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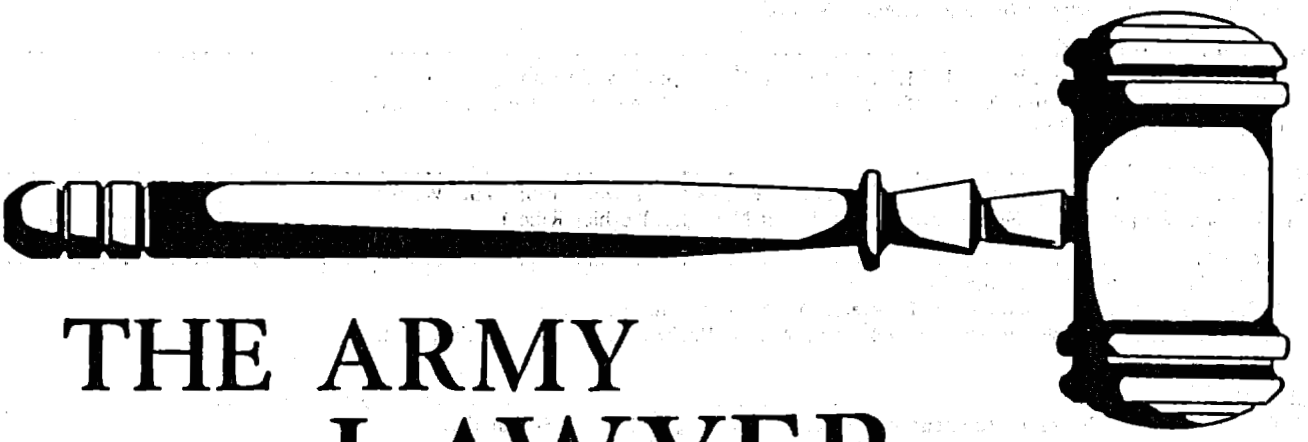

THE ARMY LAWYER

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Editor
Captain Matthew E. Winter

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

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should also be submitted on floppy disks, and should be in either Enable, WordPerfect, MultiMate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and Military Citation (TJAGSA, July 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZD

10 NOV 1988

MEMORANDUM FOR: COMMAND AND STAFF JUDGE ADVOCATES

SUBJECT: Providing Prosecution Services

1. The expanding scope of our responsibilities into new and nontraditional areas of our practice of law does not detract from our basic responsibility to ensure that our court-martial cases are properly tried. Skillful advocacy should be the hallmark of our most successful judge advocates. The skills learned in the preparation of cases, introduction of evidence in court, and persuasive arguments provide the foundation for many other areas of the law. It is important that officers selected for this duty be properly trained and supervised if they and the Army are to receive the maximum benefit from their activity.

2. As is true in almost all cases, the responsibility for this effort falls upon Staff Judge Advocates and their senior officers. It begins with the selection and assignment to trial counsel duties of those officers with the interest and aptitude for trial work. Consideration should be given to longer assignments as trial counsel in order to gain experience and then to utilize that experience either as primary counsel, "second chair" counsel, or evaluators of less experienced counsel.

3. Your concern should extend to how well the case is tried, not merely processing times or conviction rates. Either you or your deputy should become "ten minute managers" on contested trials. A suggested inquiry is attached. In addition, training sessions, evaluation of actual case performance, and availability of experienced courtroom "sounding boards" contribute to the enhancement of technical trial skills. While it is your primary responsibility to see that this is done, you will be supported by TJAGSA, TCAP, and the Trial Judiciary.

4. Finally, you need to look at what your Chief of Military Justice is doing now that we do not have the burdens of the traditional pretrial advice and post-trial review. Ensure that the prosecutor is properly utilizing the NCOIC and legal post-trial specialists, setting standards for them, and not becoming involved with their tasks unless the standards are not met. An excellent article on the duties of the Chief of Military Justice is contained in Coupe & Trant, The Role of Chiefs of Military Justice as Coaches of Trial Counsel, The Army Lawyer, August 1987 at 5. Ensure your CMJ has read the article, and it makes good reading for you as well.

5. The Article 6 Inspection Check List will be revised to reflect my interest in how we are training and supervising our trial counsel. I know you will join me in this important work.

Hugh Overholt

Encl

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

The following questions should be asked by the "Ten Minute Manager."

1. The following questions should be asked to determine how cases are being prosecuted in general:

a. When is the next trial?

b. Is the trial a guilty plea or a contested case; judge alone or members?

2. If it is a contested case with members, the following questions should be asked:

a. What are you doing on voir dire?

b. What is your opening statement?

c. What is the most critical part of your case and how are you going to handle it; what do you think will be the defense's strategy and how will you handle it?

d. What legal issues do you anticipate?

e. What instructions do you intend to ask for?

f. What are the main points of your closing statement?

3. If it is a guilty plea case with a pretrial agreement, the following questions should be asked:

a. What is in the stipulation?

b. What are the matters in aggravation you plan to introduce?

c. What are you introducing from the personnel records?

d. Who will testify as to rehabilitative potential?

e. What are the main points in your sentence argument?

Note from the Executive, Office of The Judge Advocate General

Professional Responsibility

Army attorneys are not immune from having professional responsibility allegations made against them. The following case represents a recent example of a judge advocate becoming the subject of professional responsibility allegations. The example is presented to portray the responsibilities of a legal assistance attorney upon a permanent change of station, and to highlight the applicability of the Rules of Professional Conduct, found in DA Pam 27-26. It is hoped that the example will help other judge advocates avoid a similar situation.

CPT X, a legal assistance attorney, agreed to help a client with the preparation of the client's income tax return. In so doing, he took possession of several of the client's financial and legal documents. CPT X subsequently departed on permanent change of station without: 1) informing the client of his reassignment; 2) returning the client's documents; and 3) arranging alternative representation of the client before his reassignment.

After the client complained to the staff judge advocate, an initial inquiry official was appointed pursuant to the professional responsibility provisions of AR 27-1. The inquiry official determined that the client's allegations had merit. In his report, the inquiry official discussed several ethical standards that CPT X appeared to violate. The major violations of the Rules of Professional Conduct for Lawyers were: 1) Rule 1.2(c) — "A lawyer may limit the objectives of the representation if the client consents. . . ." (CPT X's representation was limited by his pending PCS, but he failed to disclose it to his client); 2) Rule 1.3 — "A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with [the] client . . . as often as necessary after undertaking representation." (CPT X never contacted the client about the income tax return after the initial consultation); 3) Rule 1.4(a) — "A lawyer shall keep a client reasonably informed about the status of a matter. . . ."; 4) Rule 1.16(d) — "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protects a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled. . . ." (CPT X left his assignment without informing anyone of his representation of the client and without returning the client's documents); 6) Rule 8.4 — "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; . . . [or] (d) engage in conduct that is prejudicial to the administration of justice. . . ." (Besides the ethical violations, the inquiry official opined that CPT X violated the following articles of the Uniform Code of Military Justice: article 92 (dereliction of duty); article 121 (wrongful appropriation); and article 133 (conduct unbecoming an officer).)

Before the allegations could be fully processed under the applicable procedures of AR 27-1, CPT X received a general officer letter of reprimand for his actions, and the Army accepted CPT X's resignation from service. After his discharge, however, The Judge Advocate General informed CPT X's state bar of CPT X's actions. This notification was pursuant to Rule 8.3, which requires a lawyer to report another attorney who has committed a violation of the Rules of Professional Conduct that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

Recent Developments in Contract Law—1988 in Review*

Major Raymond C. McCann, Lieutenant Colonel Levator Norsworthy, Jr., Major Robert L. Ackley, Major Jose Aguirre, Major Charles B. Mellies, and Major Earle D. Munns, Jr.
Instructors, Contract Law Division, The Judge Advocate General's School

Introduction

The length of this article reflects the wide variety of changes and events that occurred in 1988 that will shape or affect the federal procurement system. Congress was very active, enacting several new legislative controls on the way we do business, and correcting specific problems in the system. While one may question the wisdom of so many changes every year, it is clear that in light of Operation "Ill Wind" and the resurgence of interest in the area of fraud abatement, we have not seen the last of them. At any rate, coupled with the many new regulations and the significant jurisdictional and substantive developments that occurred in the various forums in which we practice, these changes demonstrate how dynamic the practice of government contract law can be.

Items discussed herein have been selected for their general interest and significance or because they impact upon the contracting process and the contract attorney. The discussion of these items is not intended to be exhaustive, but is intended to be a general overview of the developments in government contract law in 1988.

Authorization and Appropriations Acts

National Defense Authorization Act, 1989

General

On August 3, 1988, President Reagan vetoed the first Fiscal Year 1989 DOD Authorization Act passed by Congress because of restrictions on, among other things, Strategic Defense Initiative spending. In October 1988, however, President Reagan signed into law the revised National Defense Authorization Act, Fiscal Year 1989 (FY 1989 DOD Authorization Act). [1] Included in this Act are several provisions affecting acquisition policy and management, many of which reflect recommendations of the Packard Commission. Some of the more important provisions for acquisition attorneys are discussed below.

Multiyear Contracts

Continuing a trend first established in 1982, Congress authorized the Department of Defense to enter into multiyear contracts for several major systems, including the M1 Abrams tank, the UHF Follow-On Satellite System (wherein the Navy will accept delivery of satellites in orbit), and the F-16 C/D aircraft. Section 107 of the FY 1989 DOD Authorization Act, however, places several restrictions on how these procurements may be accomplished, including a requirement for demonstrated cost savings over current or proposed annual contracts. Section 107 also allows the services to include in these multiyear contracts negotiated priced options for varying quantities of end items in the "out" years. This option should provide the services greater flexibility in these programs, and thus enhance the multiyear procurement process.

Management of Defense Procurement Programs

Section 117 of the FY 1989 DOD Authorization Act requires DOD to submit to Congress a "stretchout impact statement," which includes cost increases and a justification for the stretchout, of any major defense acquisition program whose production rates are slowed down from those planned when the program was initiated.

University Research Initiative

Section 220 of the FY 1989 DOD Authorization Act added a new permanent provision, 10 U.S.C. § 2361, which requires, effective October 1, 1989, all grants or contract awards to colleges or universities for research and development to be made using competitive procedures. The only exception to this competition requirement is for programs specifically earmarked for a particular school in some other legislative provision.

Enhancement of Capability to Combat Fraud, Waste and Abuse

Section 307 of the FY 1989 DOD Authorization Act requires DOD to increase, by September 30, 1989, the number of DOD IG audit and support personnel from the 550 requested in the DOD budget request to not less than 657. Additionally, it requires an increase in the number of DCAA audit and support personnel from the 6,439 requested in the DOD budget request to not less than 7,007. The conference report comments accompanying this provision state that funding for these additional personnel must come from the operation and maintenance funds authorized by the Act, and without other reductions from the funds available for the DOD IG or the DCAA. [2]

Prohibition on the Acquisition of Toshiba Products

Section 313 of the FY 1989 DOD Authorization Act continues last year's prohibition in section 8129 of the FY 1988 DOD Appropriations Act, [3] precluding the purchase or sale in exchanges, concessionaires, or other DOD resale activities of all Toshiba Corporation products (except microwave ovens produced in the United States). This prohibition is effective for three years.

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* This article was originally prepared for and presented to the 1989 Government Contract Law Symposium, which was held at the U.S. Army Judge Advocate General's School, 9-13 January 1989.

[1] Pub. L. No. 100-456, 102 Stat. 2088 (1988).

[2] H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 378 (1988).

[3] Pub. L. No. 100-202, 101 Stat. 1329 (1987).

Section 8124 of last year's FY 1988 DOD Appropriations Act prohibited DOD from procuring either directly or indirectly any goods or services from Toshiba or any of its subsidiaries, or from Kongsberg Vaapenfabrikk or any of its subsidiaries, unless national security interests were affected. Acquisition Letter 88-9 [4] implemented these restrictions in Defense Federal Acquisition Regulation Supplement (DFARS) 25.7011. These restrictions were not repeated, however, in either this year's DOD Authorization Act or its Appropriations Act. Instead, the Multilateral Export Control Enhancement Amendments Act [5] altered these restrictions to permit contracting with these companies under certain conditions. These conditions were spelled out in Acquisition Letter 88-34 [6] as a deviation to DFARS 25.7011, and allow contracting for spare parts, routine servicing and maintenance of products, and for information and technology.

Commercial Activities Program

Army Depot Maintenance Funding. Section 315 of the FY 1989 DOD Authorization Act continues for one year the requirement in section 314 of the FY 1988/1989 DOD Authorization Act [7] that not less than sixty percent of funds appropriated for Army depot maintenance be used to perform depot work in-house by military or DOD civilian personnel. The intent behind this requirement is to stabilize and reverse the downward trend in the Army's organic capability and depot level employment.

Private Operation of Commissary Stores. Section 321 of the FY 1989 DOD Authorization Act amended 10 U.S.C. § 2482 (1982) to prohibit any contracting out of procurement functions (relating to products bought for resale) or overall management functions at military commissaries. Contracting out of other commissary functions, such as checkout clerks and stock employees, is still permissible.

Depot Maintenance Workload Competitions. Section 326 of the FY 1989 DOD Authorization Act added a new permanent provision, at 10 U.S.C. § 2466, which prohibits DOD from requiring the Army or the Air Force to compete depot maintenance workloads between themselves or with private contractors.

Retirement Costs in Cost Comparisons. Section 331 of the FY 1989 DOD Authorization Act added a new permanent provision, 10 U.S.C. § 2467(a), which requires DOD, in all cost comparisons, to include the retirement system costs of both the Department of Defense and the contractor. This provision will help ensure that future cost comparisons are more equitable for in-house bids, which had already been including these costs even though contractor bids had not.

Consultation with DOD Employees. Section 331 also added a provision, 10 U.S.C. § 2467(b), which requires DOD officials responsible for deciding whether to keep a commercial function in-house or to contract it out to consult monthly during the review process with the civilian employees who will be affected by the determination.

Severance Payments to Foreign Nationals

Section 323 of the FY 1989 DOD Authorization Act makes severance payments to foreign nationals under service contracts performed outside the United States unallowable costs, but only to the extent that they exceed those customarily paid within the particular industry in the United States.

Authority to Delegate Authority to Approve Justifications and Approvals

Section 803 of the FY 1989 DOD Authorization Act gives the Under Secretary of Defense for Acquisition the ability to delegate his authority to approve justifications and approvals for contract awards in excess of $10 million that use less than full and open competition to "a senior official" (defined as a general or flag officer, or a civilian, above the O-7 level or equivalent) within each DOD element other than a military department. Previously, the Under Secretary had been able to delegate this authority only to "senior procurement executives," which only the military departments had. This section will be codified at 10 U.S.C. § 2304(f).

Evaluation of Contracts for Professional and Technical Services

Section 804 of the FY 1989 DOD Authorization Act requires DOD to establish regulations to ensure that proposals for contracts for professional and technical services are evaluated on a basis that does not encourage contractors to propose mandatory uncompensated overtime for professional and technical employees. The intent behind this provision is to help ensure uniformity in the evaluation of contractor hourly labor costs in bids.

Procurement of Critical Spare Parts

Section 805 of the FY 1989 DOD Authorization Act requires DOD to use, in the procurement of critical aircraft and ship spare parts, the qualification and quality requirements used in procuring the original parts, unless the Secretary of Defense determines in writing that any or all such requirements are unnecessary (e.g., technological improvements obviate the need for the original requirements). This provision will be codified at 10 U.S.C. § 2383. [8]

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[4] Acquisition Letter 88-9 (24 Mar. 1988).

[5] Pub. L. No. 100-418, 102 Stat. 1369 (1988).

[6] Acquisition Letter 88-34 (21 Sept. 1988).

[7] Pub. L. No. 100-180, 101 Stat. 1019 (1987).

[8] For an interesting case involving the relaxing of specifications in an aircraft engine spare parts contract that arose prior to the enactment of this section, see Comp. Gen. Dec. B-231733 (16 Sept. 1988), 88-2 CPD ¶ 262. In this case the original manufacturer was stuck with the stricter requirements on its original contract, which placed it at a competitive disadvantage economically on the spare parts contract because it could not establish a separate production line for the spare parts contract.

Incentives for Innovation

Section 806 of the FY 1989 DOD Authorization Act amended 10 U.S.C. § 2305(d) to prohibit, except in limited circumstances, DOD from requiring an offeror in its proposal to acquire competitively in the future an identical item if the item was developed exclusively at private expense. The intent behind this provision is to not force competition when it would discourage innovation in private industry. The limited exceptions include necessity for mobilization base purposes, or when the original manufacturer cannot produce the item in sufficient quantities.

Regulations on Use of Fixed Price Development Contracts

Last year, Congress placed substantial limits on DOD's use of fixed price development contracts. Section 8118 of the FY 1988 Department of Defense Appropriations Act prohibited DOD from awarding a fixed price contract in excess of $10 million for the development of a major system or subsystem "unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable adjustment and sensible allocation of program risk between the contracting parties." This provision applied only to contracts funded by Fiscal Year 1988 appropriations.

DOD issued no new regulations in response to this provision, apparently in the belief that FAR 35.006 sufficiently discouraged the use of fixed price development contracts. Unhappy with this, Congress included section 807 of the FY 1989 DOD Authorization Act, which requires DOD to revise and strengthen the regulations to include more detail concerning when the use of fixed price contracts in development programs will be allowed. The revised regulations must prohibit the award of a fixed price contract for such a program unless: 1) the level of program risk permits realistic pricing; and 2) the fixed price contract permits an equitable and sensible allocation of program risk between the government and the contractor. The regulations must also prohibit the use of fixed price contracts in excess of $10 million for development programs. This prohibition can be waived, however, if the two conditions above are met. Although section 807 expires on September 30, 1989, this does not mean that DOD may relax its regulations after that time, because Congress has stated that it expects the DOD regulations to follow congressional intent, and that it will get involved in this area again if DOD does relax its regulations. [9]

Buy American Restrictions for Valves and Machine Tools

Congress is beginning to reassess the role of "Buy American" restrictions in the procurement of defense equipment. Section 822 of the FY 1989 DOD Authorization Act prohibits DOD from buying certain valves and machine tools from sources other than in the United States or Canada, unless the usual exceptions are met, such as unreasonable cost or unavailability in sufficient commercial quantities in the United States. Although this prohibition expires at the end of FY 1991, DOD may extend it by regulation for two more years. This type of prohibition is not unusual, but what is new is that the conference report on the Act directs DOD to submit to the House and Senate Armed Services Committees, by February 1, 1989, a report on the costs and effects of all statutory "Buy American" restrictions that affect purchases by the Defense Department. [10] This could lead to substantial changes in the "Buy American" area in the future.

Allowability of Foreign Selling Costs

In somewhat of a reversal of the restriction, found in every annual appropriations act since 1984, against reimbursing contractors for foreign selling costs, section 826 of the FY 1989 DOD Authorization Act amended 10 U.S.C. § 2324(f) to allow contractors to charge these costs against DOD contracts if they are likely to result in future cost advantages to the United States. The provision places a ceiling, however, of 110 percent of the previous year's foreign selling costs (if they exceeded $2.5 million) on the amount that can be reimbursed. Also, the provision expires in three years. The provision, of course, is intended to stimulate exports by the domestic defense industry and to generate savings to the United States by reducing the unit cost of goods sold to DOD. [11]

Persons Convicted of Felonies Related to Defense Contracts

Under 10 U.S.C. § 2048 a person convicted of fraud or another felony arising out of a contract with DOD is prohibited from working in a management or supervisory capacity on any defense contract, or from serving on the board of directors of any defense contractor, for a period of not less than one year. Section 831 of the FY 1989 DOD Authorization Act extends the disqualification period to not less than five years after the date of the conviction (the period is waivable for national security reasons), and expands the list of disqualified activities to include serving as a consultant to a defense contractor and other activities as DOD determines by regulation to be appropriate. A proposed rule to amend the implementation of 10 U.S.C. § 2048 in the DFARS was published in the Federal Register on December 9, 1988. [12]

Allowability of Air Fare Costs

Section 833 of the FY 1989 DOD Authorization Act requires the General Services Administration to negotiate

[9] H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 427 (1988).

[10] H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 428 (1988).

[11] This provision has not yet been implemented in the Federal Acquisition Regulation [hereinafter FAR]. Previously, however, Federal Acquisition Circular [hereinafter FAC] 84-36 modified FAR 31.205-1 to allow DOD to reimburse contractors for costs incurred to promote American aerospace exports at domestic and international exhibits. FAC 84-36, 12 April 1988. That provision also disallows some foreign selling costs that are for entertainment, hospitality suites, and advertising in conjunction with air shows.

[12] 53 Fed. Reg. 49694 (1988).

agreements with air carriers that would allow defense contractor personnel to travel on business at the same rates as government employees travelling at government expense. Then, 120 days after such agreements go into effect, air travel costs in excess of these government rates would no longer be allowable costs. This provision is effective for three years.

Small Disadvantaged Business Goals

Section 844 of the FY 1989 DOD Authorization Act extends for one year (through Fiscal Year 1990) the three year goal of contracting not less than five percent of DOD contract dollars with small disadvantaged businesses. This goal was originally established in section 1207 of the FY 1987 DOD Authorization Act, [13] and because it took DOD some time to issue implementing regulations, it is being extended to give DOD a full three years to attempt to reach this goal.

Safeguarding of Military Whistleblowers

Section 846 of the FY 1989 DOD Authorization Act amended 10 U.S.C. § 1034 to protect lawful communications, such as allegations of violations of law or regulation or of waste of funds, by military personnel to a member of Congress or the DOD Inspector General. The provision prohibits retaliatory personnel actions, or threats thereof, as a reprisal for such a communication, and requires the DOD IG to investigate allegations of such reprisals expeditiously. The provision also provides statutory guidance for Boards of Correction of Military Records, including a hearing with a Judge Advocate General's Corps counsel in certain cases, in reviewing allegations of such reprisals.

Department of Defense Appropriations Act, 1989

General

On October 1, 1988, President Reagan signed into law the Department of Defense Appropriations Act, 1989. [14] Avoiding the requirement for any "continuing resolutions," Congress also enacted all twelve of the other fiscal year 1989 appropriations acts before September 30, 1988. This was the first time since 1976 that Congress had enacted every appropriations act before the beginning of the new fiscal year. [15] The Defense Appropriations Act, 1989 appropriates $282 billion in budget authority for fiscal year 1989, for all DOD programs, except military construction and military family housing, which are provided for in the Military Construction Appropriations Act, 1989. [16] Continuing a trend started in 1985, budget authority for DOD again declined in "real terms." [17] Some of the more important provisions for acquisition attorneys follow.

Obligation Rates

Congress once again directed DOD to meet obligation rates and avoid year-end spending. Section 8008 of the Defense Appropriations Act, 1989, states that no more than twenty percent of the annual (one-year) appropriations provided in the Act may be obligated during the last two months of fiscal year 1989. This section does not apply to obligations incurred in support of active duty training of civilian components, summer camp training for the Reserve Officer Training Corps, or the National Board for the Promotion of Rifle Practice, Army.

Unsolicited Proposals for Studies, Analyses, or Consulting Services

Section 8027 of the Defense Appropriations Act, 1989, contains the annual prohibition against contracts for studies, analyses, or consulting services entered into without competition on the basis of unsolicited proposals unless the responsible head of the activity determines that: 1) as a result of thorough technical evaluation, only one source is found fully qualified to perform the proposed work; or 2) the purpose of the contract is to explore an unsolicited proposal that offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source; or 3) where the purpose of the contract is to take advantage of unique and significant industrial accomplishment by a specific concern, or to ensure that a new product or idea of a specific concern is given financial support. These determinations, however, are not necessary for small purchases or when it would not be in the interests of national defense.

Multiyear Procurement Contracts

Section 8031 of the Defense Appropriations Act, 1989, prohibits the obligation of funds to execute a multiyear contract that includes any economic order quantity or funded contingent liability in excess of $20,000,000, unless the House and Senate Armed Services and Appropriations Committees are notified in advance. Section 8031 also specifically states that no funds shall be available to initiate a multiyear procurement contract for any system or component thereof if the value exceeds $500,000,000, unless specifically provided for in the Act.

Fixed Price Development Contracts

Section 8085 of the Defense Appropriations Act, 1989, contains the same restrictions on the use of fixed price development contracts as section 807 of the FY 1989 DOD Authorization Act. [18] The section also requires the FAR to state the policy that cost type contracts are usually more appropriate for development contracting due to program risk and uncertainty.

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[13] Pub. L. No. 99-661, 100 Stat. 3973 (1986).

[14] Pub. L. No. 100-463, 102 Stat. 2270 (1988).

[15] 46 *Congressional Quarterly*, at 2807 (Oct. 8, 1988).

[16] Pub. L. No. 100-447, 102 Stat. 1829 (1988).

[17] S. Rep. No. 402, 100th Cong., 2d Sess. 7 (1988).

[18] Pub. L. No. 100-456, 102 Stat. 2088 (1988).

Conflict of Interest Standards

Section 8141 of the Defense Appropriations Act, 1989, requires the Administrator of the Office of Federal Procurement Policy (OFPP) to issue a policy which sets forth: 1) conflict of interest standards for persons who provide consulting services; and 2) procedures, including such registration, certification, and enforcement requirements as may be appropriate, to promote compliance with such standards. OFPP must issue this policy not later than 90 days after the date of enactment of the Act, and not later than 180 days thereafter it must issue government-wide regulations. The regulations must apply, to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States, to the following types of consulting services: 1) advisory and assistance services provided to the government; 2) services related to the support of the preparation or submission of bids and proposals for federal contracts; and 3) such other services related to federal contracts as may be specified in the regulations. Before the regulations are issued, the President will determine if their promulgation would have a significant adverse effect on the accomplishment of the missions of DOD or of other federal agencies. If he does so, he will report that determination in writing to the Congress, and the requirement for the regulations will be nullified.

Allowability of Foreign Selling Costs

Section 8105 of the Defense Appropriations Act, 1989, contains the same changes to 10 U.S.C. § 2324(f) regarding the allowability of foreign selling costs as section 826 of the FY 1989 DOD Authorization Act. [19]

Prohibition on the Acquisition of Toshiba Products

Section 8092 of the Defense Appropriations Act, 1989, provides for the same restrictions on the acquisition of Toshiba products as section 313 of the FY 1989 DOD Authorization Act. [20]

Nonappropriated Fund Instrumentalities

Section 8122 of the Defense Appropriations Act, 1989, continues for another year the annual requirement that no appropriated fund support can be given to a nonappropriated fund activity that procures malt beverages and wine for resale on a military installation, unless the beverage or wine was purchased from a source within the state (or District of Columbia) in which the military installation is located.

Vessels, Aircraft, and Vehicles

Section 8042 of the Defense Appropriations Act, 1989, prohibits DOD from using funds available during the current fiscal year to enter into, extend, or renew any contract for a term of eighteen months or more, for any vessels, aircraft or vehicles, through a lease, charter, or similar agreement, without previously submitting the contract to the House and Senate Committees on Appropriations during the budgetary process.

Dogs and Cats

Section 8046 of the Defense Appropriations Act, 1989, states that none of the funds appropriated by the Act shall be used to purchase dogs or cats, or otherwise fund the use of dogs or cats, for the purpose of training DOD students or other personnel in surgical or other medical treatment of wounds produced by any type of weapon.

Special Operations Forces

Title VII of the Defense Appropriations Act, 1989, establishes a Special Operations Forces (SOF) Fund and directs that $108 million be transferred from the SOF Fund to the Other Procurement, Army (OPA), appropriation for the purchase of communication and electronic equipment. The Defense Department has determined that these transferred funds are only available for obligation for a single year, rather than the normal three year period for OPA monies. [21] The Defense Department has issued OPA-SOF budget authority as a separate apportionment and has instructed that it be accounted for separately on budget execution reports.

Military Construction Appropriations Act, 1989

General

On 27 September 1988, President Reagan signed into law the Military Construction Appropriations Act, 1989. [22] The Act appropriates budget authority for specified (line item) military construction projects, unspecified minor construction projects, and the military family housing program.

Exercise-Related Construction

Congress was displeased with the DOD's military construction budget submission because it did not include line items for exercise-related construction outside the United States, as Congress had previously directed last year. [23] Accordingly, the Military Construction Act, 1989, appropriated limited (only $4,000,000 for the Army), and difficult to use budget authority to DOD for unspecified minor construction accounts for exercise-related construction outside the United States. This budget authority may not be obligated for exercise-related construction until DOD formally notifies the Congressional Appropriations Committees that a specific line item for exercise-related construction will be included in the fiscal year 1990 budget. [24] Deputy Secre-

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[19] Pub. L. No. 100-456, 102 Stat. 2088 (1988).

[20] Pub. L. No. 100-456, 102 Stat. 2088 (1988).

[21] Message, HQ, Dep't of Army, OASA[FM], 132120z Dec. 88, Subject: OPA-SOF (2037) Appropriation.

[22] Pub. L. No. 100-447, 102 Stat. 1829 (1988).

