”<sup>169</sup> Additionally, the Stafford Act also authorized the following specific types of assistance: disaster housing assistance,<sup>170</sup> individual and family grants,<sup>171</sup> small business administration disaster loans,<sup>172</sup> farm service agency loans,<sup>173</sup> unemployment assistance,<sup>174</sup> food commodities,<sup>175</sup> legal services,<sup>176</sup> and crisis counseling.<sup>177</sup>

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<sup>156</sup> Federal Emergency Management Agency, About FEMA, FEMA History, <http://www.fema.gov/about/history.shtm> (last visited Oct. 5, 2006) [hereinafter FEMA Directors].

<sup>157</sup> See Federal Disaster Relief Act of 1974.

<sup>158</sup> See FEMA Directors, *supra* note 156.

<sup>159</sup> See KEITH BEA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, FEMA AND DISASTER RELIEF I (1998).

<sup>160</sup> See Federal Disaster Relief Act of 1974.

<sup>161</sup> See Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (July 20, 1979).

<sup>162</sup> The Federal Emergency Management Agency also assumed the responsibilities of the Federal Insurance Administration, the National Fire Prevention and Control Administration, the National Weather Service Community Preparedness Program, the Federal Preparedness Agency of the General Services Administration and Civil Defense. See FEMA Directors, *supra* note 156.

<sup>163</sup> See Exec. Order No. 12,148.

<sup>164</sup> See Federal Disaster Relief Act of 1974.

<sup>165</sup> See 42 U.S.C. § 5121 (2000).

<sup>166</sup> BEA, *supra* note 159, at 9.

<sup>167</sup> Major disaster designations provide for more federal assistance than an emergency. See *id.*

<sup>168</sup> See *id.* at 10.

<sup>169</sup> JENNIFER ELSEA ET AL., CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 4 (2005).

<sup>170</sup> See 42 U.S.C. § 5174.

<sup>171</sup> See *id.* § 5178.

<sup>172</sup> See 15 U.S.C. § 636.

<sup>173</sup> See 7 U.S.C. § 1961.

<sup>174</sup> See 42 U.S.C. § 5177.

<sup>175</sup> See *id.* § 5179.

<sup>176</sup> See *id.* § 5182.

Despite the creation of FEMA and the enactment of the Stafford Act, however, criticism of civilian federal disaster relief management continued.<sup>178</sup> In late August and early September of 1992, several hurricane disasters caused FEMA to activate its newly created Federal Response Plan.<sup>179</sup> Unfortunately, state and local officials underestimated the damage and degree of federal assistance needed, and the delay in providing adequate assistance set “off a flurry of activity at the federal and state level to get federal assistance to those who needed it.”<sup>180</sup> Once federal assistance began, the military responded by providing thousands of personnel and millions of dollars in supplies and equipment.<sup>181</sup> Frustration aimed at civilian leadership of FEMA was apparent when at least one official suggested that the military should, once again “take over Federal disaster activities.”<sup>182</sup>

Ironically, despite the growth of civilian management of domestic disaster relief efforts, calls for the military to return to a management role in domestic disaster relief assistance continued. In 1993, shortly after Hurricane Andrew, criticism of FEMA prompted at least one legislative proposal for the DOD to resume control of federal disaster assistance.<sup>183</sup>

[T]he Department of Defense is the Federal agency with the personnel, equipment, training, and organization to respond quickly to major disasters where mass care is required anywhere in the United States, and should be used to provide mass care whenever State, local or private relief organizations cannot adequately respond in a major disaster.<sup>184</sup>

During post-cold war discussions of the U.S. military’s role, reference is made to “the superb contribution the military made to disaster relief as evidence of a new role for the U.S. armed forces.”<sup>185</sup> In more recent times, FEMA<sup>186</sup> was heavily criticized and blamed for mismanagement of federal response efforts associated with Hurricane Katrina in 2005.<sup>187</sup> Shortly after replacing the FEMA director, President George Bush suggested a change in the role of the military in domestic disaster assistance and called the military “the institution of our government most capable of massive logistical operations on a moments notice.”<sup>188</sup> While there can be no doubt of the successful contributions by civilian agencies in disaster relief response and planning since FEMA was created,<sup>189</sup> disaster management under civilian control has not escaped criticism.

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<sup>177</sup> See *id.* § 5183.

<sup>178</sup> See KARL SCHNEIDER, THE INDUSTRIAL COLLEGE OF THE ARMED FORCES, DISASTER RELIEF—IS IT SPELLED F-E-M-A? 6 (1993).

<sup>179</sup> The Federal Response Plan detailed responsibilities to each federal agency in disaster response when state and local governments are overwhelmed. See *id.* at 7. The Federal Response Plan was later modified and changed in 2005 to the National Response Plan. See DEPARTMENT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN (2005) [hereafter DEP’T OF HOMELAND SECURITY, NRP]. As part of the National Response Plan, specific agencies are designated particular responsibilities called Emergency Support Function (ESF) in a proactive attempt to identify the resource best suited to contribute to the relief needs. The Department of Defense is the primary agency responsible for public works and engineering, and the support agency for all other ESFs. See *id.* at ESF #3-1.

<sup>180</sup> SCHNEIDER, *supra* note 178, at 8.

<sup>181</sup> See *id.*

<sup>182</sup> *Id.* at 9.

<sup>183</sup> See *id.* at 12.

<sup>184</sup> *Id.* at 18 (titled the Federal Catastrophic Disaster Response Act of 1993, this author has found no evidence of the proposed legislative enactment).

<sup>185</sup> INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES, *supra* note 2, at 6.

<sup>186</sup> It should be noted that FEMA was placed under the control of the Department of Homeland Security in 2002. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>187</sup> See Peter Baker, *FEMA Director Replaced as Head of Relief Effort*, WASH. POST, Sept. 10, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/09/AR2005090900795.html> (detailing criticism of FEMA’s response to Hurricane Katrina and how the civilian director was replaced by a military officer, Coast Guard Vice Admiral Thad Allen).

<sup>188</sup> *Historic [C]hanges [P]ossible in [M]ilitary’s [R]ole in [D]omestic [E]mergencies*, USA TODAY, Sept. 17, 2005, available at [http://www.usatoday.com/news/nation/2005-09-17-katrina-military\\_x.htm](http://www.usatoday.com/news/nation/2005-09-17-katrina-military_x.htm). President Bush stopped short of offering what changes might be considered.

<sup>189</sup> See generally FEMA, FEMA History, <http://www.fema.gov/about/history.shtm> (last visited Jan. 24, 2007).

An important development for the military in disaster support was the passing of the Economy Act<sup>190</sup> on 13 September 1982. The Economy Act authorizes agency heads to obtain goods or services by an interagency agreement.<sup>191</sup> The Act also provided funding authorization for the military to support other agencies and receive reimbursement of actual costs for the goods and services they provide.<sup>192</sup> The serious shortages of military supplies and lack of congressional support to fund the military for domestic disaster relief assistance provided by the Army in the 1920's and 1930's<sup>193</sup> were clearly a concern of the past. For example, from 1995-1999 the Air Force provided twenty-six airlifts and was reimbursed \$378,205.<sup>194</sup>

### **The U.S. Military in a Supporting Role**

While disaster relief legislation has emerged over the past fifty years to establish and create civilian agencies as the primary federal disaster relief entities,<sup>195</sup> the military has experienced continued growth in the various levels of military command that oversee and coordinate military domestic disaster assistance.

Until recently, the Secretary of the Army was the DOD Executive Agent for disaster relief operations; however, the responsibility was transferred in 2003 to the Assistant Secretary of Defense for Homeland Defense.<sup>196</sup> The Joint Director of Military Support (JDOMS) is the agent that coordinates and monitors military domestic disaster relief assistance operations for the Assistant Secretary of Defense for Homeland Defense.<sup>197</sup> When properly directed by the President through the Assistant Secretary of Defense, the JDOMS must coordinate and monitor military support via several levels of military commands. The various levels of command participate to varying degree with some performing a direct role of support and others merely assisting to coordinate activities or simply falling within the chain of command.

### *United States Northern Command*

In 2002, U.S. Northern Command (NORTHCOM) became the ninth unified command within the DOD.<sup>198</sup> In addition to homeland defense, NORTHCOM's mission is civil support, including military assistance in domestic disaster operations.<sup>199</sup> Northern Command helps coordinate military domestic disaster relief as directed by JDOMS while having few inherent assets and no direct command and control over combatant commanders.<sup>200</sup> In helping coordinate military civil support, NORTHCOM operates through subordinate Joint Task Forces.<sup>201</sup> Separate and distinct from domestic disaster assistance, however, Joint Task Force Civil Support (JTF-CS) is a subordinate unit of NORTHCOM and is specifically charged with "provid[ing] temporary critical life support during a chemical, biological, radiological, nuclear or high-yield explosive (CBRNE) situation in the United States or its territories and possessions."<sup>202</sup> Despite this specific tasking, on at least one occasion JTF-CS supported a purely natural domestic disaster relief mission when it joined Hurricane Katrina relief efforts.<sup>203</sup>

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<sup>190</sup> See Economy Act, Pub. L. No. 97-258, 96 Stat. 933 (1982).

<sup>191</sup> See 31 U.S.C. § 1535 (2000).

<sup>192</sup> See Economy Act, Pub. L. No. 97-258, 96 Stat. 933.

<sup>193</sup> See generally FOSTER, *supra* note 13, at 115.

<sup>194</sup> See U.S. GAO REPORT FULL EXTENT OF SUPPORT, *supra* note 31, at 14.

<sup>195</sup> See generally Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (July 20, 1979); 42 U.S.C. § 5121 (2000).

<sup>196</sup> See Transfer Military Support Mission Message, *supra* note 20.

<sup>197</sup> See *id.*

<sup>198</sup> See U.S. Northern Command, About Us, [http://www.northcom.mil/about\\_us/about\\_us.htm](http://www.northcom.mil/about_us/about_us.htm) (last visited Oct. 6, 2006).

<sup>199</sup> See *id.* at [http://www.northcom.mil/about\\_us/vision.htm](http://www.northcom.mil/about_us/vision.htm).

<sup>200</sup> See generally *id.* at [http://www.northcom.mil/about\\_us/about\\_us.htm](http://www.northcom.mil/about_us/about_us.htm).

<sup>201</sup> See *id.*

<sup>202</sup> Joint Task Force Civil Support, JTF-CS, Unit Fact Sheet, <http://www.jtfc.northcom.mil/pages/factsheet.html> (last visited Oct. 6, 2006).

<sup>203</sup> See Joint Task Force Civil Support, News, Joint Task Force Civil Support Joins Katrina Relief Effort (Sept. 1, 2005), <http://www.jtfc.northcom.mil/pages/news20050901.html>.

## United States Joint Forces Command

United States Joint Forces Command (USJFCOM) is a consolidated unified command that integrates the military capabilities of the Army, Navy, Air Force, and Marines “to enhance a combatant commander’s capabilities to implement the president’s strategy.”<sup>204</sup> One of nine combatant commands in the DOD,<sup>205</sup> USJFCOM “direct[s], plan[s], coordinate[s], schedule[s], and control[s] the joint operations and inter-theater deployment of all USJFCOM forces,”<sup>206</sup> including military assistance in domestic disasters.<sup>207</sup> Component commands from each of the four services report to USJFCOM to provide troops and equipment.<sup>208</sup> While each of the military services contributes equally, for purposes of illustrating the levels of military commands related to domestic disaster assistance, this article focuses on the Army component command of USJFCOM—U.S. Army Forces Command.

### U.S. Army Forces Command

United States Army Forces Command (FORSCOM) “trains, mobilizes, deploys, sustains, transforms, and reconstitutes conventional forces, providing relevant and ready land power to Combatant Commanders world wide in defense of the nation both at home and abroad.”<sup>209</sup> As a Joint Force Land Component Command to NORTHCOM, FORSCOM trains and provides those forces and equipment in support of domestic disaster relief.<sup>210</sup> Included in the land forces under FORSCOM are the First and Fifth Continental United States Armies (CONUSA). Until recently, First United States Army supported all domestic disaster relief for the eastern United States and Fifth United States Army supported all domestic disaster relief missions for the western United States.<sup>211</sup> A recent example of the employment of First Army in support of a domestic disaster assistance mission was Task Force Katrina.<sup>212</sup> As part of the current Army transformation, all responsibility for domestic disaster assistance has been transferred to Fifth United States Army, which has been re-designated as U.S. Army North or ARNORTH.<sup>213</sup> The United States Army Forces Command, however, is not limited to only the CONUSAs for federal domestic disaster assistant missions and can utilize other land forces as may be required.

After a federal disaster or emergency declaration has been made and JDOMS directs the military to assist, a senior military representative is designated to facilitate the use of military personnel and equipment in support of a domestic disaster.<sup>214</sup> This senior military officer is called a Defense Coordinating Officer (DCO)<sup>215</sup> and is assigned to supplement a FEMA Joint Field Office.<sup>216</sup> Once a request is made for military assistance, the DCO is usually the first point of contact for civilian authorities seeking support from the military.<sup>217</sup>

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<sup>204</sup> United States Joint Forces Command, About Us, <http://www.jfcom.mil/about/about1.htm> (last visited Oct. 6, 2006).

<sup>205</sup> *See id.*

<sup>206</sup> United States Joint Forces Command, Operations, Plans, Logistics and Engineering Directorate (J3/4), [http://www.jfcom.mil/about/abt\\_j34.htm](http://www.jfcom.mil/about/abt_j34.htm) (last visited Oct. 6, 2006).

<sup>207</sup> *See* United States Joint Forces Command, Military Assistance to Civilian Authorities, [http://www.jfcom.mil/about/abt\\_msca.htm](http://www.jfcom.mil/about/abt_msca.htm) (last visited Oct. 6, 2006).

<sup>208</sup> The component command for the Army is Forces Command, for the Marine Corps is Marine Forces Atlantic, for the Navy is U.S. Atlantic Fleet, and for the Air Force is Air Combat Command. *See* United States Joint Forces Command, Who Works for Us, <http://www.jfcom.mil/about/who.htm> (last visited Oct. 6, 2006).

<sup>209</sup> U.S. Army Forces Command, Mission Statement, <http://www.forscom.army.mil/cgwelcome/Mission101804.htm> (last visited Oct. 6, 2006).

<sup>210</sup> *See id.*

<sup>211</sup> *See* Fifth U.S. Army, Military Support to Civil Authorities (MSCA), <http://5tharmy.army.mil/5a/FifthArmy/about/MSCA.htm> (last visited Oct. 6, 2006).

<sup>212</sup> *See* Association of the United States Army, *Joint Task Force Katrina Begins Setting up at Camp Shelby, Miss.*, Aug. 31, 2005, <http://www.ausa.org/web/pub/DeptHome.nsf/byid/CTON-6FUPLU> [hereafter AUSA, Joint Task Force Katrina].

<sup>213</sup> *See* Joint Task Force Civil Support, News, First Army takes over [M]obilization [N]ationwide (Jan. 18, 2006), <http://www.jtfc.northcom.mil/pages/news/20060118.html>.

<sup>214</sup> *See* DEPARTMENT OF HOMELAND SECURITY, NRP, *supra* note 179, at 42.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at 28.

<sup>217</sup> *See id.*

The DCO, the senior federal DOD representative assigned to locally coordinate requests for military personnel, equipment, and support in domestic disaster relief missions, is part of a Defense Coordinating Element (DCE), which is comprised of a staff of key military officers who advise the DCO in responding with military support.<sup>218</sup> Additionally, the DCO exercises immediate response authority to act “to save lives, prevent human suffering, or mitigate great property damage,”<sup>219</sup> without prior approval.

The military has developed a sophisticated and intricate level of military command, control, and coordination for civil support and disaster assistance (and in the case of NORTHCOM, merely visibility oversight). While maintaining the status of a support role, the military has not only continued to keep pace with the growth and changes in federal civilian domestic disaster management but has retained its ability to resume a primary role in domestic disaster management.

### **The U.S. Military and Domestic Disaster Relief Assistance in the Twenty-First Century: Returning to a Primary Role?**

*[A]fter the hurricanes in Florida and Hawaii many people hailed the superb contribution the military made to disaster relief as evidence of a ‘new role’ for the U.S. armed forces. Nothing could be more off the target. The U.S. military have regularly provided such relief in the past. . . . [i]n floods and blizzards and hurricanes it was the Army that was first on the spot with cots, blankets, and food. That has been the case throughout our history. It is hard to conceive of any non-military role for the U.S. military that does not have some precedent in U.S. history. Non-military functions of the armed forces are as American as apple pie.*<sup>220</sup>

The emergence of civilian management agencies in the past fifty-five years has resulted in a de jure support role for the military in federal domestic disaster assistance.<sup>221</sup> As this article has illustrated, however, the history of civilian management of domestic disasters has produced some mixed results. When civilian management fails, it is the military that seemingly charges in to take control in the aftermath of domestic disasters. The reality is that the military has returned to the de facto primary role in domestic disaster assistance that it once held during the latter part of the nineteenth and early part of the twentieth centuries.

### **The Military’s De Facto Role**

During the birth of the nation, a small peacetime military and a strong belief in states’ rights and responsibilities prevented an active role of the federal government and the military in domestic disaster assistance. The military became the agency of choice for domestic disaster assistance following the Civil War when federal assistance began to emerge. During World War I and World War II, the military was called to perform its primary mission. Even during war, however, the military continued to contribute, if only indirectly, to disaster planning and response with advancements in technology and lessons learned. The advancement of civilian management agencies as the primary federal disaster relief entity over the past fifty years have produced mixed results. The Federal Emergency Management Agency has repeatedly come under criticism since its creation in 1979 and “on [more than one] occasion has been enveloped in controversy.”<sup>222</sup> Recently, at least one Senator remarked, “FEMA has become, to many people in America, and particularly the Gulf Coast, a joke, a four-letter word.”<sup>223</sup>

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<sup>218</sup> See *id.*

<sup>219</sup> 1993 DOD DIR. 3025.1 *supra* note 22, para. 4.5.1.

<sup>220</sup> INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES, *supra* note 2, at 6 (quoting Samuel P. Huntington, keynote speaker on Non-Traditional Roles for the U.S. military).

<sup>221</sup> See 1993 DOD DIR. 3025.1 *supra* note 22, para. 4.1.3.

<sup>222</sup> BEA, *supra* note 159, at 1.

<sup>223</sup> *Lawmakers Call for Overhauling FEMA*, JOURNAL STAR (Lincoln, NE), Feb. 19, 2006, available at <http://www.journalstar.com/articles/2006/02/19/nation/doc43f8fad40b7e2453654508.txt> (quoting Sen. Joseph Lieberman of Connecticut); see also UNITED STATES GENERAL ACCOUNTABILITY OFFICE, TESTIMONY BEFORE THE SENATE COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, EXPEDITED ASSISTANCE FOR VICTIMS OF HURRICANES KATRINA AND RITA, FEMA’S CONTROL WEAKNESSES EXPOSED THE GOVERNMENT TO SIGNIFICANT FRAUD AND ABUSE—STATEMENT OF GREGORY KUTZ,

Despite the best laid plans and preparation by civilian management and FEMA, when catastrophic natural disasters strike, it is the military that retains (and perhaps never really lost) an active primary role. Hurricane Katrina is a recent example. When most federal civilian agencies were criticized for a lack of response to Hurricane Katrina, the DOD and the Coast Guard were both credited for “lean[ing] forward in proactive efforts anticipating a major disaster.”<sup>224</sup> As the military and the nation settle into the twenty-first century, the military’s return to a primary role of federal domestic disaster relief may become a reality.

Once, in the nation’s history, domestic disaster assistance received very little support from the federal government. However, the nature and role of the federal government’s responsibility in natural domestic disaster assistance has changed. Now, domestic disaster assistance is a billion dollar industry. During the 1990s, FEMA reported expenses totaled \$25.4 billion for declared disaster and emergencies.<sup>225</sup> In 2003 alone, there were fifty-six declared disasters for which FEMA reports it expended a total of \$1.978 billion dollars.<sup>226</sup> Major disaster declarations have grown from thirteen in 1953 to sixty-eight in 2004.<sup>227</sup> Whether this growth is an indication of more awareness and response to disaster relief or an indication of a more serious global natural disaster development (e.g., effects of global warming) remains uncertain. It is significant to note, however, that the top ten natural disasters ranked by relief costs have all occurred since 1989.<sup>228</sup>

In response, the military continues to offer the supplies and personnel that have always made the military an attractive resource for emergency assistance.<sup>229</sup> Military oversight and coordination of domestic disaster assistance continues to grow and now includes several levels of military command and control. Accordingly, during a recent congressional hearing, military leaders reported that the DOD response to Hurricane Katrina “was the largest, fastest deployment of military forces for a civil-support mission in U.S. history.”<sup>230</sup>

For disaster relief missions, the Army field manual for domestic disaster relief missions<sup>231</sup> lists twenty different forms of support that the Army may provide.<sup>232</sup> Military personnel assistance is provided in a wide range of military skills, to include weather observers, communication specialists, medics, engineers, pilots, rescuers, depot managers, cooks, and drivers.<sup>233</sup> In addition to these military occupational specialties, the military has the logistics structure necessary to respond quickly to domestic disasters because of its foremost role as a modern fighting force. The military “has the premier capability for ground and helicopter transport, engineering and construction, water purification and distribution, medical care in austere environments and large, demanding logistics operations.”<sup>234</sup> In making a case for military use in domestic disaster relief, the Institute for National and Strategic Studies stated that “it does not make sense to forego the tremendous capability of the armed forces. In fact, the talent and resources of the DOD and the armed forces are already being used extensively in non-combat roles that are perceived as in our national interest.”<sup>235</sup>

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MANAGING DIRECTOR FORENSIC AUDITS AND SPECIAL INVESTIGATIONS (Feb. 13, 2005) (discussing significant flaws in FEMA’s management of disaster funds for victims of Hurricanes Katrina and Rita) (on file with author).