[23] H.R. Conf. Rep. No. 446, 100th Cong., 1st Sess. 723 (1987); Ackley, Aguirre, McCann, Munns, and Pedersen, *Recent Developments in Contract Law—1987 in Review*, The Army Lawyer, Feb. 1988, at 7.

[24] H.R. Conf. Rep. No. 912, 100th Cong., 2d Sess. 1 (1988).

tary of Defense Taft has already sent a letter to the committees concerning exercise-related construction in the fiscal year 1990 budget, and therefore DOD can use its fiscal year 1989 budget authority. The unspecified minor construction account is the only appropriation available for this type of construction because 10 U.S.C. § 2805(c)(2) (1982) prohibits the funding of exercise-related construction from the O&M accounts.

Biennial Budgeting

Biennial budgeting for military construction and family housing is finished. The experiment demonstrated that two-year line item budgeting, for military construction projects anyway, is impractical and misleading. The Conference Report [25] directed that the Construction Annex (C-1) and DD Forms 1391 in support of the next budget submission provide line item detail and justification for projects requested for fiscal year 1990, and that any information submitted for subsequent years be aggregated at the appropriation account level.

Air Force Construction Agency

Instead of continuing to rely principally upon the Army Corps of Engineers for its construction support, the Air Force recently proposed to Congress that it act as its own construction agent. The Conference Report [26] responded to the request by directing the Air Force to review the feasibility of the proposal and advise the Congressional Appropriations Committees of its findings by 1 December 1988. The conferees questioned whether financial economies and construction execution enhancements would be achieved if the request was approved.

General and Flag Officer Quarters

Congress is not happy with the relatively large number of out-of-cycle notification actions for maintenance and repair of general and flag officer quarters. The military departments are therefore directed to limit notification actions to one per year except for emergencies. [27]

Other Significant Legislation

Office of Federal Procurement Policy Act Amendments of 1988

General

The Office of Federal Procurement Policy Act Amendments of 1988 (OFPP Amendments) [28] amended the Office of Federal Procurement Policy Act. [29] The main purpose of the OFPP Amendments, of course, was to re-authorize permanently the Office of Federal Procurement Policy (OFPP), and to strengthen its oversight powers. The OFPP Amendments also contain several significant provisions that will impact on the procurement of government contracts.

Federal Acquisition Regulatory Council

Section 4 of the OFPP Amendments created a four-member Federal Acquisition Regulatory Council (FAR Council), whose job will be to direct and coordinate government-wide procurement regulatory activities. One goal of the FAR Council will be to make procurement policy more uniform throughout the government through FAR changes, but agencies will still have the authority to issue their own regulation supplements to cover their unique needs. Future changes to the DFARS, however, will have to be first approved by the DOD representative on the FAR Council.

Cost Accounting Standards (CAS) Board

Another major provision in the OFPP Amendments, section 5, created a five-member, independent Cost Accounting Standards Board (CAS Board), which will have the exclusive authority to make, issue, amend, rescind, and interpret the Cost Accounting Standards. The Cost Accounting Standards are currently in FAR Part 30, and generally apply to negotiated contracts and subcontracts over $500,000. This threshold was formerly $100,000, but it was raised to $500,000 by this section of the OFPP Amendments.

Commercial Products Advocate

Section 9 of the OFPP Amendments established within OFPP a "Commercial Products Advocate," whose duties are to review regulations for their impact on, and to otherwise encourage, the acquisition of commercial products.

Procurement Integrity Provisions

Prohibited Conduct and Certification Requirements. The most important provision in the OFPP Amendments, however, is section 6, which contains several new procurement integrity provisions. Section 6 prohibits the disclosing, soliciting, or obtaining, directly or indirectly, of any proprietary or source selection information prior to award. This applies to both competing contractors and government contracting officials. Section 6 also prohibits competing contractors from offering anything of value, such as a promise of future employment, money, or gratuities, to an agency procurement official during the award process. A reciprocal provision in section 6 prohibits agency officials from asking for or accepting anything of value from a competing contractor during the award process. Section 6(d) also requires both the agency contracting officer and the contractor's representative responsible for the offer to certify that they are not aware of any violations of the above prohibitions. Additionally, if they are aware of any violations, they must disclose them. The OFPP Amendments require FAR implementation of these certification rules within 180 days of enactment, and it is possible

[25] H.R. Conf. Rep. No. 912, 100th Cong., 2d Sess. 6 (1988).

[26] H.R. Conf. Rep. No. 912, 100th Cong., 2d Sess. 6 (1988).

[27] H.R. Conf. Rep. No. 912, 100th Cong., 2d Sess. 7 (1988).

[28] Pub. L. No. 100-679, 102 Stat. 4055 (1988).

[29] 41 U.S.C. §§ 401-12 (1982).

that the regulations may apply these rules to other agency officials as well. Section 6(d) also requires a one-time certification, by both contractor and agency personnel who participate personally and substantially on a contract, that they are aware of the above prohibitions and agree to report any violations of which they become aware. Both certifications are required for contracts and contract modifications greater than $100,000, but there are provisions for waiving them, and they are not applicable to foreign government contracts not required to be competed.

Enforcement Provisions. To enforce these prohibitions and certification requirements, section 6(f) authorizes the creation of a contract clause which would allow, for violations, a reduction or denial of profit, a termination of the contract for default, or any other appropriate remedy. Section 6(g) also authorizes the imposition of administrative actions including contract rescission, suspension or debarment, and removal or suspension of government officials. Additionally, section 6(h) authorizes civil fines for violations of up to $100,000 for individuals, and up to $1,000,000 for contractors. Finally, for knowing and willful violations of the restrictions on the transfer of proprietary or source selection information, section 6(i) authorizes confinement up to five years and criminal fines.

Employment Restrictions. The last important procurement integrity provision is section 6(e), which prohibits, for a two year period after the end of his or her participation on the behalf of the government, every government employee, civilian or military, regardless of rank, who has participated personally and substantially on a contract, or who has personally approved an award, from participating on the behalf of a competing contractor in the negotiations, award, modification, extension, or performance of the same or any related contract.

Major Fraud Act of 1988

For ease of reference to the recent developments in the area of fraud, waste and abuse, the Major Fraud Act of 1988 [30] is covered in detail in the section of this article entitled "Fraud and Related Matters."

Anti-Substance Abuse Act of 1988/Drug-Free Workplace Act of 1988

Drug-Free Workplace Act of 1988

As part of the Anti-Substance Abuse Act of 1988, [31] Congress included at sections 5151 through 5160 the Drug-Free Workplace Act of 1988. The Act establishes new conditions for federal contractors (defined as those receiving contracts in excess of $25,000) and grantees to ensure that their workplaces are drug-free. Contractors are required to certify that their workplaces are drug-free, and must establish anti-drug policies and education programs. Contractors must also require their employees to notify the contractor within five days of any criminal drug conviction, so that they can notify the government, and must have sanctions and rehabilitation assistance available to offenders. Violations of these provisions or a false certification could lead to suspensions of payments, terminations of contracts or grants, or to a debarment for up to five years. The Office of Federal Procurement Policy must publish regulations to implement this Act.

Obstruction of Auditors

Another interesting provision of the Anti-Substance Abuse Act of 1988 is section 7078, which amended 18 U.S.C. § 1516 to make it a felony to try to obstruct, influence, or impede a federal auditor in the performance of his official duties. Destroying or fabricating documents, or intimidating witnesses or employees, are covered under this provision. Violators are subject to up to five years in jail, a fine of up to $250,000 for individuals or $500,000 for corporations, or both.

Reforms to the Small Business Administration's 8(a) Program

In order to make small disadvantaged businesses more competitive and to curb abuses in the program, Congress has made some changes to the SBA's 8(a) program [32] including: 1) requiring competition among 8(a) businesses in all manufacturing contracts over five million dollars; 2) requiring competition among 8(a) businesses in service contracts and other nonmanufacturing acquisitions worth three million dollars or more; 3) requiring the SBA to establish targets of business activity for firms that have been in the program for five years; 4) authorizing contracting officers to assess liquidated damages against prime contractors who fail to meet the minority subcontracting goals required under law; [33] and 5) prohibiting former SBA employees from holding stock in 8(a) firms for two years after leaving the agency.

The Prompt Payment Act Amendments of 1988

Congress recently amended the Prompt Payment Act (PPA) [34] by the Prompt Payment Act Amendments of 1988 (PPA Amendments). [35] The PPA Amendments are significant and will require changes to the policies and procedures contained in Office of Management and Budget (OMB) Circular A-125, "Prompt Payment," and the FAR implementation at FAR Subpart 32.9. The PPA Amendments make the following changes, among others, to the Act: 1) they specify a standard for establishing the payment period for commercial items and services and a specific payment period (thirty days

[30] Pub. L. No. 100-700, 102 Stat. 4631 (1988).

[31] Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[32] 15 U.S.C. § 637(a) (1982). *See* Pub. L. No. 100-656, 102 Stat. 3853 (1988).

[33] Pub. L. No. 95-507, 92 Stat. 1757 (1978).

[34] Pub. L. No. 97-177, 96 Stat. 87 (1982) (codified at 31 U.S.C. §§ 3901-3906 (1982)).

[35] Pub. L. No. 100-496, 102 Stat. 2455 (1988).

unless approved at a level above the contracting officer) for noncommercial items or services; 2) they establish a ten day payment period for dairy products; 3) in order to clarify when the payment period starts, which determines the payment due date and the date upon which an interest penalty begins to accrue, the PPA Amendments establish more specific criteria for determining when an agency has received an invoice from the contractor (to include the creation of a conclusive presumption); 4) the PPA Amendments reduce from fifteen days to seven days the time available for an agency to return a defective invoice or progress payment request to a contractor; 5) they eliminate the fifteen day interest penalty payment grace period, thereby making the interest penalty accrue from the day after the payment date; 6) they create an additional penalty for late interest penalty payments; 7) they require the regulations to provide for periodic payments unless specifically prohibited by the contract; 8) they create interest penalties for late progress payments and late payments of retained amounts in construction contracts; 9) they establish an interest penalty for receipt of unearned progress payments in construction contracts (i.e., the contractor will be required to pay the government); and 10) they require government construction contracts to require prime contractors to pay their subcontractors within seven days from when the government pays the prime, and to require the prime to include a similar payment clause in its contracts with subcontractors (this requirement flows down to all lower tier subcontractors). Most of these changes will be effective starting with contracts awarded, renewed, and contract options exercised during the third quarter of fiscal year 1989. [36]

Women's Business Ownership Act of 1988

On October 25, 1988, Congress passed the Women's Business Ownership Act of 1988, [37] which amended the Small Business Act [38] and a provision [39] of the Consumer Credit Protection Act. [40] In addition to making an affirmative finding of discrimination in entrepreneurial endeavors based on gender, Congress established a National Women's Business Council, whose duties include reviewing: 1) the status of women-owned businesses; 2) existing barriers to their progress; and 3) the role of the federal and local governments in assisting or hindering women-owned businesses. Additionally, the Council must recommend to Congress and the President, by December 31, 1989, and every year thereafter, initiatives or ways to improve management and technical assistance, and access to public and private sector financing and procurement opportunities, for women-owned businesses. These recommendations could lead to further legislation in the future to help women-owned businesses overcome discriminatory barriers to their progress.

Commercial Activities Program Cost Comparisons

Congress amended the Federal Employees' Retirement System (FERS) Act [41] in section 1 of Valuation of the Federal Employees' Retirement System [42] to require the consideration of all retirement costs of federal employees and the government in cost comparisons under the Commercial Activities Program. Previously, the government was not allowed under OMB Circular A-76 to deduct its contributions to Social Security and the FERS thrift plan from its in-house bids, while contractors were allowed to deduct the full amount of these costs from their bids. This amendment makes these costs deductible before performing the cost comparison.

Omnibus Trade and Competitiveness Act of 1988

Title VII of the Omnibus Trade and Competitiveness Act of 1988 [43] amended the Buy American Act [44] by prohibiting the acquisition of products and services from individuals and organizations of countries who discriminate against U.S. products or services. Agencies are prohibited from awarding contracts for products mined, produced, or manufactured: 1) in a signatory country that is considered to be a signatory not in good standing of the Trade Agreements Act of 1979; [45] or 2) in a foreign country whose government maintains in government procurement a significant and persistent pattern or practice of discrimination against U.S. products or services as identified by the President. The prohibition also applies to the procurement of services from a contractor or subcontractor that is a citizen or national of such countries. The prohibitions do not apply to products or services: 1) procured and used outside the United States; 2) from a least developed country; or 3) that the President or the head of an agency determines is necessary. The prohibition process goes into effect no later than April 30, 1990 (the deadline for the first annual report from the President on discriminating countries). The amendments are to remain in effect until April 30, 1996.

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[36] For a more detailed description of the changes see Mellies, *The Prompt Payment Act Amendments of 1988*, The Army Lawyer, Jan. 1989, at 49.

[37] Pub. L. No. 100-533, 102 Stat. 2689 (1988).

[38] 15 U.S.C. §§ 631-650 (1982 & Supp. IV 1986).

[39] 15 U.S.C. § 1691b(a) (1982).

[40] 15 U.S.C. §§ 1601-1693(r) (1982).

[41] Pub. L. No. 99-335, 100 Stat. 514 (1986).

[42] Pub. L. No. 100-36, 102 Stat. 826 (1987).

[43] Pub. L. No. 100-418, 102 Stat. 1545 (1988).

[44] 41 U.S.C. § 10a-10c (1982).

[45] 19 U.S.C. §§ 2501-2582 (1982).

Regulatory Changes

Drug-Free Work Force

In an interim rule issued on September 28, 1988, a new clause in DFARS 252.223-7500 entitled "Drug-Free Work Force (SEP 1988)" now requires certain contractors "to institute and maintain a program for achieving the objective of a drug-free work force." [46] The program must include: 1) an employee assistance program emphasizing education, counseling and rehabilitation; 2) supervisory training to assist in identifying and addressing illegal drug use by employees; 3) opportunities for self-referrals and supervisory referrals for treatment; and 4) provisions for identifying illegal drug users, including testing. Appropriate alternatives to these criteria are also acceptable. Testing may be random, as a result of a reasonable suspicion, as part of new employee applications, after an accident or other unsafe incident, or as a follow-up to a treatment program. Contractors cannot allow any employee who is found to be using illegal drugs to remain on duty or perform in a sensitive position. The clause was required effective October 31, 1988, for solicitations and contracts involving access to classified information, and for any other contract that the contracting officer deems necessary for national security or for reasons of health or safety. The clause does not apply, however, to commercial contracts or to contracts performed outside the United States. These new requirements are likely to be challenged on fourth amendment grounds, and as contrary to the requirements in the Drug-Free Workplace Act of 1988, [47] which does not require contractors to implement testing programs.

Anti-Kickback Rules

The final rule implementing the Anti-Kickback Enforcement Act of 1986 [48] was issued to replace the interim rule issued last year. [49] Effective on October 3, 1988, the final rule revises FAR 3.502, 9.406-1, and 52.203-7, and is intended to deter subcontractors from making payments, and contractors from accepting payments, for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract. All contracts must require contractors to have in place and follow reasonable procedures designed to prevent and detect violations of the Act, and to cooperate on investigations of such violations. The final rule gives examples of "reasonable procedures," such as company ethics rules, education programs, and certification, procurement, audit, and reporting procedures.

Audit Follow-up Guidance

Department of Defense Directive 7640.2 [50] was revised to eliminate any perception that the authority of the contracting officer in resolving contract audit reports was being unduly restricted. Contracting officers are responsible for negotiating contracts, to include determining the government's negotiating position. Therefore, the revised directive no longer requires contracting officers to reconcile their disagreements with auditors. The directive does require them, however, to "fully consider" any audit advice received. Also, DFARS 215.807 and 215.808 were amended to ensure that the contracting officer: 1) incorporates any auditor advice in the pre-negotiation objectives; and 2) documents in the Price Negotiation Memorandum how audit findings and recommendations were handled. [51]

Options

New Requirements

FAC 84-37 also revised the rules concerning the exercise of options. [52] Two new requirements in FAR 17.207(f) must be met before a contracting officer can exercise an option. First, the option must have been evaluated as part of the initial competition. This helps satisfy the full and open competition requirements of FAR Part 6. The second requirement is that the option must be pre-priced, or its price must be determinable from the terms of the basic contract. Examples of when a price is determinable include formulas in the contract, or a price stated that is subject to an economic price adjustment or a wage rate adjustment clause in the contract. Also, before exercising an option, the contracting officer must document in the contract file that the exercise is in accordance with the terms of the option, as well as the FAR Part 6 full and open competition requirements and all requirements in FAR Subpart 17.2.

Evaluation of Options in Sealed Bidding

An amendment to DFARS 217.200 provides that there shall be no provision for the evaluation of options in an IFB unless the contracting officer determines that there is a reasonable likelihood that the options will be exercised. [53]

Acquisitions From Other Than Required Sources

DFARS 208.470-2 and 208.7100-1 were revised to allow greater flexibility to use sources other than the central supply system when such action is judged to be

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[46] 33 Fed. Reg. 37,763 (1988); DFARS Subpart 223.75.

[47] Pub. L. No. 100-690, 102 Stat. _____ (1988).

[48] Pub. L. No. 99-634, 100 Stat. 3523 (1986) (codified at 41 U.S.C. §§ 51-58 (Supp. IV 1986)).

[49] FAC 84-39, 2 September 1988.

[50] Dep't of Defense Directive 7640.2, Policy for Follow-Up on Contract Audit Reports (12 February 1988).

[51] Defense Acquisition Circular [hereinafter DAC] 86-14, 15 May 1988.

[52] FAC 84-37, 18 May 1988.

[53] DAC 86-15, 1 July 1988. This amendment implements the statutory requirement at 10 U.S.C. § 2301(a)(7) (1982).

in the best interests of the government. [54] Effective February 1, 1988, these changes increase the ability of buying activities to take advantage of local market conditions when they offer the best combination of quality, timeliness, and cost.

Rights in Technical Data

DOD's First Interim Rule

The saga of DOD's attempt to implement regulations defining the rights of the government and contractors with respect to technical data that will satisfy both sides continues. Although last year DOD issued a "final rule" governing technical data rights, [55] President Reagan issued Executive Order 12591 [56] on April 10, 1987, which required further regulations that would assure the commercialization of technology developed under government contracts. Also, in 1987 Congress amended 10 U.S.C. § 2320 to place further restrictions on DOD's regulations. [57] Therefore, on April 1, 1988, DOD issued a new, interim rule on technical data rights that changed several aspects of DOD's policy in this area. [58] The interim rule kept the three classes of data rights (unlimited rights, government purpose license rights, and limited rights), and provided detailed guidance on when each of these rights attach. The interim rule also provided for negotiation of different rights at the option of the parties, and prescribed at DFARS 227.473-1 a detailed negotiation process that is designed to get the parties to agree on these rights as early as possible in the development process.

Criticism and DOD's Response—Another Interim Rule

Unfortunately, but predictably, the interim rule met with harsh criticism from both industry and the OFPP. They claimed that the rule did not go far enough to assure that contractors could retain the commercial rights of data developed under government contracts, which was the main objective of the Executive Order. Additionally, they claimed that it gave DOD rights to technical data produced at private expense. The Office of Management and Budget's Office of Information and Regulatory Affairs even refused to issue DOD the necessary Paperwork Reduction Act [59] clearance to make the rule valid and legally enforceable in its contracts. The Defense Acquisition Regulatory Council therefore issued a revised interim rule on October 28, 1988. [60] This revised rule contains numerous changes that are generally more favorable to contractors. It deleted many of the more controversial rules, such as: 1) the requirement to certify that to the best of the contractor's knowledge the information on development of data at private expense is accurate, current and complete; 2) the rule that the government would have unlimited rights in any data not included in a list in the contract; and 3) the requirement to submit development cost data on items developed in part at private expense. The new rule also simplified and clarified the process for establishing rights in data. Because the new rule is not final, it may undergo more changes in the future.

Amendment of Solicitations

FAC 84-40 amended FAR solicitation provisions 52.214-3 and 52.215-8 to provide that if the solicitation is amended, all terms and conditions that are not modified remain unchanged. [61] This is the rule that had been traditionally employed by the GAO. [62] As we reported last year, however, the GSBCA had established a different rule. [63] Under the GSBCA interpretation, when an amendment changed only the date for proposal submission without mentioning the time, the solicitation was treated as having no specified proposal closing time. Therefore, the board determined that FAR 15.412(b) operated to establish 4:30 p.m. as the submission deadline. Under the GAO rule, if the deadline had been 2:00 p.m., it remained 2:00 p.m. This change to the FAR is especially helpful to contracting officers in those situations when a proposal on an amended ADP solicitation is received after the originally specified time, but before 4:30 p.m.

Applicability of Trade Agreements Act

Federal Acquisition Circular 84-38 contained several changes to the FAR pertaining to the applicability of the Trade Agreements Act of 1979. [64] The changes include: 1) application of the Act is determined by the estimated value of the acquisition, rather than by the value of the offers received; 2) extension of the Act's applicability to leases, lease-purchase and rental agreements; and 3) inclusion of the value of all options when calculating the threshold for application of the Act. [65]

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[54] DAC 86-10, 15 March 1988.

[55] *See* DAC 86-3, 15 May 1987; 52 Fed. Reg. 12391 (1987); DFARS Subpart 27.4).

[56] Exec. Order No. 12,591, 3 C.F.R. 220 (1988).

[57] FY 1988/1989 DoD Authorization Act, Pub. L. No. 100-180 § 808, 101 Stat. 1019 (1987); *see* Ackley, Aguirre, McCann, Munns, and Pedersen, *Recent Developments in Contract Law—1987 in Review*, The Army Lawyer, Feb. 1988, at 5, 8.

[58] DAC 86-13, 15 April 1988.

[59] 44 U.S.C. §§ 3501-3520 (1982 & Supp. III 1985).

[60] 53 Fed. Reg. 43699 (1988).

[61] FAC 84-40, 26 October 1988.

[62] *See, e.g.*, Comp. Gen. Dec. B-218322 (26 Mar. 1985), 85-1 CPD ¶ 353.

[63] BH & Associates, GSBCA No. 9209-P, 88-1 BCA ¶ 20,340; *see* Ackley, Aguirre, McCann, Munns, & Pedersen, *Recent Developments in Contract Law—1987 in Review*, The Army Lawyer, Feb. 1988, at 14.

[64] 19 U.S.C. §§ 2501-2582 (1982). FAC 84-38, 20 July 1988.

[65] *See* FAR 25.402.

Ratification of Unauthorized Commitments

Federal Acquisition Circular 84-33 amended the FAR by adding a section at FAR 1.602-3 on ratification of unauthorized commitments. [66] Before this coverage was added to the FAR, the ratification procedures were contained in DFARS 1.670 and the FAR's predecessor regulations, the Defense Acquisition Regulation (DAR) and the Federal Procurement Regulations (FPR). The coverage has been deleted from the DFARS because of the new coverage in the FAR. [67]

Multiple Best and Final Offers

Effective August 10, 1988, the Defense Acquisition Regulatory Council issued a new rule at DFARS 215.611 that imposes restrictions and requires approvals for the use of multiple best and final offers. [68] Under the new rule, before conducting a second or subsequent round of best and final offers, approvals must be obtained: 1) from the Source Selection Authority (SSA) and the Service Acquisition Executive (SAE) for negotiated acquisition procedures using formal source selection procedures; and 2) from the Head of the Contracting Activity (HCA) for all other negotiated acquisitions. The SAE may delegate his or her authority no lower than the HCA.

Labor Standards for Construction Contracts

Replacing the outdated Defense Acquisition Regulation coverage, FAC 84-34 implemented the labor standards provisions applicable to federal construction contracts at FAR 1.105 and Subparts 22.3 and 22.4. [69]

Cost Allowability

FAR 31.204 was revised to provide guidelines for determining the allowability of costs to which more than one cost principle is relevant. [70] Effective June 17, 1988, when more than one cost principle in FAR 31.205 applies to a contractor's cost, the cost must be apportioned among the applicable cost principles, and allowability will be determined for each portion based upon the cost principle applicable to it. If, however, the cost cannot be apportioned, the cost principle that most specifically deals with or best captures the essential nature of the cost at issue will determine allowability.

Penalties for Unallowable Costs

The FY 1986 DOD Authorization Act [71] added a permanent provision in 10 U.S.C. § 2324, which authorized DOD to assess certain penalties when contractors submit unallowable costs in proposals for settlement of indirect costs. DOD implemented this new authority by adding a new DFARS Subpart 231.70, Penalties for Unallowable Costs, and a related clause (DFARS 252.231-7001) and section (DFARS 242.771). [72] These penalties apply to all DOD contracts in excess of $100,000 awarded after February 26, 1987, except fixed-price contracts without cost incentives. These penalties are in addition to any other applicable civil or criminal penalties, and may include up to two times the amount of the disallowed cost, interest on the paid portion, if any, and up to $10,000 per proposal.

DOD Raises Progress Payment Rates

A recent interim rule in DFARS 232.501-1 revises progress payment rates in DOD to the same levels provided in the FAR. [73] The rule provides that the customary progress payment rate for large businesses is seventy-five percent, and eighty percent for small businesses if the contract is funded with FY 1987 appropriations. For all other DOD contracts, the customary rate is eighty percent for large businesses and eighty-five percent for small businesses. The interim rule was effective for solicitations issued on or after October 1, 1988. The rule also: 1) adjusts the amount of contractor investment required in work-in-process inventory for contracts with flexible progress payments; 2) reduces progress payment retainage on construction contracts from fifteen percent to ten percent; and 3) raises the basis for payment on architect-engineer contracts from eighty-five percent to ninety percent.

Changes to Fast Payment Procedures

FAC 84-38 revised fast payment procedures in FAR Subpart 13.3 and 52.213-1. [74] The revisions include: 1) allowing, rather than mandating, use of the procedures; 2) more specifically describing the conditions that justify the use of the procedures; and 3) increasing the period of time from 90 days to 180 days for verifying contractor delivery of supplies and for corrective action by the government.

The Army Information Resources Management Program

The Army regulation on management of the Information Mission Area has been revised. The new regulation consolidates several regulations on matters ranging from automation to records management policy. [75]

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[66] FAC 84-33, 8 February 1988.

[67] DAC 86-14, 15 May 1988.

[68] DAC 88-1, 1 November 1988.

[69] FAC 84-34, 18 February 1988.

[70] FAC 84-37, 18 May 1988.

[71] Pub. L. No. 99-145, 99 Stat. 583 (1985).

[72] DAC 86-14, 15 May 1988.

[73] 53 Fed. Reg. 35511 (1988).

[74] FAC 84-38, 20 July 1988.

[75] Army Reg. 25-1, The Army Information Resources Management Program (18 Nov. 1988).

Proposed FIRMR Changes

GSA has proposed several changes to the Federal Information Resource Management Regulation (FIRMR). [76] The proposed changes include the establishment of uniform blanket delegations of procurement authority for hardware, software, and support services. The proposed thresholds are $2.5 million for competitive acquisitions and $250,000 for noncompetitive acquisitions.

Proposed Changes to the Small Business Administration's Certificate of Competency (COC) Regulations

In order to reflect a number of changes in procurement laws not presently incorporated in the present SBA Certificate of Competency (COC) regulations, the SBA has proposed the following changes, among others, to its COC regulations: 1) in order to be eligible for a COC, a small business would have to perform with its own facilities and personnel the portion of the contract now required by the Small Business Act, as amended; [77] 2) a small business would not be eligible for a COC if a significant portion of the contract would be performed outside the United States, its trust territories, possessions, or Puerto Rico; 3) create a presumption of nonresponsibility for certain criminal convictions, for certain civil judgments, and for small businesses that are six months or more delinquent on a debt to the United States Government; 4) clarify the SBA's Regional Office's authority to deny a COC regardless of the dollar value of the contract, and clarify that the Regional Office's decision to deny a COC is a final administrative appeal within the SBA; 5) provide procedures whereby agencies can appeal initial Regional Office determinations to issue a COC (the FAR already has procedures for such appeals at 19.602-2 and 19.602-3, but the SBA rules do not); and 6) permit the SBA to reconsider a determination to issue a COC if new adverse information is received prior to award, or the contracting agency has not awarded the contact within sixty days of the COC's issuance. [78]

Small Disadvantaged Business Preference Programs

The latest rules concerning small disadvantaged business preferences and set-asides are summarized in detail at the beginning of the "Potpourri" section of this article.

Implementation of the Program Fraud Civil Remedies Act

For ease of reference to the recent developments in the area of fraud, waste and abuse, the final rules that implement the Program Fraud Civil Remedies Act of 1986 within DOD [79] are covered in detail in the section of this article entitled "Fraud and Related Matters."