<sup>224</sup> Letter from David Walker, Comptroller General of the United States, to The Honorable Thomas Davis, Chairman, Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, H.R., subject: Statement by Comptroller General David M. Walker on GAO’s Preliminary Observations Regarding Preparedness and Response to Hurricanes Katrina and Rita 4 (Feb. 1, 2006) (on file with author) [hereinafter Walker Letter].

<sup>225</sup> See FEMA, FEMA Disaster Costs, 1990 to 1999, [http://www.fema.gov/library/df\\_7.shtm](http://www.fema.gov/library/df_7.shtm) (last visited Jan. 26, 2006) (website no longer contains the cited material, copy on file with author).

<sup>226</sup> See FEMA, Disaster Expenditures, Jan. 1, 1990 to dec. 31, 2003, [http://www.fema.gov/library/df\\_6.shtm](http://www.fema.gov/library/df_6.shtm) (last visited Jan 26, 2006) (website no longer contains the cited material, copy on file with author).

<sup>227</sup> See FEMA, Total Major Disaster Declarations, [http://www.fema.gov/news/disaster\\_totals\\_annual.fema](http://www.fema.gov/news/disaster_totals_annual.fema) (last visited Jan. 26, 2006).

<sup>228</sup> See FEMA, Top Ten Natural Disasters, Ranked by FEMA Relief Costs, [http://www.fema.gov/library/df\\_8.shtm](http://www.fema.gov/library/df_8.shtm) (last visited Jan. 26, 2006) [hereinafter FEMA, Top Ten Natural Disasters] (website no longer contains the cited material, copy on file with author).

<sup>229</sup> See Anderson, *supra* note 7, at 244.

<sup>230</sup> Sergeant. Sara Wood, *DoD Leaders Rep. on Hurricane Response*, U.S.A. AM. PRESS SERV., Nov. 10, 2005, available at <http://www.jtfc.northcom.mil/pages/news20051110.html>.

<sup>231</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (20 Feb. 2003).

<sup>232</sup> See *id.* at 3-07 (listing reconnaissance, command and control systems support, planning support, manpower support, supply and equipment, transportation, food preparation, water purification, mortuary affairs, laundry and shower, temporary shelter, health support, power generation, general engineering, security, restore law and order, search and rescue, traffic control, fire fighting, and to provide liaison).

<sup>233</sup> See U.S. GAO REPORT FULL EXTENT OF SUPPORT, *supra* note 31, at 8.

<sup>234</sup> SORTOR, *supra* note 29, at 21.

<sup>235</sup> INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES, *supra* note 2, at 93.

As noted earlier in this article, the primary responsibility of the U.S. military is to provide for the common defense of the United States<sup>236</sup>—to fight wars and conduct combat missions.<sup>237</sup> The DOD is responsible for providing a standing military needed to deter war and protect the security of our country.<sup>238</sup> Is the military's primary responsibility of preparing for and fighting our nation's wars inhibited by formally accepting the return to a primary role in federal domestic disaster relief management? That is, can the military carry the load of fighting the nation's wars while also providing disaster assistance relief when necessary?

### Availability for War Fighting: Can the Military Carry the Load?

The military has already proven the ability to carry both loads. In the past three years, while conducting the Global War on Terrorism (GWOT) and spearheading Operations Enduring and Iraqi Freedom,<sup>239</sup> the military assisted in the following domestic disasters relief operations: Hurricane Ivan (2004),<sup>240</sup> Hurricane Charley (2004),<sup>241</sup> Hurricane Frances (2004),<sup>242</sup> Hurricane Jeanne (2004),<sup>243</sup> and Hurricane Katrina (2005),<sup>244</sup> all of which are listed in the top ten disasters ranked by FEMA.<sup>245</sup> At the same time that the military was conducting operations in Afghanistan and Iraq in the fall of 2005, "military support to Hurricane Katrina-affected areas reflected an unprecedented domestic response of 70,000 personnel—far greater than in any other domestic disaster, including Hurricane Andrew. This response involved about 20,000 active duty troops and about 50,000 National Guard troops."<sup>246</sup>

Further, the concern of the military's ability to conduct all current missions, including disaster relief operations, was addressed in a 16 February 2005 report to Congress.<sup>247</sup> The report concluded the military has been able to perform its assignments due to a large reliance upon reserve forces.<sup>248</sup> The report also noted the current organizational transformation from a division to brigade structure by the Army as an advantage that should assist the diversity of roles by the military.<sup>249</sup>

Finally, there is recognition that domestic disaster relief assistance by the military can enhance overall combat readiness.<sup>250</sup> The skills required to respond to domestic disasters are the "kinds of experiences [that] prepare troops for combat."<sup>251</sup> The aftermath of a natural disaster presents military commanders and servicemembers with real-life opportunities to apply the skills needed for their primary mission. In environments similar to combat or battlefields when triage decisions often mark the difference between life and death, the aftermath of a disaster calls upon careful coordination between functional specialized units. This task is extremely well-suited for the military.<sup>252</sup>

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<sup>236</sup> See U.S. CONST. art. I, § 8.

<sup>237</sup> See INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES, *supra* note 2, at 5.

<sup>238</sup> See DOD DIR. 5100.1, *supra* note 3.

<sup>239</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). On 14 September 2001 Congress passed legislation authorizing the President to use military force against those responsible for the attacks on 11 Sept. 2001 and which formed the legal basis for military force in *Operation Enduring Freedom* and *Operation Iraqi Freedom*. See *id.*

<sup>240</sup> See FEMA, Top Ten Natural Disasters, *supra* note 228.

<sup>241</sup> See *id.*

<sup>242</sup> See *id.*

<sup>243</sup> See *id.*

<sup>244</sup> See AUSA Joint Task Force Katrina, *supra* note 213.

<sup>245</sup> See FEMA, Top Ten Natural Disasters, *supra* note 228.

<sup>246</sup> Walker Letter, *supra* note 224, at 5.

<sup>247</sup> See LAWRENCE KAPP, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESSIONAL, OPERATIONS NOBLE EAGLE, ENDURING FREEDOM, AND IRAQI FREEDOM: QUESTIONS AND ANSWERS ABOUT U.S. MILITARY PERSONNEL, COMPENSATION, AND FORCE STRUCTURE 14 (2005).

<sup>248</sup> See *id.* at 15. This report, however, cautioned against problems in retention if the current deployment tempo continued at its present rate over an extended period of time. *Id.*

<sup>249</sup> See *id.* at 16 (describing the reorganization as creating units of actions).

<sup>250</sup> See INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NON-COMBAT ROLES, *supra* note 2, at 92.

<sup>251</sup> *Id.*

<sup>252</sup> See Anderson, *supra* note 7, at 244.

## Conclusion

Overall, the demands of the military for non-traditional roles have grown and are expected to continue to grow.<sup>253</sup> The military has a rich history of assisting in domestic disasters. Assisting in domestic disasters is simply the job the military is trained to do. The training, equipment, supplies, capabilities, experience, command structure, mobility and resources are all fine-tuned to work in the most dire of situations, namely on the battlefield. In many ways, the aftermath of a natural disaster is like a battlefield. It calls for an organization that has an infrastructure to move decisively and quickly, and for the personnel who have the skills, training and leadership to accomplish the task.

The preservation of human life and property are primary purposes of disaster relief. In many instances, the success of disaster relief assistance turns on how fast assistance assets and personnel can react to the disaster. The victims of natural disasters benefit from the capabilities of the military to manage and assist quickly in a disaster situation. In a major domestic disaster, it is not unreasonable to assert that the American public's expectation is that the military will save the day. The military also benefits from providing disaster assistance. The most notable benefit is the military's ability to practice and sharpen war-fighting skills by participating in and leading disaster relief efforts. In addition to building trust and confidence in the nation's military, the military also helps maintain its readiness level and the necessary skills to be successful in its primary war-fighting mission.

If history is a lesson for the future, then it is time to recognize the de facto return of the military as the primary domestic disaster assistance relief agency. Battle-proven in the role of disaster assistance with over one hundred years of active management and participation, the military has secured a solid victory on the battlefield of domestic disaster assistance relief. Even when relegated to a support role, the military has continued to keep pace with disaster assistance management.

Despite the growth of civilian management of domestic disaster assistance over the last fifty-five years, the results always seem to be the same following a catastrophic domestic disaster. First, the civilian management agency, namely FEMA, is heavily criticized. Next, the government attempts to correct deficiencies. Generally, these attempts are in the form of legislative proposals, budget increases, change of policy-making personnel, or better coordination between local, state, and federal disaster officials. Unfortunately, history suggests this repeating cycle has not and is not working. The time has come to accept and recognize that the military should be recognized as the primary agency to manage domestic disaster relief. The return of the military as the primary disaster assistance agency is a role well-suited and well-earned for the twenty-first century military.

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<sup>253</sup> See SORTOR, *supra* note 29, at 90.

## Military Pension Division: The “Evil Twins” – Concurrent Retirement and Disability Pay (CRDP) and Combat Related Special Compensation (CRSC)

Colonel (USA, Ret.) Mark E. Sullivan, & Major (USAF, Ret.) Sue Darnell<sup>1</sup>

### Introduction<sup>2</sup>

The law concerning waiver of military retired pay in exchange for Department of Veterans Affairs (VA) disability compensation allows a retiree to elect an amount of tax-free disability compensation only if he gives up the same amount of retired pay.<sup>3</sup> Taking this option is always beneficial to the military retiree, since it yields an increase in net income because of the non-taxable aspect of VA disability compensation.

This election, however, wreaks havoc when the retiree’s pension is subject to a garnishment order for part of “disposable retired pay” in favor of a former spouse due to separation or divorce. As soon as the election takes place at the Defense Financing and Accounting Service (DFAS), the former spouse usually sees her share of divisible retired pay decrease, sometimes substantially. Thus if the military retiree, John Doe, had disposable retired pay (without disability) of \$1,500 per month and his disability were evaluated as equivalent to \$1,000 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount tax-free. His monthly benefit would still total \$1,500, but only \$500 of this would be subject to taxes if he makes this choice.

In addition, only this \$500 remaining from his military pension would be subject to division with Mary Doe, his ex-wife. The Uniformed Services Former Spouses’ Protection Act exempts VA disability compensation from the definition of “disposable retired pay.”<sup>4</sup> So if the military pension division order had given Mary 40% of John’s disposable retired pay, her pre-waiver share would have been \$600 a month (40% X \$1,500), but her post-waiver amount would be only \$200 (40% X \$500). When rent or mortgage payments depend on the continued receipt of a stable, predictable amount of divided military retired pay, such a VA waiver by the military retiree can be catastrophic.

### Congressional Developments Since 2003—Back to the Beginning

In 2003, Congress passed legislation taking effect 1 January 2004 to allow concurrent receipt of both forms of payments—retired pay and disability benefits—for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (CRDP).<sup>5</sup>

Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (CRSC), these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a combat-related disability rated at least 10% (such as hazardous duty or training for combat).<sup>6</sup> Combat Related Special Compensation regulations are contained in the Defense Financial Management Regulations (DODFMR).<sup>7</sup>

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<sup>2</sup> This article is part of a series of articles entitled *Silent Partner*. *Silent Partner* is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association’s Family Law Section.

<sup>3</sup> 38 U.S.C. § 3105 (LEXIS 2006).

<sup>4</sup> 10 U.S.C. § 1408(c)(4)(C).

<sup>5</sup> 10 U.S.C.S. § 1414 (LEXIS 2006).

<sup>6</sup> *Id.* § 1413a.

<sup>7</sup> 6 DEP’T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION secs. 6301-6310 (31 May 2006).

Both of these provisions affect the division of military retired pay. Both are complex and misunderstood—if not unknown—by civilian practitioners as well as many judge advocates. This article examines how they work.

### CRDP Explained

For those who have at least twenty years of qualifying military service and a VA disability rating of at least 50%, CRDP authorizes a ten-year phased elimination of the VA offset. Put in positive terms, this means—unless the disability rating is 100%—a ten-year period in which the retiree will gain back every dollar of the waived retired pay that he exchanged for VA disability compensation. The disability does *not* have to be combat-related. Concurrent Retirement and Disability Pay is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation. Concurrent Retirement and Disability Pay also is divisible with a former spouse under a military pension division order.

The eligible retiree will see his retirement pay increase each year until the phase-in period is complete in 2014, when the retiree will be receiving an additional amount that is equal to the amount of retired pay waived. The period of phase-in began in 2004, with the following initial amounts provided in 2004 as additional military retired pay in each month's retiree payment:

Disability % Rating	2004 Amount
100%	\$750
90%	\$500
80%	\$350
70%	\$250
60%	\$125
50%	\$100

Table 1<sup>8</sup>

Note that the phase-in is “front-loaded,” not just 10% a year over ten years. In 2005, the individual receives the amount shown above plus 10% of the difference between his remaining retired pay waiver and the amount shown above for 2004. In 2006 he gets the amount he received in 2005, plus 20% of the difference between his remaining retired pay waiver and the amount shown above for 2004. Payments increase the same way until full restoration in 2014.<sup>9</sup> Those retiring after 2004 but before 2014 receive a larger initial monthly increment of CRDP than shown in the table above due to the schedule of additional amounts paid between 2004 and retirement.

### How Much CRDP? An Example

To illustrate, use the hypothetical facts in our scenario above with John Doe entitled to \$1,500 per month retired pay. Ignore any annual cost-of-living adjustments (COLAs). John has waived \$1,000 of his retired pay due to VA disability compensation. If his disability rating were 60%, here is how his payments would grow:

- In 2003, he was receiving \$500 retired pay and \$1,000 VA disability compensation.
- In 2004, he receives total retired pay of \$625 (\$500 + \$125, the 2004 amount for a 60% disability rating shown above). There is still \$875 remaining in retired pay waiver (\$1,000 - \$125). He still receives \$1,000 in VA compensation.
- In 2005, he receives \$700 in total retired pay. This is made up of \$625, the prior year amount, plus 10% of the difference between \$875, his remaining retired pay waiver amount, and \$125, the 2004 amount shown on the table above. (Let's check:  $\$875 - 125 = \$750$ .  $\$750 \times 10\% = \$75$ .  $\$625 + \$75 = \$700$ ). In addition, he is still receiving his VA payment of \$1,000 a month.
- This process continues onward until full restoration of the waived \$1,000 at 2014.

<sup>8</sup> 10 U.S.C. § 1414(c).

<sup>9</sup> *Id.*

## Verifying Receipt of CRDP

Concurrent Retirement and Disability Pay increases the pension of the retiree effective January of each year, with the payment arriving on or about 1 February. How will you know if John is receiving CRDP? Read the comment at the "MESSAGE SECTION" on page 2 of his retiree account statement (RAS), Form DFAS-CL 7220/148 (see Attachment 1). The message will appear as follows:

<b>MESSAGE SECTION</b>
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$____.

If the individual will not voluntarily produce his RAS, which is usually sent to him by e-mail from DFAS every time there is a change of pay and is also posted on a secure DFAS website (see below), counsel may resort to formal discovery procedures if the matter is in litigation. Defense Finance and Accounting Service will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge.

### Don't Take "NO" for an Answer

Sometimes the attorney for the retiree will disavow any knowledge of the existence of an RAS, or the retiree will claim that it was lost, misplaced, or "floated away in that big flood last month." You should know that all military retirees are eligible for a free "myPay" account on DFAS website. This secure website is located at <https://mypay.dfas.mil>. Once the retiree has accessed the website, he may obtain his current RAS after he enters his "LogIn ID" and password by going to the screen marked "Your Military Retiree Pay Account" and selecting "Retiree Account Statement (RAS)." Retired Phoenix attorney Mike McCarthy, a retired Air Force Reserve brigadier general, says that he has had some success obtaining a court order requiring both attorneys and the retiree to use a computer to access the current or past RAS from the *myPay* website.

Retirees receive the following e-mail message at the end of each December (a fictitious ending with X's is shown below):

*Your electronic W2 for 2005 is available on myPay at <https://mypay.dfas.mil/mypay.aspx?xxxxxXXX~XXXXX>*

*The Defense Finance and Accounting Service (DFAS) implemented the myPay web-based system in March 2000. myPay delivers pay information and lets you process pay-related transactions timely, safely and securely. The Web-based system reduces the risks of identity theft associated with postal delivery by allowing members to access electronic W-2, LES and other financial information. myPay matches industry standards for the highest level of encryption and security to protect myPay users.*

*If you do not have a PIN for accessing myPay, you can obtain one via email by clicking on the New PIN button on the myPay website at the web address shown above. A temporary PIN will be emailed to your official email address. If you have any questions concerning myPay, please call our contact center toll free at 1-800-390-2348. If the information posted to your W-2 is incorrect, please contact your servicing pay office or your customer service representative for assistance.*

Another method of finding out the retiree's deductions is to ask DFAS through a written request. A little-known notice in the *Federal Register* makes this possible. Effective 13 July 2000, DFAS announced that it would disclose this information to a former spouse:

*In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:*

*To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.*<sup>10</sup>

While the information may be difficult to obtain if the person at DFAS responding to the written request is a newly hired employee or is not familiar with this rule, diligence and courtesy will usually produce results. When drafting the request, on behalf of the former spouse, be sure to include full identifying information on the retiree (name and Social Security number), the Social Security Number of the former spouse and, if appropriate, an authorization for DFAS to provide the information to the former spouse's attorney. Consider, for example, the following request:

*To: Defense Finance and Accounting Service, Cleveland Office*

*Pursuant to the Privacy Act Routine Use set out at 65 Fed Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 USC 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]*

\_\_\_\_\_/s/\_\_\_\_\_  
*Mary P. Doe*  
SSN 234-56-7899

### **A Few More Rules**

Concurrent Retirement and Disability Pay includes Chapter 61 medical retirees and Guard or Reserve members with twenty or more "good years" toward retirement. Concurrent Retirement and Disability Pay cannot exceed gross retired pay. The National Defense Authorization Act of 2005 eliminated the nine-year phase-in for full concurrent receipt payments to eligible retirees rated as totally disabled (military disability pay and VA disability pay), as of 1 January 2005.

Mary Doe, the former spouse, should have been receiving payments of pension division from DFAS since her ex-husband's disability rating was less than 100% and he was still receiving *some* retired pay. In this situation, no new application is needed since her pension division order is "in the system" at DFAS. She begins receiving increased pension payments from DFAS due to the increased pension that John Doe is now receiving.

If, however, a former spouse has not been receiving payments because the retiree has a disability rating of 100%, then her attorney should submit the paperwork anew, including the divorce decree, military pension division order, and Department of Defense Form 2293.<sup>11</sup> Fax the request to the DFAS at (216) 522-6960 or mail it to DFAS-GAG/CL, PO Box 998002, Cleveland, OH 44199-8002.

Garnishment for pension division through DFAS will be for current retired pay division. There is no authority for the DFAS to garnish for pension division arrears.

Concurrent Retirement and Disability Pay will go a long way toward ameliorating the unfairness of unilateral changes in military pension division orders by retirees who, after the fact, obtain VA disability compensation and reduce the share of the former spouse. Concurrent Retirement and Disability Pay will not, however, eliminate the problem entirely. Since it exempts those individuals whose disability rating is less than 50%, and it puts off full restoration until 2014 in most cases, the problem will remain to some extent.<sup>12</sup>

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<sup>10</sup> See 65 Fed. Reg. 43,298 (July 13, 2000).

<sup>11</sup> U.S. Dep't of Defense, DD Form 2293, Application for Former Spouse Payments from Retired Pay (Jan. 2002).

<sup>12</sup> Another article in the *Silent Partner* series, *Military Pension Division: The Spouse's Strategy*, addresses tools and options for reducing or eliminating this unfairness.

## CRSC Explained

Combat Related Special Compensation is a benefit provided by Congress for servicemembers who have a combat-related disability of at least 10% under certain conditions. The Defense Department estimates that about 200,000 military retirees will be eligible for CRSC.

The disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it—

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
  - (A) as a direct result of armed conflict;
  - (B) while engaged in hazardous service;
  - (C) in the performance of duty under conditions simulating war; or
  - (D) through an instrumentality of war.<sup>13</sup>

These qualifications include, by way of example, injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and “confidence courses”), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military planes). These conditions are defined at section 6302 of CRSC regulations in the Department of Defense Financial Management Regulation.<sup>14</sup> Since “combat-related” is service-specific, the application is sent to the retiree’s branch of service, not to the Department of Defense.

Combat Related Special Compensation is not longevity retired pay;<sup>15</sup> it is an additional form of compensation for certain members of the armed forces. Thus, CRSC payments are not divisible as property.

Combat Related Special Compensation rates come from the VA tables and increase with the number of a retiree’s dependents (spouse, spouse and child, etc.). To use a May 2006 example, the rate for a 10% disability, no dependents, is \$112 a month. The no-dependents rate for a 20% disability rating is \$218 per month. The amount goes up to a total of \$2,844 for maximum dependents and a 100% disability rating.

## CRSC Twists and Turns

Once a CRSC application is approved, DFAS does the retiree’s calculating and decision-making. Since one cannot receive both CRDP and CRSC, DFAS automatically elects whichever is most financially advantageous, that is, yields the highest net cash flow. Defense Finance and Accounting Service doesn’t take into account that the retiree may have a property division garnishment in effect. If CRDP is more favorable in gross dollars, then that is what DFAS will choose. This means that, for example, if CRSC in a particular case were \$500 and CRDP for the same year were \$501, then DFAS would choose CRDP for the retiree, even though CRDP is taxable and subject to a garnishment division with the ex-spouse.

The potential hardships for former spouses due to CRSC elections are remarkable. Phoenix practitioner Mike McCarthy writes:

*First example: Assume an Air Force tech sergeant with 20 years of creditable service; 100% VA disability rating, all of it combat-related, former spouse to receive 43% of the disposable retired pay as property division. He receives \$2,979 VA disability compensation and waives ALL of his \$1,299 gross military retired pay. In return, he receives \$1,299 in CRSC payments. Thus he gets \$4,278 per month tax-free. His ex-wife gets her share, 43%, of the pension, but the pension at this point is ZERO. She gets nothing; she has lost \$558 per month.*

<sup>13</sup> 10 U.S.C.S. §1413a (e) (LEXIS 2006).

<sup>14</sup> 7B DEP’T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION ch. 63, available at [http://www.dod.mil/comptroller/fmr/07b/07b\\_ic\\_r01\\_06.pdf](http://www.dod.mil/comptroller/fmr/07b/07b_ic_r01_06.pdf) (incorporating a new chapter that introduces the CRSC). Additional information on CRSC is available at [www.hrc.army.mil/site/crsc/](http://www.hrc.army.mil/site/crsc/).

<sup>15</sup> *Id.* (stating “[p]ayments under this section are not retired pay”).

*Another scenario? Sure. Assume same facts except that the CRSC disability rating is 40%. The retiree gets \$2,979 VA disability compensation but he must waive all of his \$1,299 pension, and he gets \$1,191 CRSC. Thus he gets \$4,170 per month tax-free; while the ex-wife still gets NIL from disposable retired pay – there is none.*

*As a further illustration of this, assume a full Colonel with 100% VA and 100% CRSC disability rating, with 43% award to former spouse. His military pension is \$ 6,630 before VA waiver of \$2,979, so his real "disposable" pension is \$3,651. He also gets the maximum amount of CRSC, \$2,979. His former wife gets 43% of only \$3,651, which equals \$1,570, rather than 43% of the gross \$6,630, or \$2,850. She loses \$1,280. He gets the balance of the pension (\$2,081), plus the two disability benefits (\$5,958) for a total of \$8,039.<sup>16</sup>*

There will be “retroactivity problems” for the former spouse. A CRSC payment is retroactive to the date of filing of the VA claim or of the enabling legislation (the 2003 law for limited conditions or the 2004 expansion, for the conditions listed above), whichever is later. If the retiree has been getting CRDP and elects CRSC, there will be a one-time retroactive payment to him, and the money received under CRDP for that same period covered by CRSC retroactive payment will be taken back

For the retiree, CRDP pay-back will be subtracted from the retroactive CRSC payment that he receives. But what about the former spouse? If the retiree’s former spouse has been receiving a share of the pension as property division, the share paid from CRDP must also be collected back from her. If CRSC election results in *no further pension garnishment payments* to the former spouse, then DFAS will initiate a debt collection action against her, since there would no longer be any continuing pension garnishment payments from which to deduct CRDP payments made to her. Conceivably the former spouse could petition for “remission of indebtedness,” which is a waiver of the debt claim by the federal government. If the former spouse is still receiving pension garnishment payments, then the collection action will result in decreased payments to her.

### **CRSC Final Points and Charts**

Here are some final points about CRSC:

- There is no phase-in for CRSC; eligible retirees will receive full CRSC payments plus whatever VA disability compensation and unwaived retired pay they had been receiving.
- Combat-Related Special Compensation payments do not end in 2014, as CRDP payments do.
- The CRSC payment cannot exceed the amount of the military retired pay waived for VA disability compensation.
- Unlike ordinary retired pay (including CRDP), CRSC is non-taxable—it is disability compensation, not retired pay.
- Combat-Related Special Compensation is available for support determinations and for garnishment for alimony and child support. This is also true of CRDP.
- The statute includes Guard and Reserve personnel who have at least twenty qualifying years for retirement purposes.

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<sup>16</sup> E-mail from Mike McCarthy, to Mark E. Sullivan (8 Feb. 2006) (on file with author).

Below is a table outlining CRSC compensation rates (without dependents).

Combat related VA Disability Rating	Monthly CRSC
100%	\$2,393
90%	\$1,436
80%	\$1,277
70%	\$1,099
60%	\$873
50%	\$690
40%	\$485
30%	\$337
20%	\$218
10%	\$112

Table 2<sup>17</sup>

The following table provides a simplified way of understanding the comparisons between CRDP and CRSC:

CRDP and CRSC – A Comparison	CRDP	CRSC
Type of disability required	Service-connected	Combat-related
Considered longevity retired pay	Yes	No
Divisible as property	Yes	No
Minimum disability rating required	50%	10%
Taxable	Yes	No
Phase-in	Yes*	No
Retroactive payment	No	Yes†
Increases with number of dependents	No	Yes‡
Available for support determinations, garnishments	Yes	Yes
Survivor benefit available	No	No

Table 3

\* Except for 100% disability cases

† Payment is retroactive to the date of filing of the VA claim.

‡ If CRSC rating is 40% or more.

### CRDP and CRSC—the Election

Eligible retirees can elect either CRDP or CRSC.<sup>18</sup> The election may be made once a year during the January open season.<sup>19</sup> This means that John Doe can alternate between CRDP and the CRSC yearly. Defense Finance Accounting Service guidance in this area provides that:

<sup>17</sup> Military.com, Combat Related Special Compensation, <http://www.military.com/benefits/military-pay/retired-pay/combat-related-special-compensation> (providing a sampling of the value of the CRSC benefit) (last visited 31 Jan. 2007).

<sup>18</sup> 10 U.S.C.S. § 1414 (d)(1) (LEXIS 2006).

<sup>19</sup> *Id.* § 1414(d)(2).

*If you are eligible for both CRDP and CRSC you may participate in CRDP/CRSC Open Season. This annual Open Season lets you choose which payment you would prefer to receive (Federal law states that you can receive CRDP or CRSC; not both).*

*Beginning in late December, eligible retirees will be mailed a CRDP/CRSC Open Season Election Form. You only need to return the form if you want to change from CRDP to CRSC, or vice versa. If you prefer to keep things the way they are, do nothing. The payments you now receive will continue uninterrupted.*

*To help you make a more informed decision, the form will include a comparison of the amounts to which you would be entitled under CRDP and CRSC as well as information about the collection actions and taxes to which each type of payment is subject.*

*If you want to change from CRDP to CRSC or vice versa, your form must be received here at DFAS by January 31st. If your form is received after this date it will not be processed and the payments you now receive will continue uninterrupted.*

*The change in payment will be effective with your payment on the first business day of February. Due to our thirty-day processing timeframe, you may receive your first payment on the first business day of March and a retroactive adjustment for the payment which would have been paid on the first business day of February.*

*Your election will remain in effect unless you change from CRDP to CRSC or vice versa in a subsequent annual open season.<sup>20</sup>*

Conceivably—if John alternated annually between the two forms of payment—Mary could get her share of CRDP in 2004, then be told by DFAS that no CRDP funds were available in 2005 when John switched over to CRSC. Then in 2006, John could change back to CRDP.

Defense Finance and Accounting Service advises that it is treating the initial election of CRSC as a termination of former spouse payments if there is no other disposable pay available for the former spouse.<sup>21</sup> This election requires a new DD Form 2293 (but not the entire set of original documents submitted with the original application). Thus if John later switched back to CRDP, Mary would have to reapply to re-start the payments. Defense Finance and Accounting Service does not say how Mary would know of this switch, since it will not independently inform her of the change and John certainly will not tell her! If, however, John still had disposable retired pay available after his CRSC election, Mary would continue to receive her share (at a reduced rate). If he later switched back to CRDP, the payment to Mary would increase automatically.

### **CRDP and CRSC—A Basic Scenario**

Jane Green retires in 2000 from the Army. She is divorced and her property division order requires her to pay Jack, her ex-husband, 50% of her disposable retired pay (DRP). At this point, assuming that she has \$2,000 a month in DRP, the parties would each receive \$1,000 a month.

After she retires, Jane goes to the nearest VA hospital for a physical evaluation. Several months after the physical (it could be up to a year, depending on backlogs), she receives a *findings and ratings letter* from VA. In this correspondence, the VA states that she is rated X% disabled (the disability rating represents a figure greater than 50% in this example), due to hearing loss, back problems, and carpal tunnel syndrome. All of these disabilities are determined to be *service-connected*, but the back problem stems from a parachute jumping accident, and the hearing loss came from a career of being in airplanes for airborne operations. The letter informs Jane that the X% disability rating qualifies her for non-taxable VA disability compensation of \$800 a month. To elect to receive this benefit, she must waive the same amount of her retired pay.

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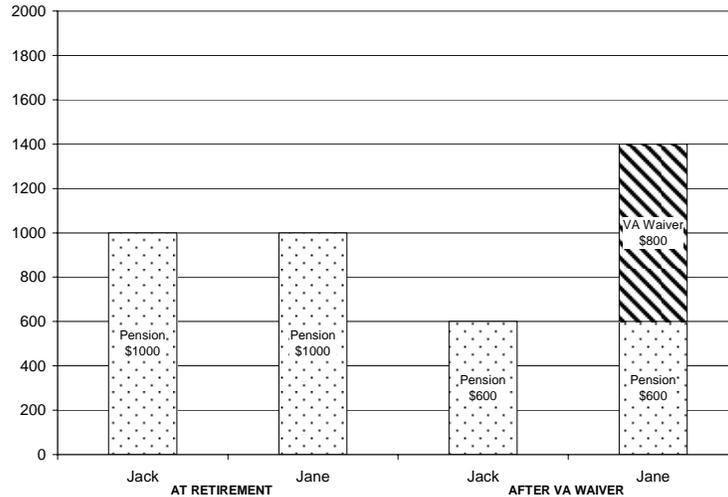
<sup>20</sup> CRDP and CRSC, Defense Finance and Accounting Service, [www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay/crdpandcrsc.html](http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay/crdpandcrsc.html) (last visited Feb. 8, 2007).

<sup>21</sup> E-mail from Neal W. Nelson, Deputy Assistant General Counsel, Garnishment Operations, Defense Finance and Accounting Service, to Mark E. Sullivan (21 June 2006) (on file with author).

## Jane Gets VA Disability Compensation

Jane elects VA disability compensation and agrees to waive \$800 of longevity retired pay. This means that she would have \$800 subtracted from her gross retired pay, leading to a reduction in the amount available for division as a percentage of DRP with her ex-husband. In other words, Jack gets less DRP share due to Jane's election of VA payments. His half share is reduced from \$1,000 a month to \$600 a month, since he now is receiving half of \$1,200 a month (\$2,000 - \$800). Jane receives her share, \$600 a month, plus her untouchable, untaxable VA disability payment of \$800. Note that these calculations and the ones below ignore the annual cost of living allowances (usually between 2% and 3%), which occur with military retired pay, and also the usual deduction for Survivor Benefit Plan premiums.

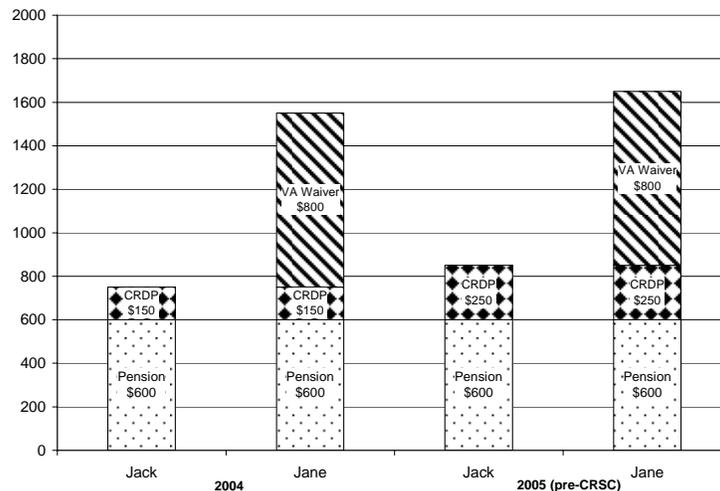
Here is what the payments to the parties look like *before* and *after* the VA disability decision:



## Jane Receives CRDP

This situation continues through 2003. In 2004, Jane begins to receive CRDP; this is automatic, and there is no need to apply for it. Assume that the amount for 2004 for X% disability rating is \$300 a month. Jane's 2004 RAS would show that she is receiving DRP of \$750 (original \$600 plus \$150 as half of CRDP) plus her \$800 VA payment, while Jack gets \$750 (\$600 + \$150 CRDP).

In 2005 she begins receiving \$500 (hypothetically) in CRDP, once again raising the DRP available for division with Jack. Now Jane is receiving \$850 in DRP (\$600 + \$250, which is half of CRDP of \$500), plus her \$800 VA payment. Jack is receiving \$850 (\$600 + \$250). Here is what the payments for the parties look like in this period of time:



### Jane Applies for CRSC

Jane decides to apply for the CRSC in 2005. First, Jane retrieves her 2004 VA findings and ratings letter, and she looks for types of disabilities that will qualify for the CRSC. These would be disabilities incurred as direct result of armed conflict, hazardous duty, an instrumentality of war, or conditions simulating war.

Since applications are service-specific, Jane sends in her application form, DD Form 2860, to the Army. The entire process is retiree-driven. The retired servicemember must apply to be considered for CRSC; it is not automatic, like CRDP. A board will decide Jane's case, and she sends in copies of her physicals, medical records (active duty military, VA and private health care provider), personal statements, and, if available, statements of witnesses or experts.

Several months later Jane receives a letter from the Army. The letter outlines the findings regarding her claims as to combat-related injuries or disabilities (e.g., "Of your X% service-connected disability rating, Y% is combat-related and qualifies for CRSC.").

### DFAS Makes the Choice for Jane

Soon after the letter confirming her CRSC eligibility, Jane's CRSC payments begin. Combat Related Special Compensation payments come from a specific table that states the amounts, and the amounts vary according to the number of the beneficiary's dependents. As mentioned above, DFAS makes the choice for Jane—CRSC or CRDP—based on whichever one yields the larger total gross payment. If CRSC amount is \$400 per month (as against a present total CRDP payment in this example of \$500 monthly), DFAS will leave CRDP payment unchanged, despite the fact that the \$500 is taxable and divisible with her ex-husband. Jane can change this election annually in the January open season if she wishes. If DFAS chooses CRDP, then there will be no change on Jane's RAS. The comment at the MESSAGE section on page 2 remains the same as before.

If, however, CRSC payments were \$600 per month, which is better financially for Jane (in the eyes of DFAS), Defense Finance and Accounting Service will select that option, issuing her a CRSC monthly statement. An example of a CRSC statement, not tied to this scenario, is as follows:

CRSC Pay Statement		
STATEMENT EFFECTIVE DATE <b>APR 21, 2006</b>	PAYMENT DATE <b>MAY 01, 2006</b>	SSN <b>123-45-6789</b>
RETIREE'S NAME AND ADDRESS		HOW TO CONTACT US
PLEASE REMEMBER TO NOTIFY DFAS OF YOUR ADDRESS CHANGES  <b>MAJOR JOHN Q. DOE, USAF (RET.) 123 GREEN STREET APEX, NC 27511-1234</b>		DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIRED PAY PO BOX 7130 LONDON, KY 40742-7130  COMMERCIAL (216) 522-6398 TOLL-FREE 1-800-472-7098 TOLL-FREE FAX 1-800-469-6559  myPay <a href="https://myPay.dfas.mil">https://myPay.dfas.mil</a> 1-877-363-3677
PAYMENT ADDRESS <b>DIRECT DEPOSIT</b>		
PAYMENT INFORMATION		ENTITLEMENT INFORMATION
CRSC Payment <b>377.00</b>		Retired Pay Before Deductions <b>2,746.00</b>
CRSC Debt Deduction <b>0</b>		Retired Pay Offset by DVA Compensation <b>757.00</b>
CRSC Garnishment Deduction <b>0</b>		CRSC Debt Balance <b>0</b>
		Branch of Military Service

CRSC Net Pay <b>377.00</b>	<b>AIR FORCE</b> Garnishment Being Withheld <b>NO</b>
THE DVA OR YOUR BRANCH OF SERVICE PROVIDED THE FOLLOWING	
CRSC SPECIAL MONTHLY COMPENSATION CODE	<b>00</b>
UNEMPLOYABLE	<b>NO</b>
DVA DISABILITY %	<b>50</b>
COMBAT RELATED DISABILITY %	<b>30</b>
PURPLE HEART %	<b>00</b>
CRSC START DATE	<b>JAN 01, 2004</b>
SPECIAL MONTHLY COMPENSATION START DATE	
REMARKS	
<b>This is your monthly CRSC statement. Please refer to myPay frequently asked questions for additional information about CRSC and this statement.</b>	

The new CRSC statement will be issued on-line and will not be sent by mail. A July 2005 notice from DFAS stated the following about CRSC monthly statements:

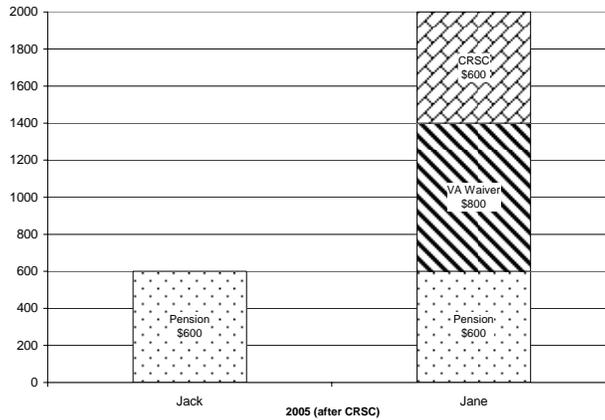
- *DFAS is now implementing the electronic delivery of CRSC account statements; the statements will be available on a monthly basis beginning July 1, 2005 via the online pay account site, [myPay](#).*
- *While retirees may continue to contact the Retired and Annuitant Contact Center by phone at 1-800-321-1080, the statement will likely answer most questions regarding the computation of CRSC payment.*
- *The CRSC monthly statement will only contain information concerning continuing monthly CRSC payments. Details about retroactive payments will be available through [myPay](#) by the end of the 2005. The CRSC monthly statement will only be available through the [myPay](#) Web site at <https://mypay.dfas.mil>.*
- *The Web-based system delivers personal pay information and provides the ability to process pay-related transactions timely, safely and securely for all its members. The online system eliminates the risks associated with hard copy documents by allowing members to access their electronic 1099R, Retiree Account Statement (RAS) and other financial information. myPay security matches existing private industry standards with the highest level of encryption and security designed to prevent member information from being accessed by others on the Internet.*
- *DFAS is confident that providing CRSC statements on myPay will be a useful addition to the information provided to retirees. We remain committed to offering the best service for our retired and annuitant customers. If you don't have a myPay account, call us at 1-800-390-2348 to get a Personal Identification Number (PIN) to access your myPay account on the web.<sup>22</sup>*

Defense Finance and Accounting Service will also issue Jane a new RAS. The new RAS will contain new retired pay figures, and the amount for retired pay will be reduced from the previous month's amount because CRDP will have disappeared. The comment in the MESSAGE SECTION on page 2 also will be gone:

<b>MESSAGE SECTION</b>

<sup>22</sup> *Retirees to Receive Monthly CRSC Statements*, Defense Finance and Accounting Service, [www.dod.mil/dfas/news/releases/2005/05-21.htm](http://www.dod.mil/dfas/news/releases/2005/05-21.htm) (last visited Feb. 14, 2007).