Protests

General Accounting Office

Legislation Ends Constitutional Squabble

The dispute concerning the constitutionality of the automatic stay provision of the Competition in Contracting Act (CICA) [80] has been resolved. In section 8139 of the Department of Defense Appropriations Act, 1989, [81] Congress amended the automatic stay provision to eliminate the Comptroller General's discretion to extend the stay beyond ninety working days. This removed the major constitutional objection, that the Comptroller General's discretion violated the separation of powers doctrine, that the Department of Justice asserted in *Ameron, Inc. v. U.S. Army Corps of Engineers*. [82] Upon the request of the Department of Justice, the Court dismissed the case in October. [83]

Timeliness Exception for Successful Bidders in A-76 Acquisitions

Under Supplement 1 to OMB Circular A-76, agencies must establish procedures for appealing cost comparisons. These procedures must allow a minimum of fifteen days for interested parties to contest cost comparison issues. Generally, GAO will not consider the protest of a cost comparison issue unless the protester has first made a timely protest to the agency. In *Apex International Management Services* [84] the apparent successful bidder did not raise any objections to the cost comparison during the agency appeal period. In its rebuttal of other protests to the agency, however, it raised new issues to offset the cost comparison challenges made by the other protesters. The agency had dismissed these new issues as untimely. In a modification of its general rule, however, GAO determined that the apparent successful bidder should be permitted to raise new issues during the agency appeal rebuttal period. GAO reasoned that the apparent successful bidder had no reason to challenge a cost comparison under which it stood to receive the

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[76] 53 Fed. Reg. 32085 (1988).

[77] Pub. L. No. 99-661, 100 Stat. 3973 (1986).

[78] 53 Fed. Reg. 22015 (1988).

[79] Pub. L. No. 99-509, 100 Stat. 1934 (1986) (codified at 31 U.S.C. §§ 3801-3812 (Supp. IV 1986)).

[80] Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified at 10 U.S.C. §§ 2301-2356, 31 U.S.C. §§ 3551-3556, 40 U.S.C. § 759, and 41 U.S.C. §§ 252-254 (Supp. IV 1986)).

[81] Pub. L. No. 100-463, 102 Stat. 2270 (1988).

[82] 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 108 S. Ct. 1218 (1988).

[83] U.S. Army Corps of Engineers v. Ameron, Inc., 109 S. Ct. 297 (1988).

[84] Comp. Gen. Dec. B-228885.2 (6 Jan. 1988), 88-1 CPD ¶ 9.

award, and therefore it should be permitted to offer offsetting objections after its standing for award was challenged. The net result of the decision is that the low bidder in a Commercial Activities Program acquisition will not be constrained by the appeal period stated in the solicitation. Instead, agency appeal boards must consider objections raised during the rebuttal period.

The Significant Issue Exception—An Exceptional Case?

The GAO's rules [85] provide that GAO may consider any protest that is not timely filed if it raises issues significant to the procurement system. A significant issue is generally deemed to be one that is both novel and of widespread interest to the procurement community. [86] A more arcane, and unevenly applied, aspect of this rule is where an egregious violation of statute or regulation is evident in the protest and solicitation, such as where award would clearly not result in the lowest cost to the government. [87] GAO invoked this exception to consider, and sustain, a more subjective allegation that the protester had been improperly excluded from the competitive range. [88] The bottom line on this case appears to be that the protester had a winning case on the merits, and the timeliness issue arose after the record was fully developed. It is probably an aberration, however, because GAO stated that the decision was limited to its facts. In any event, it constitutes a significant demonstration of GAO's flexibility in interpreting its rules, and illustrates the importance of examining the procedural aspects of a protest before developing a record.

Protest Costs Under the New Rules

On December 8, 1987, GAO promulgated new protest rules applicable to protests filed on or after January 15, 1988. One of the major changes under the new rules was the elimination of specific criteria for the award of protest costs, including attorney's fees. Now the rule provides a bare statement that GAO may declare the protester entitled to protest costs where the government has not complied with a statute or regulation. [89] In the commentary accompanying the new rules, GAO stated that "the costs of filing and pursuing a protest generally should be granted whenever a protest is sustained based on more than some technical violation of statute or regulation." [90] The decision most often cited by GAO for the award of protest costs is *Kirilla Contractors, Inc.* [91] That decision offers no explanation for the award; it merely declares the protester's entitlement to costs with a reference to the 1988 rules. In practice, it appears that GAO will grant protest costs whenever a protest is sustained. For example, in *Pacific Northwest Bell Telephone Company* [92] GAO decided that the cost of pursing a protest includes the costs entailed in responding to a government request for reconsideration.

No Change in Bid Preparation Cost Awards

GAO's old rule [93] permitted recovery of bid preparation costs when the protest was sustained but no practical relief was available. GAO's new rules eliminated this prerequisite for such an award, but in practice, GAO's decisions under the new rules appear to be unchanged. For example, GAO has awarded bid preparation costs when the protest was sustained but termination was not recommended for practical reasons. [94]

No Attorney's Fees on Government Capitulation

GAO expressly declined to follow the General Services Board of Contract Appeals' (GSBCA) practice of awarding attorney's fees where a protest is dismissed as a result of the government's capitulation. [95] Under GAO's interpretation of the statute authorizing the award of fees, [96] a determination on the merits is required for the award of fees and costs. When GAO dismisses a protest as moot, no such determination occurs. In contrast, a capitulation by the government in a GSBCA protest entails a joint motion for dismissal pursuant to a stipulated violation. [97] GSBCA's dismissal of the protest, viewed by GAO as a ratification of the stipulation, constitutes a determination that a statute or regulation was violated and thus provides a legal basis for the payment of costs. GAO declined to employ similar formal procedures, however, because the intent of CICA was merely to "codify and strengthen" GAO's existing informal procedures.

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[85] 4 C.F.R. 21.2(b)(1988).

[86] *See, e.g.*, Comp. Gen. Dec. B-231898.2 (22 Aug. 1988), 88-2 CPD ¶ 169.

[87] *See* Comp. Gen. Dec. B-222627 (7 Oct. 1986), 86-2 CPD ¶ 401.

[88] Comp. Gen. Dec. B-230013 (18 May 1988), 88-1 CPD ¶ 467, *reconsideration denied*, Comp. Gen. Dec. B-230013.2 (29 July 1988), 88-2 CPD ¶ 100.

[89] 4 C.F.R. 21.6(d)(1988).

[90] 52 Fed. Reg. 46,448 (1987).

[91] Comp. Gen. Dec. B-230731 (10 June 1988), 67 Comp. Gen. _____, 88-1 CPD ¶ 554.

[92] Comp. Gen. Dec B-227850.3 (6 June 1988), 88-1 CPD ¶ 527.

[93] 4 C.F.R. 21.6(e) (1987).

[94] *See, e.g.*, Comp. Gen. Dec. B-230268 (14 June 1988), 88-1 CPD ¶ 570; Comp. Gen. Dec. B-230246 (21 June 1988), 88-1 CPD ¶ 590.

[95] Comp. Gen. Dec. B-230171.22 *et al.* (6 Sept. 1988), 88-2 CPD ¶ 213.

[96] 31 U.S.C. § 3554(c)(1) (Supp. IV 1986).

[97] *See, e.g.*, Federal Data Corp., GSBCA No. 9343-P, 88-2 BCA ¶ 20,175.

General Services Board of Contract Appeals

The Board Continues Its Jurisdictional Expansion

Unlike the GAO, the GSBCA has determined that it will review affirmative determinations of responsibility. The board has stated, however, that protesters will bear a substantial burden of proof because its *de novo* review authority must be tempered in such a highly discretionary area. Thus, the board will "grant deference to those determinations regarding the responsibility of prospective contractors, without slavishly following them." [98]

The board asserted jurisdiction over a protest involving a procurement conducted under section 8(a) of the Small Business Act. [99] The board noted that CICA empowers it to consider any protest of a procurement that is subject to the Brooks Act. [100] Because section 8(a) acquisitions are not specifically exempted from the Brooks Act, the board concluded that it had jurisdiction over them. [101]

In *Diversified Systems Resources, Ltd.* [102] the board assumed jurisdiction over a protest against a termination for convenience where the basis for the termination was an agency determination that the award failed to conform with the law. The board noted that its decision was in consonance with those of the GAO, citing *Norfolk Shipbuilding and Drydock Corp.* [103]

Some New Wrinkles in Timeliness

Where the protester is prevented from filing a timely protest due to the closing of the board's office as a result of inclement weather, the board will extend the protest period to the next working day. [104]

The location of a contracting activity does not affect the period in which a protest may be filed. In *The Miklin Group, Inc.* [105] the deadline for receipt of proposals (RFP) was 2 p.m., Japan standard time, on December 23rd. The protester (who wanted to protest the content of the RFP) served the contracting officer prior to the deadline, but delayed filing with the board until 9:09 a.m., eastern standard time, on December 23rd, approximately fourteen hours after the deadline in Japan. Miklin argued that it had delayed filing to comply with the requirement to serve the contracting officer on the same day. The board rejected this argument, holding that local time controlled the filing deadline, and that the "same day" service rule was satisfied if service and filing occurred at more or less the same time.

In *North American Automated Systems Co.* [106] the board held that where the government failed to provide the statutory minimum of thirty days for submission of bids, a protest would be considered timely if it was received within thirty days of the date of the solicitation. In *React Corporation* [107] the board extended this decision. The solicitation gave offerors twenty-eight days to submit proposals. The due date was March 4th. If the government had given offerors the full thirty days, the due date would have been March 7th. The protester's offer was received on March 7th, but the contracting officer rejected it as late. The protest was filed on March 9th (two days after when the deadline for receipt of offers (and hence protests) should have been), and was arguably untimely under the rule announced in *North American Automated Systems.* The board, however, decided that the protester could file a protest within ten working days from the time it learned of the *effect* of the statutory violation. The current rule appears to be that: 1) if the government allows less than thirty days for submission of proposals, and 2) the protester submits its bid after the due date, but before the expiration of the thirty day period, then 3) the protester may file a protest within ten working days from receipt of notice of rejection of its offer.

Attorney's Fees and Bid Preparation Costs

In *Compuware Corporation* [108] the board decided that a successful protester was entitled to costs incurred for a request for suspension of the government's delegation of procurement authority, even though the protester had withdrawn the request. Similarly, in *Calma Company* [109] the board allowed recovery of costs associated with issues that had been withdrawn or dismissed where the protester had significantly prevailed on numerous issues.

The board's reluctance to split hairs over the reasonableness of costs has its limits. In *React Corp.* [110] the protester's attorney claimed 193 hours in preparation of a timeliness issue, with only one reported case as precedent. In reducing the claim by half, the board stated, "while we have no particular problem with the

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[98] Del Net, Inc., GSBCA No. 9178-P, 88-1 BCA 20,342.

[99] 15 U.S.C. § 637(a) (1982).

[100] 40 U.S.C. § 759 (1982).

[101] KOH Systems, Inc., GSBCA No. 9388-P, 88-2 BCA ¶ 20,664.

[102] GSBCA No. 9493-P, 88-3 BCA ¶ 20,897.

[103] Comp. Gen. Dec. B-219988.3 (16 Dec. 1985), 85-2 CPD ¶ 667.

[104] Severin Companies, Inc., GSBCA No. 9344-P, 88-1 BCA ¶ 20,513.

[105] GSBCA No. 9322-P, 88-1 BCA ¶ 20,516.

[106] GSBCA No. 8681-P, 87-1 BCA ¶ 19,404.

[107] GSBCA No. 9530-C (9456-P), 88-3 BCA ¶ 20,835.

[108] GSBCA No. 8890-C (8869-P), 88-1 BCA ¶ 20,252.

[109] GSBCA No. 8865-C (8744-P), 88-3 BCA ¶ 20,898.

[110] GSBCA No. 9530-C (9456-P), 88-3 BCA ¶ 21,026.

rate, . . . such a rate presupposes an efficient attorney knowledgeable in the field of government contracts and protests."

In its most significant decision this year concerning attorney's fees, the board held that the Army was required to reimburse the judgment fund, established pursuant to 31 U.S.C. § 1304 (1982), for protest costs awarded. [111] In a split decision, the board determined that it had the authority to order reimbursement based upon 40 U.S.C. § 759(h)(6)(C) (Supp. III 1985), which empowers the board to order any additional relief that it is authorized to provide under any statute or regulation.

Not every successful protest results in the award of bid preparation costs, however. Recovery is generally based on whether the government's violation resulted in the protester's bid preparation expenditures being wasted. In *Federal Systems Group, Inc.* [112] the protester had prevailed in an earlier protest alleging that its offer had been improperly rejected as late. On the board's order, the government considered the protester's proposal, but determined that it was not the lowest acceptable offer. In rejecting the claim for bid preparation costs, the board held that the offer had been fairly considered and that, under these circumstances, such costs are nothing more than a normal business expense.

Contrast the *Federal Systems Group, Inc.* decision with *Morton Management, Incorporated*, [113] where the board determined that the government had conducted an acquisition without a delegation of procurement authority from the General Services Administration. The board granted bid preparation costs because an award could not properly be made without this delegation of authority. Thus, the government had caused the protester to incur unnecessary expenses.

The board has specifically declined to adopt the GAO practice of denying bid preparation costs whenever the protester regains the opportunity to compete further in a procurement. [114]

Urgent and Compelling Circumstances—Suspensions

The board refused to suspend procurement authority in *North American Automated Systems Co., Inc.* [115] because the acquisition was for computer equipment to be used for AIDS research. The board noted that "there are few circumstances more urgent and compelling . . . than this scourge."

Authority to Conduct Future Acquisitions Revoked

In *ISYX* [116] the board revoked the National Oceanic and Atmospheric Administration's (NOAA) blanket delegation pertaining to the use of GSA Schedule contracts. In other words, the board revoked NOAA's authority to conduct *future* acquisitions without a specific delegation of authority from GSA. The board found that NOAA had a fundamental lack of understanding of the regulatory requirements for the use of schedule contracts, and ordered that the blanket delegation could not be reinstated until NOAA had obtained GSA's approval and had demonstrated that it was capable of properly using the contracts. The *ISYX* case arose out of a fairly common problem faced by contracting activities: the determination of what constitutes a single requirement for purposes of the Commerce Business Daily synopsis threshold and other regulatory constraints. NOAA had separately received and processed two requests for microcomputers. The board viewed this as a failure to satisfy the statutory requirement for planning and market research under 41 U.S.C. § 253(a)(1)(B) (Supp. III 1985). The board noted that, "to implement this mandate, procuring activities must coordinate their actions well enough that separate orders for similar requirements requested by different offices at virtually the same time will be combined so that the taxpayers can derive the benefits which may accrue from volume buying." [117]

Litigation

Jurisdiction

Advisory Opinion

In *Arctic Corner, Inc. v. United States* [118] the Court of Appeals for the Federal Circuit held that it lacked jurisdiction over an appeal from an ASBCA grant of summary judgment because the board's opinion was advisory only, and not a decision. The board had held that because the contractor had settled three default terminations, it was barred from seeking the difference between the contract prices and any costs claimed by the surety who had completed the contract. [119] The surety had not submitted any claims for costs, and therefore it was not known whether the contractor would ever have a claim. But until a claim is filed and denied, the court held that the board could not *decide* that the contractor's claim was barred. Accordingly, the board's action was considered an advisory opinion only. The appeal

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[111] Julie Research Laboratories, Inc., GSBCA No. 9075-C (8919-P), 89-1 BCA ¶ 21,213, 88 BPD ¶ 208.

[112] GSBCA No. 9381-C (9240-P), 88-2 BCA ¶ 20,773.

[113] GSBCA No. 9053-C (8965-P), 88-2 BCA ¶ 20,777.

[114] Recognition Equipment Incorporated, GSBCA No. 9408-C (9363-P), 89-1 BCA ¶ _____, 88 BPD ¶ 228.

[115] GSBCA No. 9098-P, 88-1 BCA ¶ 20295.

[116] GSBCA No. 9407-P, 88-2 BCA ¶ 20,781, *reconsideration denied*, 88-2 BCA ¶ 20,815.

[117] ISYX, at 104,999.

[118] 845 F.2d 999 (Fed. Cir. 1988).

[119] Arctic Corner, Inc., ASBCA No. 34216, 87-3 BCA ¶ 20,139.

was dismissed because a case or controversy is required to invoke the court's jurisdiction.

Transfer

The U.S. District Court for the Northern District of California decided in *Southwest Marine Inc. v. United States* [120] that the Armed Services Board of Contract Appeals could take jurisdiction over a claim transferred by a federal court even though the claim was filed more than ninety days after receipt of the final decision. The contractor had timely appealed the denial of its claims to the ASBCA, and then filed another suit on the behalf of its subcontractor with the district court. The government requested that this suit be transferred to the ASBCA so that it could be consolidated with the contractor's appeal. The contractor contended that the board would lack jurisdiction over the subcontractor claim because the district court suit on it had been filed more than ninety days after receipt of the final decision. The district court held that the ninety day statutory appeal period applies only to direct appeals, and not to transferred appeals which have otherwise been timely filed, and accordingly it transferred the suit to the ASBCA.

The Court of Appeals for the Federal Circuit held in *John R. Glenn v. United States* [121] that an appeal may be filed with the Claims Court for the express purpose of transferring the case to the Armed Services Board of Contract Appeals. The Claims Court had refused to transfer the case to the ASBCA because it was filed with the express purpose of requesting a transfer and, because the appeal could not have been timely filed with the ASBCA, transferring it would distort the Contract Disputes Act's appeal procedure. The transfer was held proper because it would avoid two tribunals from concurrently deciding appeals on interrelated issues, the contractor having previously filed a related appeal with the board.

Technical Data Rights

The ASBCA held in *General Electric Automated Systems Division* [122] that it had jurisdiction over technical data rights disputes. The contractor challenged a contracting officer's final decision that technical data in a report had not been developed at private expense. The government contended that the board lacked jurisdiction because there was no money at issue. The board held that jurisdiction existed because the FY 1985 Defense Authorization Act [123] defined a claim involving the validity of proprietary data as a claim under the Contract Disputes Act. [124]

Binding Election

The Claims Court held in *Jo-Mar Corp. v. United States* [125] that the contractor's earlier, although untimely, appeal with the ASBCA was not a binding election of forums that deprived the court of jurisdiction over the contractor's appeal. The court stated that the board's proper dismissal of the untimely appeal rendered inapplicable the doctrine of holding a contractor to its election as between two forums. For there to be a binding election, the court held that the other forum must have been able to exercise jurisdiction over the appeal.

In *National Neighbors, Inc. v. United States* [126] the court ruled that a contractor's filing in the Claims Court did not constitute a binding election because the contractor did not know whether a related appeal filed with the ASBCA had been timely. The Claims Court had dismissed the appeal to it for lack of jurisdiction. Stating that a choice of forums occurs only when that choice is available, the court held that the Claims Court's dismissal was premature because the ASBCA had not yet decided whether the appeal was timely filed. The contractor made a binding election to proceed before the ASBCA only if the board determines that the filing was timely.

Government Breach Claims

In *Seaboard Lumber Co. v. United States* [127] the contractor challenged the Claims Court's jurisdiction over the government's counterclaims for common law breach. The contractor contended that because the Claims Court was an article I court, [128] it lacked jurisdiction over common law claims. The Claims Court held that it had jurisdiction because the government's contract claims were not based on common law, but instead arose from the sovereign-contractor relationship. The contractor also contended that it was entitled to a jury trial under the seventh amendment to the U.S. Constitution. The seventh amendment guarantees a jury trial in suits at common law where the amount in controversy exceeds $20. But because the government claims are not common law actions, the court denied the contractor's request for a jury trial.

Reconsideration of a Final Decision

In *Nash Janitorial Services, Inc.* [129] an appeal filed more than ninety days after the original final decision

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[120] 680 F. Supp. 327 (N.D. Calif. 1988).

[121] 858 F.2d 1577 (Fed. Cir. 1988).

[122] ASBCA No. 36214, 88-3 BCA ¶ 21,195.

[123] Pub. L. No. 98-525, 98 Stat. 2591 (1984).

[124] 41 U.S.C. §§ 601-613 (1982).

[125] 15 Cl. Ct. 602 (1988).

[126] 839 F.2d 1539 (Fed. Cir. 1988).

[127] 15 Cl. Ct. 366 (1988).

[128] The U.S. Claims Court was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

[129] GSBCA No. 7338, 88-2 BCA ¶ 20,809.

was issued was timely, because the actions of the contracting officer constituted a reconsideration of the decision. After receiving the original decision, the contractor took exception to three items and requested a copy of an audit report. The contracting officer provided a copy of the audit report and requested additional information concerning the three items. The board held that the contracting officer's request for additional information amounted to an agreement to reconsider the original decision. The board also stated that no finality attached to the original decision because it failed to specify the reasons for the decision reached.

In *Horton Electric, Inc.* [130] the board held that the contracting officer had not reconsidered his final decision. The board held that the contracting officer's refusal to respond to the contractor's letter and telephone calls requesting reconsideration could not have reasonably led the contractor to believe that the contracting officer would reconsider his decision.

Subrogated Surety Entitled to Pursue Contractor's Claim

In *Peerless Insurance Co.* [131] the board, with dissenting opinions, ruled that a surety that loses money on a performance or payment bond may pursue its claim before the board under the subrogation doctrine. The board decided that the equitable doctrine of subrogation puts a surety in privity with the government. In reviewing the Court of Claims and Federal Circuit cases taking jurisdiction under the doctrine of subrogation, the board found nothing that intimated that Boards of Contract Appeals did not have similar jurisdiction under the Contract Disputes Act.

Interlocutory Orders

The Court of Appeals for the Federal Circuit now has exclusive jurisdiction over appeals from a district court's interlocutory order either granting or denying a motion to transfer the case to the Claims Court. [132] Under the old procedures, the losing party could not seek review of the action until the district court had rendered a decision on the merits.

Certification

Partial Payment of Claim

In *T.E Deloss Equipment Rentals* [133] the ASBCA held that it had jurisdiction over an uncertified claim for the difference between the payment authorized and paid by the contracting officer and the amount claimed by the contractor. The final decision granted a portion of the contractor's uncertified claim, and payment was made in that amount. Jurisdiction existed because the payment reduced the remaining claim to an amount less than $50,000, and thus no certification was needed.

Not the Right "Magic Words"

The ASBCA held in *Times Fiber Communications, Inc.* [134] that a contractor's statement that the contractor "had previously provided complete and accurate data and all otherwise necessary documentation" did not meet the Contract Disputes Act's certification requirements under 41 U.S.C § 605. A certification requires a statement that simultaneously asserts that the claim is made in good faith, that supporting data is accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment believed due. The contractor's certification was defective because the statement could not fairly be read to state that the data supporting the *present* claim was accurate and complete to the best of the contractor's knowledge and belief.

How Specific An Amount?

A contractor's claim for future savings due under a value engineering change proposal (VECP) that did not specifically state a sum certain was held to be sufficiently complete to be properly certified. The contractor in *East West Research, Inc.* [135] had stated a specific amount for known purchases of equipment within the VECP. A price per unit was claimed for other purchases, the quantity of which the contractor had no means of determining because the information was within the government's control. The board held that the claim was for a sum certain, because it was stated in a manner that allowed a reasonable determination of the recovery available at the time the claim was presented to the contracting officer.

Undefinitized Contracts

Bell Helicopter Textron, Inc. [136] concerned an undefinitized contract. A contract clause provided that the contracting officer could set a unilateral price if a negotiated price could not be agreed upon. The contractor appealed from the unilateral modification setting the price, which stated that the modification was a final decision. The government moved to dismiss for lack of certification. In opposing the motion, the contractor argued that the decision to set the contract price was a government claim, which the contractor did not have to certify. The ASBCA held that the contracting officer's action did not amount to a government claim because he was merely performing his contractual duty of establishing the contract price, and was not adjusting or interpreting any terms of the contract. Therefore, the board granted the government's motion to dismiss for lack of certification.

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[130] ASBCA No. 35677, 88-2 BCA 20,608.

[131] ASBCA No. 28887, 88-2 BCA ¶ 20,730.

[132] Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[133] ASBCA No. 35374, 88-1 BCA 20,497.

[134] ASBCA No. 36276, 88-3 BCA ¶ 21,034.

[135] ASBCA No. 35401, 88-3 BCA ¶ 20,931.

[136] ASBCA No. 35950, 88-2 BCA ¶ 20,656, *mot. for recon. denied*, ASBCA No. 35950, 88-3 BCA ¶ 21,131.

Timeliness

Facsimile Copy of Final Decision

The ASBCA held in *Tyger Construction Co.* [137] that the contractor's receipt of a facsimile copy of a final decision starts the running of the ninety-day appeal period. The Contract Disputes Act requires that the contracting officer issue a written decision and mail or otherwise furnish it to the contractor. [138] The board stated that there was nothing in the telecopy which indicated that it was not a final decision. The contractor's appeal was therefore held to be untimely.

Filing Before Final Decision Issued

Cushing Construction Company, Inc. [139] concerned an appeal that was filed seven days before the final decision terminating the contract for default was issued. The main opinion stated that the Contract Disputes Act's language that contractors may appeal "within ninety days from the receipt of a contracting officer decision" was broad enough to encompass the ninety days prior to the issuance of the final decision. The concurring opinions agreed with the result, but on different rationale. Prior to the issuance of the final decision, the contracting officer sent a notice of default to the contractor. Although the notice of default lacked the necessary language to start the running of the statutory appeal period, it was a contracting officer's decision from which an appeal could be taken. Accordingly, the appeal was not premature.

Receipt By Contractor's Attorney

The Claims Court held in *Structural Finishing, Inc. v. United States* [140] that the statutory appeal period began upon receipt of a final decision by the contractor's attorney. The contractor's attorney had filed the underlying claim, an appeal with the ASBCA (that had been dismissed because it was untimely), and the instant appeal. Under these circumstances, the court held that the attorney was the contractor's duly authorized representative, and that notice to the attorney was notice to the contractor. The court therefore dismissed the appeal because it was filed one day late.

Private Carrier

In *Associate Engineering Company* [141] the contractor contended that an appeal should be considered filed when it is given to a private carrier (Federal Express) for delivery. The board stated that the appeal period is a statutory waiver of sovereign immunity and must therefore be strictly construed. Although precedent establishes that an appeal is considered filed when it is mailed, the board noted that "mailed" has been defined as delivery of a properly addressed notice of appeal, affixed with adequate postage, to the U.S. Postal Service. The board refused to adopt the contractor's position that delivery to a private carrier equated to delivery to the Postal Service, and therefore dismissed the appeal as untimely.

Discovery Sanctions

Monetary Sanctions Against the Government

For the first time, the Claims Court has imposed monetary sanctions under its Rule 37 against the government for failing to comply with the court's discovery orders. In *Mortenson Co. v. United States* [142] the court concluded that the government had failed to respond adequately to the contractor's requests for documents and that sanctions were appropriate. The government contended that the award of attorney's fees was not proper under the Equal Access to Justice Act [143] because the contractor was not a prevailing party, as required by the EAJA, at this stage of the litigation. The Claims Court stated that the EAJA's prohibition was not applicable because the attorneys fees were being assessed under the court's rules of practice and not the EAJA. The court also rejected the government's claim that because the court's rules of practice had not been adopted by Congress, it had not waived sovereign immunity for the imposition of this monetary sanctions. The court held that its rules were properly adopted, bind the litigants, and have the full force and effect of law. The court therefore ordered the government to pay the contractor more than $21,000 in attorney's fees and costs.

"De Facto" Dismissal

In another case, however, the Court of Appeals for the Federal Circuit (CAFC) reversed a Rule 37 Claims Court order that barred the government from presenting any evidence on its fraud defenses. In *Ingalls Shipbuilding, Inc. v. United States* [144] the CAFC decided that this sanction, which amounted to a "de facto" dismissal of the government's case, should not have been imposed under the circumstances merely because in the Claims Court's opinion the case had no merit and was holding up the discovery process. The court stated that discovery sanctions are meant to deter intentional abuses of the discovery process, and not to be a method of resolving the merits of a case for perceived lack of proof. The dissenting opinion stated that bad faith could have been inferred from the government's terribly inadequate interrogatory responses and the lack of a request for guidance.

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[137] ASBCA Nos. 36100 and 36101, 88-3 BCA ¶ 21,149.

[138] 41 U.S.C. § 605 (1982).

[139] GSBCA No. 92445, 88-2 BCA ¶ 20,787.

[140] 14 Cl. Ct. 447 (1988).

[141] VABCA No. 2673, 88-2 BCA ¶ 20,709.

[142] 15 Cl. Ct. 362 (1988).

[143] 28 U.S.C. § 2412 (1982).

[144] 857 F.2d 1448 (Fed. Cir. 1988).

Pretrial Interviews

In *Ralph Construction, Inc.* [145] sanctions were imposed against the government for failure to permit pretrial interviews ordered by the Armed Services Board of Contract Appeals. The government refused to permit two government witnesses to be interviewed until the contractor had complied with a certain DOD directive and Navy instruction, which required that requests for interviews be in writing. The board held that the directive and instruction were intended to govern only the internal operations of DOD and the Navy Department, and that they did not supercede the board's Rules of Practice. The board barred the government witnesses from testifying.

Equal Access to Justice Act

Background

The Equal Access to Justice Act (EAJA) [146] allows eligible prevailing litigants to recover attorney's fees and expenses where the government's position is not substantially justified. Applications for fees are required to be submitted within thirty days of final judgment. Fees awarded will not exceed the statutorily mandated limit of $75 per hour unless a court or board determines that an increase in the cost of living or some special factors justifies a higher fee. Some of the more interesting decisions under EAJA in 1988 follow.