Assume that CRSC payment to Jane is \$600 a month. In this case, the payments to both parties would appear as follows after CRSC election:



### The Impact: “A CRSC Attack”

To understand some of the consequences of CRSC election, remember that Jane cannot receive CRDP if she is receiving CRSC. This does not mean a dollar-for-dollar waiver of CRDP for CRSC—Jane cannot receive *any* CRDP if she receives even \$1 of CRSC.

The payments for Jane go up, while those for her ex-husband—after going up by \$250 to \$850 monthly—will go back down. Jane’s ex-husband’s payment will drop to the original 2004 amount (\$600 a month, his half of \$1200 DRP), while Jane will receive \$600 a month (DRP share), \$800 a month (VA), and her CRSC payment. If we assume that her CRSC payment is \$600 a month, Jane’s total is \$2000 a month (\$600 DRP + \$800 VA + \$600 CRSC). Despite the original court order specifying equal shares for both parties, Jack’s total remains \$600!

Jack will see even more bad news due to CRSC retroactivity problem described above. Since Jane has received CRDP beginning in early 2004, which has been shared through DFAS with Jack, DFAS now must take back CRDP payments, and this means collection from Jack as well. Defense Finance and Accounting Service advises that it is collecting these CRDP payments back over a thirty-six-month period.<sup>23</sup>

The consequence for Jane is that she will have to check with her certified public accountant or tax preparer about an adjustment on her current (in this scenario, 2005) tax returns, since she will want to report an adjustment for the “pay-back” of 2004’s CRDP. The current year’s CRDP income and pay-back will be adjusted in the Internal Revenue Service Form 1099 that she receives; this portion of her reported income for the current year will just be zeroed out, since she received it but then paid it back in the current year. Her only reportable income for 2005 (our current year in this example) would be her \$600 monthly pension share.

### Choice Points for Jane

At the start in some cases, CRSC will be better for the retiree because it will provide him more money. But as we get closer to 2014, CRDP will probably be a better option for many retirees because of the gradual increase in the amount of taxable retired pay, even though taxes will cause a reduction as will any division with a former spouse. In many of these cases, eventually the net CRDP will probably exceed the non-taxable CRSC. The “switch factors” over time are the ten-year phase-in, changes in the taxable income of the retiree, garnishment of military retired pay as pension division with a former spouse, and potential increase or decrease in disability rating.

<sup>23</sup> E-mail from Dennis Disbrow, Contractor, Retired Pay Division, Defense Finance and Accounting Service, to Mark E. Sullivan (20 Feb. 2007) (on file with author)

In Jane's case, however, if CRSC payment were at least \$400 a month, there would be no reason to switch back to CRDP (assuming all the above hypothetical numbers are frozen), since the maximum she would receive back in CRDP is her share of the waived amount (half of \$800, or \$400), which would also be taxable. Combat and Related Special Compensation at \$400 a month is non-taxable. So long as CRSC payment is \$400 a month or more, the choice for her is obvious.

### Why "The Evil Twins"?

As we have seen, the new CRSC benefit can have a significant and detrimental impact on CRDP payments. The receipt of even \$1 of CRSC wipes out any CRDP payments, without notice to the former spouse. Thus Jack, after seeing the gradual increase of his payments because of CRDP, may suddenly find these gains wiped out without explanation by CRSC election. While the retiree knows what's happening to *the former spouse's share* of the retired pay, the former spouse has no idea of what's going on with *the retiree's share*. Furthermore, Jane can elect to alternate between CRSC and CRDP once a year, a whipsaw tactic that will totally confuse and exhaust Jack and his lawyer.

Because DFAS treats the initial election of CRSC as ending former spouse payments (if there is no other disposable pay available for the former spouse), Jack would have to reapply to restart his payments if Jane switched back to CRDP when it became more financially advantageous for her to receive CRDP. How would Jack, however, know of her switch? Jane is unlikely to tell him, and DFAS will not independently inform him of the new payment status. Conceivably—if Jane alternated annually between the two forms of payment—Jack could get her share of CRDP in 2004, then be told by DFAS that no CRDP funds were available in 2005 when Jane switched over to CRSC. Then in 2006, she could change back to CRDP without his knowledge of the switch.

### Practical Pointers for the Non-Military Spouse's Attorney

The lawyer representing the servicemember's spouse cannot predict much of anything before the servicemember's retirement. You could ask whether the servicemember is an active-duty trooper or a member of the Guard or Reserve. Since most of the creditable service of National Guard or Reserve personnel is made up of weekend drill and two weeks of annual training, or "summer camp," you could predict that these Reserve Component servicemembers are less likely to suffer from disabling conditions arising from combat, hazardous duty or other qualifying causes. But remember that even Guard and Reserve servicemembers could be injured operating a plane, helicopter, or weapons system while on a regularly scheduled field exercise or during a six-month mobilization in the Middle East, which would likely qualify them for CRSC.

If you are representing the spouse of an active-duty servicemember, you can make some educated guesses as to whether there might be a combat-related disability or injury by assessing whether the servicemember might be a "Front-Line Felicia" or a "Backfill Bill." Is the servicemember a paratrooper or a Ranger, or a garrison trooper who sits at a desk all day? Consider the job assignment or military occupational specialty as well as the unit to which the servicemember belongs. If the servicemember is a supply sergeant, does that mean he is unlikely to suffer combat-related injury from his military service? Not necessarily; suppose she is, during training missions, also a jumpmaster in charge of parachute drops from the aircraft. Just because Bill is a Navy nurse doesn't mean that he is in a relatively safe position. What if Bill is assigned to Navy Seal Team 6, jumping out of helicopters and swimming to the objective? Be sure to ask your client many questions: Does the military spouse demonstrate any injuries or disabilities? Has he been in the hospital for anything related to military service? What is the state of his health?

If you are trying to negotiate a settlement, draft your settlement document with an indemnification clause. Be sure that you include language that states that the military spouse will repay your client any moneys that are removed from Disposable Retired Pay due to any action of the retiree. Such an indemnification clause might read as follows:

The military retired pay of respondent shall be apportioned between the parties, with the petitioner receiving 39.375% of same, without regard to any reductions or setoffs due to disability compensation or any other reason except the premium for the Survivor Benefit Plan. If the respondent shall do anything—actively or passively—to reduce the share of amount of petitioner, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.

On the other hand, the military servicemember might be wary of "indemnification language" or division of the gross retired pay, in which case a weaker set of words, such as the following, might be useful or necessary, if such words will—under state law—provide sufficient protection for the nonmilitary party:

Petitioner shall receive 39.375% of respondent's retired pay, which is at present based solely on 22 years of creditable service without any reductions. The respondent shall do nothing to reduce petitioner's share of same or interfere with her receipt of same.

This clause attempts to identify the number of years of service as the sole measure of determining respondent's compensation in retirement. Even better would be a sentence that attempts to forecast the likely longevity retired pay of the respondent so that the judge would have a benchmark to use in case the servicemember took actions in the future that diminished the spouse's share. Ideally, the settlement agreement would also have a general breach clause, which is standard in most marital settlement agreements, stating that any breach of the agreement by a party entitles the other to payment of damages, costs, expenses and reasonable (or all) attorney's fees.

If the member is already retired, try using the following for the "strong" language clause:

Respondent is currently receiving gross military retired pay of \$2,000 a month, with deductions of \$130 for SBP premium and \$500 for VA disability waiver. This waived retired pay is currently being reduced by \$239 a month due to his receipt of CRDP (Concurrent Retirement and Disability Pay), which means an increase of disposable retired pay from \$1,370 before CRDP ( $\$2,000 - \$130 - \$500$ ) to \$1,609 presently ( $\$1,370 + \$239$ ). The parties anticipate the increase of CRDP until 2014, and these payments shall be treated the same as disposable retired pay, with petitioner receiving the same share of CRDP as of disposable retired pay. If the respondent shall do anything to reduce the share or amount of petitioner as of disposable retired pay, including CRDP, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.

If a more diluted form of language is needed, try wording the clause as follows:

Respondent is receiving at present gross military retired pay of \$2,000 a month, with deductions of \$130 for SBP premium and \$500 for VA disability waiver. He is also receiving a payment of \$239 for CRDP (Concurrent Retirement and Disability Pay). The parties anticipate the increase of CRDP until 2014, and these payments shall be treated the same as disposable retired pay, with petitioner receiving the same share of CRDP as of disposable retired pay. The respondent shall do nothing to reduce petitioner's share of same or interfere with her receipt of same.

Another possibility is to hold alimony open. Consider reserving the issue of alimony or setting alimony at \$1 per year, to allow the court to make an adjustment in this area if the anticipated share of retired pay is diminished by the retiree's actions in electing CRSC over CRDP.

If the case goes to trial, make sure you draft the decree or are allowed input. The decree should, if possible, specify that the servicemember or retiree shall indemnify the former spouse if he does anything to reduce her share, along the lines of the above "agreement language." If your state statutory and case law do not allow this, or if the judge refuses this language, try inserting the following language in the decree:

The parties shall comply with the terms of this order and shall exercise good faith in doing nothing to interfere with the terms provided by the court herein.

Breach of the good faith requirement, by election of CRSC, would allow the court to impose sanctions, assess damages, use the contempt power, or apply other remedies in favor of the wronged spouse.

### **Practical Pointers for the Military Spouse's Attorney**

There are only two things that the servicemember retiree's attorney should say. The first is: "Do the right thing." This means treating the former spouse fairly and not destroying the returning share of retired pay (CRDP) that she should be receiving, or else sharing CRSC that is paid to the retiree. Concurrent Retirement and Disability Pay is the means of reconciling accounts for servicemembers and spouses in light of the VA disability compensation and the retired pay waiver. Concurrent Retirement and Disability Pay means everyone gets treated fairly, retirees get paid disability on top of retired pay, and former spouses receive their share of a pension that formerly was diminished because of the waiver. Leaving that balance intact is one option for the retiree. Sharing CRSC, which involved compensation without taxes, is also fair if it does not reduce the share of retired pay to which the former spouse is entitled.

The second piece of advice would be, “Get out your checkbook.” This means that there will be, in all likelihood, a long, hard fight over the issue of CRDP if CRSC is elected. Since CRSC destroys CRDP, the retiree should expect to see serious litigation over this. As in the area of VA disability and the retired pay waiver, many cases will wind up in the appellate courts. And, predictably, most courts will follow the trail blazed by VA disability litigation, holding that a retiree cannot unilaterally reduce the former spouse’s share or amount of returning retired pay (CRDP) by selecting CRSC. The remedies will vary—indemnification, damages, compensatory alimony, or complete revision of the property division. The result, however, will be the same in most state courts. They will side with the former spouse and the prior judgment, decree, or agreement, especially if it contains an indemnification clause.

### **Resources for the Resourceful Attorney**

The following list provided helpful websites when assisting clients with the issues discussed above.

Interim CRSC Regulations: [http://www.dod.mil/comptroller/fmr/07b/07b\\_ic\\_r01\\_06.pdf](http://www.dod.mil/comptroller/fmr/07b/07b_ic_r01_06.pdf)

Computing VA compensation rates: <http://www.vba.va.gov/bln/21/Rates/comp01.htm>

Combined ratings Table (for several disabilities):  
[http://www.warms.vba.va.gov/regs/38CFR/BOOKC/PART4/S4\\_25.DOC](http://www.warms.vba.va.gov/regs/38CFR/BOOKC/PART4/S4_25.DOC)

Computing CRDP by rate and year:  
<http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay/crdppaymentrates.html>

CRSC payment rate:  
<http://www.military.com/Resources/ResourcesContent/0,13964,38339,00.html#3>

Military Officers Association of America website on CRSC:  
[https://www.moaa.org/controller.asp?pagename=serv\\_benefits\\_pay\\_crsc](https://www.moaa.org/controller.asp?pagename=serv_benefits_pay_crsc)

Army Human Resources Command - CRSC overview: <https://www.hrc.army.mil/site/crsc/>

DFAS website on CRDP: <http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay.html>.

There are many references to CRSC and CRDP at [www.military.com](http://www.military.com).

**Attachment 1**

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE DEC 16, 2005		NEW PAY DUE AS OF FEB 01, 2006		SSN 123 - 45 - 6789	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES  Major John Q. Doe, USAF (Ret.) 123 Green St Apex, NC 27511-1234				DFAS-CL POINTS OF CONTACT	
				DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130  COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559  myPAY <a href="https://myPay.dfas.mil">https://myPay.dfas.mil</a> 1-877-363-3677	
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,746.00	2,746.00	FITW	191.31	209.05
VA WAIVER	591.30	473.04	ALLOTMENTS/BONDS	40.00	40.00
SBP COSTS	179.28	179.28			
TAXABLE INCOME	1,975.42	2,093.68			
			NET PAY	1,744.11	1,844.63
PAYMENT ADDRESS		YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)			
DIRECT DEPOSIT		TAXABLE INCOME:		1,975.42	
		FEDERAL INCOME TAX WITHHELD:		191.31	
TAXES					
FEDERAL WITHHOLDING STATUS:		SINGLE			
TOTAL EXEMPTIONS:		.01			
FEDERAL INCOME TAX WITHHELD:		209.05			
SURVIVOR BENEFIT PLAN (SBP) COVERAGE					
SBP COVERAGE TYPE:	SPOUSE AND CHILD(REN)		ANNUITY BASE AMOUNT:	2,750.50	
SPOUSE COST:	176.78		55% ANNUITY AMOUNT:	1,512.77	
CHILD COST:	50		40% ANNUITY AMOUNT:	1,100.20	
			SPOUSE DOB:	12 DEC 1945	
			CHILD DOB:	13 MAR 1996	
<p>THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% (\$1100.20) AND 55% (1512.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.</p>					

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RETIRED SERVICEMAN FAMILY PROTECTION PLAN (RSFPP) COVERAGE					
RSFPP COVERAGE TYPE	ANNUITY PAYABLE			RSFPP COST	
ALLOTMENTS AND BONDS					
ALLOTMENT TYPE	PAYEE	AMOUNT	BOND FACE VALUE	SERIES	DEDUCTION
INSURANCE	VGLI	40.00			
TAX LEVY DEDUCTIONS					
DATE OF LEVY	MONTHLY AMOUNT		BALANCE		
GARNISHMENT DEDUCTIONS					
PAYEE	GARNISHMENT AMOUNT		COMPLETION DATE		
FORMER SPOUSE PROTECTION ACT DEDUCTIONS					
PAYEE	AMOUNT				
MISCELLANEOUS DEBTS					
DEBT TYPE	MONTHLY DEDUCTION	PRINCIPAL AMT	INTEREST AMT	ACCUMULATED INTEREST	DEBT BAL
ARREARS OF PAY BENEFICIARY INFORMATION					
YOU HAVE ELECTED ORDER OF PRECEDENCE. THE FOLLOWING BENEFICIARIES ARE ON RECORD:					
NAME	SHARE		RELATIONSHIP		
JANE P. DOE	.00		WIFE		
MESSAGE SECTION					
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$283.96.					
***					

DFAS-CL 7220/148 (Rev 03-01)

# Protecting Servicemembers from Illegal Pretrial Punishment: A Survey of Article 13, Uniform Code of Military Justice, Caselaw

Timothy Riley<sup>1</sup>

## I. Introduction

A servicemember, unlike his civilian counterpart, is afforded no civil remedy for illegal restraint under either the Federal Civil Rights Act<sup>2</sup> or the Federal Tort Claims Act.<sup>3</sup> A servicemember, however, does have recourse under Article 13 of the Uniform Code of Military Justice (UCMJ), which protects the basic guarantee of the Fifth Amendment Due Process Clause.<sup>4</sup> The Eighth Amendment<sup>5</sup> and Article 55,<sup>6</sup> both of which prohibit cruel and unusual punishment, generally do not apply to conduct occurring prior to a court-martial.<sup>7</sup> Thus, in many instances, Article 13 serves as the only judicial recourse for defense counsel seeking relief for clients suffering from otherwise unlawful pretrial punishment.

This article surveys Article 13 caselaw to identify key rules and decisional factors commonly used by military courts when adjudicating pretrial punishment issues. Part II briefly describes the purpose and judicial breadth of Article 13. Part III details the black letter law, standard of review, and general decisional factors applicable to Article 13 cases. Part IV outlines the most commonly cited forms of non-confinement pretrial punishment addressed by military courts. The article emphasizes the identification of important factual issues, factors, and specific rules applied by the courts. A similar analysis for confinement-based pretrial punishment is conducted in Part V. Part VI briefly investigates issues surrounding how and when Article 13 protection may be waived by accused servicemembers. Finally, Part VII discusses the remedies available to military courts after finding that an accused servicemember was intentionally or inadvertently exposed to illegal pretrial punishment.

## II. Article 13

Article 13 codifies the prohibition against pretrial punishment<sup>8</sup> and fundamentally embodies the precept that an accused servicemember is presumed innocent until proven guilty.<sup>9</sup> As such, Article 13 safeguards constitutional due process

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<sup>1</sup> Law student, Vermont Law School, class of 2008. M.A. 2003 *summa cum laude*, University of North Texas; B.A. 1999 *cum laude*, University of North Texas. An earlier version of this article was prepared for Colonel (COL) Alan Cook, Military Judge, 3d Judicial Circuit, Fort Hood, Texas, while I participated in the U.S. Army's Judge Advocate General's Corps Summer Intern Program in the Office of the Staff Judge Advocate, 1st Cavalry Division, Fort Hood, Texas. I would like to thank COL Cook for providing valuable and constructive comments.

<sup>2</sup> 42 U.S.C.S. §§ 1983, 1985 (LEXIS 2006).

<sup>3</sup> 28 U.S.C.S. § 1346 (LEXIS 2006); *United States v. Miller*, 46 M.J. 248, 249-50 (1997).

<sup>4</sup> *See* UCMJ art. 13 (2005).

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

*See also* U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*See generally* *United States v. Fischer*, 61 M.J. 415, 422 (2005) (Erdmann, J., dissenting) (discussing how Article 13 is rooted in the constitutional guarantee of due process before the law).

<sup>5</sup> U.S. CONST. amend. VIII.

<sup>6</sup> UCMJ art. 55.

<sup>7</sup> *United States v. Destefano*, 20 M.J. 347, 349 (C.M.A. 1985) (referencing *Powell v. Texas*, 392 U.S. 514 (1968)).

<sup>8</sup> UCMJ art. 13.

<sup>9</sup> *See* *United States v. Heard*, 3 M.J. 14, 17 (C.M.A. 1977).

protections by preventing the imposition of punishment prior to conviction.<sup>10</sup> Moreover, Article 13 proscribes imposing pretrial punishment by anyone exerting authority over the accused, irrespective of the chain of command.<sup>11</sup>

Military courts have asserted Article 13 protection broadly, consistently rebuking prosecutorial attempts to narrowly define applicability to only *pretrial* punishment. Such protections extend to servicemembers awaiting trial, retrial, or rehearing.<sup>12</sup> The protection also extends to conduct prior to the preferral of charges.<sup>13</sup> Essentially, the onus of inquiry turns on the treatment of the accused servicemember rather than the date a criminal proceeding formally commences.<sup>14</sup>

Illegal pretrial punishment<sup>15</sup> may manifest itself in two distinct ways. First, punishment can take the form of unreasonable or harassing restraint that creates a specter of guilt shadowing a servicemember prior to trial.<sup>16</sup> Second, punishment may result from an onerous confinement condition imposed on a servicemember.<sup>17</sup> In either instance, the punishment may be intentional<sup>18</sup> or a product of circumstances giving rise to a permissible inference that an accused or suspected servicemember is being punished.<sup>19</sup>

### III. Black Letter Law, Appellate Standard of Review, & Decisional Factors

#### A. Black Letter Law

Trial judges have substantial discretion to grant administrative credit upon an affirmative finding that pretrial punishment has been inflicted against an accused servicemember.<sup>20</sup> Whether a restraining activity or confinement constitutes punishment turns on the circumstances surrounding the alleged Article 13 violation. The U.S. Supreme Court in *Bell v. Wolfish* articulated the general test for judges to use when considering the merits of pretrial punishment allegations.<sup>21</sup>

A court must decide whether the disability has been imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees. (Citations and footnotes omitted).<sup>22</sup>

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<sup>10</sup> See *id.*; *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976) (citing *In re Winship*, 397 U.S. 358 (1970)).