Timeliness

In *Anderson/Donald Inc.* [147] the board held that an EAJA application must be filed within 150 days after the applicant received a final or unappealed board order. In this case, as in most cases, the applicant and the government received the board's decision on different days (the government received the decision on May 17, 1986, and the applicant received its copy on May 23, 1986). Of course, the government argued that the application was late, and conversely, the applicant argued that it was timely. In resolving this issue, the board first ascertained when the decision became final. In so doing, it stated that under the Contract Disputes Act of 1978 [148] a decision of the board is final, unless appealed by one of the parties, within 120 days after receipt of a copy of the opinion. Thus for each party, finality would attach after 120 days. The board then added the statutory 30-day EAJA application period for a total of 150 days. The key point of this case is that the board recognized that there may be more than one single start date for the purpose of determining when a board decision becomes final, and thus the time to file an EAJA application will be governed by when the applicant receives its copy of the board decision.

In *J&B Engineering Contractors, Inc.* [149] the board held that an EAJA application was untimely where it was filed more than thirty days after receipt of the board's order dismissing the appeal after the parties had agreed to settle the dispute. The language in the settlement agreement, although not dispositive, was an additional significant ground that militated against consideration of the application. The board indicated that even assuming that it had jurisdiction to consider the application, the terms of the agreement that provided that appellant, *inter alia*, agreed "not to bring any action before the ASBCA arising out of or as a result of appeal 33390," constituted a release for reimbursement that would include attorneys fees and expenses. [150]

Substantial Justification

In reviewing EAJA applications and government actions, courts and boards have routinely reviewed the issue of whether the government's position was substantially justified on a standard that required the government to demonstrate that its actions were more than merely reasonable. [151]

In *Pierce v. Underwood* [152] the Supreme Court interpreted the language "substantially justified," found in one portion of the EAJA, to mean that the government's position must be reasonable both in law and in fact, and rejected the "more than merely reasonable" standard. Specifically, the term was defined to mean "justified to a degree that could satisfy a reasonable person." The Court also issued guidance regarding the scope of appellate review by stating that sound judicial administration required adoption of an abuse-of-discretion standard when reviewing a district court's decision regarding attorneys fees under EAJA. Lastly, the Court defined the term "limited availability of qualified attorneys" to mean those attorneys with distinctive knowledge or specialized skill needed for the litigation involved, such as patent law or knowledge of a foreign language, as opposed to the general standard that applied to attorneys with a high level of general knowledge useful in general litigation.

To date, at least two boards of contract appeals have adopted the *Pierce v. Underwood* standard. In *Bula Forge Inc.* [153] the Postal Service Board of Contract

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[145] ASBCA No. 35673, 88-2 BCA ¶ 20,731.

[146] 5 U.S.C. § 504 (Supp. IV 1986).

[147] ASBCA No. 31213, 88-2 BCA ¶ 20,620.

[148] 41 U.S.C. §§ 601-613 (1982).

[149] ASBCA No. 33390, 88-2 BCA ¶ 20,621.

[150] *Id.* at 104,218.

[151] Gavette v. Office of Personnel Management, 785 F.2d 1568, 1579 (Fed. Cir. 1986); Schuenemeyer v. United States, 776 F.2d 329, 330 (Fed. Cir. 1985); John C. Grimberg Co., Inc., ASBCA No. 32490, 88-3 BCA ¶ 20,860.

[152] 108 S. Ct. 2541 (1988).

[153] PSBCA No. 1490, 89-1 BCA ¶ _____ (21 Nov. 1988).

Appeals, in reviewing an EAJA application and the government's position (both pre-litigation and litigation), held that "to the extent that Board opinions decided before the Supreme Court decision in *Pierce v. Underwood* indicated that more than mere reasonableness is necessary, they are no longer precedential." [154]

In *Abel Converting, Inc. v. United States* [155] the District Court for the District of Columbia was called upon to decide whether a settlement at the behest of the government creates an irrebuttable presumption that the government's position was not substantially justified. Relying on *Trahan v. Reagan*, [156] the court concluded that the government's initial action in denying a valid protest was contrary to law. The government finally decided, after receiving a permanent injunction against it, [157] to resolicit its entire requirement for the item in question, thus capitulating to the protestor. The court stated that a "contrary to law" finding is only rarely compatible with a "substantially justified" finding, and held the government liable for attorney's fees. In the district court's opinion, while settlement (government capitulation) will not automatically trigger liability for attorney's fees and expenses, it is a strong indication that the government's position was not substantially justified.

The distinction between "more than merely reasonable" and "reasonable in both law and fact," is not one which suggests a substantial difference. But adoption of the *Pierce* standard does present the government with more latitude in justifying its positions under EAJA litigation. The extent of that latitude will undoubtedly be determined in subsequent cases. But while defining what constitutes "reasonable in both law and fact" remains difficult, the following cases illustrate what courts and boards have determined will *not* pass the test of reasonableness under any circumstances.

In *Galivan Joint Community College District* [158] the Ninth Circuit held that where the government instituted an action after the applicable six year statute of limitations had run [159] to recover overpayments made by the Veteran's Administration to the Joint Community College District, the government's position for EAJA purposes could not be characterized as substantially justified. In so doing, the court stated that there was no reason for holding that the government's position was substantially justified when it proceeded to file an action that was time-barred. Moreover, the court found no special circumstances existed to relieve the government from the consequences of pursuing a time-barred claim because the case did not interpret "a novel but credible extension or interpretation of the law," "an issue on which reasonable minds could differ," or an "important and doubtful question." [160]

In *Anderson/Donald Inc.* [161] the board found that the government's negligence in formulating its position was sufficient to prevent it from being substantially justified. In an earlier opinion the board sustained the appellant's appeal in the amount of $12,743.35. [162] The remaining dispute related to the amount of credit the government was entitled to receive, and the method for computing that amount. During the ensuing application for fees and expenses, the board stated that it was clear that the government was entitled to contest the amount of credit it was to receive, but that did not mean that its positions in calculating the amount it demanded from the appellant were substantially justified. The board found that the government did not rely on the best information available, and in fact all of its computations contained "egregious errors." In short, "a position which was unreasonably maintained in the face of evidence that it was not correct cannot be held to have been substantially justified." [163] Thus the government must, even under the more relaxed standard announced in *Pierce v. Underwood*, ensure that the positions it adopts are developed with a solid factual or legal basis. As the Ninth Circuit indicated in *Galivan*, the government may be able to demonstrate that it was substantially justified if the government convinces the court or board that it is pursuing: 1) a novel but credible extension of the law; 2) an issue on which reasonable minds could differ; or 3) an important and doubtful question. [164]

Scope of Recovery of Fees and Expenses

Generally, a party may only recover that portion of the fee expended in connection with or attributable to positions found not to be substantially justified. In *American Federal Contractors, Inc.* [165] the board reduced by sixty percent the amount of attorney's fees and expenses that were properly claimed, on the basis that the government had demonstrated that it was substantially justified in opposing a portion of the application that correlated to sixty percent.

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[154] Slip op. at 3. *See also* W.D. McCullough Construction Company, ENG BCA No. 4593-F, 89-1 BCA ¶ 21,274.

[155] 695 F. Supp. 574 (D.D.C. 1988).

[156] 824 F.2d 96 (D.C. Cir. 1987).

[157] *See* Abel Converting, Inc. v. United States, 679 F. Supp. 1133, 1142 (D.D.C. 1988).

[158] 849 F.2d 1246 (9th Cir. 1988).

[159] 28 U.S.C. § 2415(a) (1982).

[160] *Id.* at 1249.

[161] ASBCA No. 31213, 88-2 BCA ¶ 20,620.

[162] Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036.

[163] *Id.* at 104,215.

[164] 849 F.2d at 1249.

[165] PSBCA No. 1359, 88-2 BCA ¶ 20,526.

Reasonable attorney's fees will also be permitted in pursuing EAJA applications. Such recovery is authorized, however, only where the government's opposition to the EAJA award is not substantially justified.[166]

Expenses relating to paralegals and law clerks are allowable at the actual rate paid to them, and not the rate billed to the client.[167]

EAJA and the Contracts Disputes Act

In *Oklahoma Aerotronics, Inc.*[168] the board declined to extend its jurisdiction to consider an EAJA application for attorney's fees and expenses, where the contractor had elected to proceed under the disputes clause of the contract as opposed to the Contract Disputes Act of 1978.[169] The board held that the jurisdiction of the board to award attorney's fees and other expenses is limited to those appeals that are processed under the Contract Disputes Act of 1978.

Terminations

Nonmonetary Default Terminations Are Appealable

The uncertainty concerning whether a default termination is a reviewable final decision has been resolved. The uncertainty was created by conflicting Claims Court cases. *Gunn-Williams v. United States*[170] held that the Claims Court had no jurisdiction over an appeal from a default termination in the absence of a contracting officer's final decision on a monetary claim. *Z.A.N. Co. v. United States*[171] took a contrary view, holding that a default termination alone was a reviewable final decision. In *Malone v. United States*[172] the Federal Circuit held that boards of contract appeals have jurisdiction to hear appeals from default terminations, noting that default is "inextricably linked to financial liability of both the government and the contractor." The Claims Court, citing *Malone* and noting that its jurisdiction is coextensive with the boards, finally decided that it also has jurisdiction over default termination appeals.[173]

Reconsideration of Default Termination Occurs Upon Consideration of Later Claim

In *Delphi Construction, Inc.*[174] the contractor failed to file a timely appeal of its default termination to the board, but filed a timely appeal with the Claims Court. The Claims Court dismissed the appeal because the appeal involved an uncertified claim. Following the dismissal, the contractor filed a certified claim and appealed its denial to the board. The government contended that because the board permits an appeal to be taken directly from a default termination, the contractor's failure to file a timely appeal of the underlying termination barred it from contesting the default termination in an appeal from the second final decision. The board denied the government's motion to dismiss on several grounds. First, the board held that no finality had attached to the first decision because it was timely appealed to the Claims Court. Second, the board found that the consideration and denial of the certified claim constituted a reconsideration of the first decision, and therefore of the underlying default termination. The concurring opinion also stated that because the first decision did not include findings or statements regarding excusable delay or other delays raised earlier by the contractor, it was not a final decision that started the statutory appeal period.

Termination for Convenience Proposals

Several cases addressed the issue of whether a contractor's initial termination for convenience proposal is a claim under the Contract Disputes Act.[175] These cases involved convenience termination proposals, which were labelled claims, were properly certified, and were submitted under different disputes clauses: the current disputes clause, a March 1979 clause, and a February 1983 clause, respectively. Each decision held that, notwithstanding the labelling and certification, the convenience termination proposals were not claims because there were no disputes over the termination costs at the time of the submissions. They were considered routine requests for payment that did not seek as a matter of right a finite amount, but were merely initial settlement proposals. In addition, the proposals did not request final decisions. The Claims Court reached a similar conclusion in *Technassociates, Inc.*,[176] wherein the convenience termination proposal was not labelled a claim or certified.

Fulford Doctrine

In *Dailing Roofing, Inc.*[177] the board refused to apply the "Fulford Doctrine," first articulated in *Fulford*

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[166] Wilkerson & Jenkins Construction Co., Inc., ENG BCA No. 5176-F, 88-2 BCA ¶ 20,669.

[167] Anderson/Donald Inc., ASBCA No. 31213, 88-2 BCA ¶ 20,620.

[168] ASBCA No. 28006, 88-3 BCA ¶ 20,917.

[169] 41 U.S.C. §§ 601-613 (1982).

[170] 8 Cl. Ct. 531 (1985).

[171] 6 Cl. Ct. 298 (1984).

[172] 849 F.2d 1441 (Fed. Cir. 1988).

[173] Claude E. Atkins Enterprises, Inc. v. United States, 15 Cl. Ct. 644 (1988).

[174] ASBCA No. 34208, 88-3 BCA ¶ 21,138.

[175] Mayflower Construction Co. v. United States, 841 F.2d 1576 (Fed. Cir. 1988), *aff'g* ASBCA No. 30800, 87-1 BCA ¶ 19,542, Gardner Machinery Corp. v. United States, 14 Cl. Ct. 200 (1988), and Hugh Auchter GmbH, ASBCA No. 33123, 88-3 BCA ¶ 20,926.

[176] 14 Cl. Ct. 286 (1988).

[177] ASBCA No. 34739, 89-1 BCA ¶ _____ .

Manufacturing Co. [178] The Fulford Doctrine applies whenever there is a timely appeal from a demand for excess reprocurement costs, and permits the examination of the propriety of the underlying default termination even though the contractor failed to take a timely appeal from the termination. This appeal concerned a government demand for certain costs and for the return of unliquidated progress payments after the government terminated a construction contract for default. The contractor did not timely appeal the termination for default, but argued that its timely appeal of the final decision concerning the government's costs and the unliquidated progress payments permitted an examination of the underlying default termination. The board considered the history of the Fulford Doctrine and decided that it applies only to excess reprocurement costs. In the standard construction contract default clause, the contractor is liable for any increased costs of completion. Because the government claim did not include any "excess completion costs," the construction contract equivalent to excess reprocurement costs, the Fulford Doctrine did not apply to the instant appeal. [179]

Fraud and Related Matters

Operation "Ill Wind"

The Investigation

Fraud made the national headlines in 1988 as the result of a covert, two-year, nationwide investigation by the Federal Bureau of Investigation and the Naval Investigative Service. These agencies investigated alleged fraud and bribery on the part of defense contractors, consultants, and government officials in the purchase of electronics, computer equipment, and aircraft. The investigation, named Operation "Ill Wind," culminated in the issuance, on June 14, 1988, of thirty-eight search warrants to individuals and corporate offices in twelve states and the District of Columbia. The investigation was initiated based on a tip from a former Navy employee. Wire taps had been in place in the Pentagon for most of the two years.

DOD's Response—The Competitive Information Certificate and the Profit Reduction Clause

As a result of the Ill Wind probe, the Defense Department issued a new rule requiring a certification of integrity and the use of a profit reduction clause for certain contractors under investigation who receive competitive awards over $100,000. [180] The contractor must certify, in its Competitive Information Certificate, that it has not improperly obtained information on an award. When a certification is required, the contract must include a "Profit Reduction for Illegal or Improper Activity Clause." This recapture clause will apply to contractors whose certifications are found to be materially false at the time they were filed or, notwithstanding the offeror's best knowledge or belief, the certificate is materially incomplete or inaccurate. The clause will also apply to contractors convicted of violating specified statutes. The amount of profit recaptured will depend on the contract type.

Major Fraud Act of 1988

Criminal Offense of Major Fraud

The Major Fraud Act of 1988 [181] created a new criminal offense of "major fraud" against the United States. "Major fraud" is defined as knowingly executing or attempting to execute any scheme or artifice with intent to defraud the United States, or obtaining money or property by means of false or fraudulent pretenses, representations, or promises. The offense covers any prime contractor, subcontractor, or supplier if the contract or subcontract is valued at $1,000,000 or more. The maximum prison term is ten years. The maximum fines are subject to a sliding scale varying from $1,000,000 per count to $10,000,000 per prosecution. The statue of limitations for major fraud is seven years. In addition, the U.S. Sentencing Commission was directed to promulgate guidelines, or amend existing guidelines, to provide for penalty enhancements where there is a conscious or reckless risk of serious personal injury.

Whistleblower Protection

An individual who was not a participant in the unlawful activity under prosecution may sue his or her employer for reprisals taken against the individual because of lawful acts done by the individual in aid of a prosecution under the Act. Prohibited acts of reprisal include discharge, demotion, suspension, threats, and harassment. Successful plaintiffs are entitled to reinstatement, twice the amount of back pay, interest on the back pay, and compensation for special damages, to include litigation costs and attorney's fees.

Limitation on Allowability of Certain Proceeding Costs

The Act contains two conflicting sections relating to the allowability of costs in certain proceedings. Section 8 appears to have been intended to replace section 3, however, and the discussion that follows is based on this premise. The limitation covers any criminal, civil, or administrative proceedings, including an investigation commenced by the United States or a state relating to a violation of, or failure to comply with, a federal or state statute or regulation. It applies to any contract of more than $100,000 entered into by an executive agency other than a fixed-price contract without cost incentives. Costs are defined as all costs incurred by a contractor in connection with a covered proceeding, including administrative and clerical expenses, the cost of legal services performed by outside or inside counsel, the costs for services of accountants and consultants, and the pay of directors, officers, and employees for the time devoted to the proceeding. All of these costs are disallowed if the

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[178] ASBCA Nos. 2143, 2144 (20 May 1955).

[179] *See also* Guidance Systems, ASBCA No. 34690, 88-3 BCA ¶ 20,914.

[180] 53 Fed. Reg. 42,945 (1988) (to be codified at 32 C.F.R. Part 173).

[181] Pub. L. No. 100-700, 102 Stat. 4631 (1988).

proceeding results in a criminal conviction (including a conviction pursuant to plea of *nolo contendere*), a civil or administrative determination of liability if it involved allegations of fraud or similar conduct, a civil or administrative imposition of a penalty (this does not include restitution, reimbursement, or compensatory damages), or a decision to debar or suspend the contractor or to rescind, void or terminate the contract for default. If the proceeding does not result in one of the previously described dispositions, then the allowable costs are limited to eighty percent of the costs incurred. If the proceeding is resolved by consent or compromise, covered costs may be allowed to the extent specifically provided for in the settlement.

Funding for Additional Prosecution Resources

Additional Assistant U.S. Attorney positions and support staff positions are authorized by the Act. The primary function of these individuals shall be the investigation and prosecution of fraud against the government. An additional $8,000,000 is appropriated for Fiscal Year 1989, and such sums as may be necessary in each of the four succeeding years, to carry out the purpose of the Act.

Qui Tam Actions

And finally, the Act amended the *qui tam* provisions of the False Claims Act [182] to provide for the reduction of the *qui tam* plaintiff's recovery if he or she planned or initiated the underlying violation. Additionally, the *qui tam* plaintiff must be dismissed from the action and barred from participation in the recovery if he or she is convicted of criminal conduct for his or her role in the violation.

Implementation of the Program Fraud Civil Remedies Act

General

Two years after Congress passed the Program Fraud Civil Remedies Act of 1986, [183] the Department of Defense finally issued rules to implement it. The Program Fraud Civil Remedies Act allows federal agencies to assess penalties of $5,000 for each false claim or false statement submitted under a federal program. Jurisdiction is limited to a claim or related claims not exceeding $150,000. The final rules are included in Department of Defense Directive (DOD Dir.) 5505.5. [184] The directive requires the military departments to issue regulations to implement this directive within ninety days.

Liability for Covered Acts

Under DOD Dir 5505.5, liability may be imposed on any person who makes a claim that the person knows or has reason to know is false, fictitious, or fraudulent. Liability may also be imposed against any person who makes a claim that includes or is supported by a written statement that asserts a material fact that is false, fictitious, or fraudulent. Claims which include or are supported by any written statement that omits a material fact, is false, fictitious, or fraudulent as a result of such omission, or is a statement in which the person making such statement has a duty to include such material fact, will also give rise to liability. Finally, liability attaches to any claim for payment for property or services which have not been provided as claimed.

Procedural Rights

The directive provides for procedural rights and filing requirements. All parties may be represented by an attorney, conduct discovery, agree to stipulations, present evidence, present and cross-examine witnesses, present oral arguments at the hearing as permitted by the presiding officer, and submit written briefs and proposed findings of fact and conclusions of law after the hearing. The presiding officer may impose sanctions for failing to comply with an order, for failing to prosecute or defend an action, or for engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing. The defendant's liability and any aggravating factors must be proven by a preponderance of the evidence. The rules also provide for an appeal to a designated appeal authority, who may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer in any initial decision.

DOD Voluntary Disclosure Program

DOD IG Pamphlet IGDPH 5505.50, Voluntary Disclosure Program—A Description of the Process

The DOD Inspector General has issued a pamphlet, Dep't of Defense Inspector General Pamphlet IGDPH 5505.50, [185] that describes the process used by the Defense Department and the Department of Justice (DOJ) in the administration of the Department of Defense Voluntary Disclosure Program. Defense contractors are encouraged to adopt a policy of voluntary disclosure as a central part of their corporate self-governance programs, and to enhance their responsibility under the FAR. Disclosures are to be made with no advance agreements or promises regarding resolution of the matter by DOD or lack of civil or criminal prosecution by DOJ. Prompt voluntary disclosure, full cooperation, complete access to necessary records, restitution, and adequate corrective actions are viewed as key indicators of contractor integrity. The disclosure must not be triggered by the contractor's recognition that the potential fraud is about to be discovered by the government. For a matter to be accepted into the program, the disclosure must contain "sufficient information" as defined in the pamphlet. A contractor's refusal to waive the statute of limitations, to supply records, or to allow

[182] 31 U.S.C. § 3730 (1982).

[183] Pub. L. No. 99-509, 100 Stat. 1934 (1986) (codified at 31 U.S.C. §§ 3801-3812 (Supp. IV 1986)).

[184] Dep't of Defense Directive 5505.5, Implementation of the Program Fraud Civil Remedies Act (Aug. 30, 1988).

[185] Dep't of Defense Inspector General Pamphlet IGDPH 5505.50, The Department of Defense Voluntary Disclosure Program—A Description of the Process (September 1988).

interviews will be considered in evaluating the contractor's cooperation.

Contractor Risk Assessment Guide (CRAG) Program

The Defense Department has also prepared a new initiative, called the Contractor Risk Assessment Guide (CRAG) Program, to encourage contractors to take certain actions to reduce audit and oversights. The CRAG addresses five risk areas: indirect cost submissions, labor charging, material management and accounting systems, estimating systems, and purchasing systems. For each of the five areas, the guide states a control objective, and lists the internal "major controls" that a contractor should have to ensure that the contractor meets the control objective. A contractor who can demonstrate its implementation of internal controls that meet CRAG control objectives will receive less government oversight in that area. A draft of the program, reproduced at Federal Contracts Reporter (BNA) No. 49 at 976 (May 16, 1988), was sent to over 100 defense contractors and industry associations for comments. A joint DOD-industry forum will be convened in coordination with the Council of Defense and Space Industries Association to finalize the draft and implement the program.

Debarment and Suspension Cases

Wiretap Evidence

In *Alamo Aircraft Supply v. Carlucci* [186] the District Court for the District of Columbia decided that a contractor that challenges an indictment based on an illegal wiretap is entitled, before the government relies on the indictment as grounds for suspending the contractor, to a hearing on suppression of the evidence. FAR 9.407-2 provides that a suspension must be based on adequate evidence and that an indictment constitutes adequate evidence. Accordingly, the government contended that it was not required to look behind the indictment. The court held, however, that the FAR could not negate the provisions of 18 U.S.C. § 2518 (1982), which entitle a person to a hearing on a motion to suppress evidence that is alleged to have been obtained in violation of the wiretap statute.

Lifting Suspension Does Not Make Challenge to It Moot

In another suspension case, *Capital Engineering & Manufacturing Co. v. Weinberger*, [187] the District Court for the District of Columbia held that the validity of a suspension is not rendered moot by its termination. The contractor sought a declaratory judgment that the suspension was illegal and void from the start. The court stated that the case was not moot simply because the suspension was lifted and the contractor was eligible for new awards. The contractor was entitled to try to cleanse its business record by having the suspension declared void. The court also found that the case was ripe because the government still refused to declare the suspension void from the outset.

Inconsistent Treatment

The Court of Appeals for the District of Columbia held in *Caiola v. Carroll* [188] that the inconsistent treatment of corporate officials justified the overturning of a debarment decision. The debarring official found that the company's president and treasurer were not involved in manufacturing and production, and that the secretary was a "figurehead" who held her position by virtue of her marriage to the principal stockholder. The court found that the debarring official's conclusion that the company's president and secretary had reason to know of the company's falsification of test results was not supported by a preponderance of the evidence. The court also found that the failure to debar the treasurer, who appeared to be as remote as the company president from the illegal activity, demonstrated that the debarments were unreasonable. Finally, the court held that although the period of debarment had ended, the lingering stigma of debarment and other adverse effects remained and the case was not moot.

Double Debarments Are Permitted?

Finally, in *Facchiano v. Department of Labor*, [189] the Third Circuit decided that a contractor may be debarred by a second agency for the same misconduct. The Department of Housing and Urban Development (HUD) had debarred the contractor for mail fraud convictions stemming from Davis-Bacon Act [190] violations. The court stated that the first debarment did not necessarily preclude the Department of Labor (DOL) from debarring the contractor based on the same misconduct. The contractor contended that the doctrine of claim preclusion barred the second action. Under the doctrine of claim preclusion, determinations made by an administrative forum that has the same essential procedural protections as a court are to be given the same *res judicata* effect as a court decision. But because the contractor had not raised this defense in the DOL proceeding, a defense that the DOL administrative law judge must consider, the action was dismissed for failure to exhaust administrative remedies.

Significant Fraud Cases

Government Fraud Counterclaims

In *Martin J. Simko Construction Inc. v. United States* [191] the Court of Appeals for the Fedral Circuit held that government fraud counterclaims under section 604 of the Contract Disputes Act of 1978 [192]

[186] 698 F. Supp. 8 (D.D.C. 1988).

[187] 695 F. Supp. 36 (D.D.C. 1988).

[188] 851 F.2d 395 (D.C. Cir. 1988).

[189] 859 F.2d 1163 (3d Cir. 1988).

[190] 40 U.S.C. § 276 (1982).

[191] 852 F.2d 540 (Fed. Cir. 1988).

[192] 41 U.S.C. §§ 601-613 (1982).

(CDA) and the False Claims Act [193] do not have to be the subject of a contracting officer's final decision to invoke the jurisdiction of the Claims Court. The Claims Court had ruled that 41 U.S.C. § 605(a), which provides that "all claims" by the government be the subject of a final decision, applied to all fraud counterclaims by the government. [194] The CDA's antifraud provision, 41 U.S.C. § 604, makes a contractor liable to the extent it is unable to support any part of its claim because of misrepresentation or fraud. After reviewing the legislative history of the "all claims" language, the Court of Appeals for the Federal Circuit concluded that Congress never intended to include claims under the CDA's antifraud provision within the agency disputes process. The language of 41 U.S.C. § 605(a), which provides that its authority does not extend to "claims or disputes for penalties or forfeitures prescribed by statute or regulation which another federal agency is specifically authorized to administer, settle, or determine," makes the Department of Justice (DOJ) solely responsible for actions under 41 U.S.C. § 604. DOJ is specifically authorized to administer the False Claims Act. Therefore, the Federal Circuit held that the above quoted language excludes claims under the False Claims Act from the requirement for a contracting officer's decision.

Request for Stay of Proceedings Based on Fraud

In *Todd Shipyards Corporation* [195] the board found that the government's request for a stay lacked the requisite showing. The government alleged that DOJ "understood" that issues before the board were integrally related to an ongoing investigation and that DOJ "believed" that the contractor's discovery request touched on privileged matters. The board denied the request because the government had failed to specify what issues were integrally related or how the board proceedings impacted on the investigation.

Convenience Termination Involving Fraud

The government argued in *General Construction and Development Co.* [196] that the board lacked jurisdiction because the appeal involved fraud. In reviewing the convenience termination proposal, the government discovered allegedly fraudulent charges for certain costs not incurred. These charges had been paid by the government in progress payments to the contractor prior to the termination. The government moved for dismissal on the basis that the final decision attempted to settle a claim involving fraud. The board denied the motion for dismissal because it found that the contracting officer had not decided whether the contractor had committed fraud in claiming costs not incurred. In the board's view, the contracting officer had only decided that certain costs were not properly incurred, a determination that was within the contracting officer's authority and within the board's jurisdiction.

Default Terminations Based on Fraud

The Armed Services Board of Contract Appeals held in *Greenleaf Distribution Services, Inc.* [197] that a default termination could not be justified on the basis of alleged fraudulent conduct. The government contended that the contractor's submission of an altered insurance policy constituted a material breach because it violated 18 U.S.C. § 494. [198] Inasmuch as there had been no criminal conviction, the board lacked jurisdiction and could not uphold the default termination based on whether the contractor's conduct violated the criminal statute. The default termination was upheld, however, on the basis of performance deficiencies.

In *Dry Roof Corporation* [199] the contractor took a timely appeal from a default termination based on performance deficiencies. After the default termination, the contractor was convicted of submitting forged performance and payment bonds under the terminated contract. The government moved to dismiss for lack of jurisdiction, arguing that the contractor was trying to perfect a convenience termination claim involving fraud. The board held that the appeal did not involve any fraud claim. The board found that the only claim to be adjudicated was the government's decision to terminate the contract for default, not a fraud claim against the contractor. Furthermore, there was no contractor claim involving fraud before the board. The government had also filed a motion for summary judgment on the basis that the criminal conviction supported the default termination. Finding no material issue as to any genuine fact, the board held that the submission of forged bonds was sufficient to warrant the termination of the contract.