<sup>11</sup> *United States v. Villamil-Perez*, 29 M.J. 524, 525 (A.C.M.R. 1989).

<sup>12</sup> *United States v. Combs*, 47 M.J. 330, 333 (1997).

<sup>13</sup> *United States v. Davis*, 30 M.J. 980, 981-82 (A.C.M.R. 1990).

<sup>14</sup> *Id.*

<sup>15</sup> Prior to trial, servicemembers may be lawfully restrained, and even confined, so as to ensure the servicemember’s appearance at trial or prevent misconduct. *United States v. Fischer*, 61 M.J. 415, 422 (2005) (Erdmann, J., dissenting); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(h)(2)(B) discussion (2005) (listing factors commanders should consider before imposing pretrial confinement) [hereinafter MCM]. Moreover, the MCM identifies four types of legal restraint: conditions on liberty, restriction in lieu of arrest, arrest, and confinement. *Id.* R.C.M. 304(a)(1).

<sup>16</sup> See, e.g., *United States v. Stringer*, 55 M.J. 92 (2001) (finding a Soldier subject to illegal punishment when arrested and handcuffed during formation). *But see United States v. Starr*, 53 M.J. 380 (2000) (stating that an accused was not subject to illegal punishment when transferred to different unit for legitimate government purposes); *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000).

<sup>17</sup> See, e.g., *United States v. Kinzer*, 56 M.J. 739 (N-M Ct. Crim. App. 2002) (holding that an arbitrary policy placing accused in pretrial confinement violated Article 13). *But see United States v. Fogarty*, 35 M.J. 885 (A.C.M.R. 1992) (commingling of sentence and pretrial confines did not constitute an Article 13 violation given the limited size of the facility).

<sup>18</sup> See *United States v. McCarthy*, 47 M.J. 162 (1997).

<sup>19</sup> See *United States v. Pryor*, 57 M.J. 821 (N-M. Ct. Crim. App. 2002).

<sup>20</sup> *United States v. Fulton*, 55 M.J. 88, 89 (2001).

<sup>21</sup> *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>22</sup> *Id.* at 538-39.

Subsequently, the Court of Appeals for the Armed Forces (CAAF) in *United States v. Starr* refined the *Bell* test into a simple two-part rule that asks whether “there [was] an intent to punish or stigmatize a person awaiting disciplinary action, and if not, were the conditions . . . in furtherance of a legitimate, nonpunitive, government objective.”<sup>23</sup> All of the Military Service Courts of Criminal Appeals have recognized the *Starr* two-part test.<sup>24</sup>

## B. Appellate Standard of Review

The Supreme Court and the CAAF consider Article 13 issues as a mixed constitutional and statutory matter.<sup>25</sup> As such, appellate courts grant independent review of Article 13 rulings,<sup>26</sup> akin to questions raised under Article 31(b),<sup>27</sup> compulsory self-incrimination prohibited, and Article 37,<sup>28</sup> unlawfully influencing action of court. Notwithstanding the CAAF ruling in *United States v. McCarthy* mandating a *de novo* standard of review, prior conflicting military service court opinions adopting an abuse of discretion standard have yet to be directly overruled.<sup>29</sup> The CAAF, however, has consistently applied *McCarthy*, and subsequently *United States v. Mosby*,<sup>30</sup> to require *de novo* review.<sup>31</sup>

## C. Decisional Factors

In *United States v. Smith*, the CAAF identified the following four broad factors for courts to consider when determining whether pretrial restraint crosses the threshold to pretrial punishment.<sup>32</sup>

- What similarities, if any, in daily routine, work assignments, clothing attire, and other restraints and control conditions exist between sentenced persons and those awaiting disciplinary disposition?
- If such similarities exist, what relevance to customary and traditional military command and control measures can be established by the government for such measures?
- If such similarities exist, are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing persons awaiting disciplinary disposition?
- If so, was there an intent to punish or stigmatize a person waiting disciplinary disposition?<sup>33</sup>

The boundaries between the four *Smith* factors are fluid and judges may give greater emphasis to one factor over the others depending on the facts present in each case.<sup>34</sup> Moreover, the *Smith* factors have been either directly applied or implicitly recognized in subsequent military service court cases.<sup>35</sup>

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<sup>23</sup> *United States v. Starr*, 53 M.J. 380, 381 (2000) (citing *Bell*, 441 U.S. at 520; *United States v. Phillips*, 42 M.J. 346 (1995)).

<sup>24</sup> See *United States v. Fortune*, NMCCA 200300779, 2005 CCA LEXIS 119, at \*5 (N-M. Ct. Crim. App. Apr. 13, 2005) (unpublished); *United States v. Fay*, 59 M.J. 747, 749 (C.G. Ct. Crim. App. 2004); *United States v. Payne*, ACM 34422, 2002 CCA LEXIS 121, at \*6 (A.F. Ct. Crim. App. May 29, 2002) (unpublished); *United States v. Quintero*, 54 M.J. 562, 566 (Army Ct. Crim. App. 2000).

<sup>25</sup> *United States v. McCarthy*, 47 M.J. 162, 164-65 (1997) (citing *Bell*, 441 U.S. at 520; *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985)).

<sup>26</sup> *Id.* at 165 (quoting *Thompson v. Keohane*, 516 U.S. 99 (1995)).

<sup>27</sup> UCMJ art. 31(b) (2005).

<sup>28</sup> *Id.* art. 37.

<sup>29</sup> *United States v. Phillips*, 38 M.J. 641, 642 (A.C.M.R. 1993); *United States v. Daniels*, 23 M.J. 867, 868 (A.C.M.R. 1987).

<sup>30</sup> 56 M.J. 309, 310 (2002).

<sup>31</sup> *United States v. Crawford*, 62 M.J. 411, 414 (2006); *United States v. Fischer*, 61 M.J. 415, 423 (2005).

<sup>32</sup> *United States v. Smith*, 53 M.J. 168, 172 (2000).

<sup>33</sup> *Id.*

<sup>34</sup> See CPT Jeffery D. Lippert, Notes from the Field, *A Trial Counsel's Guide for Article 13 Motions: Making Your Best Case*, ARMY LAW., Sept. 2002, at 36, 37.

<sup>35</sup> See, e.g., *United States v. Quintero*, 54 M.J. 562, 567 (Army Ct. Crim. App. 2000); *United States v. Chapa*, 53 M.J. 769, 773 n.4 (Army Ct. Crim. App. 2000); *United States v. Field*, No. NMCM 200100146, 2001 WL 641752, at \*1 (N-M. Ct. Crim. App. June 8, 2001).

## IV. Pretrial Punishment Other Than Confinement

### A. Non-Confinement Punishment Generally

Issues relating to alleged non-confinement pretrial punishment often turn on questions concerning officers or enlisted personnel exerting unreasonable command authority over the accused servicemember. Court decisions in this area are highly dependent upon the specific facts that define the case; specifically, whether an authority intentionally acted in a way calculated to serve as punishment or whether the authority's conduct was consistent with an otherwise legitimate governmental purpose. Caselaw covering the most common confinement punishment issues typically involves the following issues:

- Public Apprehension<sup>36</sup>
- Humiliation or Ridicule<sup>37</sup>
- Transfer to Special or Different Unit<sup>38</sup>
- Display of Military Uniform<sup>39</sup>
- Withholding of Pay<sup>40</sup>
- Use of Escorts<sup>41</sup>

### B. Public Apprehension

Generally, military courts consider the intentional public apprehension of a suspected servicemember as an act violating Article 13, particularly if the arrest or detainment is conducted in the presence of the servicemember's unit. In *United States v. Cruz*, the Court of Military Appeals (COMA) held that apprehending a servicemember during a scheduled mass formation, stripping him of his unit crest, and detaining him in the presence of the formation constituted illegal punishment in violation of Article 13.<sup>42</sup> The court specifically rejected the government's argument that the apprehension was a legitimate exercise to curb a substantial drug abuse problem within the unit.<sup>43</sup> Specifically, the court stated, "Clearly, public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute unlawful pretrial punishment prohibited by Article 13."<sup>44</sup>

Furthermore, the Army Court of Military Review (ACMR) has recognized that mass apprehensions with "less extraordinary aggravating circumstances" than *Cruz* will also violate Article 13.<sup>45</sup> In *United States v. Hatchell*, the court held that removing and handcuffing suspected servicemembers from the rear of a morning physical fitness training formation constituted illegal punishment.<sup>46</sup> Again, the trial counsel failed to demonstrate a legitimate government purpose. In dicta, the *Hatchell* court demanded that the government clearly show the "necessity" behind the use of mass apprehensions, a form of detainment not common to the military justice system.<sup>47</sup> Although military courts articulate only a rationale basis standard of review, deference is rarely granted, and the courts appear to require a factual showing more consistent with demonstrating an important government interest.

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<sup>36</sup> See, e.g., *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).

<sup>37</sup> See, e.g., *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994).

<sup>38</sup> See, e.g., *United States v. Starr*, 53 M.J. 380 (2000).

<sup>39</sup> See, e.g., *United States v. Carr*, 37 M.J. 987 (A.C.M.R. 1993).

<sup>40</sup> See, e.g., *United States v. Jauregui*, 60 M.J. 885 (Army Ct. Crim. App. 2004).

<sup>41</sup> See, e.g., *United States v. Smith*, 53 M.J. 168 (2000).

<sup>42</sup> *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).

<sup>43</sup> *Id.* at 331.

<sup>44</sup> *Id.*

<sup>45</sup> *United States v. Hatchell*, 33 M.J. 839, 842 (A.C.M.R. 1991).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

### C. Humiliation or Ridicule

Military courts also generally find that an overt and intentional attempt to publicly humiliate or ridicule an accused servicemember constitutes illegal punishment.<sup>48</sup> Again in *Cruz*, the COMA held that removing the accused Soldier's unit crest and denouncing him in front of his fellow troops prior to his arrest by Criminal Investigation Division agents violated Article 13.<sup>49</sup> Two specific factors the military courts commonly consider are whether the servicemember was (1) *publicly* ridiculed by (2) anyone acting within an *official* capacity. In *United States v. Stamper*, the ACMR held that the repeated disparaging and public comments made by an accused servicemember's company commander violated Article 13 by "chip[ping] away at the accused's presumption of innocence."<sup>50</sup> Specifically, the court stated, "this behavior is offensive, not only because it is by one who would bear the title of 'leader,' but because it also violates due process of law."<sup>51</sup>

In situations where the accused is denounced privately without malice intent, however, military courts will not find that the offending conduct reaches illegal punishment. For instance, removing an honor guard tab from an accused servicemember in anticipation of pretrial confinement does not constitute illegal punishment.<sup>52</sup> Additionally, an accused servicemember in confinement is not illegally punished when subject to ridicule by others not in a position of authority over him and when the commanding authority (e.g., commanding officer or first sergeant) did not sanction such ridicule.<sup>53</sup>

### D. Transfer to Special or Different Unit

In many instances, accused servicemembers pending court-martial are not placed in pretrial confinement. Nevertheless, attempts by the chain of command to transfer the accused into a special unit without demonstrating a legitimate government interest may produce an Article 13 violation. In *Cruz*, servicemembers accused of various drug-related charges were segregated from their unit and combined into a "peyote platoon," where the servicemembers were subject to ridicule. After referral of charges, the servicemembers were given the option of returning to the unit, but many elected to remain in the platoon.<sup>54</sup> The COMA held that the peyote platoon violated Article 13 despite the servicemembers' opportunity to elect to return to their original unit.<sup>55</sup>

An Article 13 violation is not necessarily implicated, however, when an accused servicemember is transferred to a special unit for legitimate, non-punitive reasons. For example, in *United States v. Starr*, an Airman attached to a security forces squadron under suspicion of misconduct was transferred to an "X-Flight," a unit composed of personnel who did not conduct security operations.<sup>56</sup> Airmen on medical profile, under investigation, or serving administrative punishment were assigned to the X-Flight and were not allowed to wear their Security Police berets or carry firearms, a requirement for security personnel.<sup>57</sup> The CAAF held that the transfer did not violate Article 13 because the government provided the Airman a productive, non-punitive position that did not require the use of a weapon, which the Airman was prohibited from carrying pending final disposition of his case.<sup>58</sup>

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<sup>48</sup> *United States v. Latta*, 34 M.J. 596, 597 (A.C.M.R. 1992).

<sup>49</sup> *Cruz*, 25 M.J. at 331.

<sup>50</sup> *United States v. Stamper*, 39 M.J. 1097, 1100 (A.C.M.R. 1994) ("Don't go out stealing car stereos this weekend,' 'don't go looking at car lots at night,' 'watch your stuff on your desk, Stamper's here,' 'getting any five finger discounts lately Stamper?' and 'go ask Stamper where it is if its [sic] 'lost'' were typical of CPT Decato's comments."); *see also Latta*, 34 M.J. at 597 (stating that the first sergeant referring to an accused Soldier as "my favorite AWOL case" constituted Article 13 violation).

<sup>51</sup> *Stamper*, 39 M.J. at 1100 (citing *United States v. Nelson*, 39 C.M.R. 177, 181 (C.M.A. 1969)).

<sup>52</sup> *See United States v. Van Metre*, 29 M.J. 765 (A.C.M.R. 1989).

<sup>53</sup> *United States v. Fogarty*, 35 M.J. 885, 891 (A.C.M.R. 1992).

<sup>54</sup> *Cruz*, 25 M.J. at 329.

<sup>55</sup> *Id.* at 330.

<sup>56</sup> *United States v. Starr*, 53 M.J. 380, 381 (2000).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

## E. Display of Military Uniform

Attempts to visually distinguish an accused servicemember by requiring different uniforms or removal of rank, name tag, or other insignia, can be considered proscribed punishment under Article 13. In *United States v. Carr*, the accused, following his return to military control from absent without leave (AWOL), was assigned to the personnel control facility (PCF), where he was required to wear a special PCF uniform.<sup>59</sup> “Prior to his assignment to the PCF unit, [the accused] was assigned to B Battery, 2d Battalion, 62d Air Defense Artillery.”<sup>60</sup> The PCF uniform lacked any army insignias or rank and “all of the tasks performed by the members of the [PCF] were performed in the ‘PCF uniform’ in full view of the military community.”<sup>61</sup> As such, Soldiers in the military community called the accused a criminal and ridiculed him even though he had not been convicted of a crime.<sup>62</sup> The ACMR held the “the military judge correctly found that the conduct of the government in requiring soldiers to alter their uniforms so that they do not comply with government standards and not allowing them to wear their insignia of rank was improper.”<sup>63</sup> The court, however, also stated that “the test is not only whether the government intended to punish or humiliate, but also whether the conduct serves a legitimate nonpunitive governmental objective.”<sup>64</sup> Finding that the government failed to demonstrate a legitimate purpose for not allowing accused servicemembers to wear standard military uniforms, the ACMR held that requiring the accused to wear the PCF uniform was inappropriate and tantamount to illegal punishment.<sup>65</sup>

When an accused servicemember is placed in pretrial confinement, however, the government can require the servicemember to wear an alternate uniform without violating Article 13. For instance, in *United States v. James*, the COMA held that an accused servicemember placed in pretrial confinement at a civilian detention facility may be required to wear an orange jumpsuit instead of his military uniform.<sup>66</sup> The court found that “all the complained-of conditions were rationally related to reasonable operating procedures of the facility and were not so ‘excessive’ as to rise to the level of punishment.”<sup>67</sup> Specifically, the court found that the accused “failed to demonstrate that any condition of his confinement was intended as punishment. Even though he was required to wear an orange jumpsuit instead of his uniform, wearing of the jumpsuit was consistent with the internal operating procedures of the jail, and all detainees were required to wear this garb.”<sup>68</sup> In a related case, *United States v. Palmiter*, the court held that the Navy did not violate Article 13 when a confined servicemember was only allowed to wear under-shorts while being held in a solitary cell and a uniform similar to sentenced prisoners while being held in the general population.<sup>69</sup> Although recognizing that the record failed to explain the necessity for the Navy’s dress code regulations, the court nevertheless concluded that the imposed restrictions were not punishment.<sup>70</sup>

## F. Withholding of Pay

The government may withhold a servicemember’s pay without violating Article 13 so long as the regulation or activity is not intentionally punitive or punitive in effect.<sup>71</sup> If the government *erroneously* withholds a servicemember’s pay, however, the defendant may still seek recovery under Article 13.<sup>72</sup> In *United States v. Jauregui*, the Army erroneously failed to pay an accused Soldier for seventy-seven days of military duties after returning from AWOL.<sup>73</sup> The Army Court of Criminal

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<sup>59</sup> *United States v. Carr*, 37 M.J. 987 (A.C.M.R. 1993).

<sup>60</sup> *Id.* at 988.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 988-89.

<sup>63</sup> *Id.* at 990.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 991-92.

<sup>66</sup> *United States v. James*, 28 M.J. 214 (C.M.A. 1989).

<sup>67</sup> *Id.* at 216 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985).

<sup>70</sup> *Id.*

<sup>71</sup> *United States v. Fischer*, 61 M.J. 415 (2005).

<sup>72</sup> *See United States v. Jauregui*, 60 M.J. 885 (Army Ct. Crim. App. 2004).

<sup>73</sup> *Id.* at 886.

Appeals (ACCA) never decided whether such failure constituted an Article 13 violation because the defense constructively waived Article 13 protections by failing to raise the issue prior to the court-martial.<sup>74</sup> Instead, the court took judicial notice of the error and reduced the accused's sentence under the court's discretionary powers under Article 66(c).<sup>75</sup>

## G. Use of Escorts

Servicemembers awaiting trial may be assigned a security escort while on a military installation or visiting certain locations on the installation. Such a restriction is not considered punishment if reasonably calculated to advance a legitimate government purpose.<sup>76</sup> For instance, in *United States v. Smith*, the CAAF held that requiring an escort for an Air Force Academy cadet when visiting the dormitory, cadet store, post office, and barber shop was justified because the government was ensuring the cadet's personal safety since the crimes he was charged with were against other cadets and occurred while he was living in the cadet dormitory.<sup>77</sup> In addition, the court recognized the command's concern "about the possibility of [the accused] committing further thefts against his fellow cadets."<sup>78</sup>

## V. Illegal Pretrial Confinement

### A. Generally

Pretrial confinement should be used only as necessary to insure the accused's presence at court and to prevent foreseeable serious misconduct.<sup>79</sup> Servicemembers in pretrial confinement generally cannot be required to participate in punitive work duties, wear special uniforms, or perform otherwise humiliating tasks.<sup>80</sup> Also, servicemembers in pretrial confinement should not be commingled with sentenced prisoners.<sup>81</sup> Additionally, questions of whether an act of confinement or restraint constitutes punishment often turn on whether the act advances an otherwise legitimate government interest and was imposed without punitive intent.<sup>82</sup> The following are the most common confinement punishment issues:

- Commingling of Detainees & Prisoners<sup>83</sup>
- Confinement Conditions<sup>84</sup>
- Punitive Duty Assignments<sup>85</sup>

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<sup>74</sup> *Id.* at 888. "Complaints of unlawful pretrial punishment in violation of Article 13, UCMJ, are ordinarily waived if made for the first time on appeal." *Id.*

<sup>75</sup> 10 U.S.C.S. § 866(c) (LEXIS 2006); *Jauregui*, 60 M.J. at 889. "We will eliminate any prejudice to appellant by exercising our authority under Article 66(c), UCMJ, to approve only that part of the sentence which we determine should be approved. We will take the erroneous failure to pay appellant into consideration in our reassessment of the sentence." *Id.* (citation omitted).

<sup>76</sup> *United States v. Rogers*, 50 M.J. 815 (A.F. Ct. Crim. App. 1999).

<sup>77</sup> *United States v. Smith*, 53 M.J. 168 (2000).

<sup>78</sup> *Id.* at 173.

<sup>79</sup> *See United States v. Scalarone*, 52 M.J. 539 (N-M. Ct. Crim. App. 1999); *United States v. Anderson*, 49 M.J. 575 (N-M. Ct. Crim. App. 1998); *United States v. Carr*, 37 M.J. 987 (A.C.M.R. 1993).

<sup>80</sup> *See United States v. Corteguera*, 56 M.J. 330 (2002).

<sup>81</sup> *See United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985).

<sup>82</sup> *United States v. Washington*, 42 M.J. 547 (A.F. Ct. Crim. App. 1995) (stating that manual labor that is not otherwise demeaning or degrading can still constitute an illegal form of punishment if imposed with punitive intent).

<sup>83</sup> *See, e.g., United States v. Bruce*, 14 M.J. 254 (C.M.A. 1982).

<sup>84</sup> *See, e.g., United States v. Fricke*, 53 M.J. 149 (2000).

<sup>85</sup> *See, e.g., United States v. Corteguera*, 56 M.J. 330 (2002).

## B. Commingling of Detainees & Prisoners

The general rule states that pretrial detainees should not be commingled with sentenced prisoners.<sup>86</sup> Simply placing a pretrial detainee in the same facility as sentenced prisoners or allowing casual contact during work periods, however, does not constitute commingling.<sup>87</sup> Absent an otherwise legitimate government reason, housing a pretrial detainee with sentenced prisoners and ordering him to perform duty assignments indistinguishable from those conducted by sentenced prisoners violates Article 13.<sup>88</sup> Notwithstanding a detainee's express waiver, Article 13 protections cannot be affirmatively waived prior to court-martial.<sup>89</sup> For instance, in *United States v. Bruce*, the COMA refused to accept the Air Force's argument that a confined Airman waived Article 13 protections after volunteering to be commingled with prisoners to obtain access to recreational facilities.<sup>90</sup> Under certain circumstances, a detainee *can* voluntarily accept a confinement situation that involves commingling with sentenced prisoners; however such acceptance is not considered an affirmative waiver of Article 13 rights.<sup>91</sup>

Military courts recognize that there are situations requiring the commingling of pretrial detainees and sentenced prisoners. As with other Article 13 issues, a key factor to consider in determining if commingling constitutes pretrial punishment is whether officials intended commingling to be a punishment; or, in the alternative, whether there exists an otherwise legitimate government reason for the commingling.<sup>92</sup> In *United States v. Fogarty*, the COMA took judicial notice of the small size and limited facilities of the Marine Corps' Parris Island Brig, which the Army also used as a pretrial confinement facility for Fort Stewart Soldiers under an interservice support agreement.<sup>93</sup> The court held that commingling at the Parris Island Brig "did not constitute pretrial punishment, but was a condition that was reasonably related to a legitimate governmental purpose."<sup>94</sup> Specifically, the court found that commingling "occurred because of the physical limitations of the Brig, the limited manpower resources to operate the Brig, and the need to maintain security and order of the general population inside and outside of the Brig."<sup>95</sup> The court stated that confinement officials did not commingle prisoners with pretrial detainees to punish the detainees but did so to "ensure the orderly and efficient operation of the confinement facility."<sup>96</sup> More importantly, the court stated that absent substantial evidence to the contrary, courts should give deference to decisions made by facility operators.<sup>97</sup>

## C. Confinement Conditions

Article 13 provides that pretrial confinement should not be "more rigorous than the circumstances require to insure" the servicemember's presence at court.<sup>98</sup> "Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished. . . ."<sup>99</sup> Arbitrary or purposeless conditions also can be considered to raise an inference of

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<sup>86</sup> See *United States v. Pringle*, 41 C.M.R. 324 (C.M.A. 1970).

<sup>87</sup> *United States v. Stroud*, 27 M.J. 765 (A.F.C.M.R. 1988); *United States v. Austin*, 25 M.J. 639 (A.C.M.R. 1987).

<sup>88</sup> *United States v. Bruce*, 14 M.J. 254 (C.M.A. 1982).

<sup>89</sup> See, e.g., *id.* at 256 ("We can find in this statute no express provision for waiver by a military accused, nor are we inclined to find such a waiver provision by implication."); *United States v. Palmiter*, 20 M.J. 90, 96 (C.M.A. 1985) ("[I]t should be noted that a prisoner cannot 'waive' his Article 13 protections prior to trial because no one can consent to be treated in an illegal manner.")

<sup>90</sup> *Bruce*, 14 M.J. at 256.

<sup>91</sup> See *Palmiter*, 20 M.J. at 96; *United States v. Huffman*, 40 M.J. 225, 226 (C.M.A. 1994), *overruled on other grounds*, *United States v. Inong*, 58 M.J. 460 (2003). In *Huffman*, pretrial detainees continued to wear military uniforms (as opposed to the orange jumpsuits worn by the prisoners), performed duties separate from sentenced prisoners, and were otherwise treated as active duty servicemembers. *Id.*

<sup>92</sup> See *United States v. Walker*, 27 M.J. 878 (A.C.M.R. 1989). "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." (quoting *Palmiter*, 20 M.J. at 95 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979))).

<sup>93</sup> *United States v. Fogarty*, 35 M.J. 885, 887 (A.C.M.R. 1992).

<sup>94</sup> *Id.* at 890-91.

<sup>95</sup> *Id.* at 890.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> UCMJ art. 13 (2005).

<sup>99</sup> *United States v. King*, 61 M.J. 225, 227-28 (2005); see also *United States v. Crawford*, 62 M.J. 411 (2006).

punishment.<sup>100</sup> Similar to Article 13 claims surrounding the illegal commingling of pretrial detainees and sentenced prisoners, military courts often give deference to confinement officials' security determinations.<sup>101</sup>

Conditions imposing more than a de minimis hardship that create genuine privations over an extended period of time may raise constitutional due process questions as to whether the conditions constitute punishment.<sup>102</sup> In *United States v. Fricke*, a naval officer raised an Article 13 motion following his conviction alleging illegal pretrial punishment based upon his pretrial confinement.<sup>103</sup> During 326 days of pretrial confinement, the accused was forced to live in a six-foot by eight-foot cell for twenty-three hours per day, disallowed to speak with other prisoners, permitted only to read the *Bible* or other Christian literature, and required to sit at a small school-like desk from 1630 to 2200 each day.<sup>104</sup> The CAAF recognized that the pretrial confinement conditions alleged were not "'de minimis' impositions on a pretrial detainee"<sup>105</sup> and remanded the case for a *DuBay* hearing<sup>106</sup> so that "the record can be fully developed as to the conditions actually imposed on [the accused] during his pretrial confinement and the intent of detention officials in imposing those conditions."<sup>107</sup> In another case, the ACMR held that ordering a Soldier pending trial to live in a pup tent surrounded by concertina wire constituted illegal punishment despite the government's argument that such actions were imposed as corrective training to teach the accused to respect the barrack space he damaged during a party.<sup>108</sup>

Not all hardship conditions, however, amount to illegal pretrial confinement. Hardship conditions imposed on a pretrial detainee can survive an Article 13 challenge if the government can demonstrate that the restriction or condition is reasonably related to a legitimate government goal.<sup>109</sup> One such goal is to separate potentially dangerous or high escape risk detainees from the general prison population.<sup>110</sup> Military courts have consistently upheld the validity of administrative actions that place dangerous or flight-risk detainees under heightened or separate security pending trial.<sup>111</sup> Additionally, military courts loathe accepting Article 13 motions predicated on imposed hardships based solely on limited confinement facility services. Because a pretrial confinement facility lacks some amenities required by military regulations does not create a per se Article 13 violation.<sup>112</sup> Rather, the courts often use a totality of the circumstances test when deciding if a substandard facility or lack of amenities constitutes illegal punishment.<sup>113</sup> For instance, the mere lack of hot running water did not constitute punishment for a servicemember being held at the detention facilities at the Naval Base in Roosevelt Roads, Puerto Rico.<sup>114</sup> Even temporarily housing an accused Soldier in a barracks utility room does not create an Article 13 issue where the confinement was predicated on a concern that an otherwise acceptable confinement facility was unavailable and there was a legitimate

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<sup>100</sup> *King*, 61 M.J. at 227-28 (citing *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989)).

<sup>101</sup> *Id.* at 228.

<sup>102</sup> *United States v. Fricke*, 53 M.J. 149, 155 (2000) (quoting *Bell v. Wolfish*, 441 U.S. 520, 542 (1979)); see also *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *Pippins v. Adams County Jail*, 851 F. Supp. 1228, 1232 (C.D. Ill. 1994).

<sup>103</sup> *Fricke*, 53 M.J. at 154.

<sup>104</sup> *Id.* at 151.

<sup>105</sup> *Id.* at 155. On remand, the military service court found that the accused's claims were unwarranted and did not correspond with the record developed under the mandated *DuBay* hearing. The court held that there was no Article 13 violation. *United States v. Fricke*, NMCCA 9601293, 2004 WL 784271, at \*3-5 (N-M. Ct. Crim. App. Apr. 9, 2004) (unpublished).

<sup>106</sup> See *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

<sup>107</sup> *Fricke*, 53 M.J. at 155.

<sup>108</sup> *United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987); see also *United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991).

<sup>109</sup> *Fricke*, 53 M.J. at 155 (on remand after a *DuBay* hearing the court found that there was no Article 13 violation); see also *Block v. Rutherford*, 468 U.S. 576, 583-84; *United States v. Singleton*, 59 M.J. 618, 621 (Army Ct. Crim. App. 2003).

<sup>110</sup> *United States v. Hopkins*, 2 M.J. 1032 (A.C.M.R. 1976), *aff'd in part, rev'd in part on other grounds*, 4 M.J. 260 (C.M.A. 1978).

<sup>111</sup> See, e.g., *United States v. Willenbring*, 56 M.J. 671 (Army Ct. Crim. App. 2001) (justifying maximum custody upon determination of violent, predatory, and dangerous criminal behavior over period of years); *United States v. Swan*, 45 M.J. 672 (N-M. Ct. Crim. App. 1996) (solitary confinement justified to protect other detainees); *United States v. Hitchman*, 29 M.J. 951 (A.C.M.R. 1990) (justifying confinement on basis of detainee posing flight risk); *United States v. Moore*, 32 M.J. 56 (C.M.A. 1991) (preventing detainee from seeing stepdaughter-victim justified); *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985) (precluding exposure to aberrant sexual misconduct temptations is legitimate government purpose).

<sup>112</sup> *United States v. Daniels*, 23 M.J. 867 (A.C.M.R. 1987).

<sup>113</sup> *United States v. Phillips*, 38 M.J. 641, 643 (A.C.M.R. 1993).

<sup>114</sup> *United States v. Tschida*, 1 M.J. 997 (N.C.M.R. 1976).

concern of escape.<sup>115</sup> Shackling a pretrial detainee to a cot, however, constitutes illegal punishment without a justifiable belief that there exists a flight risk or other aggregating factors.<sup>116</sup>

#### D. Punitive Duty Assignments

The COMA announced the general rule governing duty assignments under Article 13 in *United States v. Bayhand*, where the court held that a pretrial detainee may not be required to perform work with sentenced prisoners or be subject to punitive duties.<sup>117</sup> A pretrial detainee, however, can be required to perform legitimately useful military duties similar to work performed by other servicemembers.<sup>118</sup> Additionally, assigning pretrial detainees duties similar to sentenced prisoners is not per se unlawful punishment; rather, the nature, purpose, and duration of duties must be considered to determine whether an Article 13 violation exists.<sup>119</sup> Military courts adjudicate punitive duty claims on a case-by-case basis.<sup>120</sup> In *United States v. Corteguera*, the CAAF held that activities such as filling sandbags, yard work, washing vehicles, and painting red lines did not constitute punitive duties, nor were the tasks so onerous as to have the effect of punishment.<sup>121</sup>

When a duty is assigned arbitrarily or with intent to humiliate a servicemember, however, a court may substantiate an Article 13 claim. For example, in *United States v. Lee*, a Coastguard Fireman (E-3) pending trial on narcotics charges was occasionally required to “de-puddle” a pier with a sponge, which demanded that he work on his hands and knees in the presence of other servicemembers.<sup>122</sup> The Coast Guard Court of Criminal Appeals found no legitimate government interest in cleaning the pier in such a manner and held that the task was intended to humiliate and degrade the servicemember.<sup>123</sup>

A detainee generally cannot refuse to complete duties on the basis that the tasks are beneath his rank or require him to perform the tasks with those junior in grade. In *United States v. Quintero*, the ACCA held that a noncommissioned officer cannot refuse to perform cleaning duties with enlisted prisoners.<sup>124</sup> The *Quintero* court identified the following four factors when determining the legality of the assigned work detail:

- (1) [accused’s] assignment to work details was consistent with the prison’s operational and security requirements;
- (2) [accused’s] work assignments were not intended to punish or humiliate him, nor were his working conditions different from other pretrial prisoners;
- (3) the conditions of [the accused’s] pretrial confinement served legitimate nonpunitive governmental objectives as embodied in *Army Regulation 190-47*; and
- (4) [accused’s] pretrial confinement conditions constituted a reasonable accommodation between [the accused’s] dual status as a noncommissioned officer and as a [S]oldier who had to be confined and guarded to ensure his presence for court-martial.<sup>125</sup>

Defense counsel should also note that the court took judicial notice of the government’s attempt to respect and balance a confined servicemember’s rank and status with the realities of effectively operating a confinement facility.<sup>126</sup>

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<sup>115</sup> *United States v. Gilchrist*, 61 M.J. 785 (Army Ct. Crim. App. 2005).

<sup>116</sup> *Id.* at 798.

<sup>117</sup> *See United States v. Bayhand*, 21 C.M.R. 84 (C.M.A. 1956).

<sup>118</sup> *Id.* at 772.

<sup>119</sup> *United States v. Corteguera*, 56 M.J. 330, 335 (2002); *United States v. Holz*, 59 M.J. 926, 930 (C.G. Ct. Crim. App. 2004).

<sup>120</sup> *United States v. Huelskamp*, 21 M.J. 509, 510 (A.C.M.R. 1985).

<sup>121</sup> *Corteguera*, 56 M.J. at 335.

<sup>122</sup> *United States v. Lee*, 61 M.J. 627, 631-32 (C.G. Ct. Crim. App. 2005).

<sup>123</sup> *Id.*

<sup>124</sup> *United States v. Quintero*, 54 M.J. 562, 567 (Army Ct. Crim. App. 2000).

<sup>125</sup> *Id.* (citations omitted).

<sup>126</sup> *Id.*

## VI. Waiving Article 13 Protections

If a servicemember does not assert an Article 13 issue within a timely manner, the issue may be waived. Generally, absent plain error, if an alleged Article 13 offense is not raised at court-martial, it cannot be redressed on appeal.<sup>127</sup> In limited circumstances, however, an Article 13 claim may be argued for the first time on appeal. In *United States v. Singleton*, an accused servicemember on appeal asserted that his defense counsel advised him that “he should not raise the issue of unlawful pretrial punishment with the military judge or convening authority because this issue would be ‘better raised on appeal.’”<sup>128</sup> The ACCA examined the servicemember’s assertions as an issue of ineffective assistance of counsel as opposed to an Article 13 claim.<sup>129</sup> As such, the court remanded the matter for reconsideration following a limited *DuBay* hearing.<sup>130</sup>

Under no circumstances may a servicemember waive Article 13 protections *prior to* court-martial.<sup>131</sup> Even when a servicemember executes an agreement or “work program request” relinquishing certain statutory protections, such as duty hours and commingling, Article 13 protections are not waived and may be raised at trial.<sup>132</sup> This blanket prohibition recognizes that no one can consent to be treated in an illegal manner.<sup>133</sup> An accused servicemember, however, can waive a motion for Article 13 credit under a pretrial agreement plea deal during the sentencing phase of a court-martial.<sup>134</sup>

## VII. Remedies

Various potential remedies are available to a servicemember who successfully raises an illegal pretrial punishment issue. In *United States v. Sharrock*, the COMA identified the following three options that can be argued before a trial judge:

- If the accused is still confined at the time of trial, he may seek release from the unlawful confinement by means of a pretrial motion;
- If the accused has been released at the time of trial, he may seek credit against his sentence for any served unlawful confinement by means of a sentencing motion; or
- If evidence is seized as a result of unlawful confinement, the accused may seek to suppress admission of this evidence at court-martial.<sup>135</sup>

In extraordinary circumstances and in the interests of justice, a trial judge could dismiss the charges entirely because of the highly egregious nature of the pretrial punishment.<sup>136</sup> Or, in the alternative, a servicemember could seek extraordinary relief from the military appellate court system.<sup>137</sup> Additionally, relief may be available when the illegal punishment resulted from the actions of persons not involved in actually confining the accused servicemember.<sup>138</sup> Finally, although highly unlikely, the

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<sup>127</sup> *United States v. Inong*, 58 M.J. 460, 463-64 (2003) (implementing a “raise or waive” rule and overruling affirmative waiver caselaw, including *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994), *United States v. Southwick*, 53 M.J. 412 (2000), and *United States v. Tanksley*, 54 M.J. 169 (2000)); *see also United States v. King*, 58 M.J. 110 (2003); *United States v. Watts*, 36 M.J. 748 (A.C.M.R. 1993).

<sup>128</sup> *United States v. Singleton*, 59 M.J. 618, 622 (Army Ct. Crim. App. 2003), *aff’d*, 60 M.J. 409 (2005).

<sup>129</sup> *Id.* at 623, 627 (“accepting as true appellant’s un rebutted assertion that his counsel told him he should raise the issue of illegal pretrial punishment for the first time at our court, we conclude that this issue was not waived” and remanding the case for a *DuBay* hearing where the “military judge will determine whether appellant received ineffective assistance of counsel during appellant’s trial with respect to the issue of illegal pretrial punishment”).

<sup>130</sup> *Id.* at 627.

<sup>131</sup> *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985).

<sup>132</sup> *Id.*; *Watts*, 36 M.J. at 749-50; *United States v. Alexander*, 17 M.J. 763 (N.M.C.M.R. 1983).

<sup>133</sup> *Palmiter*, 20 M.J. at 96.

<sup>134</sup> *See generally* MCM, *supra* note 15, R.C.M. 705 (2005).

<sup>135</sup> *United States v. Sharrock*, 32 M.J. 326, 330 (C.M.A. 1991) (citations omitted).

<sup>136</sup> *United States v. Fulton*, 55 M.J. 88 (2001).

<sup>137</sup> *See generally* *United States v. Montesinos*, 28 M.J. 38 (C.M.A. 1989) (stating that military appellate courts may issue extraordinary writs pursuant to inherent powers granted under the All Writs Act, 28 U.S.C.S § 1651(a) (LEXIS 2006)).

<sup>138</sup> *Coyle v. Commander*, 21st Theater Army Area Command, 47 M.J. 626 (1997) (giving credit because of punishing actions of commander); *United States v. Latta* 34 M.J. 596 (A.C.M.R. 1992) (giving credit for ridiculing remarks made by accused’s first sergeant).

chain of command could bring criminal charges under Article 97, UCMJ,<sup>139</sup> against those officers or non-commissioned officers who illegally punished an accused servicemember.<sup>140</sup>

Ultimately, there is no defining formula for military courts to use when granting relief from illegal pretrial punishment.<sup>141</sup> Furthermore, not all Article 13 violations require a remedy if no substantial prejudice resulted from the violation.<sup>142</sup> When relief is granted, the military judge generally grants administrative credit to the accused's sentence<sup>143</sup> or takes judicial notice of the illegal punishment when drafting a sentence upon a finding of guilt.<sup>144</sup>

### VIII. Conclusion

Counsel and appellate courts should approach Article 13 allegations carefully, giving particular attention to the facts surrounding the asserted violation. Although the common law provides general guidance to the courts, few bright line rules exist, and most situations will require hyper-individualized treatment. The policy underlying Article 13, however, is clear: any overt or negligent act that intentionally or unintentionally imposes a punitive condition that tends to unjustifiably erode a servicemember's presumption of innocence infringes upon a constitutional right of due process. As each Article 13 issue is unique, military courts have substantial judicial latitude to craft individualized remedies to appropriately respond to illegal acts of confinement or command influenced pretrial punishment.

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<sup>139</sup> See UCMJ art. 97 (2005) (proscribing the unlawful apprehension, arrest, or confinement of any person bound by the UCMJ).

<sup>140</sup> 10 U.S.C.S. § 897 (LEXIS 2006).

<sup>141</sup> *United States v. Newberry*, 35 M.J. 777, 781 (A.C.M.R. 1992).

<sup>142</sup> *Id.*; see also *United States v. Villamil-Perez*, 32 M.J. 341, 344 (C.M.A. 1991); *United States v. Hatchell*, 33 M.J. 839, 843 (A.C.M.R. 1991).

<sup>143</sup> See *United States v. Tilghman*, 44 M.J. 493 (1996) (accused servicemember received ten-for-one credit); *United States v. Carr*, 37 M.J. 987 (A.C.M.R. 1993) (one-for-one credit granted).

<sup>144</sup> *United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987) (voiding forfeitures).

**A View from the Bench**  
**Aggravation Evidence—Adding Flesh to the Bones of a Sentencing Case**

*Lieutenant Colonel Edye U. Moran, USAR*  
*Military Judge, 2nd Judicial Circuit*  
*U.S. Army Trial Judiciary, Fort Bragg, North Carolina*

Why is a fundamental knowledge of aggravation evidence important to the military trial practitioner? A trial counsel who fails to present cogent, material aggravation evidence usually presents a skeletal sentencing case, starkly devoid of the facts necessary to support a fair and appropriate sentence. Conversely, a defense counsel who fails to object to inadmissible aggravation evidence makes it more difficult to obtain relief for his client, both at trial and on appeal. The military judge would prefer counsel to formulate, in advance of trial, the respective arguments supporting admission of aggravation evidence or objections against admission of such evidence. To do so, however, a trial counsel must investigate, research, and present a sentencing case with discernment and vigor, and a defense counsel must know when and why to object.