Custodial Interviews

The Court of Appeals for the District of Columbia held in *United States v. Baird* [200] that a Department of Transportation investigator's interview of a Coast Guard officer did not constitute a custodial interrogation. The officer was ordered to appear for the interview and made incriminating statements that revealed that he had received compensation from a contractor for his assistance in obtaining a contract. Prior to beginning the interview, the investigator had advised the officer of the purpose of the interview, that the interview was voluntary, and that the officer was free to go whenever he wanted. The court found that the command merely put the officer at the disposal of the investigator, and that alone did not coerce the officer to incriminate himself.

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[193] 31 U.S.C. §§ 3729-3733 (1982).

[194] Martin J. Simko Construction, Inc. v. United States, 11 Cl. Ct. 257 (1986).

[195] ASBCA No. 31092, 88-1 BCA ¶ 20,509.

[196] ASBCA No. 36138, 88-3 BCA ¶ 20,874.

[197] ASBCA No. 34300, 88-3 BCA ¶ 21,001.

[198] 18 U.S.C. § 494 (1982) (submission of fraudulent documents relating to a business).

[199] ASBCA No. 29061, 88-3 BCA ¶ 21,096.

[200] 851 F.2d 376 (D.C. Cir. 1988).

Potpourri

Small Disadvantaged Business Preference Programs

Background: The Five Percent Goal

Section 1207 of the FY 1987 DOD Authorization Act [201] established an objective for the Department of Defense of awarding five percent of its total contract dollars during fiscal years 1987, 1988, and 1989 (approximately $5 billion per year) to small disadvantaged business concerns (SDB's), historically black colleges and universities (HBCU's), and minority institutions (MI's). Section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 required DOD to make substantial progress towards meeting the mandated goal. [202] Section 844 of the FY 1989 DOD Authorization Act [203] extends the five percent goal through fiscal year 1990. Starting in May 1987 DOD has issued three iterations of rules to implement a program to meet the congressionally mandated objective. [204] The program consists of set-asides, an evaluation preference for SDB's/HBCU's/MI's, and incentives for subcontracting with SDB's/HBCU's/MI's.

Total Small Disadvantaged Business Set-Aside

When Required and Prohibited. As part of the program DOD implemented a policy that requires certain acquisitions to be set-aside for exclusive SDB participation. The present implementation requires total SDB set-asides if it is determined that: 1) there is a reasonable expectation that two or more (rule of two) SDB's will submit offers; and 2) the award price will not exceed the fair market price by more than ten percent. DFARS 219.502-72(a). To promote the SDB program, but to minimize interference with other small business and SDB acquisitions, SDB set-asides may not be used in the following circumstances: 1) when the product or service has been acquired previously on the basis of a small business set-aside; 2) when the acquisition has been reserved for the 8(a) program; 3) when using small purchase procedures; 4) in acquisitions for construction, including maintenance and repairs, between $5,000 and $2,000,000; and 5) in acquisitions for architectural and engineering services and construction design for military construction projects. [205]

Economic Impact Analysis. In *Abbott Products, Inc.* [206] the United States Army Armament, Munitions and Chemical Command (AMCCOM), performed an economic impact analysis of other small businesses affected by a total SDB set-aside in order to decide whether to restrict the acquisition to SDB's. Based on the impact analysis, AMCCOM requested and was granted an individual deviation from the interim regulations mandating a total SDB set-aside. Ultimately, the acquisition was awarded to a small business on an urgent sole source basis. The GAO held that although the DOD SDB set-aside program does not contain a provision for an economic impact analysis, such an analysis is not prohibited and is within DOD's discretion in attempting to reconcile the statutory goal of increasing SDB participation while also increasing overall small business participation. [207]

Partial Set-Aside With Preferential Consideration for Small Disadvantaged Business Concerns

Another provision of the DOD program requires contracting officers to set aside a portion of an acquisition, except for construction, for exclusive small business participation, and to provide preferential consideration to SDB's when at least one SDB is expected to be capable of performing at a price not exceeding the fair market price by more than ten percent. [208] This means that, on the set-aside portion, negotiations will be conducted first with the SDB that submitted the lowest bid on the non-set-aside portion of the solicitation. Award to SDB concerns on the set-aside portion will be at the lower of either: a) the price offered by the concern on the non-set-aside portion; or b) a price that does not exceed the award price on the non-set-aside portion by more than ten percent.

Evaluation Preference for Small Disadvantaged Business Concerns

Offers from SDB concerns are also given an evaluation preference in certain types of acquisitions. [209] Generally, the evaluation preference is only applied in competitive acquisitions where the award is based on price and price-related factors. The evaluation preference may also be used in other competitive acquisitions if the source selection authority determines that SDB's are expected to possess qualifications consistent with the acquisition. In either case, the award price may not exceed the fair market price by more than ten percent. In addition, the evaluation preference does not apply to: 1) small purchases; 2) total SDB set-asides; 3) total small business set-asides; 4) partial set-asides for Labor Surplus Area concerns; 5) partial small business set-asides;

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[201] Pub. L. No. 99-661, §1207, 100 Stat. 3816, 3973 (1986).

[202] Pub. L. No. 100-180, § 806, 101 Stat. 1019 (1987).

[203] Pub. L. No. 100-456, 102 Stat. 2088 (1988).

[204] 52 Fed. Reg. 16,263 (1987); 53 Fed. Reg. 5114 (1988); and 53 Fed. Reg. 20626 (1988). For a more detailed description of the three iterations of rules for contracting with small disadvantaged business concerns, see *Disadvantaged Business Concerns*, The Army Lawyer, Aug. 1988, at 46, and McCann, *New Interim Rules for the Small Disadvantaged Business Set Aside Program*, The Army Lawyer, May 1988, at 49.

[205] DFARS 219.502-73(b).

[206] Comp. Gen. Dec. B-231131 (8 Aug. 1988), 88-2 CPD ¶ 119.

[207] *See also* Comp. Gen. Dec. B-231736 (18 Oct. 1988), 88-2 CPD ¶ 361.

[208] DFARS 219.502-3.

[209] DFARS Subpart 219.70.

6) certain purchases under the Trade Agreements Act; [210] and 7) purchases where the application would be inconsistent with any international agreement, memorandum of understanding, etc., with a foreign government. [211]

Subcontracting With Small Disadvantaged Business Concerns

Consistent with the congressional SDB goals, DOD has implemented provisions that direct contracting officers to ensure that contractors submit subcontracting plans and establish goals for subcontract awards to SDB's, HBCU's, and MI's. [212] DOD has also implemented an incentive program for subcontracting with SDB's, HBCU's and MI's. The incentive program applies to negotiated acquisitions that offer subcontracting possibilities and are expected to exceed $500,000. [213] Prime contractors required to submit subcontracting plans may receive an additional award fee (or profit) for exceeding their established subcontracting goals. [214] The award fee will be either ten percent of the difference between its actual subcontracted dollars awarded and its goal, or ten percent of the difference between the total actual dollar amount of subcontracts awarded to SDB's, HBCU's, and MI's and five percent of the total actual subcontracting dollars.

The Latest Proposed Changes to Contracting With Small Disadvantaged Businesses

In response to comments received during the implementation of the third iteration of interim rules for SDB contracting, DOD has again proposed revisions to the DFARS coverage. The following revisions have been proposed: 1) coverage will be added to afford HBCU's and MI's the same evaluation preference as accorded SDB's at DFARS 219.7000; 2) revisions to the application of the evaluation preference to acquisitions under the Trade Agreements Act which equal or exceed the dollar thresholds at FAR 25.402; 3) revised DFARS coverage stating that in order to be eligible for the SDB evaluation preference an SDB dealer must provide the product of an SDB manufacturer if one is available; 4) a definition of "disadvantaged business concern" as a minority owned business enterprise which meets SBA criteria for social and economic disadvantaged business status, but which no longer qualifies as a small business; and 5) coverage to protect disadvantaged business concerns on certain follow-on contracts. [215]

Presumption of Both Social and Economic Disadvantage

The Presumption. As part of the third iteration of rules, there is a presumption in DOD of both social and economic disadvantage for persons within certain designated groups (Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans). [216] The contracting officer may presume that members of these groups are socially and economically disadvantaged in order to qualify as a SDB.

Challenging the Status. Although the third iteration of rules created a presumption for these groups, it also provides that contracting officers may not presume and must question the SDB status, for further determination by the SBA, any concern whose ownership is not within these designated groups, if the concern is not currently enrolled in the 8(a) program, [217] or if it has not been determined to be both socially and economically disadvantaged by the SBA within the six months preceding the concern's submission of its offer. [218]

Protesting the Disadvantaged Status of an Offeror

To be consistent with the SBA's procedures, the third iteration of interim rules provided procedures governing protests to the SBA of the disadvantaged status of offerors. [219] Under the interim rules both offerors and the SBA may challenge the social or economic disadvantaged status of a concern representing that it is an SDB. [220] The interim rules apply to challenges of status in partial set-asides, total SDB set-asides, and the application of the evaluation preference for SDB's. An offeror's protest must be filed with the contracting officer, orally or in writing, prior to the close of business on the fifth business day after either bid opening for sealed bids, or after the contracting officer's notification of the apparently successful SDB in negotiated acquisitions. [221] The SBA must file its protest with its Director of the Office of Program Eligibility, and must notify the contracting officer of the filing. [222] Upon receipt of a protest, the award must be withheld unless: 1) the contracting officer determines in writing

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[210] 19 U.S.C. §§ 2501-2582 (1982).

[211] DFARS 219.7000(a). *See also* Comp. Gen. Dec. B-232059 (9 Aug. 1988), 88-2 CPD ¶ 122.

[212] DFARS 219.702-70.

[213] DFARS 219.708(c)(1).

[214] DFARS 52.219-7009.

[215] 53 Fed. Reg. 49577 (1988).

[216] DFARS 219.301-70(b)(2).

[217] 15 U.S.C. § 637(a) (1982).

[218] DFARS 219.301-70(b)(2) and (3).

[219] 53 Fed. Reg. 20627 (1988).

[220] DFARS 219.302(70).

[221] DFARS 219.302(70)(2).

[222] DFARS 219.302(70)(1).

that an award must be made to protect the public interest; or 2) the SDB certifies that within the six months preceding submission of its offer it has been determined by the SBA to be socially and economically disadvantaged and no circumstances have changed to vary that determination. [223] The SBA Director, Office of Program Eligibility, will make the determination of the challenged offeror's status. The Associate Administrator for Minority Small Business and Capital Ownership Development of the SBA is the final appellate authority. [224]

Small Business Cases

Qualifying for Small Business Set-Asides Size Standards

In *Size Appeal of Louisiana Filling, Inc.* [225] the SBA Office of Hearings and Appeals ruled that, as the regulations are presently written, large businesses can qualify as eligible to submit offers and receive awards of small business set-aside acquisitions for supplies as nonmanufacturers, provided that they supply the product of a small business manufacturer or producer. The SBA contends that this decision is contrary to the letter and spirit of the Small Business Act, [226] and has therefore proposed a revision to the regulations. [227] The proposed changes would make it clear that a nonmanufacturer offeror must also be a small business, and it establishes a size standard of 500 employees for such nonmanufacturers.

The Repetitive Small Business Set-Aside Requirement

In *Geronimo Service Company* [228] the GAO rejected the protestor's argument that the government's plan to award a job order contract or consolidated task contract that would include the same work previously contracted for under small business set-asides is inconsistent with the FAR requirement for repetitive set-asides. [229] The GAO held that in effect the government's requirements had changed, and its current need was not just a contract for individual tasks but for a contractor who could coordinate and manage the more than 25,000 separate tasks involved.

Awarding a Contract When the Agency Knows That the SBA is Likely to Issue a COC

In *All Seasons Construction & Roofing, Inc.*, [230] a case involving contract awards and certificates of competency, the GAO applied the rationale of *Age King Industries, Inc.* [231] GAO held that an agency cannot make an award, even after the expiration of the deadline for notifying the agency, if the agency *knows* that the SBA is going to issue a COC. GAO also stated that an agency cannot make an award, even when it does not know definitely that a COC will be issued, when the agency knows that the SBA is on the verge of completing its COC review, and that the SBA is likely to issue a COC. In this case, although there was a dispute between the Corps of Engineers and the SBA concerning when the COC review period started and ended, it was not clear in the decision whether the GAO accepted the Corps' view or the SBA's.

Responsiveness to Small Business Set-Aside Small Business Product Certification

In *Delta Concepts, Inc.* [232] the GAO overruled its holding in *ASC Industries, Inc.* [233] to the extent that, in a small business set-aside procurement, the place of performance clause may be used to cure a bidder's failure to certify that all end items will be manufactured or produced by a small business.

Buy American Act Cases

Domestic Construction Materials For Public Buildings and Works

In The Veterans Administration—Request for Advance Decision [234] the GAO ruled that structural steel detailing is not a component of fabricated steel. Therefore, the cost of detailing by a foreign firm should not be considered in determining whether fabricated steel is of domestic or foreign origin for purposes of the Buy American restrictions. Structural steel detailing is an engineering function in which the detailer prepares shop drawings that are used to fabricate the steel. The GAO stated, "While we understand that the cost of the detailing is absorbed into the final cost of the fabricated steel, and that the drawings are a product of the steel detailing, the fact is that they are not directly and physically incorporated into the fabricated steel."

Domestic Item Restrictions—Application of the Berry Amendment

The Berry Amendment, among other things, prohibits DOD from purchasing clothing manufactured

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[223] DFARS 219.302(70)(4).

[224] DFARS 219.302(70)(5), (6), and (7).

[225] Appeal No. 2796 (December 14, 1987).

[226] 15 U.S.C. §§ 631-650 (1982 & Supp. IV 1986).

[227] 53 Fed. Reg. 15232 (1988).

[228] Comp. Gen. Dec. B-231637 (22 Sept. 1988), 88-2 CPD ¶ 277.

[229] FAR 19.502-2.

[230] Comp. Gen. Dec. B-230299 (28 Jun. 1988), 88-1 CPD ¶ 613.

[231] Comp. Gen. Dec. B-225445.2 (17 June 1987), 87-1 CPD ¶ 602.

[232] Comp. Gen. Dec. B-230632 (13 July 1988), 88-2 CPD ¶ 43.

[233] Comp. Gen. Dec. B-216293 (21 Dec. 1984) 84-2 CPD ¶ 684.

[234] Comp. Gen. Dec. B-230762 (18 May 1988), 88-1 CPD ¶ 472.

from or containing materials not grown, reprocessed, reused, or produced in the United States or its possessions. [235] The amendment is intended to protect certain American industries from foreign competition, and has been included in annual DOD appropriation acts since 1941. In *Gumsur, Ltd.* [236] Tooele Army Depot issued an IFB for demilitarization protective ensembles (DPE's), which are protective coverings worn by civilian personnel to access toxic areas to dismantle chemical munitions. The protestor's bid was low, but the contracting officer rejected it because it intended to provide DPE's manufactured in Israel. The Army determined that under the Berry Amendment, the DPE's must be manufactured domestically. The protestor argued that the ensembles are not clothing and, alternatively, even if they are clothing, they fit under the statutory exception for "chemical warfare protective clothing." The GAO stated that "where resolution of a protest requires an interpretation of restrictions contained in an appropriation act, the interpretation given the act by the agency charged with its implementation is entitled to deference in the absence of evidence demonstrating that the agency's interpretation is clearly incorrect." Based on the legislative history of the Berry Amendment, the GAO held that the government's interpretation was correct because the term "clothing" includes a wide variety of items and that the "chemical warfare protective clothing" exception is a narrow exception not applicable to DPE's.

"Domestic End Product" Cases

Under the Buy American Act [237] and FAR Part 25, a "domestic end product" means:

> (a) an unmanufactured end product mined or produced in the United States, or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) [238]

In *Orlite Engineering Company, Ltd.* [239] the GAO found that the domestic raw material, Kevlar fabric, was shipped to Israel where it was cut, molded, heated, bonded, trimmed, and drilled to make helmets. The helmet shell was also painted and a rubber edge was applied in Israel. The GAO ruled that the Kevlar lost its identity as a domestic component and became part of the Israeli produced outer shell component of the end product. Citing *Yohar Supply Co.*, [240] GAO denied the protest and stated that, "if a manufacturing process performed on material results in a separately identifiable component that in turn is integrated into the end product being procured, the material does not constitute a component."

In *Ballantine Laboratories, Inc.* [241] the board applied the standards in *Matzkin & Day* [242] and *Marbex, Inc.*, [243] and held that the processes of testing and evaluation as well as packaging were not "manufacturing" and thus could not be considered in determining whether the item was domestic or foreign. The board reiterated the accepted interpretation of the term "manufacture" in the context of the Buy American Act as "the completion of the article in the form required for use by the Government."

In *U.S. v. Rule Industries Inc.* [244] a contractor and two of its officers were fined $604,000 in a civil case in U.S. District Court for false claims involving the Buy American Act. The contractor falsely claimed that hacksaw blades sold to the government were manufactured with predominantly American made components. Rule Industries, its president, and vice-president were found liable for 302 violations of the False Claims Act. [245] This may be the first case in which a contractor was fined for false claims to enforce the Buy American Act. [246] This case has been appealed to the First Circuit.

Sealed Bidding

Failure to Solicit Incumbent Contractor

In a case involving the failure to solicit an incumbent contractor, the Air Force synopsized the procurement in the Commerce Business Daily, posted copies of the solicitation, and mailed the solicitation to eleven firms on the mailing list. Although the Air Force received three offers, it failed to solicit the incumbent contractor. The GAO held that the Air Force made a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solici-

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[235] Defense Appropriations Act, 1989; Pub. L. No. 100-463, § 8010, 102 Stat. 2270 (1988).

[236] Comp. Gen. Dec. B-231630 (6 Oct. 1988), 88-2 CPD ¶ 329.

[237] 41 U.S.C. § 10a-10c (1982).

[238] FAR 25.101.

[239] Comp. Gen. Dec. B-229615 (23 Mar. 1988), 88-1 CPD ¶ 300.

[240] Comp. Gen. Dec. B-225480 (11 Feb. 1987), 87-1 CPD ¶ 152 (domestic rolled steel sent to Korea for fabrication into parts for a lock set is not a component).

[241] ASBCA No. 35138, 88-2 BCA ¶ 20,660.

[242] Comp. Gen. Dec. B-166008 (9 May 1969), 48 Comp. Gen. 727.

[243] Comp. Gen. Dec. B-225799 (4 May 1987), 87-1 CPD ¶ 468.

[244] DC Mass, No. CA 85-1070-S (March 29, 1988).

[245] 10 U.S.C. § 231 (1982).

[246] 49 Fed. Cont. Rep. (BNA) 751 (11 Apr. 1988).

tation materials, and did obtain reasonable prices. [247] The GAO distinguished its decision in *Abel Converting Company*, [248] where it sustained a protest and recommended that the agency resolicit a portion of the requirement because it failed to solicit the incumbent. In that case, only one bid was received on a portion of the requirement.

In a subsequent action in the District Court for the District of Columbia, the incumbent contractor, dissatisfied with GAO's recommendation to resolicit a portion of the procurement, sought a preliminary injunction to prevent the government from awarding a contract on those items that the GAO had not recommended to be resolicited. The district court held that the agency's failure to mail the incumbent contractor a copy of the solicitation, in violation of the Competition in Contracting Act, significantly diminished the level of competition so as to warrant resolicitation of the entire requirement. [249] The court held that only two bids on seventeen of the line items, one bid on fourteen line items, and three or more on two line items warranted resolicitation of the entire requirement and, therefore, granted the preliminary injunction. The court disagreed with GAO's holding that receipt of two or more bids indicated that adequate competition had been achieved. The court stated that "when so few bidders participate in a solicitation, the absence of even one responsible bidder significantly diminishes the level of competition." [250] It is also important to note that the court stated that, besides the absence of full and open competition, the regulations violation required resolicitation because the exclusion of Abel, a small business, substantially threatened its viability. On March 16, 1988, the district court permanently enjoined the GSA and ordered it to take the necessary steps to resolicit all of the items. [251]

No Award to Government Employee

In *Speakman Company v. Weinberger* [252] the Court of Appeals for the District of Columbia held that FAR 3.601, which prohibits awards to business concerns owned or substantially owned by government employees, does not prohibit an award of a contract to a business whose owner had left government employment between bid opening and award.

Indefinite Quantity Solicitation—Materially Unbalanced Bids

In *Pierce Brothers Company* [253] the GAO held that an indefinite quantity type contract with a first article requirement resulted in materially unbalanced bids. GAO found that the evaluation methodology in this particular solicitation was structured to encourage unbalanced bidding. It also stated that prior cases that dealt with the problem of first article front loading had involved procurements for definite quantities. [254]

Associations

Associations are not eligible for awards of contracts. In response to a government request for an advisory opinion, the GAO decided that an unincorporated association is not eligible for award of a government contract. [255] GAO noted that, unlike a corporation, an unincorporated association has no existence independent of its members. Hence, no party would be responsible for the totality of performance.

Commercial Activities Program

The Comptroller General recently ruled that a bidder on a sealed bid, fixed-price Commercial Activities solicitation may bid at below its costs and, if it wins the cost comparison with the government's in-house bid, it should receive the contract award as long as it is otherwise responsible. [256] In this case, the bidder bid at $7.4 million below the Navy's $24.9 million in-house bid, but because it was a fixed-price procurement, the bidder would be bound to perform no matter what its actual costs turned out to be. Therefore, the Comptroller General reasoned, a below-cost bid is by itself not sufficient to avoid contract award to the bidder. This ruling may have serious adverse consequences on future procurements of the services in question, however, because once the in-house capability is destroyed it is virtually impossible to bring the work back in-house, and in the absence of effective competition among other bidders the government may end up paying much more for the services than it should.

Descriptive Literature

Where an Invitation for Bids (IFB) fails to describe adequately the descriptive literature required to be sub-

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[247] Comp. Gen. Dec. B-228406 (11 Feb. 1988), 88-1 CPD ¶ 139.

[248] Comp. Gen. Dec. B-229065 (15 Jan. 1988), 88-1 CPD ¶ 40.

[249] Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988) (order granting preliminary injunction).

[250] *Id.* at 1141.

[251] Abel Converting, Inc. v. U.S., Civ. A. No. 88-0177-OG (D.D.C. 16 Mar. 1988) (Westlaw, DCTU Database). *See also* Abel Converting, Inc. v. U.S., 695 F. Supp 574 (D.D.C. 1988) (the recovery of attorney's fees in the subject case).

[252] 837 F.2d 1171 (D.C. Cir. 1988).

[253] Comp. Gen. Dec. B-228524 (22 Feb. 1988), 88-1 CPD ¶ 180.

[254] *See, e.g.*, Comp. Gen. Dec. B-228334 (9 Dec. 1987), 87-2 CPD ¶ 572.

[255] Comp. Gen. Dec. B-228345.2 (7 Apr. 1988), 88-1 CPD ¶ 346.

[256] Comp. Gen. Dec. B-229558 (4 Oct. 1988), 88-2 CPD ¶ 310.

mitted with a bid, a bidder's failure to include adequate descriptive literature does not make its bid nonresponsive.[257] The IFB must clearly establish the nature and extent of the descriptive literature requested, the purpose for which it will be used, and whether it will be considered as a material part of a contract to be awarded.

Options

If the government fails to exercise an option on a contract and thereby breaks the contractor's continuous production of an item, then it loses the right to exercise a later option for that same item. In *Texas Instruments, Inc.*[258] the board held that, because of nonrecurring start-up costs and other factors, a contractor could reasonably expect that options would be exercised with no break in production, and therefore the contractor was entitled to an equitable adjustment for having to re-start production.

Source Selection

Evaluation Must Be Reasonable

An agency's evaluation of a proposal must be reasonable. In *International Consulting Engineers, Inc.*[259] the Navy was procuring architectural and engineering services and had selected the protestor for price negotiations when it discovered that the protestor knew it had the highest evaluated proposal. Since it had improperly disclosed procurement information to the protestor, the Navy set aside the initial decision and re-evaluated the proposals, with different results. The Comptroller General agreed with the Navy's decision to re-evaluate, but sustained the protest because it was unclear whether the second evaluation of the protestor's proposal was *reasonable*. The protestor's ranking was significantly lower after the second selection process, when it went from first to last.

Competitive Range of One

It is possible to have a competitive range of one. In *Everpure, Inc.*[260] the awardee's technical proposal was superior to the protestor's, and was forty-three percent lower in cost. Although the proposal submitted by the protestor was evaluated as acceptable, the agency properly concluded that there was no reasonable chance that the protestor would be selected for award, and therefore excluded it from the competitive range.

Unsolicited Proposals

A favorable evaluation of an unsolicited proposal does not entitle the submitter to a follow-on sole source contract. In *S.T. Research Corp.*[261] the protestor proposed a solution to the Navy's "false alarm" problem in an electronic support measures system. The Navy approved the proposal as a possible solution to its problem, but stated that other and more cost-effective design approaches may be available through competition. In its dismissal of the protest, the Comptroller General stated that FAR 15.507(a) only sets forth those circumstances where an agency is required to reject an unsolicited proposal. In the other circumstances, the agency *may* award a sole source contract, or it may seek full and open competition for its requirement.

Responsibility Determinations

Licensing Requirements

When the solicitation contains a general requirement that the contractor comply with state and local licensing requirements, the contracting officer is not expected to inquire into what those requirements may be or whether the bidder will comply. In *James C. Bateman Petroleum Services, Inc.*[262] GAO denied a protest concerning the awardee's compliance with California licensing requirements because the issue was encompassed by the contracting officer's affirmative determination of responsibility.

When the solicitation requires specific compliance with Department of Transportation aviation regulations and licensing requirements, the contracting officer may inquire into the offeror's ability to comply with the regulations in determining the offeror's responsibility. In *Intera Technologies, Inc.*[263] GAO denied a protest concerning a nonresponsibility determination because there was substantial risk that the protestor would not be able to obtain a required permit in time for performance.

Individual Sureties

A contracting agency may determine that an individual surety on a bid bond is unacceptable and, consequently, that the bidder is nonresponsible, where the individual surety failed to disclose outstanding bid bond obligations. In *Site Preparation Contractors, Inc.*[264] the Army Corps of Engineers determined that the protestor was nonresponsible because its individual sureties did not disclose "all other bonds on which I am a surety," as required on the Affidavit of Individual Surety form. GAO denied the protest, which contended that the sureties did not disclose because they did not know whether they would be liable under any or all of their previously executed bid bonds. Similarly, in *Excavators,*

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[257] Comp. Gen. Dec. B-229942 (10 May 1988), 88-1 CPD ¶ 449.

[258] ASBCA Nos. 25942 and 29906, 88-1 BCA ¶ 20,421.

[259] Comp. Gen. Dec. B-230305.2 (24 Aug. 1988), 88-2 CPD ¶ 175.

[260] Comp. Gen. Dec. B-226395.2, B-226395.3 (20 Sept. 1988), 88-2 CPD ¶ 264.

[261] Comp. Gen. Dec. B-321752 (16 Aug. 1988), 88-2 CPD ¶ 152.

[262] Comp. Gen. Dec. B-232325 (22 Aug. 1988), 88-2 CPD ¶ 170.

[263] Comp. Gen. Dec. B-228467 (3 Feb. 1988), 88-1 CPD ¶ 104.

[264] Comp. Gen. Dec. B-232105 (20 Sept. 1988), 88-2 CPD ¶ 269.

Inc. [265] GAO held that an individual surety must disclose outstanding bid bond obligations regardless of the actual risk of liability on them.

Superior Knowledge

The Court of Appeals for the Federal Circuit decided in *Petrochem Services, Inc. v. United States* [266] that if superior knowledge is disclosed orally, then the government must show that the communication was not only made, but also heard and understood. This burden may be met by showing, either through conversations between the parties or other such evidence, that the government either knew or reasonably believed that the contractor was aware of the communication and understood its import.

Differing Site Conditions

The contract in *Frank Lill & Sons, Inc.* [267] stated that asbestos might exist in areas other than those indicated in the contract. The government contended that this notice made the contractor responsible for any subsequently discovered asbestos. The board found that the contract made the contractor responsible for the removal of *additional* asbestos, but not for the removal of *substantial amounts* of additional asbestos. The ASBCA held that the increased quantity of asbestos constituted a differing site condition that materially differed from what the contract indicated, entitling the contractor to an equitable adjustment.

Terminations

Contracting Officers Must Consider All Information Received Prior to the Formal Termination Decision

In *Kurz-Kasch, Inc.* [268] the contractor was unable to meet the specification, and had not met the required delivery date, but had requested approval of several deviations from the specification. Between the time of the informal termination decision and dispatch of the termination notice, the contracting officer received information that the deviations had been approved by the requiring activity. The board acknowledged that the contract could properly have been terminated based on the information available at the time of the informal decision. It found, however, that the contracting officer's failure to consider the new information was an abuse of discretion, and therefore it converted the default to a convenience termination.

Truth is Stranger Than Fiction

In *Maxima Corp. v. United States* [269] the government attempted to recover payments made under an indefinite quantity contract because only half of the minimum guaranteed quantity had actually been ordered. With an argument exploring the boundaries of the "straight-face" test, the recovery attempt was based on the theory that the contract was constructively terminated with regard to the unordered amounts. Noting that the proposed use of the constructive termination doctrine was unprecedented, the court held that such use of the doctrine would make the contract "of the sort that has long been recognized to fail for lack of consideration and mutuality."