**Rule for Court-Martial (RCM) 1001(b)(4)**

Just as it is the defense counsel's duty to zealously represent the accused, it is the trial counsel's responsibility to strike hard and fair blows in the interest of justice by introducing proper aggravation evidence.<sup>1</sup>

Courts-martial, like their civilian-judge counterparts, can only make intelligent decisions about sentences when they are aware of the full measures of the loss suffered by all the victims, including the family and the close community. This, in turn, cannot be fully assessed unless the court-martial knows what has been taken.<sup>2</sup>

Rule for Courts-Martial 1001(b)(4) permits a trial counsel to “present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.”<sup>3</sup> Such evidence includes matters of financial, social, psychological, and medical impact on the victim of an offense “and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.”<sup>4</sup>

**What Is “Directly Relating To or Resulting From?”**

“Directly relating to or resulting from the offenses of which the accused has been found guilty,” by definition, does not mean tangentially related. Rather, government counsel must show that the accused's offense played a *material role* in bringing about the effect alleged, and a military judge should not admit the evidence if an independent, intervening event played the important part in bringing about the argued effect. For example, in *United States v. Rust*, an obstetrician was derelict in his duty by failing to examine an expectant mother who had symptoms of premature labor.<sup>5</sup> As a result of the dereliction, the baby was born prematurely and later died. Five days later, the woman's lover, and the baby's putative father, strangled the woman to death and then committed suicide by shooting himself. A suicide note found with the bodies was subsequently received in evidence over defense objection. On appeal, the court held that admission of the suicide note was

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<sup>1</sup> In *Berger v. United States*, Justice George Sutherland wrote:

[A prosecutor in Federal Court] is the representative not of an ordinary part to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and who interest, therefore, in a criminal prosecution is not that is shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935).

<sup>2</sup> *United States v. Pearson*, 17 M.J. 149, 152 (C.M.A. 1984).

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(4) (2005) [hereinafter MCM].

<sup>4</sup> *Id.*

<sup>5</sup> *United States v. Rust*, 41 M.J. 472 (1995).

error and set aside the sentence. The court stated the phrase “directly relating to or resulting from the offenses”<sup>6</sup> imposes a higher standard than mere relevance. In other words, an accused is not responsible for a never ending chain of causes and effects. While MAJ Rust was negligent when he failed to examine the woman, his negligence did not *cause* the woman’s paramour to kill her and commit suicide, which was found to be the independent result of a disturbed mind.<sup>7</sup>

The Army Court of Criminal Appeals further discussed the concepts of proximate cause and foreseeability in *United States v. Stapp*.<sup>8</sup> A fifteen-year-old runaway girl and Private Jason Stapp spent the night in his barracks room. They eventually parted company but the girl stayed with other Soldiers in the unit for several more days. The girl was later taken into custody and turned over to her parents after someone notified the authorities the girl was staying in the barracks. Private Stapp was subsequently convicted of violating a general order prohibiting underage overnight visitors in the barracks. The minor’s mother testified for the government in sentencing that the Soldiers she dealt with when recovering her daughter’s belongings from the barracks treated this as a “joke” and were playing a “long cat-and-mouse game.” The accused, however, was not among them. The Army court held that it was error to allow the mother to testify about her “bitter” frustrations with the unit since the accused had nothing to do with the woman’s difficulties in recovering her daughter’s belongings or the obstructive behavior of apparently independent actors.<sup>9</sup>

“Syndrome evidence” is generally admissible as evidence of a specific harm caused by an accused’s acts.<sup>10</sup> Interestingly, conditions such as rape trauma syndrome and post-traumatic stress disorder are generally considered “directly related” even though the victim may not yet have exhibited symptoms of or experienced physical, emotional or psychological harm.<sup>11</sup> For example, in *United States v. Hammer*,<sup>12</sup> an expert witness in a child molestation case testified that “child victims of sexual abuse are at a higher risk of suffering long-term effects of the abuse . . . and that the [accused’s] crimes put the victim at greater risk for psychological disorders in the future.”<sup>13</sup> The defense argued the testimony should have been excluded as too speculative because the victim was not exhibiting any adverse symptoms at the time of the testimony. The Air Force Court of Criminal Appeals affirmed the conviction and sentence, holding testimony that child victims of sexual abuse are generally at increased risk of suffering long-term psychological and emotional disorders is admissible as “directly related to” evidence even though there is no indication of actual impact to the individual.<sup>14</sup>

What about when the victim cannot be specifically identified, as in a child pornography case? The “[a]bsence of evidence is not evidence of absence.”<sup>15</sup> Thus, evidence can still be sufficiently “direct” to qualify as impact evidence despite the lack of an identified victim. In *United States v. Anderson*, the trial counsel offered part of a U.S. Senate Report concluding that children depicted in such images generally experience physical and psychological harm.<sup>16</sup> The military judge overruled a defense objection that the report was too attenuated to qualify as aggravation evidence. On appeal, the Air Force appellate court found no error, holding that, while the relationship to the offenses must be “direct,” there is no requirement that victim impact be limited to matters that have already occurred. The court agreed that RCM 1001(b)(4) does not require child pornography victims be identified and the impact on the unnamed or unidentified children used in the production of the pornography possessed by the accused is proper aggravation.<sup>17</sup>

Uncharged misconduct is not automatically admissible. It must still be “directly related to or resulting from an offense of which the accused has been found guilty.”<sup>18</sup> When there is a continuous course of conduct involving the same or similar crimes, the same victims, or a similar location, uncharged misconduct evidence is almost always relevant to show the true

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<sup>6</sup> *Id.* at 478.

<sup>7</sup> *Id.*

<sup>8</sup> *United States v. Stapp*, 60 M.J. 795 (Army Ct. Crim. App. 2004).

<sup>9</sup> *Id.*

<sup>10</sup> *United States v. Hammer*, 60 M.J. 810 (A.F. Ct. Crim. App. 2004).

<sup>11</sup> *See, e.g., United States v. Stark*, 30 M.J. 329 (1990); *United States v. Hammond*, 17 M.J. 218 (1984).

<sup>12</sup> 60 M.J. 810, 829 (A.F. Ct. Crim. App. 2004).

<sup>13</sup> *Id.* at 829.

<sup>14</sup> *Id.*

<sup>15</sup> *See* CARL SAGAN, *THE DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE* (1978).

<sup>16</sup> *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004).

<sup>17</sup> *Id.* at 556.

<sup>18</sup> R.C.M. 1001(b)(4), MCM.

impact of crimes upon the victims.<sup>19</sup> For example, in *United States v. Tanner*, the accused was convicted of sexually abusing his ten-year-old biological daughter. During the sentencing proceedings, over defense objection, the judge admitted evidence the accused had previously molested his fifteen-year-old-stepdaughter.<sup>20</sup> On appeal, the Court of Appeals for the Armed Forces (CAAF) held that “evidence of a prior act of child molestation ‘directly relates to’ the offense of which the accused has been found guilty and is therefore relevant during sentencing.”<sup>21</sup> In fact, prior acts of child molestation appear to now enjoy nearly a presumption of admissibility in presentencing, unless the court determines the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.

### What About Mission Impact Evidence?

Once again, the government must show that there is a direct, logical connection between the offense and the mission impact evidence offered. In *United States v. Bungert*, the accused offered to identify eleven Coast Guardsmen who were allegedly using drugs in return for a favorable deal.<sup>22</sup> The trial counsel called witnesses on sentencing to testify that, as a result of the accused’s allegations, the command was locked down, a base-wide urinalysis was conducted, flight operations were cancelled, maintenance operations were shut down, and agents spent sixty to seventy hours on the investigation. However, the investigation did not turn up any evidence that any of the individuals identified by the accused had ever used illegal drugs. In his closing, the trial counsel argued that the baseless allegations took up valuable time and resources. The CAAF held that testimony concerning the command’s response to the accused’s false allegations in this case directly resulted from the various offenses and properly admitted into evidence.<sup>23</sup>

The government, however, should not attempt to disguise as “aggravation” evidence the court-martial’s detrimental impact on a unit. In *United States v. Stapp*,<sup>24</sup> the first sergeant testified that his unit was administratively burdened by the court-martial process, stating that several Soldiers had to leave their duties to attend the accused’s trial. The Army court held that this evidence can never be used as mission impact evidence since it would allow the government to argue that an accused should be punished more harshly because his court-martial inconvenienced the unit, an event over which the accused has no control. Evidence of the administrative burden of the court-martial process, such as providing escorts to accompany the accused to and from interviews with his counsel or having to produce witnesses to testify at trial, is ordinarily not considered mission impact evidence attributable to the accused.<sup>25</sup>

### Conclusion

Military trial practitioners who understand the purpose and scope of aggravation evidence will help ensure that the fact finder gets not only the bones of the case but also the flesh. A well-presented sentencing case on both sides will result in a fairer trial and lead to an appropriate sentence.

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<sup>19</sup> *United States v. Nourse*, 55 M.J. 229 (2001) (citing *United States v. Mullens*, 29 M.J. 398 (1990)).

<sup>20</sup> *See United States v. Tanner*, 63 M.J. 445 (2006).

<sup>21</sup> *Id.* at 449.

<sup>22</sup> 62 M.J. 346 (2006).

<sup>23</sup> *See MCM*, *supra* note 3, MIL. R. EVID 103.

<sup>24</sup> *See United States v. Stapp*, 60 M.J. 795 (Army Ct. Crim. App. 2004).

<sup>25</sup> *Id.* at 801.

## TJAGLCS Practice Notes

### *Tax Law Note*

#### Update for 2006 Federal Income Tax Returns

This note is to inform legal assistance attorneys of changes that may be relevant to military taxpayers for purposes of completing and filing taxes for the upcoming tax season and providing information to assist clients in tax planning for future tax years. Most changes are in the area of Individual Retirement Arrangements (IRAs)<sup>1</sup>, taxation of unearned income of minors<sup>2</sup>, and the deduction of charitable donations.<sup>3</sup> This note highlights the changes in the order they would appear on Internal Revenue Service (IRS) Form 1040, income tax return.

#### Key Changes for 2006

##### *Expansion of IRA Options for Military Members*

Under the Heroes Earned Retirement Opportunities (HERO) Act, taxpayers who received tax-free combat pay can now use that pay to determine whether they qualify to contribute to either a Roth or traditional IRA.<sup>4</sup> Prior to this change, military taxpayers who received tax-free combat zone pay could not use the amount earned to determine qualification for IRA contributions.<sup>5</sup> Consequently, a military taxpayer who spent the entire year deployed in a combat zone was barred from contributing to an IRA.<sup>6</sup> Servicemembers who earned tax-free combat pay and wish to make contributions for tax year 2004 or 2005 may make contributions for those years until 28 May 2009.<sup>7</sup> Taxpayers wishing to make contributions for 2004 can contribute up to \$3,000 (for taxpayers under the age of 50) or up to \$3,500 (for taxpayers over the age of 50).<sup>8</sup> Taxpayers wishing to contribute for 2005 can contribute \$4,000 if the taxpayer is under the age of 50 and \$4,500 if the taxpayer is over the age of 50.<sup>9</sup> For tax year 2006, taxpayers under the age of 50 may contribute \$4,000 to an IRA, while those taxpayers over the age of 50 may contribute up to \$5,000.<sup>10</sup>

Taxpayers who make up contributions to a Roth IRA for 2004 and 2005 need not report those contributions to the IRS, because Roth IRA contributions are not deductible.<sup>11</sup> However, taxpayers who make up contributions to a traditional IRA must file an amended tax return, using IRS Form 1040X, whether or not the contributions are deductible.<sup>12</sup> Military taxpayers who make up contributions to a traditional IRA for tax years 2004 and 2005 may discover that they are entitled to additional tax refunds.<sup>13</sup>

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<sup>1</sup> I.R.C. § 408 (LEXIS 2006).

<sup>2</sup> *Id.* § 1(g).

<sup>3</sup> *Id.* § 170.

<sup>4</sup> Heroes Earned Retirement Opportunities Act, Pub. L. No. 109-227, 120 Stat. 385 (2006) (codified at I.R.C. § 219(f)(7) (LEXIS 2006)).

<sup>5</sup> I.R.C. § 219(f) (LEXIS 2005).

<sup>6</sup> *Id.*

<sup>7</sup> News Release, I.R.S., New Law Expands IRA Options for Military; Many Can Still Contribute for 2004 and 2005 (IR-2006-129, Aug. 18, 2006) [hereinafter I.R.S. News Release]

<sup>8</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16m, 115 Stat. 94 (2001) (codified at I.R.C. § 219(b) (LEXIS 2006)).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> I.R.C. § 408A(c) (LEXIS 2006).

<sup>12</sup> I.R.S. News Release, *supra* note 7.

<sup>13</sup> *Id.*

## Changes in Rollover Options

Individuals who wanted to convert a 401(k), SIMPLE, or other qualified retirement plan<sup>14</sup> to a Roth IRA would have to roll the amount in the qualified plan over into a traditional IRA and then convert the traditional IRA into a Roth IRA.<sup>15</sup> Under the Pension Protection Act of 2006, taxpayers who wish to roll funds from a qualified plan into a Roth IRA will now be able to roll those funds over directly into a Roth IRA after 31 December 2007.<sup>16</sup> The taxpayer need only meet the conversion qualifications.<sup>17</sup>

Taxpayers who rollover amounts from a qualified plan to a Roth IRA can only do so if the taxpayer's adjusted gross income is \$100,000 or less.<sup>18</sup> The Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) eliminates the adjusted gross income ceiling on rollovers to Roth IRAs in 2010.<sup>19</sup> Generally, amounts taxpayers rollover into a Roth IRA are taxable in the year they are transferred.<sup>20</sup> Under the TIPRA, however, taxpayers who rollover from a traditional or other than Roth IRA to a Roth IRA can elect to pay tax on the amounts rolled over in equal installments in 2011 and 2012.<sup>21</sup>

Finally, the Pension Protection Act of 2006 has changed tax treatment of rollovers to an individual retirement plan by a nonspousal beneficiary.<sup>22</sup> As of 1 January 2007, a nonspousal heir who inherits a qualified plan can roll the qualified plan over into his own IRA.<sup>23</sup> Previously, only a spouse could roll over an inherited qualified plan into his own IRA.<sup>24</sup>

## IRA Distributions

Normally, if a taxpayer takes a distribution from an IRA before the taxpayer reaches age 59½, the taxpayer will have to pay a 10% penalty for early withdrawal on the distribution, with a few exceptions.<sup>25</sup> The Pension Protection Act of 2006 added another exception to the 10% penalty for reservists called to active duty.<sup>26</sup> The change allows a member of the reserves called to active duty for more than 179 days from 11 September 2001 through to 31 December 2007, to take distributions from their IRAs without penalty.<sup>27</sup> The distribution must be made from IRA during the time the reservist is called to active duty.<sup>28</sup> The servicemember then has two years from the date of leaving active duty to re-contribute the amount withdrawn to avoid paying income tax on the distribution.<sup>29</sup> Those reservists who have already paid penalties resulting from a distribution received when called to active duty may receive credit or refund for overpayment of taxes, but they must file an IRS Form 1040X within a year of the Pension Protection Act's enactment, if the reservist would be otherwise precluded from filing an amended return for the refund or credit.<sup>30</sup>

<sup>14</sup> A qualified retirement plan is a plan that meets the requirements for qualification under I.R.C. § 401(a). I.R.C. § 401(a) (LEXIS 2006).

<sup>15</sup> *Id.* § 408A(c).

<sup>16</sup> Pub. L. No. 109-280, 120 Stat. 779 (2006).

<sup>17</sup> 120 Stat. at 824 (codified at I.R.C. § 408A(d)(3)(A)).

<sup>18</sup> I.R.C. § 408 (c)(3)(B).

<sup>19</sup> Pub. L. No. 109-222, 120 Stat. 345 (2006).

<sup>20</sup> I.R.C. § 408A(c).

<sup>21</sup> 120 Stat. at 345 (codified at I.R.C. § 408A(d)(3)(A)(iii)).

<sup>22</sup> Pub. L. No. 109-280, 120 Stat. 779 (2006) (codified at I.R.C. § 402(c)(11)).

<sup>23</sup> *Id.*

<sup>24</sup> I.R.C. § 402(c)(9) (LEXIS 2005).

<sup>25</sup> I.R.C. § 72(t) (LEXIS 2006). These exceptions include, for example, distributions for first-time home purchases and payments for qualified higher education expenses. *Id.*

<sup>26</sup> Pub. L. No. 109-280, 120 Stat. 779 (2006).

<sup>27</sup> *Id.* (codified at I.R.C. § 72(t)(2)(G) (LEXIS 2006)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 120 Stat. at 827.

### *IRA Contributions*

The increase in the amount of contributions to an IRA under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) is now permanent.<sup>31</sup> The EGTRRA was set to end in 2010, taking with it the increased dollar amounts allowed for IRA contributions.<sup>32</sup> Starting in 2006, IRA contributions were increased from \$3,000 in 2005, \$4,000 in 2006, and \$5,000 in 2008.<sup>33</sup> Under the Pension Protection Act of 2006, the increase in IRA contributions started by the EGTRRA is permanent and will be adjusted for inflation.<sup>34</sup>

### *Unearned Income for Minors*

All children who receive unearned income are taxed on that income at the “kiddie tax” rate of 15%.<sup>35</sup> The Tax Increase Prevention and Reconciliation Act of 2005 has changed the age at which the “kiddie tax” rates apply.<sup>36</sup> Previous to this act, the “kiddie tax” only applied to the unearned income of children who were under the age of 14.<sup>37</sup> Under the new law, which went into effect 1 January 2006, children who are under the age of 18 receive the first \$850 of unearned income tax free.<sup>38</sup> The second \$850 of unearned income is taxed at 15%--the “kiddie tax” rate.<sup>39</sup> Anything over \$1,700 is taxed at the parent’s marginal rate.<sup>40</sup>

### *Charitable Deductions*

For those taxpayers who deduct charitable contributions, there are now stricter requirements for the deduction of charitable donations of clothing and household items. The Pension Protection Act of 2006 amends section 170 of the Internal Revenue Code, only allowing deductions for donations of clothing and household goods if the items are in good used condition or better.<sup>41</sup> Items of minimal value, such as worn socks and underwear, may be denied deduction.<sup>42</sup> Further, the act modifies recordkeeping requirements for charitable donations of clothing and household goods.<sup>43</sup> A deduction will not be allowed unless the taxpayer maintains a record of the contribution, such as a bank record or a written communication from the donee organization stating the organization’s name, the date of the contribution, and the amount of the contribution.<sup>44</sup> These changes affect contributions after 17 August 2006, the date the act was signed.<sup>45</sup>

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<sup>31</sup> 120 Stat. at 811 (codified at I.R.C. §§ 72(t), 219, 401-408).

<sup>32</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16m, 115 Stat. 94 (2001) (codified at I.R.C. § 219(b)).

<sup>33</sup> I.R.C. § 219(b).

<sup>34</sup> 120 Stat. at 811.

<sup>35</sup> I.R.C. § 1(g).

<sup>36</sup> Pub. L. No. 109-222, 120 Stat. 345 (2006) (codified at I.R.C. § 1(g)).

<sup>37</sup> I.R.C. § 1(g)(2)(A) (LEXIS 2005).

<sup>38</sup> 120 Stat. at 345 (codified at I.R.C. § 1(g)(2)(A) (LEXIS 2006)).

<sup>39</sup> I.R.C. § 1(g); Rev. Proc. 2005-70, 2005 I.R.B. 47.

<sup>40</sup> Rev. Proc. 2005-70, 2005 I.R.B. 47.

<sup>41</sup> Pub. L. No. 109-280, 120 Stat. 779 (2006) (codified at I.R.C. § 170(f)(16) (LEXIS 2006)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; I.R.C. § 1217 (codified at I.R.C. § 170(f)(17)).

<sup>45</sup> *Id.*; I.R.C. § 1216-1217 (codified at I.R.C. §§ 170(f)(16), 170 (f)(17)).