A Change in Circumstances

The greater significance of the *Maxima* case concerns actual terminations for convenience. While not yet squarely addressing the issue, the court clearly endorsed *Torncello v. United States* [270] and its "changed circumstances" test. The prudent attorney should therefore ensure that contract files include documentation of the facts supporting changed circumstances in termination decisions.

The Claims Court held that the changed circumstances test was satisfied in *Nationwide Roofing and Sheet Metal Co., Inc.* [271] The government had awarded a contract to the second low bidder after erroneously determining that the low bidder was nonresponsive. Upon discovering the error, the government terminated the contract with the second low bidder, and made the award to the low bidder. The court held that this was a legitimate use of the convenience termination, noting that it was a circumstance cited with approval in *Torncello.*

Bankruptcy

Make No Assumptions?

In *In Re West Electronics* [272] the contractor filed a bankruptcy petition shortly after receiving a show cause notice, but before the contract had been terminated. Under the automatic stay provision of the Bankruptcy Code, [273] the government was prevented from terminating the contract until the stay was lifted. The district court refused to lift the stay because an assumption of the contract was a major part of the proposed reorganization. In reversing the district court, the Third Circuit held that the Nonassignment Act [274] prevents a "debtor in possession," i.e, the bankrupt debtor, from assuming

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[265] Comp. Gen. Dec. B-232066 (1 Nov. 1988), 88-2 CPD ¶ _____.

[266] 837 F.2d 1076 (Fed. Cir. 1988).

[267] ASBCA No. 35774, 88-3 BCA ¶ 20,880.

[268] ASBCA No. 32486, 88-3 BCA ¶ 21,053.

[269] 847 F.2d 1549 (Fed. Cir. 1988).

[270] 681 F.2d 756 (Ct. Cl. 1982).

[271] 14 Cl. Ct. 733 (1988).

[272] 852 F.2d 79 (3d Cir. 1988).

[273] 11 U.S.C. § 362(a) (1982).

[274] 41 U.S.C. § 15 (1982).

a government contract. Thus, the district court had abused its discretion by refusing to lift the stay.

In *Antenna Products Corporation* [275] the board held that the Nonassignment Act did not prevent a debtor from assuming a contract for the limited purpose of pursing a claim.

A Final Decision is Not Required for Filing

In *In Re Remington Rand Corporation* [276] the Third Circuit decided that a contracting officer's final decision was not a prerequisite to filing a claim against the bankruptcy estate. The intent of the Bankruptcy Code is to surface all possible claims for disposition, and any potential government claim not filed may be discharged.

Defective Pricing Cases

Projected G&A Rates

In *Texas Instruments, Inc.* [277] the Armed Services Board of Contract Appeals held that an error in estimating future General and Administrative expense (G&A) rates did not render a contractor's cost data defective. The contractor had provided estimates of its projected G&A costs. The estimates were based on disclosed actual costs for the previous year and the first quarter of the current year. During the negotiations, the contractor discovered that certain costs had been duplicated in projecting its future costs. This error was reported to the Administrative Contracting Officer (ACO) after the date the contractor certified its data. The board stated that the contractor's estimates were information of a judgmental nature, and that judgmental information is not cost or pricing data. The board also stated that notice to the ACO was sufficient because it was the ACO who was responsible for negotiating the G&A rates.

Prenegotiation Position Already Reflected Reduced Costs

In *Sperry Corporation Computer Systems, Defense Systems Division* [278] the price reduction for defective data concerning certain labor factors was based on the difference between the costs derived from the undisclosed data and the costs expressed in the government's prenegotiation position. The government had argued for use of the contractor's earlier proposals, which reflected substantially higher costs than those used to formulate the government's prenegotiation position and those agreed upon by the parties. The board rejected the government's position because use of the earlier proposals would duplicate the price reduction already achieved by the government.

Quotations Versus Purchase Orders

In *Etowah Manufacturing Co.* [279] the price reduction for defective data was based on the difference between the costs derived from the undisclosed costs and the costs reflected in the government's memorandum of negotiations. The parties had negotiated on a total price basis. The government, realizing that it had to justify the price in terms of costs and a reasonable profit, listed in its memorandum of negotiations the cost elements upon which it had justified the total price. The board held that the government's memorandum was the proper basis from which to measure the amount of the price reduction. The board also held that the contractor's failure to disclose subsequent purchase orders for previously disclosed quotations rendered certain data defective. The board stated that the issuance of the purchase orders was a fact providing a more certain basis for estimating future costs than the quotations.

DCAA Subpoena Power

Newport News and Internal Audit Reports

The struggle between the Defense Contract Audit Agency (DCAA) and Newport News Shipbuilding & Drydock Company continued in 1988, with victories for both sides in the Fourth Circuit. Last year, in an opinion which significantly limited the scope of DCAA's subpoena power, [280] a district court held that the DCAA does not have the authority to subpoena a contractor's internal audit reports. The court in *Newport News Shipbuilding & Drydock Co. v. Reed* [281] found that Congress did not intend to expand DCAA's access-to-records authority under FAR 52.215-2 when, in the FY 1985 Defense Authorization Act, [282] it gave the DCAA the power to subpoena records related to costs incurred in the negotiations, proposals, and performance of specific contracts. This year, the Fourth Circuit upheld the district court's decision on the same grounds. [283] The court stated that internal audits are not related to any particular contract and contain the company's audit staff's subjective evaluation of the company's operations. The statute, on the other hand, is aimed at providing the government with objective data upon which its auditors can evaluate specific costs that are being charged to the government. Finally, the court noted that the DCAA could have obtained these internal audit reports through a DOD IG subpoena, which the

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[275] ASBCA No. 34134, 88-3 BCA ¶ 21,060, *aff'd on reconsideration*, 88-3 BCA ¶ 21,209.

[276] 836 F.2d 825 (3d Cir. 1988).

[277] ASBCA No. 30836, 89-1 BCA ¶ _____ (7 Nov. 1988).

[278] ASBCA No. 29525, 88-3 BCA ¶ 20,975.

[279] ASBCA No. 27267, 88-3 BCA ¶ 21,054.

[280] *See* 10 U.S.C. § 2313(d)(1) (Supp. IV 1986).

[281] 655 F. Supp. 1408 (E.D.Va. 1987).

[282] Pub. L. No. 98-525, 98 Stat. 2492 (1984).

[283] United States v. Newport News Shipbuilding & Drydock Co., 837 F.2d 162 (4th Cir. 1988).

IG may issue to investigate fraud, waste, and abuse. [284] The government has asked for a rehearing *en banc* in this first *Newport News* case. [285]

Newport News Revisited—Tax Returns and Financial Records

Meanwhile, in a related case, the Fourth Circuit overturned a district court decision that had refused to enforce a DCAA subpoena for the contractor's federal income tax returns and other financial records. [286] The court stated that, unlike the internal audit reports, the DCAA's subpoena power extended not only to records relating to the contractor's pricing practices on specific contracts, but also to objective factual records relating to overhead costs which may be passed along to the government. These records were thus held relevant to a proper DCAA inquiry and necessary to perform the agency's audit functions.

Access to Records

In *Ford Aerospace & Communications Corp.* [287] the ASBCA decided that the access-to-records statutes [288] do not authorize DOD to release a contractor's monthly cost performance reports or other confidential business data to outside consultants. The government had entered into a contract with a private consulting firm to review and analyze these cost reports, but Ford placed a restrictive legend on the reports to prevent their disclosure outside the government. The government argued that the consulting firm was a representative of the contracting officer under the contract's standard audit clause, [289] which said that cost reports could be reviewed by "the contracting officer or his authorized representative." But the board found that this clause did not apply because the consultant was not hired to help with an audit, which is what the clause covered.

Freedom of Information Act

Unit Prices

In *Acumenics Research and Technology v. United States* [290] the Fourth Circuit decided that unit prices in a support services contract were properly determined to be releasable by the Department of Justice. The contractor argued that the information was commercial or financial information within Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (1982), and the Trade Secrets Act. [291] Specifically, the contractor argued that release of the unit prices would enable competitors to determine its profit multipliers and pricing strategy. The court held that there were too many unascertainable variables in the unit price calculation for a competitor to derive accurately Acumenics's profit multiplier.

Audit Reports

Routine audit reports which are later incorporated into an IG investigative file become "information compiled for law enforcement purposes," and are thus exempt from disclosure under Exemption 7 of the Freedom of Information Act. [292] The court found in *Gould, Inc. v. General Services Administration* [293] that Exemption 7 protects from disclosure information that, if disclosed, could reasonably be expected to interfere with an ongoing criminal investigation, in this case one being conducted jointly by the DOD IG and a U.S. Attorney's Office. The court stated that it was immaterial that the audits were not originally conducted for law enforcement purposes and were available under FOIA prior to the initiation of the investigation, if the subsequent use of them makes them fall under the test for Exemption 7 when their disclosure is requested.

Trial Attorney Settlement Authority

In *J. H. Strain & Sons, Inc.* [294] the board refused to grant the contractor's motion for summary judgment that sought to enforce a settlement agreement reached between the contractor and the Corps of Engineers trial attorney, but without the contracting officer's approval. In denying the motion, the board relied on a provision in the Engineer Federal Acquisition Regulation Supplement that provided, *inter alia*, that "[n]o settlement will be made without the prior approval of the Contracting Officer." [295] Based upon that provision, the board concluded that the trial attorney was a limited agent of the contracting officer and possessed only such settlement authority as the contracting officer chose to delegate. Here, the contracting officer did not delegate any authority to the trial attorney to settle the appeal. In the absence of this crucial prerequisite, the board had little trouble in finding that neither apparent authority nor implied authority would save the contractor. The settlement could not be upheld on the basis of apparent

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[284] *See* United States v. Westinghouse, 788 F.2d 164 (3d Cir. 1986).

[285] Inside The Pentagon, Vol. 4, No. 12, at 12 (March 25, 1988).

[286] United States v. Newport News Shipbuilding & Drydock Co., No. 88-3520, _____ F.2d _____ (4th Cir. Dec 5, 1988).

[287] ASBCA No. 29088, 88-2 BCA ¶ 20,748.

[288] 10 U.S.C. §§ 2306a and 2313 (Supp. IV 1986).

[289] DAR 7-104.41.

[290] 843 F.2d 800 (4th Cir. 1988).

[291] 18 U.S.C. § 1905 (1982).

[292] 5 U.S.C. § 552 (1982).

[293] 688 F. Supp. 689 (D.D.C. 1988).

[294] ASBCA No. 34432, 88-3 BCA ¶ 20,909.

[295] Id. at 105,707.

authority because apparent authority does not bind the government. [296] The implied authority argument failed because the plain language of the Engineer Federal Acquisition Regulation Supplement provided that settlement of disputes was not an integral part of the duties assigned to the engineer trial attorney.

Government Contractor Defense

The Supreme Court Decision

The Supreme Court finally decided just how broad the scope of the "government contractor" defense should be in a landmark split decision that favors government contractors. In *Boyle v. United Technologies Corp.* [297] the Court decided that a contractor who manufactures military equipment based upon reasonably precise, government-approved specifications, is not liable under state law for injuries resulting from defects in the equipment if three conditions are met: 1) the government approved reasonably precise design specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the government about dangers in the use of the equipment that were known to the supplier but not to the government.

Background

The *Boyle* case arose out of the crash of a CH-53 helicopter that resulted in the death of the co-pilot. The Fourth Circuit had reversed a $725,000 jury verdict in favor of the co-pilot's estate, [298] but the Eleventh Circuit had adopted a much narrower version of the defense under similar facts, [299] creating a conflict between the circuits.

The Logic Behind the Defense—It Does Not Include the Feres Doctrine

In upholding the Fourth Circuit's broad interpretation of the defense, the Court stated that the government procurement of jet engines, including the selection or approval of their design, is a discretionary act and therefore a uniquely federal interest that cannot be regulated by state law. Therefore, contractors should not be liable under state law for injuries arising out of the performance of contracts if the above conditions are met. The Court refused, however, to accept the argument that just because the government was immune from suit under *Feres v. United States*, [300] government contractors should also be immune. Under that argument, the Court reasoned, contractors supplying standard equipment would also be protected, which would not be a reasonable result under the defense. Also, the defense would not apply to a non-military member's suit because *Feres* bars only suits by military personnel.

But Does a Conflict Still Exist?

Recognition of the defense was in the government's interests because if it did not exist, contractors might refuse to manufacture a government-specified design or would raise their prices. Inexplicably, however, three days after issuing the *Boyle* decision, in which the Court considered and specifically rejected the Eleventh Circuit's narrow formulation of the defense, the Court refused to review the Eleventh Circuit's decision in *Shaw v. Grumman Aerospace Corp.*, [301] which upheld Grumman's $840,000 liability for the death of a military pilot resulting from defective government-approved specifications. [302] This still leaves somewhat of a conflict between the circuits.

Defective Manufacture Cases

Two lower court decisions have since interpreted the government contractor defense in a slightly different context. The Fifth Circuit held in *McGonigal v. Gearhart Industries, Inc.* [303] that the defense applies only in cases involving defective design and not those based on defective manufacture. The district court in *Schwindt v. Cessna Aircraft Co.* reached a similar result. [304]

Quantum Meruit Recovery

A quantum meruit recovery can be profitable. While contracts executed in violation of statutory prohibitions or without statutory authority create no legal obligation against the government, contractors may recover under the equitable theories of *quantum meruit* or *quantum valebant*. Recovery is based upon the value of goods or services received by the government. In *Acumenics Research and Technology, Inc.—Quantum Meruit Payments* [305] GAO held that profit may be an element of a *quantum meruit* recovery. The profit must be reasonable and must constitute compensation for what the government received.

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[296] Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

[297] 108 S. Ct. 2510 (1988).

[298] Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986).

[299] Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1986).

[300] 340 U.S. 135 (1950).

[301] 778 F.2d 736 (11th Cir. 1986).

[302] Grumman Aerospace Corp. v. Shaw, 108 S. Ct. 2896 (1988), *pet. for rehearing denied*, 109 S. Ct. 10 (1988).

[303] 788 F.2d 321 (5th Cir. 1988).

[304] 50 Fed. Cont. Rep. (BNA) 554 (Oct. 3, 1988).

[305] Comp. Gen. Dec. B-224702.2 (7 July 1988), 88-2 CPD ¶ 15.

Soldiers' and Sailors' Civil Relief Act Update

Major L. Sue Hayn
Instructor, Administrative and Civil Law Division, TJAGSA

The purpose and the scope of the Soldiers' and Sailors' Civil Relief Act [1] are misunderstood by many judges, civilian attorneys, service members, [2] and, unfortunately, some judge advocates. While Department of the Army Pamphlet 27-166 [3] provides an excellent discussion of the Soldiers' and Sailors' Civil Relief Act (SSCRA) and answers most questions in this area, a few aspects of the Act warrant further emphasis.

Purpose and Scope of the SSCRA

Although many service members assume that the SSCRA relieves them of the obligation to make child and spousal support payments, repay loans, and respond to civil court actions, the SSCRA was intended primarily to delay civil judicial actions until the service member was able to appear in court to protect these interests personally. Congress passed the SSCRA in 1940, contemplating the possibility of war and recognizing that it would be difficult for service members to return from combat to defend actions initiated in their absence, or to pursue their prosecution of civil actions initiated prior to war. Consistent with this focus, Congress attempted to preserve the status quo during the conflict by permitting the service member to delay these actions until circumstances allowed the service member to return to defend endangered interests.

While 50 U.S.C. Appendix § 524 indicates that the maximum duration of a stay is the period of service plus three months following discharge, 50 U.S.C. Appendix § 523 provides that the stay may be granted only if the service member's ability to appear is "materially affected" by military service. Neither this provision of the SSCRA nor its legislative history indicates that Congress intended to permit service members to delay civil actions for the duration of their service unless military duties inhibited their ability to appear during the entire period. Consistent with this orientation, the court in *Keefe v. Spangenberg* [4] denied the defendant-service member's request for a stay in proceedings until his expected discharge in 1984, saying:

> [The] purpose [of the SSCRA] was not to shield a defendant from trial for such duration as his voluntary, peacetime enlistment might provide, or as long thereafter as he might choose to stay on active duty. The Act was enacted in 1940 to protect servicemen from having their absences taken advantage of by creditors and to enable them to devote their full time and energy to the nation's defense. [5]

Although judges will likely grant an attorney's request for a short delay when the service member is denied leave and declared "mission-essential," judges have been requiring evidence of this denial, demonstration of the unusual nature of the service member's assignment, or some other showing of "material effect" before they will grant the requested stay. For example, in *Lackey v. Lackey* [6] the husband-service member was sued by his wife to obtain custody of their child (the husband was initially awarded custody). In seeking a stay, the husband argued that duty precluded his presence, and he filed an affidavit regarding his current assignment to the U.S.S. *Decatur*. In addition, an officer aboard the ship filed an affidavit advising that the husband was assigned to the ship and that his duties prevented his departure. The court held the affidavits sufficient to establish that the husband's military service precluded him from participating in his defense.

In addition to the "material effect" requirement, judges typically also require that the service member exercise "due diligence" to attend the proceedings. The case of *Palo v. Palo* [7] is illustrative. In *Palo* the husband appealed from a trial court decision not to grant a stay in a case in which the court ultimately granted the wife a divorce and made a property division.

Both parties in *Palo* were in the military and, at the time the divorce action was initiated, were stationed in South Dakota. Subsequently, both parties transferred to Germany. In late July 1979 both parties were informed of the August 14th trial date. The husband informed his attorney that he wanted to take advantage of the SSCRA. In his letter he stated that he: 1) had no money, 2) wanted to reconcile with his wife, and 3) had no accrued leave and did not want to take an advance on leave. The wife also had no money and no accrued leave, but she borrowed the necessary money and took an advance on leave in order to get to South Dakota for the trial.

Just before the trial, the husband's attorney requested a stay, and the husband's letter was incorporated in an

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[1] 50 U.S.C. app. §§ 501-591 (1982).

[2] As the title of the Act implies, the Soldiers' and Sailors' Civil Relief Act applies to sailors, marines, and airmen, as well as to soldiers. Consequently, the term "service member" will be used herein to communicate the fact that Army legal assistance attorneys may apply the same principles when assisting clients from other services as they use when assisting soldiers.

[3] Dep't of Army, Pam. 27-166, Soldiers' and Sailors' Civil Relief Act (Aug. 1981).

[4] 533 F. Supp. 49 (W.D. Okla. 1981).

[5] 533 F. Supp. at 50.

[6] 222 Va. 49, 278 S.E.2d 811 (1981).

[7] 299 N.W.2d 577 (S.D. 1980).

affidavit by counsel and admitted into evidence. After hearing both sets of circumstances, the court found that the husband should not be permitted to take advantage of the SSCRA where the wife did not do so. The court believed that the husband was unwilling, rather than unable, to attend the proceedings. Upholding the trial court's decision, the appellate court found that the husband failed to demonstrate due diligence in trying to attend the proceedings.

Finally, while judges are inclined to grant delays for periods they believe "reasonable," they are likely to deny requests for delays they believe unreasonable. For example, in *Plesniak v. Wiegand* [8] plaintiff filed suit on May 5, 1969. Between then and the ultimate trial date of December 31, 1973, defendant-service member requested four continuances due to duty requirements, the first three of which were granted. When defendant requested the fourth stay through counsel, he did not address whether or when he could be present for trial. The court found that the denial of defendant-service member's motion for a continuance was not error in view of the indication that the defendant, who was a commanding officer, had not made a reasonable effort to make himself available for trial. Additionally, the court held that the SSCRA did not require indefinite continuances, and noted that it could not understand why a commanding officer could not obtain leave to return to Illinois for a trial.

While judges typically base their determinations on evidence of record, practitioners can glean a helpful practice tip from the case of *Underhill v. Barnes*, [9] in which, prior to entering the service, the defendant-service member was involved in an automobile accident that resulted in a civil action against him. Following the accident, the defendant entered the Navy and was stationed in Hawaii.

Through an affidavit prepared by his counsel, the defendant requested a stay of proceedings for the remainder of his period of service plus sixty days. The affidavit read, in part, that the defendant was "unable to leave his duty station in Hawaii for purposes of conferring with [his attorney] to prepare his defense and to attend trial and testify in his own behalf." [10]

The court denied the request for a stay and the appellate court upheld the denial, noting that the lower court had taken judicial notice of the fact that the defendant had accrued fifty days of annual leave, and that there had been no evidentiary showing that leave was not available. The court emphasized that due diligence and good faith are essential in effectively invoking the SSCRA's protections. In this case, then, the court attached significance not only to the contents of the defendant's affidavit, but also to what the affidavit did not say about facts which were within the defendant's knowledge.

Invoking and Preserving SSCRA Protections

The parties to judicial actions can best protect their interests if they are present during the proceedings. Consequently, service members frequently request stays in proceedings to permit their return to the jurisdiction and attendance at the proceedings.

If the judge should deny the stay and proceed with the case in the service member's absence, the service member may be able to reopen the resulting judgment. 50 U.S.C. Appendix § 520(1) provides: "In any action or proceeding commenced in any court, if there shall be a *default of any appearance* by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service" (emphasis added). Unfortunately for the service member, any appearance whatsoever by the service member may terminate the default judgment protections and render the service member subject to a default judgment with no right to petition the court to reopen the case.

It is important that the legal assistance attorney understand that any act before the court by the service member or by the service member's retained attorney (as opposed to a court-appointed attorney) may constitute a disqualifying appearance. The court determines what constitutes "an appearance." No particular type of appearance is required; some courts have found that special appearances (even for the purpose of contesting the court's jurisdiction over the subject matter or the service member), as well as general appearances, may constitute disqualifying appearances.

The definition of "appearance" is not limited to situations in which the service member files an answer through counsel or *pro se*. Courts have also found an "appearance" when the service member requested through counsel that the complaint and service be quashed, [11] when the service member contested jurisdiction through retained counsel, [12] when the service mem-

[8] 31 Ill. App. 3d 923, 335 N.E.2d 131 (1975).

[9] 161 Ga. App. 776, 288 S.E.2d 905 (1982).

[10] 161 Ga. App. at 777, 288 S.E.2d at 907.

[11] Blankenship v. Blankenship, 263 Ala. 297, 82 So. 2d 335 (1955). The defendant husband authorized an attorney to appear and request either that service be quashed or that the case be continued. The court held that the defendant had made an "appearance" under the SSCRA, finding that anything other than an appearance for the limited purpose of challenging jurisdiction or sufficiency of service constituted "any appearance" under the default judgment provision of the SSCRA.

[12] Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943). In this case, a wife's action to increase court-ordered child support was served on the attorneys who represented her soldier-spouse in the prior divorce action, but who had subsequently been discharged by him. The court found that the court appearance of an attorney whom the soldier-spouse had recently retained to contest the court's jurisdiction constituted waiver of the soldier's rights under the SSCRA. The court focused on the fact that a judgment for divorce is not final insofar as it relates to the custody and maintenance of minor children.

ber requested postponement through retained counsel, [13] and when the service member requested a stay through a legal assistance attorney. [14]

In this last case, *Skates v. Stockton*, [15] the court construed a letter to a clerk of court written by a legal assistance attorney as constituting an appearance and, consequently, as giving the court *in personam* jurisdiction over the service member, even though the letter specifically stated that it did *not* constitute an appearance on behalf of the service member. The *Stockton* case is particularly instructive because it involved a fairly typical practice of legal assistance attorneys. On behalf of Sergeant Stockton, a legal assistance attorney sent a letter to the County Clerk of the Superior Court, Pima County, Tucson, Arizona, in which he identified himself as a legal assistance attorney and stated that the defendant was on active duty in the Marine Corps.

The letter then requested that the pending paternity action against Stockton be stayed until Stockton returned to the United States pursuant to his normal rotation date, and included the "standard" language requesting relief under the SSCRA and noting that the "letter is in no way intended to be an appearance or answer in the action or be a waiver of [the defendant's] protections under the Act." The letter was signed by the legal assistance attorney.

Not only did the court find that the defendant had lost his ability to reopen the case following the court's default judgment against him, but the court also found that the letter gave the court *in personam* jurisdiction over the defendant, which they otherwise would not have had. [16] Consequently, the court found that the defendant was subject to the court's jurisdiction and had made an appearance, permitting the court to enter judgment against him.

In this particular case, it is possible that the court ruled as it did out of frustration with the defendant, whose original letter to the clerk indicated that he would defend the action upon his return to the United States in January 1982, but who apparently returned in November 1981 and nonetheless failed to take any action with respect to the pending suit.

Not all courts have rendered such harsh results. In *Kramer v. Kramer*, [17] for example, the husband was a member of the U.S. Navy stationed in Cuba. His wife brought an action in Texas for divorce and child custody. There was no evidence that the sailor had ever been in Texas. Having received notice of the proceedings during a temporary stop-over in Virginia, the sailor subsequently wrote a letter to the clerk of the Texas court stating that he was unable to appear because of his military status.

Notwithstanding the objection of the attorney who was appointed to represent the sailor minutes before the trial began, the court entered judgment. On appeal, the court reversed, concluding both that the court lacked jurisdiction over the sailor and that the sailor's letter to the clerk of court was not an appearance, but simply an application to stay the proceedings under the SSCRA. [18]

The *Stockton* case has nonetheless caused legal assistance attorneys to revise their practice to preclude such results. Legal assistance attorneys should think through each case before contacting the court. The following approach might be helpful.

Approaching the Problem

1. Review the status of the client's civil action and identify the risks of doing nothing.

a. If you fail to enter an appearance now, will you be able to reopen the case later? Do you have both material effect and a meritorious defense?

50 U.S.C. § 520(4) permits a service member to reopen a default judgment if the service member can show "prejudic[e] by reason of his military service in making his defense thereto" and that he or she "has a meritorious or legal defense to the action or some part thereof." If not, it might be better to appear now, because the service member will certainly lose if there is a default, and the member will then have no recourse.

b. If you fail to appear now, will adverse action (such as garnishment or involuntary allotment) be taken anyway?

Assuming jurisdiction and service are proper and you have nothing to challenge, it is still important to identify the impact of failing to appear. For example, if the case involves child support, garnishment or wage assignment will be initiated in any event, so failure to appear will

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[13] Vara v. Vara, 14 Ohio St. 2d 261, 171 N.E.2d 384 (1961). Although the court found that a soldier's motion to stay proceedings under the SSCRA and an affidavit filed in support thereof constituted a general appearance, the court apparently so decided because it was convinced that the soldier was able to defend the action, notwithstanding the soldier's request for a stay in the proceedings until his discharge from the service. The court focused on the possibility that the soldier's request was made in bad faith, in light of the fact that the soldier had previously prosecuted an out-of-state action for divorce, that his affidavit indicated that response to the action would prejudice his Army career (which the court balanced against the interests of his three children), and that the soldier was requesting a stay until his discharge, even though he was then attending his advanced course with a designated subsequent assignment.

[14] Skates v. Stockton, 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1984).

[15] *Id.*

[16] *In personam* jurisdiction would have been lacking because the mother's paternity complaint alleged that the child was conceived in Africa and born in Germany, but failed to allege that any act occurred in Arizona.

[17] 668 S.W.2d 457 (Tex. Ct. App. 1984).

[18] *See also* Rutherford v. Bentz, 345 Ill. App. 532, 537-38, 104 N.E.2d 343 (1952) (The court found that a soldier's telegram sent to the judge did not constitute an appearance because "[t]he court is a legal entity, created by the Constitution and the judge is the presiding officer, only. . . . A telegram to . . . these judges or a letter, while addressed to the judge, as the judge of the Circuit Court of Champaign County, is to the individual and not the Court."); Bowery Savings Bank v. Pellegrino, 185 Misc. 912, 58 N.Y.S.2d 771 (Sup. Ct. 1945) (involving documents prepared by a legal assistance attorney and mailed to a court on behalf of a service member).

not protect the client and it WILL inhibit your defense. Of course, if your client is insolvent there may be nothing to collect.

2. Is there an issue regarding *in personam* jurisdiction? If so, concentrate on challenging it by making a special appearance for that purpose only.

In some courts, a special appearance to challenge jurisdiction will not be construed as "any appearance" and therefore will not waive the service member's right to reopen a subsequent default judgment under § 520. In other courts, even this appearance will constitute "any appearance," so that if the service member loses the jurisdictional battle, he or she must now proceed on the merits. Such clients cannot just sit back with a view toward reopening the judgment if it should be adverse.

3. If a stay of proceedings is most likely to afford relief, how should you seek one?

a. Request a stay of reasonable duration.

b. Have someone other than the service member request the stay.

This person could be, for example, the commander, platoon leader, platoon sergeant, or someone else in the service member's chain of command (NOT an attorney or the service member).

c. If this is not possible, have the service member request the stay of the opposing counsel (who will then be obligated to inform the court of the service member's status).

4. Assume that the burden is on the service member to prove material effect, even though this is not clearly established by the law.