Taxpayers will be able to get a refund on their 2006 federal income tax return for federal excise tax paid on long distance phone calls.<sup>46</sup> The refund is in response to a number of federal court decisions holding that the federal excise tax does not apply to current long-distance services.<sup>47</sup> The IRS is offering the refund of long-distance service taxes from 28 February 2003 through 1 August 2006.<sup>48</sup> Anyone who paid the long-distance service taxes during the time period will get a standard refund between \$30 and \$60.<sup>49</sup> The taxpayer will only need to fill out the line on the federal tax form pertaining to the refund (Line 71, Form 1040; Line 42, Form 1040A; Line 9, Form 1040EZ).<sup>50</sup> There is no need to gather up old telephone bills or fill out additional forms.<sup>51</sup>

*Tax Relief and Health Care Act of 2006*<sup>52</sup>

On 20 December 2006, the Tax Relief and Health Care Act of 2006 was signed. This Act extends deductions that expired 31 December 2005 until 31 December 2007.<sup>53</sup> One of those deductions is for the state and local sales taxes enacted under the American Jobs Creation Act of 2004.<sup>54</sup> Consequently, for tax year 2006, taxpayers can choose between a deduction of state and local income taxes or state and local sales taxes on Form 1040, Schedule A.<sup>55</sup> Taxpayers should determine which deduction is more beneficial, keeping in mind that any amount of a state income tax refund must be included as income for the next tax year. As in previous years, taxpayers can either deduct the exact amount of sales tax paid based upon sales receipts or using the Optional State Sales Tax Tables, which take into consideration the taxpayer's income, state where the taxpayer resides, and the number of exemptions the taxpayer claims.<sup>56</sup>

Another deduction extended through 31 December 2006, was the above-the-line deduction for Qualified Tuition and Related Expenses.<sup>57</sup> Single taxpayers with adjusted gross incomes (AGI) that are \$65,000 or less and married filing jointly taxpayers with an AGI of less than \$130,000 will be able to deduct \$4,000 for higher education tuition and fees.<sup>58</sup> An above-the-line deduction of \$2,000 is available to single taxpayers with an AGI of less than \$80,000 and to married filing jointly taxpayers with an AGI of less than \$160,000.<sup>59</sup>

Finally, the Educator Expenses deduction was also extended to 31 December 2007.<sup>60</sup> For tax years 2006 and 2007, teachers, instructors, counselors, principals, and classroom aides who work at least 900 hours during the school year will be able to deduct up to \$250 for certain out-of-pocket classroom expenses.<sup>61</sup> To take the deduction, the qualifying taxpayer

<sup>46</sup> I.R.S., Internal Revenue Bulletin 2006-25, Notice 2006-50 Communications Excise Tax; Toll Telephone Service (June 19, 2006) [hereinafter Notice 2006-50].

<sup>47</sup> *Id.* (citing *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005) (ABIG); *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005) (Amtrak); *Fortis v. United States*, 2006 U.S. App. LEXIS 10749 (2d Cir. Apr. 27, 2006); *Reese Bros. v. United States*, 2006 U.S. App. LEXIS 11468 (3d Cir. May 9, 2006).

<sup>48</sup> Notice 2006-50, *supra* note 46.

<sup>49</sup> News Release, I.R.S., I.R.S. Announces Standard Amounts for Telephone Tax Refunds (IR-2006-37, Aug. 31, 2006).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Pub. L. No. 109-432, 120 Stat. 2922 (2006).

<sup>53</sup> *Id.*

<sup>54</sup> Pub. L. No. 108-359, 118 Stat. 1418 (2004).

<sup>55</sup> I.R.C. § 164 (LEXIS 2006).

<sup>56</sup> Internal Revenue Service, Form 1040, Schedule A, Instructions (2006), available at [www.irs.gov](http://www.irs.gov).

<sup>57</sup> See Internal Revenue Service, Form 1040, Line 34 (2006).

<sup>58</sup> See INTERNAL REVENUE SERVICE, PUBLICATION 970, TAX BENEFITS FOR EDUCATION (2006).

<sup>59</sup> *Id.*

<sup>60</sup> Internal Revenue Service, Form 1040, Line 23 (2006).

<sup>61</sup> I.R.C. § 62(a)(2)(D) (LEXIS 2006); see also INTERNAL REVENUE SERVICE, PUBLICATION 17, YOUR FEDERAL INCOME TAX (2005).

must work in a kindergarten, elementary school, or high school and purchase classroom supplies such as pens, paper, books, and computer software.<sup>62</sup> Any expense exceeding the \$250 threshold may be deducted as a business expense on Form 1040, Schedule A.<sup>63</sup>

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<sup>62</sup> INTERNAL REVENUE SERVICE, PUBLICATION 17, YOUR FEDERAL INCOME TAX (2005).

<sup>63</sup> I.R.C. § 164.

## Appendix

There are six different marginal tax brackets for tax year 2006: 10%, 15%, 25%, 28%, 33%, and 35%.<sup>64</sup>

### 1. Married Individuals Filing Joint Returns and Surviving Spouses:

<u>Taxable Income</u>		<u>Marginal Tax Rate</u>
<i>Over</i>	<i>But Not Over</i>	
\$1	15,100	10%
15,100	61,300	\$1,510 + 15% of amount over \$15,100
61,300	123,700	\$8,440 + 25% of amount over \$61,300
123,700	188,450	\$24,040 + 28% of amount over \$123,700
188,450	336,550	\$42,170 + 33% of amount over \$188,450
336,550		\$91,043 + 35% of amount over \$336,550

### 2. Unmarried Individuals (other than Surviving Spouses and Heads of Households):

<u>Taxable Income</u>		<u>Marginal Tax Rate</u>
<i>Over</i>	<i>But Not Over</i>	
\$1	7,550	0%
7,500	30,650	\$755 + 15% of amount over \$7,550
30,650	74,200	\$4,220 + 25% of amount over \$30,650
74,200	154,800	\$15,107.50 + 28% of amount over \$74,200
154,800	336,550	\$37,675.50 + 33% of amount over \$154,800
336,550		\$97,653 + 35% of amount over \$336,550

### 3. Heads of Households:

<u>Taxable Income</u>		<u>Marginal Tax Rate</u>
<i>Over</i>	<i>But Not Over</i>	
\$1	10,750	10%
10,750	41,050	\$1,075 + 15% of amount over \$10,750
41,050	106,000	\$5,620 + 25% of amount over \$41,050
106,000	171,650	\$21,857.50 + 28% of amount over \$106,000
171,650	336,550	\$40,239.50 + 33% of amount over \$171,650
336,550		\$94,656.50 + 35% of amount over \$336,550

### 4. Married Individuals Filing Separate Returns:

<u>Taxable Income</u>		<u>Marginal Tax Rate</u>
<i>Over</i>	<i>But Not Over</i>	
\$1	7,550	10%
7,550	30,650	\$755 + 15% of amount over \$7,550
30,650	61,850	\$4,220 + 25% of amount over \$30,650
61,855	94,225	\$12,020 + 28% of amount over \$61,850
94,225	168,275	\$21,085 + 33% of amount over \$94,225
168,275		\$45,521.50 + 35% of amount over \$168,275

### 5. Estates and Trusts:

<u>Taxable Income</u>		<u>Marginal Tax Rate</u>
<i>Over</i>	<i>But Not Over</i>	
\$1	\$2,050	15%
2,050	4,850	\$307.50 + 25% of amount over \$2,050
4,850	7,400	\$1,007.50 + 28% of amount over \$4,850
7,400	10,050	\$1,721.50 + 33% of amount over \$7,400

<sup>64</sup> I.R.C. § 1(a)-(d), (i)(2); Rev. Proc. 2005-70, 2005 I.R.B. 47.

10,050

\$2,596 + 35% of amount over \$10,050

The 2006 Standard Deduction amounts are:

Married filing jointly or qualifying widow(er) – \$10,300.

Single – \$5,150.

Head of household – \$7,500.

Married filing separately – \$5,150.<sup>65</sup>

Reduction of Itemized Deductions. (I.R.C. § 68) Otherwise allowable itemized deductions are reduced if AGI in 2006 exceeds:

Married filing separately - \$75,250.

All other returns - \$150,500.<sup>66</sup>

The 2006 Personal Exemptions are:

Personal exemption deduction – \$3,300.

2006 Phase Out Amounts for personal exemptions

<u>Taxpayer</u>	<u>Begins After</u>	<u>Fully Phased Out*</u>
Married filing jointly	\$225,750	\$348,250
Single	\$150,500	\$273,000
Head of household	\$188,150	\$310,650
Married filing separately	\$112,875	\$174,125 <sup>67</sup>

\*Phase-out occurs at rate of 2% for each \$2,500 or part of \$2,500 (\$1,250 in both cases for married filing separately) by which the taxpayer's adjusted gross income exceeds the "Begins After" amount.

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

## CLE News

### 1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, 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, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

### 2. TJAGLCS CLE Course Schedule (June 2006 - October 2007) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C22	55th Graduate Course	14 Aug 06 – 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – 22 May 08
5-27-C20	172d JA Officer Basic Course	4 – 16 Feb 07 (BOLC III) Ft. Lee 16 Feb – 2 May 07 (BOLC III) TJAGSA
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee 13 – Jul – 26 Sep 07 (BOLC III) TJAGSA <b>(Tentative)</b>
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07

5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-JAG	2007 JAG Annual CLE Workshop	1 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
<b>NCO ACADEMY COURSES</b>		
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	28 Jan – 2 Mar 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	2 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	2 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOG	28 Jan – 2 Mar 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOG	11 Jun – 13 Jul 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOG	13 Aug – 14 Sep 07
<b>WARRANT OFFICER COURSES</b>		
7A-270A1	18th Legal Administrators Course	2 – 6 Apr 07
7A-270A2	8th JA Warrant Officer Advanced Course	16 Jul – 3 Aug 07
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
<b>ENLISTED COURSES</b>		
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	8th Court Reporting Symposium	29 Oct – 3 Nov 07
512-27D/20/30	18th Law for Paralegal NCOs Course	26 – 30 Mar 07
512-27D/40/50	16th Senior Paralegal Course	18 – 22 Jun 07
512-27D-CSP	1st BCT NCOIC Course	18 – 22 Jun 07
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07

5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	60th Legal Assistance Course	7 – 11 May 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F24	31st Admin Law for Military Installations Course	19 – 23 Mar 07
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F23E	2007 USAREUR Legal Assistance CLE	22 – 26 Oct 07
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07

### CONTRACT AND FISCAL LAW

5F-F10	157th Contract Attorneys Course	5 – 13 Mar 07
	158th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	3d Operational Contracting Course	14 – 16 Mar 07
5F-F102	6th Contract Litigation Course	9 – 13 Apr 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Ft. Monmouth, NJ)	5 – 8 Jun 07

### CRIMINAL LAW

5F-F31	13th Military Justice Managers Course	10 – 14 Oct 07
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	31st Criminal Law New Developments	5 – 8 Nov 07
5F-F301	10th Advanced Advocacy Training	29 May – 1 Jun 07

### INTERNATIONAL AND OPERATIONAL LAW

5F-F42	3d Advanced Intelligence Law Course	27 – 29 Jun 07
	48th Operational Law Course	30 Jul – 10 Aug 07
5F-F42	88th Law of War Course	9 – 13 Jul 07
5F-F44	2d Information Operations Course	16 – 20 Jul 07
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07

5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07

### 3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	22 Jan – 23 Mar 07 4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	26 – 30 Mar 07 (USMC) 26 – 30 Mar 07 (NJS) 6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	7 – 11 May 07 10 – 14 Sep 07
914L	Law of Naval Operations (Reservists) (010) Law of Naval Operations (Reservists) (020)	14 – 18 May 07 17 – 21 May 07
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	29 May – 8 Jun 07 6 – 17 Aug 07
850V	Law of Military Operations (010)	11 – 22 Jun 07
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	26 – 30 Mar 07 (San Diego) 16 – 20 Apr 07 (Norfolk)
	National Institute of Trial Advocacy (020)	14 – 18 May 07 (San Diego)
0258	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060)	12 – 16 Mar 07 (New Port) 7 – 11 May 07 (New Port) 23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
No CDP	Prosecuting Trial Enhancement Training (010)	22 – 26 Jan 07
7485	Litigating National Security (010)	5 – 7 Mar 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07
3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD

961M	Effective Courtroom Communications (020)	26 – 30 Mar 07 (San Diego)
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	26 – 30 Mar 07 (Pensacola, FL) 2 – 6 Apr 07 (Quantico, VA) 9 – 13 Apr 07 (Camp Lejeune, NC) 23 – 27 Apr 07 (Pensacola, FL) 23 – 27 Apr 07 (Naples, Italy) 4 – 8 Jun 07 (Pensacola, FL) 9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)
961A	Continuing Legal Education (EUCOM) (020)	23 – 24 Apr 07 (Naples, Italy)
7878	Legal Assistance Paralegal Course (010)	16 Apr – 20 Apr 07
3090	Legalman Course (010) Legalman Course (020)	16 Jan – 30 Mar 07 16 Apr – 29 Jun 07
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
049N	Reserve Legalman Course (Phase I) (010)	9 – 20 Apr 07
056L	Reserve Legalman Course (Phase II) (010)	23 Apr – 4 May 07
846M	Reserve Legalman Course (Phase III) (010)	7 – 18 May 07
5764	LN/Legal Specialist Mid Career Course (020)	17 – 28 Sep 07
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	19 – 30 Mar 07 (Newport) 7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (090) Senior Enlisted Leadership Course (100) Senior Enlisted Leadership Course (110) Senior Enlisted Leadership Course (120) Senior Enlisted Leadership Course (130) Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	20 – 22 Mar 07 (San Diego) 28 – 30 Mar 07 (Norfolk) 25 – 27 Apr 07 (Norfolk) 24 – 26 Apr 07 (Bremerton) 1 – 3 May 07 (San Diego) 23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)
<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (040) Legal Officer Course (050)	5 – 23 Mar 07 30 Apr – 18 May 07

	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07
0379	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 Mar 07 2 – 13 Apr 07 4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	26 Feb – 2 Mar 07 2 – 6 Apr 07 25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07
<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	26 Feb – 16 Mar 07 7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07
947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	2 – 13 Apr 07 7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	2 – 6 Apr 07 (San Diego) 23 – 27 Apr 07 (Bremerton) 4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010)	26 Feb – 9 Mar 07

#### 4. Air Force Judge Advocate General School Fiscal Year 2007 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

<b>Air Force Judge Advocate General School, Maxwell AFB, AL</b>	
<b>Course Title</b>	<b>Dates</b>
Paralegal Craftsman Course, Class 07-02	13 Feb – 20 Mar 07
Judge Advocate Staff Officer Course, Class 07-B	20 Feb – 20 Apr 07

Paralegal Apprentice Course, Class 07-03	2 Mar – 13 Apr 07
Environmental Law Update Course (DL), Class 07-A	26 – 30 Mar 07
Paralegal Craftsman Course, Class 07-003	2 Apr – 4 May 07
Interservice Military Judges' Seminar, Class 07-A	10 – 13 Apr 07
Advanced Trial Advocacy Course, Class 07-A	23 – 27 Apr 07
Paralegal Apprentice Course, Class 07-04	22 Apr – 5 Jun 07
Environmental Law Course , Class 07-A	30 Apr – 4 May 07
Reserve Forces Judge Advocate Course, Class 07-A	7 – 11 May 07
Reserve Forces Paralegal Course, Class 07-A	7 – 18 May 07
Operations Law Course, Class 07-A	14 – 24 May 07
Military Justice Administration Course, Class 07-A	21 – 25 May 07
Accident Investigation Board Legal Advisors' Course, Class 07-A	4 – 8 Jun 07
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07
Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07

## 5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

## 6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is *NLT 2400, 1 November 2007*, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008 and is a

prerequisite for most judge advocate captains to be promoted to major.

A 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, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2007 will not be cleared to attend the 2008 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

## 7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<b>Jurisdiction</b>	<b>Reporting Month</b>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December

Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially

West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

\* Military exempt (exemption must be declared with state).

\*\*Must declare exemption.

## Current Materials of Interest

### 1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

Date	Unit/Location	ATRS Course Number	Topic	POC
3-4 Mar 07	10th LSO Ft. Belvoir, VA	Class: 006	Contract & Fiscal Law Administrative & Civil Law/Legal Assistance	MAJ Arthur Kaff (703) 588-6762 arthur.kaff@us.army.mil
10-11 Mar 07	63d RRC/78th LSO Anaheim, CA	Class: 007	Contract & Fiscal Law Criminal Law	MAJ DeEtte Loeffler (619) 241-6966 deette.loeffler@us.army.mil
17-18 Mar 07	Wisconsin NG JAG/Paralegal Readiness Conference Fort McCoy, WI	NA	TCAP; Ethics and Deployment After Action Reports	MAJ David Dziobkowski (608)242-3073 david.dziobkowski@wimadi.ang.af.mil
20-22 Apr 07	90th RRC Tulsa, OK	Class: 008	Domestic Operations; Deployment Law; Administrative & Civil Law	LTC Baucum Fulk (501) 771-8765 baucum.fulk@us.army.mil
28-29 Apr 07	Indiana ARNG Indianapolis, IN	Class: 009	Contract & Fiscal Law Administrative & Civil Law/Legal Assistance	LTC Brian Dickerson (317) 247-3491 brian.c.dickerson@in.ngb.army.mil
4-6 May 07	213th LSO Atlanta, GA	Class: 010	International & Operational Law Contract & Fiscal Law	LTC Robin Allen (404) 562-9583 allen.robin@epamail.epa.gov
4-6 May 07	89th RRC Kansas City, KS	Class: 014	TCAP; Administrative & Civil Law	LTC Ismael Sanabria (316) 681-1759, ext. 1341 Ismael.sanabria@usar.army.mil
19-20 May 07	139th LSO Nashville, TN	Class: 011	Contract & Fiscal Law Criminal Law	LTC Kymberly Haas (615) 256-3148 attorneykhaas@aol.com
19-20 May 07	91st LSO Oak Brook, IL	Class: 012	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Bradley Olson (309) 782-3361 bradley.olson@us.army.mil
22-24 Jun 07	94th RRC Boston/Devins, MA	Class: 013	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil

### 2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at [www.dtic.mil/dtic/current.html](http://www.dtic.mil/dtic/current.html).

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to [bcorders@dtic.mil](mailto:bcorders@dtic.mil).

### Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

### Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

### Administrative and Civil Law

- AD A351829 Defensive Federal Litigation, JA-200 (2000).
- AD A327379 Military Personnel Law, JA 215 (1997).
- AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).
- AD A452516 Environmental Law Deskbook, JA-234 (2006).
- AD A377491 Government Information Practices, JA-235 (2000).
- AD A377563 Federal Tort Claims Act, JA 241 (2000).
- AD A332865 AR 15-6 Investigations, JA-281 (1998).

### Labor Law

- AD A360707 The Law of Federal Employment, JA-210 (2000).
- AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

### Criminal Law

- AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).
- AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).
- AD A274413 United States Attorney Prosecutions, JA-338 (1994).

### International and Operational Law

- AD A377522 Operational Law Handbook, JA-422 (2005).

\* Indicates new publication or revised edition.

\*\* Indicates new publication or revised edition pending inclusion in the DTIC database.

### 3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

#### b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

#### c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

#### **4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2006, issue of *The Army Lawyer*.

#### **5. TJAGLCS Legal Technology Management Office (LTMO)**

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

#### **6. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before 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.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at [Dottie.Evans@hqda.army.mil](mailto:Dottie.Evans@hqda.army.mil).

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*Recent Issues with the Use of MatchKing Bullets and White Phosphorous Weapons in Iraq*, Major R. Craig Burton, Aug. 2006, at 19.

*Unleashing the Dogs of War: Using Military Working Dogs to Apprehend Enemy Combatants*, Major Charles T. Kirchmaier, Oct. 2006, at 1.

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### **SERVICEMEMBERS CIVIL RELIEF ACT**

*New Resources for Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USAERRA) Practitioners*, Lieutenant Colonel Jeffrey P. Sexton, May 2006, at 20.

*Staying Connected: "Home of Record" Not Always the Same as "Domicile" Under the Servicemembers Civil Relief Act's Taxation Protections*, July 2006, at 27.

## **UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

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*Update on Department of State and Department of Defense Coordination of Reconstruction and Stabilization Assistance*, Charles Oleszycki, May 2006, at 22.

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Trial Judiciary Note, *A View from the Bench: Aggravation Evidence—Adding Glesh to the Bones of a Sentencing Case*, Lieutenant Colonel Edey U. Moran, Dec. 2006, at 49.

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*General George Washington, A Military Life*, Captain Sean M. Condron, July 2006, at 35.

*Gettysburg July 1*, Major Robert A. Broadbent, May 2006, at 28.

*Guests of the Ayatollah: The First Battle in America's War with Militant Islam*, Major Patrick D. Pflaum, Oct. 2006, at 39.

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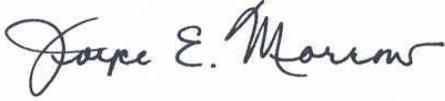
*Three Nights in August: Strategy, Heartbreak, and Joy: Inside the Mind of a Manager*, Major Roseanne Bleam, Feb. 2006, at 29.



By Order of the Secretary of the Army:

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