5. Remember, in this case, formal pleadings prepared by the legal assistance attorney are NOT helpful.

Before a legal assistance attorney contacts the court, it is best to contact an attorney (for example, a reservist who practices in that jurisdiction) who is aware of the court's approach to this issue.

Establishing and Changing Domicile

Pursuant to the SSCRA, a service member's solely owned nonbusiness personal property and military income can be taxed only by the service member's state of domicile (50 U.S.C. Appendix § 574 (1982)). Most states are pleased to acquire new domiciliaries, because they see the possibility of enhanced revenues, but they are hesitant to release domiciliaries because they may then lose this revenue. States emphasize various factors as indicative of domicile, including the following.

1. Expressed intent, oral or written.

2. Physical presence, past and present (including duration).

3. Residence of immediate family.

4. Location of schools attended by children.

5. Payment of nonresident tuition to institutions of higher education.

6. Payment of taxes (income and personal property).

7. Ownership of real property.

8. Leasehold interests.

9. Situs of personal property.

10. Voter registration.

11. Vehicle registration.

12. Motor vehicle operator's permit.

13. Location of bank and investment accounts.

14. Explanations for temporary changes in residence.

15. Submission of DD Form 2058 (change of domicile form).

16. Home of record at the time of entering service.

17. Place of marriage.

18. Spouse's domicile.

19. Place of birth.

20. Business interests.

21. Sources of income.

22. Outside employment.

23. Declarations of residence on documents such as wills, deeds, mortgages, leases, contracts, insurance policies, and hospital records.

24. Declarations of domicile in affidavits or litigation.

25. Address provided on federal income tax return.

26. Membership in church, civil, professional, service, or fraternal organizations.

27. Ownership of burial plots.

28. Place of burial of immediate family members.

29. Location of donees of charitable contributions.

It's Getting Tougher to Be From Alaska

Although most states are pleased to acquire new domiciliaries but hesitant to release established domiciliaries, Alaska is an exception to this rule. Contrary to the norm, it is difficult to acquire and easy to relinquish domicile in Alaska because, pursuant to legislation relating to the Alaska pipeline, Alaska domiciliaries pay no income tax and each member of a family domiciled in Alaska receives an annual stipend, called a Permanent Fund Dividend. Consequently, the Alaska Department of Revenue has delineated rigorous standards for establishing Alaskan domicile and the Alaska legislature has established civil penalties for anyone who misrepresents a material fact pertaining to eligibility for the dividend. Those who have claimed Alaskan domicile should have been informed of these new requirements and penalties by Ervin Jones, Director, Permanent Fund Dividend Division, P.O. Box S-0462, Juneau, Alaska 99811-0462.

Conclusion

Although they receive far less attention than the previously cited provisions of the SSCRA, the SSCRA

additionally permits reopening of default judgments, [19] tolls statutes of limitation, [20] limits interest rates, [21] prohibits eviction of a service member's family from leased housing, [22] forbids foreclosure on or sale of a service member's property for nonpayment of the mortgage, [23] permits termination of pre-service leases by military members, [24] and prohibits enforcement of liens for storage of service members' household goods, furniture, or personal effects [25] under specified circumstances. Attorneys assisting military members or their families should carefully review both the statutory language and the related case law before communicating with opposing counsel or the court. While the protections offered by the SSCRA are numerous, the consequences of unsuccessful efforts to invoke these protections may be grave.

[19] 50 U.S.C. app. § 520 (1982).

[20] 50 U.S.C. app. § 525 (1982).

[21] 50 U.S.C. app. § 526 (1982).

[22] 50 U.S.C. app. § 530 (1982).

[23] 50 U.S.C. app. § 532 (1982).

[24] 50 U.S.C. app. § 534 (1982).

[25] 50 U.S.C. app. § 535 (1982).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

ADAPCP Confidentiality Protections on Sentencing

Captain Gregory B. Upton
Defense Appellate Division

Introduction

Congress, in an effort to battle a national substance abuse epidemic, passed legislation to encourage those suffering from drug and alcohol abuse to seek treatment and rehabilitation. [1] Recognizing a need to enhance the quality and attractiveness of treatment programs, Congress protected the privacy rights of those seeking help by enacting legislation that protects from disclosure the records of identity, diagnosis, prognosis, or treatment of any patient. [2] In response to congressional concern about substance abuse, the Army implemented the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). [3] The ADAPCP regulation implements the privacy protections afforded by Congress for soldiers seeking rehabilitation and treatment.

The purpose of this article is to assist counsel in understanding the exclusionary effect the privacy protections have on the introduction of ADAPCP evidence during the *sentencing* phase of a court-martial. Specifically, the article addresses the propriety of having a witness, who normally is someone in the accused's chain-of-command, testify that the accused has been referred to ADAPCP. In order to determine the extent of the privacy protections, this article will review the decisions of the Army Court of Military Review, federal regulations, and the federal confidentiality statute and its legislative history.

The Army Court of Military Review has addressed the impact of the confidentiality issue on the introduction of ADAPCP evidence in three cases. Specifically, the Army court has focused on the admissibility, during the sentencing phase of trial, of testimony that an accused has participated in the ADAPCP. Each case develops a different analytical approach as to admissibility, and the cases are, therefore, difficult to reconcile. Conceptually, the cases may be viewed on a spectrum with one extreme allowing admission of all ADAPCP information and the other extreme prohibiting all ADAPCP information. *United States v. Howes* [4] strictly construes the federal confidentiality statute by not allowing testimony about an accused's participation in ADAPCP. *United States v.*

[1] H. Rep. No. 1663, 91st Congress, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5719 (alcohol); H. Rep. No. 775, 92nd Congress, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2045 (drug).

[2] 42 U.S.C. §§ 290dd-3, 290ee-3 (Supp. I 1983) (alcohol and drug, respectively) [hereinafter "federal confidentiality statute"]. Identical protections are afforded for alcohol- and drug-related programs. For purposes of simplicity, this article will reference only the drug privacy protections. The article, however, applies equally to the alcohol protections.

[3] Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter AR 600-85].

[4] 22 M.J. 704 (A.C.M.R. 1986).

Thomas [5] takes a middle-of-the-road approach, holding that the federal confidentiality statute applies in limited circumstances, such as where the accused is self-referred and the source of the information is responsible for, or has access to, the actual treatment records. *Thomas* would allow the admission of such otherwise protected testimony under the court order exception of the statute. *United States v. Johnson* [6] reasons that the federal confidentiality statute does not apply to testimony concerning the fact of an accused's participation in ADAPCP.

Counsel in the field are faced with the task of determining which decision to apply. Trial defense counsel will likely argue that the *Howes* decision is controlling. Trial counsel will stress the *Johnson* rationale. The author believes that when the decisions are analyzed within the framework of the federal confidentiality statute, the legislative history, and the appropriate federal regulations, the *Howes* decision should prevail.

The three Army court decisions raise two fundamental issues concerning the federal confidentiality statute, both of which will be addressed. First, does the federal confidentiality statute apply to sentencing testimony at courts-martial? *Howes* and *Thomas* hold that it does; *Johnson* reasons that it does not. Second, if the statute does apply to courts-martial, does the *Howes* or *Thomas* decision correctly apply the statute? In the final analysis, this article is an attempt to determine which of three conflicting decisions is correct.

A Typical Trial Scenario

At a special court-martial empowered to adjudge a bad-conduct discharge, the accused pleads guilty to one specification of using a minimal amount of marijuana. On sentencing, trial defense counsel calls the accused's company commander and first sergeant, who both testify that the accused is a hard worker and an excellent soldier. Both witnesses agree that the accused should be retained in the Army. On cross-examination of the company commander, trial counsel asks if the accused had ever been referred to ADAPCP. The commander replies that approximately a year earlier the accused was command-referred to ADAPCP for substance abuse. [7] Trial counsel, during his closing argument, stresses that appellant has no rehabilitative potential. Trial counsel argues that the Army gave the accused an opportunity to be rehabilitated, but the accused failed to take advantage of that opportunity. [8] The government concludes by characterizing the accused as a two-time loser devoid of rehabilitation potential.

Statutory Framework And Legislative History

Congress enacted the following privacy protections for drug rehabilitation patients.

Confidentiality of patient records.

(a) Disclosure authorization.

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent. [9]

. . . .

(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

. . . .

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(d) Continuing prohibition against disclosure irrespective of status as patient.

The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

(e) Armed Forces and Veterans' Administration; interchange of records. . . .

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[5] 26 M.J. 735 (A.C.M.R. 1988).

[6] 25 M.J. 517 (A.C.M.R. 1987), *pet denied*, 26 M.J. 226 (C.M.A. 1988).

[7] Under the holding in *Howes*, the commander's testimony concerning ADAPCP is not admissible, and trial defense counsel's failure to object to the testimony constitutes ineffective assistance of counsel. The *Johnson* holding is that the ADAPCP testimony is admissible because the federal confidentiality statute does not apply. Under *Thomas*, the ADAPCP testimony is admissible because the accused was command-referred, as opposed to self-referred, to the program.

[8] The court members' knowledge of the accused's previous participation in ADAPCP could seriously undermine trial defense counsel's argument that the accused has rehabilitation potential and should be retained in the service. The members may conclude that the Army has already given the accused a second chance, resulting in still more substance abuse.

[9] Disclosure is also allowed with the written consent of the patient. Disclosure without written consent is allowed if necessary for a bona fide medical emergency, or if the information is used in specific types of research or audits.

The prohibitions of this section do not apply to any interchange of records—

(1) within the Armed Forces or within those components of the Veterans' Administration furnishing health care to veterans, or

(2) between such components and the Armed Forces. [10]

The legislative history provides useful insight into Congress's purpose for implementing a confidentiality section in the statute:

The conferees wish to stress their conviction that the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

Every person having control over or access to patient's records must understand that disclosure is permitted only under the circumstances and conditions set forth in this section. Records are not to be made available to investigators for the purpose of law enforcement or for any other private or public purpose or in any manner not specified in this section. [11]

Army Court of Military Review Conflicting Jurisprudence

In *Howes* [12] the Army court held that the federal confidentiality statute prohibited sentencing testimony concerning the accused's participation in ADAPCP. The court vigorously protected the accused's privacy right by holding that trial defense counsel's failure to object to evidence of participation in ADAPCP constituted ineffective assistance of counsel. Pursuant to his plea, Howes was convicted of possession of marijuana with the intent to distribute. Three witnesses called by Howes during sentencing proceedings testified that Howes should not be discharged. During the cross-examination of two of the witnesses, trial counsel broached the subject of Howes' participation in ADAPCP. Following Howes' unsworn testimony that his most serious problem in the civilian community was a parking ticket, trial counsel called Howes' company commander and elicited testimony about Howes' successful completion of the ADAPCP program. Trial counsel mentioned, during closing argument, Howes' successful participation in the ADAPCP program. Trial defense counsel did not object to any of the references to his client's participation in ADAPCP.

The Army court in *Howes* applied the two-pronged *Strickland v. Washington* [13] test in analyzing the ineffective assistance of counsel issue. Employing the first prong of the *Strickland* test, the court reasoned that a valid objection should have been lodged against receipt of the ADAPCP information. "The clear language of the statute [42 U.S.C. § 290ee-3] demonstrates Congress' concern that ADAPCP-type records and information be kept confidential. The legislative history of the statute buttresses that conclusion." [14] The Army court concluded that the *Strickland* test for prejudice was also met:

Applying *Strickland's* second prong, we find a reasonable probability that appellant's sentence was prejudicially affected by trial counsel's improper use of the ADAPCP information. Appellant was charged and convicted of one specification of possession of marijuana with intent to distribute. The trial counsel's improper use of the ADAPCP information, however, not only painted appellant as a "two-time loser," but as one who was devoid of rehabilitative potential. [15]

The sentence was set aside with provisions for a rehearing.

In a factual setting similar to *Howes*, the Army court in *Johnson* [16] held that the federal confidentiality statute did not prohibit sentencing testimony concerning the accused's participation in ADAPCP. The court found no error in trial counsel introducing the subject of the accused's command-referred participation in, and failure to complete, ADAPCP. The court concluded that the privacy protection afforded by the federal confidentiality statute did not apply for two reasons. First, the company commander's testimony concerning the accused's involvement in ADAPCP did not involve the disclosure of records as required by the statute to trigger the protections. Second, the statute's privacy protection did not apply to the interchange of records within the armed forces. The court distinguished *Howes* on the basis that the Army's "limited use" policy, as opposed to the

[10] 42 U.S.C. § 290ee-3 (Supp. I 1983).

[11] H. Rep. No. 775, 92d Congress, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2045, 2072.

[12] 22 M.J. at 704.

[13] 466 U.S. 668 (1984).

[14] *Howes*, 22 M.J. at 706-07.

[15] *Id.* at 708.

[16] 25 M.J. at 517.

formerly used "exemption" policy, was in effect. [17] In short, the court provided little, if any, privacy protection for a command-referred accused who seeks to exclude testimony concerning participation in ADAPCP.

Finally, in *Thomas*, [18] the most recent ADAPCP decision by the Army court, the court's analysis lies somewhere in between the *Johnson* and *Howes* decisions. A supervisor and a noncommissioned officer with whom the accused worked testified that the accused worked hard, achieved outstanding results on the job, and possessed excellent potential for rehabilitation. On cross-examination, trial counsel challenged these opinions by asking whether they were aware that the accused was seen drinking beer while enrolled in ADAPCP. The Army court found trial counsel's inquiry to be proper. The court acknowledged the applicability of the federal confidentiality statute and noted that the court order exception of the statute, 42 U.S.C. § 290dd-3(b)(2)(c), may be utilized to admit protected ADAPCP information. The court also set forth two criteria that an accused must satisfy to "raise an issue under the disclosure prohibition:" 1) "an accused must demonstrate that the individual revealing the information is responsible for or otherwise has access to the information contained in the accused's client record;" and 2) the accused must have been self-referred, as opposed to command-referred, to the ADAPCP program. [19]

Applicability of Federal Confidentiality Statute to Courts-Martial

The three Army court decisions fail to conclusively resolve the fundamental issue of whether the federal confidentiality statute applies to sentencing testimony at courts-martial. *Johnson* holds that the confidentiality statute does not apply. *Howes* and *Thomas* hold that the confidentiality statute does apply to courts-martial. When analyzed within the framework of the federal confidentiality statute and the appropriate federal regulations, the *Howes* and *Thomas* opinions appear to be the correct way to resolve the issue.

The Army court in *Johnson* found that the federal confidentiality statute does not apply to sentencing testimony at courts-martial for two reasons. First, the court held that the company commander's testimony concerning appellant's participation in the ADAPCP program did not involve disclosure of records of identity, diagnosis, prognosis, or treatment and, therefore, the testimony did not fall within the protection of the statute. [20] The Code of Federal Regulations' interpretation of the confidentiality provisions, however, does not support the court's conclusion. "*Records* means any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program." [21] "The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which: (i) Would identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person." [22] Furthermore, Army Regulation 600-85 specifically recognizes that the confidentiality protections apply to disclosures concerning whether a soldier is or has been a client. [23] In short, the regulations clarify the fact that confidential records include testimonial information as to whether a person is or has been enrolled in a drug or alcohol treatment program.

The Department of Health and Human Services' interpretation of the statute in the Code of Federal Regulations is consistent with the policy behind confidentiality. [24] Congress's policy of promoting participation in drug and alcohol abuse programs while at the same time protecting the right of privacy would be rendered meaningless if fellow soldiers were allowed to testify that the accused participated in an ADAPCP program. Of all the types of information that could potentially be revealed about a person's involvement with a drug or alcohol abuse program, the mere fact of participation may be the most damaging. Arguably, once a person is labeled as someone who required a drug or alcohol abuse program, that person's reputation is irreparably damaged.

The *Johnson* court's second debatable interpretation of the statute involves the scope of the armed forces exception. [25] The Army court noted that the protections of the statute do not apply to the interchange of records "within the Armed Forces." While the court's general statement is true, the court failed to explore the limits of

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[17] The limited use policy was promulgated in Changes 2 and 3 to AR 600-85, dated 11 February 1983 and 29 April 1983, respectively. These changes replaced the exemption policy of the 1982 publication of the regulation. The limited use policy is incorporated in the current regulation. AR 600-85 (21 Oct. 1988).

Under the guise of seeking consistency, the Army court in *Johnson* used the "limited use" versus "exemption" change in the regulation to distinguish *Howes*. Such a distinction is meaningless. The *Howes* decision relied upon the federal confidentiality statute and its legislative history to find the ADAPCP information inadmissible. The federal confidentiality statute has not changed since the *Howes* decision. Assuming, therefore, as was held in *Johnson*, that ADAPCP information is disclosable pursuant to the "limited use" policy, the regulation would be contrary to the clear language of the federal confidentiality statute, and thus invalid.

[18] 26 M.J. at 735.

[19] *Id.* at 737.

[20] *Johnson*, 25 M.J. at 518.

[21] 42 C.F.R. § 2.11 (1987) (emphasis in original).

[22] 42 C.F.R. § 2.12(a).

[23] AR 600-85, para. 6-10a(3).

[24] 42 C.F.R. §§ 2.1-2.67 (1987).

[25] 42 U.S.C. § 290ee-3(e) (Supp. I 1983).

that exception. Arguably, the exception does not envision or allow public announcement at courts-martial of an individual's participation in a substance abuse program. The Code of Federal Regulations states that "patient records . . . may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any . . . criminal . . . proceedings conducted by any Federal . . . authority." [26] "These regulations apply to any information . . . which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except: (1) any interchange of that information within the Armed Forces." [27] It is submitted that courtroom disclosures are not interchanges "within the Armed Forces." Although courtroom disclosures occur within a military setting, *i.e.*, a court-martial, because of the public nature of a military trial the disclosures are not limited to the armed forces.

In short, the *Johnson* conclusion that the federal confidentiality statute does not apply to sentencing testimony at a court-martial concerning an accused's participation in ADAPCP is questionable. The author submits that the federal confidentiality statute does apply to such testimony.

Applying the Federal Confidentiality Statute to Courts-Martial

If the federal confidentiality statute does apply to courts-martial, the issue then becomes whether *Thomas* or *Howes* correctly applied the statute. *Howes* appears to totally foreclose the admission of ADAPCP information on sentencing. The *Thomas* court requires that two conditions be met before the federal confidentiality statute applies: the accused must be self-referred to the ADAPCP program and the witness revealing the information must be responsible for, or have access to, information contained in the accused's ADAPCP records. [28] Assuming these two criteria are established, the *Thomas* court may allow introduction through use of the court order exception.

The federal confidentiality statute, the regulations, and the legislative history suggest that the *Howes* decision represents the better application of the statute. The *Thomas* court distinguishes between command- and self-referral in determining the applicability of the federal confidentiality statute to courts-martial. Self-referred individuals may be protected; command-referred individuals are not protected. Although AR 600-85 draws a distinction between command- and self-referral, no justification for using such a distinction can be found in the statute or the Code of Federal Regulations. Whether one is command-referred or self-referred, the privacy protections afforded by Congress should apply. Indeed, the federal confidentiality statute forbids the disclosure of records of "any patient," not just self-referred patients. [29]

Before ADAPCP information can be protected, *Thomas* also requires that the source of the information be "personnel who staff the program either as a primary or secondary duty." [30] The Code of Federal Regulations does not limit the source of the ADAPCP information to staff members. "The restriction on the use of any information subject to these regulations . . . applies to *any person* who obtains that information from a federally assisted alcohol or drug abuse program, regardless of the status of the person obtaining the information or of whether the information was obtained in accordance of these regulations." [31] Furthermore, in the military, no one other than the client, his or her unit commander and immediate supervisor, and the ADAPCP staff have a need to know of a soldier's participation in the ADAPCP program. [32] All of these individuals, therefore, are primarily or secondarily involved with the ADAPCP program and are, therefore, prohibited from testifying under the *Thomas* standard.

Although the court order exception provides a possible escape from the federal confidentiality statute, as the *Thomas* court indicates, this exception should be used sparingly. The party desiring use of the ADAPCP information must make a showing of good cause, and should separately litigate the matter at trial. "In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient . . . and to the treatment services." [33] The public interest in allowing testimonial evidence on sentencing of an accused's participation in ADAPCP generally is minimal. The accused already has a federal criminal conviction. The use of ADAPCP information on sentencing is to increase the punishment the individual will receive. If military judges routinely "order" the introduction of ADAPCP information, the "fear" of public disclosure of drug abuse or of stigmatizing information that could attach for life will discourage individuals from seeking the treatment they must have, as Congress desires and intends, if this tragic national problem is to be overcome.

The Air Force Court of Military Review has, in effect, adopted the *Howes* position, by consistantly holding that evidence concerning an accused's participation in substance abuse programs is not admissible on sentencing.

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[26] 42 C.F.R. § 2.13(a) (1987).

[27] 42 C.F.R. § 2.12(c)(2) (1987).

[28] Interestingly, the court placed the burden on the accused to "raise an issue under the disclosure prohibition," instead of requiring the trial counsel to establish the admissibility of the evidence. *Thomas*, 26 M.J. at 737.

[29] 42 U.S.C. § 290ee-3(a) (Supp. I 1983).

[30] *Thomas*, 26 M.J. at 737.

[31] 42 C.F.R. § 2.12(d) (1987).

[32] AR 600-85, para. 6-2(b)(5).

[33] 42 U.S.C. §§ 290ee-3(b)(2)(c) (Supp. I 1983).

We have previously held that neither confidential drug abuse records themselves, nor the testimony of persons concerning their contents are admissible for purposes of rebutting testimony consisting of opinion evidence as to rehabilitation during the sentencing portion of court-martial proceedings, *United States v. Fenyo*, 6 M.J. 933 (A.F.C.M.R. 1979), *pet. denied*, 7 M.J. 161 (C.M.R. 1979).

. . . .

. . . [T]he general effect of these regulations is to prohibit anyone, other than the accused, from introducing, in criminal proceedings, any information about, or gained as a result of, his participation in an Air Force drug rehabilitation program. The result, then, is an extraordinarily broad evidentiary exclusionary privilege that is automatically invoked on behalf of the accused, unless he specifically directs otherwise. [34]

Although the Air Force Court of Military Review was interpreting an Air Force regulation, the federal confidentiality statute and the accompanying federal regulations underlie the Air Force decisions. [35]

Conclusion

The strict exclusionary rule of *Howes* finds support in the federal confidentiality statute, applicable regulations, legislative history, and Court of Military Review jurisprudence. Congress has provided privacy protections to patients participating in certain substance abuse and prevention programs. It is trial defense counsel's responsibility to ensure that an accused's right to privacy is respected at courts-martial. Although, the Army Court of Military Review has provided inconsistent guidance concerning the limits of the privacy protections, the *Howes* decision appears to correctly define the extent of the protection, and applies these protections through a strictly enforced exclusionary rule.

[34] United States v. Cottle, 11 M.J. 572, 574 (A.F.C.M.R. 1981)(footnote omitted). *See also* United States v. Cruzado-Rodriguez, 9 M.J. 908 (A.F.C.M.R. 1980); United States v. Schmenk, 11 M.J. 803 (A.F.C.M.R. 1981); and United States v. Lange, 11 M.J. 884 (A.F.C.M.R. 1981).

[35] *See Cruzado-Rodriguez*, 9 M.J. 908.

DAD Notes

Clemency and Parole Rules Change

For defendants in criminal cases, the bottom-line question often is how much time must be spent in confinement. If this time can be reduced by any means--including probation at the time of trial or subsequent release on parole—the defendant usually is anxious for this to be done. . . . Because of the importance of such matters to an accused, his defense counsel should be aware of the rules and policies which will affect the practical impact of sentences to confinement. [1]

On 1 September 1988, new rules affecting consideration of military prisoners for clemency and parole took effect at the direction of the Secretary of Defense. [2] As Chief Judge Everett admonished in *Hannan*, defense counsel must be aware of these changes to properly advise their clients. Although there has been no change in the procedural mechanism by which military prisoners receive consideration for clemency and parole, [3] there has been a substantial change in the requirement for mandatory clemency review and a less substantial change in the parole eligibility criteria.

Prior to 1 September 1988, all military prisoners were subject to automatic review for clemency. Prisoners with sentences to confinement of less than eight months were normally considered during their fourth month in confinement. Prisoners with sentences of eight months or more but less than two years were to be considered for clemency not earlier than the fourth month nor later than the sixth month in confinement. Prisoners with sentences of two years or more received clemency consideration not earlier than the sixth month nor later than the eighth month of confinement. [4] Pursuant to the new rules, prisoners with sentences of less than twelve months confinement receive no mandatory clemency review. Prisoners with sentences of twelve months or more but less than ten years are to be considered for clemency not more than nine months from the date confinement began. Prisoners with sentences of ten years or more but less than twenty years are to be considered not more than twenty-four months from entering confinement. Prisoners with sentences of twenty years or more but less than thirty years are to be considered not more than three years from the date confinement began. Prisoners with sentences of thirty years or more, includ-

[1] United States v. Hannan, 17 M.J. 115, 122 (C.M.A. 1984).

[2] Dep't of Defense Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities (May 19, 1988) [hereinafter DOD Dir. 1325.4].

[3] Detailed discussions of the procedures followed at the United States Army Correctional Activity and the United States Disciplinary Barracks may be found at: Phillips, *The Army's Clemency and Parole Program in the Correctional Environment: A Procedural Guide and Analysis*, The Army Lawyer, July 1986, at 18; and, McCoy, *Relief from Court-Martial Sentences at the United States Disciplinary Barracks: The Disposition Board*, The Army Lawyer, July 1986, at 64.

[4] Army Reg. 190-47, Military Police: The United States Army Correctional System, para. 6-14f (C1, 1 Oct. 1978) [hereinafter AR 190-47].

ing life, are to be considered not more than five years from the date confinement began. [5]

The rules relating to eligibility for parole have also been modified slightly. The prisoner must have an approved sentence to an unsuspended punitive discharge or dismissal or have been administratively discharged or retired. The prisoner must also have an unsuspended sentence or an aggregate sentence to confinement of twelve months or more. If these conditions are met and the prisoner requests release on parole, he or she is eligible for release after serving one-third of the term of confinement or six months, which ever is greater. If the sentence to confinement is thirty years or more, including life, the prisoner is not eligible for parole until ten years have been served. [6] The only significant change is the term of confinement criteria. Under the old rules, only prisoners with sentences of more than twelve months were eligible for parole. Therefore, it was not uncommon to enter a pretrial agreement with a provision for one year and one day confinement and, presumably, some one-year-and-one-day sentences were imposed based on this requirement. Under the new rules a sentence to one year confinement is sufficient to make a prisoner eligible for parole.

Defense counsel should ensure that their clients are fully advised as to clemency and parole procedures and the practical effect those procedures have on the operation of a sentence to confinement. This advice is critical now that clemency review is not automatic for prisoners with sentences of less than twelve months. Although such prisoners do not receive automatic clemency review, the new rules do not appear to have affected a prisoner's regulatory right to submit special petitions for clemency in order to obtain clemency review. [7] Defense counsel should ensure that their clients are aware of this right. Captain Keith W. Sickendick.

Objections to Uncharged Misconduct in Pretrial Confinement File

Trial defense counsel would be well-advised to continue challenging the admission of evidence of uncharged misconduct contained in an accused's pretrial confinement file--notwithstanding the Army Court of Military Review decision in *United States v. Fontenot*. [8] The Court of Military Appeals has granted review of the issue of whether the Army court properly held that any document, sworn or unsworn, from a pretrial confinement "file" can be admitted into evidence as a "personnel record." The Army Court of Military Review held that "minimal due process" is not required for admissibility of these documents. [9]

Trial defense counsel should argue that "minimal due process" *is* required by the following regulations that govern documents placed in a pretrial confinee's file:

Army Reg. 640-10, Individual Military Personnel Records (1 July 84) and Table 4-1 of that regulation;

Army Reg. 190-47, The United States Army Correctional System (1 Oct. 1978); and

Army Reg. 600-37, Unfavorable Information (19 Dec. 86). Additionally, failure to demonstrate compliance with these regulations calls into question the authentication of the documents and their admissibility based on the business records exception. [10] Trial defense counsel should challenge the reasoning of the *Fontenot* decision and the *dicta* in *United States v. Perry*, [11] which provided the basis, in part, for the *Fontenot* decision. [12]

In *Fontenot* the accused was confined following an alleged rape of a fellow soldier. While in confinement, Private Fontenot, according to sworn and unsworn documents admitted at trial, jumped up and down in his cell with no clothes on, urinated on the prison floor, uttered obscenities, and intimated that he would eat his excrement. He was convicted contrary to his pleas, and during sentencing the military judge admitted over seventy records of uncharged misconduct, including some unsworn disposition forms. [13] Also admitted were DD Forms 508, [14] which are similar to records of nonjudicial punishment [15] in that they record disciplinary actions taken after a soldier has a hearing in which he can present evidence. The trial judge, in considering the admissibility of the uncharged misconduct, admitted not only the DD Forms 508, but also the unsworn docu-

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[5] DOD Dir. 1325.4, encl. 1, para. J.3.a. Under both the old and new rules, provision is made for annual review based on the date on which a prisoner is first considered for clemency.

[6] *Id.*, encl. 1, para. J.3.b. Prisoners sentenced to death are ineligible for parole.

[7] AR 190-47, para. 6-14g.

[8] 26 M.J. 559 (A.C.M.R.), *pet. granted*, CMA Dkt. No. 60,577/AR (C.M.A. 5 Dec. 1988).

[9] 26 M.J. at 562.

[10] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 902(4), 803(6), 803(8) [hereinafter Mil. R. Evid.].

[11] 20 M.J. 1026, 1027 (A.C.M.R. 1985).

[12] Trial defense counsel should be aware of the *Shears* decision, wherein the Army court discussed the meaning of "personnel file." *See* United States v. Shears, 27 M.J. 509 (A.C.M.R. 1988). In *Shears* the Army court found that copies of three nonjudicial punishments were properly maintained in the "unit personnel files" even though the "file" was not authorized by Army Reg. 640-10. *Id.* at 510. The opinion in *Shears* fails to reflect the fact that the "file" was maintained by the battery first sergeant in his desk drawer. The *Shears* decision is questionable on the grounds that Army Reg. 640-10, Glossary, refers to military personnel records as a "*single* entity that pertains to the military career of a particular soldier" (emphasis added).

[13] Dep't of Army, Form 2496, Disposition Form.

[14] Dep't of Defense, Form 508, Report for Disciplinary Action.

[15] Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1982); *see* Army Reg. 27-10, Legal Services: Military Justice, chapter 3 (18 Mar. 88).

ments. The trial judge merely applied the balancing test of Military Rule of Evidence 403 and held that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial judge and trial defense counsel never addressed the issue of authentication or other aspects of the admissibility of the evidence. The Army court, on the other hand, resolved the issue by holding that "minimal due process" is not required for admissibility of the records from the confinement facility.

The Army court may have erred in extending the *Perry* decision, which governs the admissibility of DD Form 508, to *any* document which the confinement facility maintains. *Perry* properly held that DD Forms 508 are admissible, unless the evidence fails the balancing test of Military Rule of Evidence 403. The DD Form 508, however, is recognized by the pertinent Army regulation as a properly filed document in a pretrial detainee's file. [16] Furthermore, DD Forms 508 comply with the policy of Army Regulation 600-37, which provides for the filing of only certain enumerated types of information in a soldier's performance file "without further referral to the recipient." [17] Army Regulation 600-37 does not provide for the unilateral filing of sworn and unsworn statements, as occurred in *Fontenot*.

To preserve an objection to the admission of uncharged misconduct from the pretrial confinement "file" of an accused, trial defense counsel should not merely rely on the balancing test of *Perry*, *Fontenot*, and Military Rule of Evidence 403. Defense counsel should also object to admissibility of the evidence based on: 1) lack of due process (*i.e.* failure to refer the document to the accused prior to filing); 2) failure to demonstrate that the documents are maintained—pursuant to Army Regulation 190-47—in the ordinary course of business; 3) improper authentication; and 4) violation of Rule for Courts-Martial 1001(b)(5). [18] Captain Jon W. Stentz.

Follow the Instructions

The standard instruction given court members concerning punitive discharges at general courts-martial cautions that a dishonorable discharge should be reserved for those convicted of serious offenses that warrant severe punishment and, further, that a bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge. [19] The instruction warns that "[a] dishonorable or bad-conduct discharge deprives one of *substantially all* benefits administered by the Veterans Administration and the Army establishment." [20] This view of punitive discharges as severe punishment is consistent with decisions of the Court of Military Appeals. [21]

In two recent decisions, one panel of the Army Court of Military Review has reexamined the accuracy of the standard instruction in cases where there is evidence that the accused received an honorable discharge as a result of prior military service. In *United States v. Lenard* [22] the accused was tried by a general court-martial and sentenced to a bad-conduct discharge. He alleged that the military judge erred by failing to provide the standard instruction that a bad-conduct discharge deprives one of substantially all veterans' benefits. In holding that there was no error, the court observed that the accused was eligible for veterans' benefits as a result of a previous honorable discharge from the Navy, and that the bad-conduct discharge adjudged affected only benefits earned during his current period of service. [23] The court also noted that the defense counsel did not object to the military judge's failure to give the instruction. [24] Subsequently, in *United States v. Darnell* [25] the same panel of the Army Court of Military Review went one step further in applying the *Lenard* holding. In *Darnell* the accused alleged that the military judge erred by instructing that a punitive discharge would deprive him of "many" instead of "substantially all" veterans' benefits. The court applied the holding of *Lenard* and held that the instruction was adequate since appellant, having served on active duty for six years, "*presumptively* served his first four-year term of service under honorable conditions." [26] As in *Lenard*, the members adjudged a bad-conduct discharge at a general court-martial.

These two holdings are significant for several reasons. The cases underscore the importance of "following along" with the military judge as he instructs the members. Defense counsel should be attentive to any instruction that may be interpreted as minimizing the

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[16] Army Reg. 190-47, para. 5-5c.

[17] *See* Army Reg. 600-37, para. 3-3.

[18] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(5), Drafter's Analysis provides: "Subsection (5) guards against unbelievable information by guaranteeing that the accused will have the right to confront and cross-examine such witnesses." Admission of the uncharged misconduct does not afford the accused the right to confront the "witnesses" who prepare the statements or to bring out the "whole truth."

[19] *See* Dep't of Army Pam. 27-9, Military Judges' Benchbook, para. 3-27 (C2 October 1986).

[20] *Id.* (emphasis added).

[21] *See, e.g.*, United States v. Hodges, 22 M.J. 260 (C.M.A. 1986)(recipient of punitive discharge is subject to considerable stigma); United States v. Soriano, 20 M.J. 337 (C.M.A. 1985)(Congress and President intended this punishment to be severe and to be treated as severe by those who impose it).

[22] ACMR 8702428 (A.C.M.R. 30 Nov. 1988).

[23] *Lenard*, slip op. at 2. The court suggested that a new tailored instruction addressing this situation may be appropriate. *Id.* at 2 n.1.

[24] *Lenard*, slip op. at 2.

[25] ACMR 8702596 (A.C.M.R. 30 Nov. 1988)(unpub.).

[26] *Darnell*, slip op. at 2.

impact of punitive discharges and object when appropriate. It is only a matter of time before astute trial counsel assert, or military judges decide, that a modified instruction as proposed in *Lenard* is appropriate or, worse, that a presumption of prior honorable service as in *Darnell* is applicable. When confronted by such proposals, counsel should consider asserting the following arguments. First, *United States v. Harris*, [27] decided by another panel of the Army court, supports a position contrary to *Lenard* and *Darnell*. [28] Moreover, the suggestion in *Lenard* and *Darnell* that a court can look beyond general consequences of a punitive discharge [29] and consider specific administrative ramifications runs afoul of the long standing rule that courts-martial are "to concern themselves with the appropriateness of a particular sentence . . . without regard to the collateral administrative consequences of the penalty under consideration." [30] The purpose of the instruction is to ensure that the members are aware of the general consequences of a punitive discharge; it is not necessary for them to understand the precise impact in each case. [31] Finally, any modifications of punitive discharge instructions that appear to lessen the severity of the punishment do not comport with congressional intent as interpreted by recent decisions of the Court of Military Appeals. [32]

Ultimately, if these arguments do not prevail, defense counsel should be prepared to argue that as a matter of fairness, and as a means of rebuttal, the defense should be allowed to present evidence of the effects of the punitive discharge on specific benefits important or necessary to the accused. [33] The evidence offered by defense counsel in this regard may be as simple as requesting judicial notice of law and accompanying instructions. [34]

By closely following the instructions given and arguing for instructions that recognize the severity of punitive discharges but are not overly specific, defense counsel can ensure that court members gain an appreciation of the true nature of a punitive discharge and the hardships it causes an accused when imposed by general courts-martial. When judicial instructions are allowed to minimize the severe consequences of a punitive discharge, that punishment may be adjudged without due regard for its significance. Captain Timothy P. Riley.

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[27] 26 M.J. 729 (A.C.M.R. 1988).

[28] In *Harris* the court held that the correct instruction in all general courts-martial is that a bad-conduct discharge deprives a soldier of "substantially all" benefits, not "many" benefits. 26 M.J. at 734; *see* United States v. Hopkins, 26 M.J. 671 (A.F.C.M.R. 1987). The record of trial in *Harris* reveals that the accused was a sergeant who had served on active duty for over seven years. Therefore, he too presumptively received a prior honorable discharge.

[29] Instructing members that a punitive discharge deprives one of substantially all benefits is considered a general (not specific) consequence. The Air Force Court of Military Review has held that failure to give the instruction when requested is error. *See* United States v. Chasteen, 17 M.J. 580 (A.F.C.M.R. 1983); United States v. Simpson, 16 M.J. 506 (A.F.C.M.R. 1983).

[30] United States v. Quisenberry, 31 C.M.R. 195, 198 (C.M.A. 1962). There is good reason not to stray from this rule for, as one court has noted, Congress (or for that matter an administrative agency) could, by changing the law, increase administrative penalties for punitive discharges after an accused's trial. Thus, an accused whose sentence was voted upon by considering specific ramifications could attack his sentence on *ex post facto* grounds. *See* United States v. Givens, 11 M.J. 694, 696 n.3 (N.M.C.M.R. 1981).

[31] *See United States v. Quisenberry*, 31 C.M.R. at 198 (members are entitled to know no more than general effects; no requirement to deliver an unending catalogue of administrative information to members).

[32] *See supra* note 3.

[33] For example, in *Lenard* the court noted that, despite the accused's honorable discharge from the Navy, he apparently would not be eligible for medical care for injuries or disabilities received while in the Army. Slip op. at 2.

[34] *See* Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 201A. For instance, defense counsel may request that notice be taken of the effect of a punitive discharge on educational assistance. *See* 38 U.S.C. § 1602 (1982 and Supp. IV 1986) (defining veteran eligible for education assistance as as one discharged under conditions other than dishonorable). One can see how the sentencing phase however would begin to degenerate into a "battle of the benefits." This result is precisely what the "no collateral consequences" rule seeks to avoid, yet the decisions in *Lenard* and *Darnell* encourage.

Trial Defense Service Note

The Pre-Sentence Report: Preparing for the Second Half of the Case

Captain Charles R. Marvin, Jr. and Captain Russell S. Jokinen
Fort Polk Field Office, U.S. Army Trial Defense Service

Introduction

Despite the best efforts of defense counsel, the majority of soldiers brought before courts-martial are convicted of some criminal activity. After findings of guilt are announced, the trial counsel dutifully presents the normal sentencing fare: data from the front page of the charge sheet, the accused's DA Forms 2A and 2-1, and records of nonjudicial punishment.[1] The accused's company commander and first sergeant normally testify that the accused is a marginal or substandard performer with no rehabilitative potential.[2] Satisfied that the prosecution has met its burden to justify a sentence to confinement and a punitive discharge, the trial counsel settles back to await the opportunity to deliver a devastating sentence argument.

Now it is the defense counsel's turn. Although the sentencing portion of the trial allows the defense wide latitude in the presentation of evidence,[3] most defense counsel still rely on the same methodology as the prosecution. A pile of documents is entered into evidence, a few NCO's are called to flesh out the actual duty performance of the accused, and the accused spends some time talking with the court about his past, his reasons for getting into trouble, and his hopes for the future. The military judge closes court to deliberate, and the predictions and second-guessing by counsel commence. After a short time, the court reconvenes and pronounces a sentence that normally surprises no one.

Sound familiar? But for minor differences due to personalities of counsel and the time actually available for sentence preparation, this scenario repeats itself daily in courts-martial across the world. For the most part, the sentences are predictable and reasonable, given the expectations of participants who have not experienced anything different. When defense counsel play by the evidentiary rules governing the prosecution, however, many of the advantages inherent in the rules governing defense sentencing presentations are lost.

Given the many philosophical and systemic factors relevant to the determination of an appropriate sentence,[4] the defense sentencing case should provide as much information to the sentencing authority as possible. The defense counsel is in the best position to present the information that the court needs to tailor the sentence to serve the interests of both justice and the accused. By providing that information to the sentencing authority in a format designed to maximize its impact, defense counsel can ensure that their clients benefit from informed decisionmaking, tailored to the individual accused. Without such information, the sentence will be based on the typical rehabilitative potential testimony and "attaboy" evidence that the sentencing authority sees.

Principles of Sentencing

The military justice system explicitly recognizes five principal reasons for imposing sentences upon those who violate the law: 1) protection of society from the wrongdoer, 2) punishment of the wrongdoer, 3) rehabilitation of the wrongdoer, 4) preservation of good order and discipline in the military, and 5) the deterrence of the wrongdoer and those who know of the offense from committing the same or similar offenses.[5]

Rehabilitation of the wrongdoer is not the only sentencing principle that relies on an appraisal of the offender. All of the reasons for punishment have a component that focuses on the offender and potential future conduct. Sentencing evidence can be presented in a way to emphasize the forward-looking nature of an enlightened criminal justice system.

When prosecutors speak about protection of society as a sentencing principle, they invariably use the principle to justify incarceration. This is protection of society in its narrowest and most immediate sense. The protection of society in a wider sense, however, is best accomplished by the rehabilitation of the offender, followed by a swift return as a productive, law abiding member of society. Society, whether military or civilian, benefits little from supporting at great cost the forced idleness of a member who has learned the lesson sought to be taught.

Punishment of the wrongdoer, as an expression of societal disapproval of those who transgress the rules, must also focus on the wrongdoer's specific needs. Blind retribution is best left in the primitive societies from whence it came. "An eye for an eye" is no longer a useful sentencing philosophy.

The preservation of good order and discipline in the military, or any other society, requires that all the members of society accept the same values. An accused who adopts the military's value system will enhance good order and discipline. Continued punishment *after* the accused adopts the military value system, however,

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(1)-(3) [hereinafter R.C.M.].

[2] R.C.M. 1001(b)(5).

[3] R.C.M. 1001(c)(3). *See generally* Dep't of Army, Pam. 27-173, Trial Procedure (15 Feb. 1987) [hereinafter DA Pam 27-173].

[4] *See generally* Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 Mil. L. Rev. 87 (1986).

[5] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 2-59 (1 May 1982) (C1, 15 Feb. 1985).

may serve to convince the accused and others that some of the military value system is not worthy of adoption. Thus, excessive punishment can actually detract from good order and discipline.

The conventional wisdom is that the harsher the punishment, the more effective the deterrence. We may consider the law school example of pick-pockets working the crowds at the hangings of other pick-pockets as evidence that the conventional wisdom is wrong. It is the reality of the court-martial, even more than the sentence, that deters. Deterrence concerns, then, do not require harsh punishments.

The problem facing the practicing defense counsel is to accumulate and present, in meaningful fashion, information relating to all the sentencing principles. By merely offering defense exhibits A through ZZ and relying on the sentencing authority to sift through the documents to extract and digest the information contained therein, the defense counsel has transferred the responsibility to analyze the defense sentencing case to the sentencing authority. More is required, and the sentencing procedures allow the defense counsel the flexibility and latitude to accomplish the task.

Defense Sentence Evidence Presentation

While trial counsel are specifically limited in the information they can provide to the sentencing authority,[6] defense counsel have considerably more room to maneuver. In the first instance, defense may rebut any matter presented by the prosecution.[7] Normally, this is accomplished by testimony of others in the unit who have had the opportunity to observe the accused's duty performance, and who have not changed their opinions because of the accused's current troubles. This clash of opinions, however, usually results in a washout on the issue, leaving the sentencing authority with little helpful information.

Presentation of evidence in extenuation and mitigation is where the defense counsel has the potential to really influence the sentencing authority. Many defense counsel rely solely on presentation of testimony of the accused, friends, and relatives, as well as documents gathered from the accused's personal "attaboy" files. Argument is then used to tie it all together. When the sentencing authority is the military judge, the argument is often very short. After all, "he's heard it all before."

A tool that can be used to augment testimony is the unsworn statement. An unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.[8] This rule supplies the vehicle for a more coordinated, more effective, and far more organized sentencing evidence presentation. The collation of disparate data from a variety of sources into a defense pre-sentence report,[9] presented as an unsworn statement, can provide a far more accurate picture of the accused than can a few witnesses and a pile of papers. A defense pre-sentence report also provides a convenient package of information for use later in post-trial submissions,[10] petitions for clemency,[11] and evaluations for treatment programs. It collects and preserves data that otherwise might not be available. Coupled with witness testimony and keyed to the defense exhibits, the pre-sentence report can explain and amplify the defense sentencing case, and place the information within the context of specific sentencing principles.

Compiling the Pre-Sentence Report

The defense pre-sentence report should concentrate on three areas: the accused's background, an analysis of the offense and the offender's actual conduct in relation to it, and a recommendation for a specific sentence option or group of options.

Accused's Background

Analysis of the accused's background should include information relating to the following areas: family background (nurture environment), civilian education, motives for entering the service, military training, military assignments, financial history, and medical/psychological history.

Family Background

The accused's family background should be examined carefully to determine the family structure during the accused's formative years. In contemporary American society, the intact nuclear family is losing ground to a variety of nurture environments. The accused may have been reared by a single parent fighting to make ends meet, by grandparents, or even by a succession of foster parents. The impact upon an accused caused by fractured or alternative family structures may be significant in the formulation of a value system, the way the accused responds to authority, or even to the accused's amenability to particular sentence options.

Siblings should be identified and information gathered relating to sex, age, occupation, community involvement, and religious affiliation to determine the existence and level of emotional support available to the accused

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[6] *See* R.C.M. 1001(b)(1)-(5). *See generally* DA Pam 27-173, para. 25-5; Brown, *Sentencing Evidence*, The Army Lawyer, Mar. 1988, at 29; Child, *The Expanded Boundaries of Admission of Aggravation Evidence Under R.C.M. 1001(b)(4)*, The Army Lawyer, Feb. 1986, at 29; Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 Mil. L. Rev. 1 (1986); Gaydos & Capofari, *A Methodology for Analyzing Aggravation Evidence*, The Army Lawyer, July 1986, at 6; Gonzalez, *A Defense Perspective of Uncharged Misconduct Under R.C.M. 1001(b)(4): What is Directly Related to an Offense*, The Army Lawyer, Sept. 1988, at 37; and Savonarola, *Evidence of Rehabilitative Potential and Evidence in Aggravation: Misused and Abused*, The Army Lawyer, June 1987, at 25.

[7] R.C.M. 1001(d).

[8] R.C.M. 1001(c)(2)(C).

[9] *See generally* Colleluori, *What To Put in a Pre-Sentence Report*, The Practical Lawyer No. 4, at 29 (1988) (provides tips on how a civilian defense attorney should approach the pre-sentencing report in light of the new federal sentencing guidelines).

[10] R.C.M. 1105(b)(3).

[11] R.C.M. 1105(b)(4).

currently and during his earlier years. Counsel may find that the offense for which the accused has been convicted is not only a significant departure from previous military conduct, but is a departure from earlier conduct in the family and civilian community. Determine if the accused was a significant positive influence in younger siblings' development.

Siblings may also be questioned about the accused's relation to peer groups while growing up. Either the susceptibility to group pressure or strong individualistic tendencies may be relevant to choice of sentence option.

Financial status of the family should also be examined. The accused may have contributed to the financial support of the family prior to entry on active duty. Current contributions to family income should also be documented to demonstrate the full impact of any sentence to reduction in grade or forfeiture of pay. An accused's support of parents and siblings also reflects a sense of responsibility and maturity.

Although a sensitive subject, the existence of parental abuse or a history of family mental illness or lawless behavior should be explored. If the accused relates any such information, counsel should attempt to obtain more information from relatives, police records, or court documents, especially if the offense has a psychological basis, such as child abuse. Substance abuse by parents may also carry weight in the sentence determination in a drug case. Emotional or physical (nonsexual) abuse may be relevant to assault or disrespect offenses. Finally, don't forget the military connection. In many cases, the accused will come from a family with a military tradition. The accused's parents, grandparents, or siblings may have military service of their own. Some may be decorated veterans. The value of tradition and family support in the rehabilitation effort should not be underestimated.

Civilian Education

The accused's pre-service civilian education should be explored for evidence of specific educational abilities and deficiencies, primary interests, and extracurricular activities. Counsel may find evidence of participation in activities reflecting a sense of responsibility and an orientation towards maturity. Participation in scouting programs, 4-H clubs, or even Junior ROTC can help demonstrate that the accused is a forward-looking individual with goals and aspirations, rather than a reactive individual floating with the tide. Investigation may also reveal the existence of witnesses who may be instrumental in establishing the accused's reputation in the community before entering the service.

Enlistment Decision

Having determined the accused's nurture environment, the next area of concentration should be the decision to enter the service. The reasons for enlistment vary with the individual. The accused may have entered the service to fulfill family tradition, to serve the country, to earn money for a college education, to accompany friends, or to seek adventure and life experience. Positive motives for enlistment should be emphasized as directly related to the existence of a motive to correct the accused's behavior and continue the term of service.

Counsel should also explore the extent to which the accused's expectations of military life were fulfilled. If the accused entered the service after election of a specific enlistment option (Military Occupational Specialty (MOS) or duty station) that subsequently became unavailable, commendable duty performance in the accused's actual MOS or duty station can demonstrate maturity and adaptability to change.

Military Training

Although the DA Forms 2A and 2-1 submitted by the trial counsel include the accused's training and assignment history, counsel should clarify the exact nature of the military experiences of the accused, especially when the training courses or assignments are out of the ordinary experience of the sentencing authority. Everyone may realize the nature of Basic or Advanced Individual Training, but not many persons understand the rigors of Air Assault School, the Defense Language Institute, or a tour in Izmir, Turkey. A short course description, as well as information concerning the duration of the course, the accused's class standing, and any awards earned for course performance should be presented.

Counsel should emphasize any rigorous training for which the accused volunteered, such as Airborne and Ranger training. The accused's desire for continued utilization within these specialties, despite their demanding nature, will illustrate a continued motivation for valuable service. Alternatively, desire for additional training will also indicate a desire to return to productive service.

Military Assignments

Given the wide variety of Military Occupational Specialties and duties within these specialties, the DA Form 2-1 does not contain sufficient information about the actual experiences of a soldier throughout his enlistment to justify reliance upon it as a meaningful sentencing tool. It merely provides a starting point. Use the document to discuss the accused's military career, highlighting the following for each assignment:

a) whether the assignment was voluntary;

b) details regarding duties performed, awards earned, particularly rewarding or demanding duties or exercises, as well as problems encountered such as Article 15's or letters of reprimand, if such information is already in the possession of the government and admissible at trial;

c) performance information such as efficiency reports, letters of commendation or appreciation, additional Military Occupational Specialties earned, career progression. Any problematic entries should be addressed in this process;

d) the impact, if any, of assignment location on the accused's family, including financial and emotional impact;

e) off-duty activities performed at the location, such as educational advancement, community service (military and civilian), or supplementation of income through an extra job held by the soldier or spouse.

Financial History

Whether the accused is a young, single soldier, or a married soldier with a large family, there are likely to be debt obligations. Young soldiers often respond to flashy advertisements extolling the virtues of state of the art stereo systems, and cars able to double the speed limit, especially when those advertisements are coupled with a "buy now—pay later" feature. The married soldier with a family doesn't need the gimmicks. Family responsibilities often create large debts.

Preparation of a budget with the accused should illuminate the exact impact of a reduction in grade, with its corresponding reduction in pay and allowances, or of a forfeiture of pay. Presentation of the budget as part of the pre-sentence report will indicate the total impact of these sentence components to the sentencing authority. Counsel should strenuously argue that reduction or forfeiture of pay adjudged against the married soldier clearly impacts on innocent persons—the family members. Forfeitures may also mean that the family will have to go on welfare to survive. Few court members want the responsibility of adding to the welfare rolls.

The single soldier must also show the total effect of a reduction or forfeitures. Although there may be no family to support, a financial penalty may trigger other potentially devastating consequences, such as repossession of an automobile. The total financial effect may clearly militate against imposition of a monetary sentence component.

Medical/Psychological History

With the Court of Military Appeals decision in *U.S. v. Toledo*,[12] defense counsel now have access to expert assistance, under the cloak of the attorney-client privilege, in the evaluation, preparation, and presentation of psychological matters. In practice, *Toledo* requests have been used primarily to evaluate the need for a formal inquiry under R.C.M. 706,[13] without the danger of potential disclosure to the prosecution of statements by the accused in the course of the evaluation. If the expert assistance fails to develop evidence of psychological impairment sufficiently serious to rise to a defense, the results of the psychological testing and psychiatric analysis might yield results that can be helpful in the sentencing case.

Psychological evidence can be particularly helpful in child sexual abuse cases. The tests and interviews may yield favorable results regarding the potential for rehabilitation of the offender, as well as an opinion that the offender and family would progress best in a joint treatment program. With this evidence, counsel is in the strongest possible position to advocate a sentence without a term of confinement.[14]

Psychological evidence might be helpful in a number of other cases as well. In assault cases, especially where the accused has an alcohol problem or difficulty accepting authority, expert assistance could result in evidence that only a short term of confinement, coupled with participation in rehabilitation programs such as Alcoholics Anonymous or stress management classes at the installation community health activity, would best prevent recurrence of the conduct and produce a quality soldier.

Offense Analysis

The pre-sentence report should contain a dispassionate analysis of the offense of which the accused was convicted, an objective assessment of the impact of the offense on the victim(s), a discussion of the extenuating and mitigating factors raised by the defense evidentiary submissions, and a statement of the specific motivation of the accused to commit the offense.

An analysis of the offense of which the accused was convicted should attempt to defuse some of the emotion-laden rhetoric with which the trial counsel will describe the conduct of the accused. Disrespect offenses do not necessarily threaten the Army's ability to accomplish its mission. A simple assault in the heat of an argument doesn't necessarily threaten the cohesiveness of the entire unit. A sale of one marijuana cigarette by a soldier to a friend will not necessarily cause the unit to fail its next external evaluation. Obviously, careful wording is critical. Counsel should never appear to be condoning the accused's decision to commit the offense. The emphasis should be on keeping the offense in proper perspective.

Extenuating and mitigating factors contained in the defense exhibits or in witnesses' testimony should be organized and forcefully presented. If possible, these factors should be presented in direct response to anticipated aggravation evidence. Show how the factors balance the aggravation, or even outweigh it. Refer to the specific defense exhibits and testimony. Give the sentencing authority a means to make sense of the otherwise separate evidentiary submissions.

Finally, consider giving the sentencing authority a peek into the mind of the accused just prior to the offense. Did the accused commit the disrespect out of frustration with his perceived treatment by the victim? Did she take her roommate's bank card because she had been denied a loan by Army Community Services? Did he trash the trophy case in the orderly room because he had to reschedule his wedding due to an unannounced field exercise? Reaction to frustration, rather than cold calculation, should operate in the accused's favor.

Recommend Sentence Options

The primary purpose of the pre-sentence report is to support the recommendation of a specific sentence option to the sentencing authority. The sentencing authority should already have a good idea of the sentence to be recommended. In this portion of the report, counsel should present the proposal, the rationale for acceptance, any command support for the proposal,

[12] 26 M.J. 104 (C.M.A. 1988).

[13] Inquiry into the mental capacity or mental responsibility of the accused.

[14] *See generally* Cashiola, *Use of a Clinical Psychologist During Sentencing in Child Abuse Cases*, The Army Lawyer, Apr. 1988, at 43; Bailey, *Preparing to Defend a Soldier Accused of Child Sexual Abuse Offenses*, The Army Lawyer, Feb. 1986, at 44.

expert recommendations, and family and community support.

Counsel's proposal must indicate both the reasons for the selection of the recommended options, and the reasons against selection of a more onerous sentence. Counsel should discuss the principles of sentencing, and demonstrate the rationale against imposition of the unwarranted sentence components. The rationale could show that confinement, for example, is inappropriate when the reasons for confinement of any accused are balanced against the history, traits, and needs of this accused. Evidence of expert, family, and community support for the proposal should be emphasized. The sentence recommendation of counsel need not be limited to the options contained in the Rules for Courts-Martial[15]. In appropriate cases, a sentence recommendation can blend normal sentence components with participation in community or military rehabilitative programs. Although the current rules do not allow the sentencing authority at court-martial to suspend sentence components conditioned upon completion of rehabilitation programs, the sentencing authority can make that recommendation[16]. When counsel demonstrates the availability of the rehabilitative programs, and the amenability of the accused to rehabilitation and return to duty, the convening authority has the information necessary to agree to a conditional suspension.

Conclusion

Despite the best efforts of defense counsel, most accused at court-martial will be convicted of an offense. Confronted with this inescapable fact, the sentencing phase of trial becomes the most important determinant of the client's immediate future. Although the evidentiary advantage lay primarily with the prosecution for trial on the merits, the advantage clearly shifts to the defense during the sentence phase. Defense counsel should press that advantage to obtain the most appropriate sentence. The use of a defense pre-sentence report as an unsworn statement allows presentation of the facts in an organized, coherent manner, and ensures preservation of valuable information for use throughout the sentence experience.

[15] R.C.M. 1003.

[16] R.C.M. 1105(b)(4).

Trial Counsel Forum

Absentee Alphabet Soup: AWOL, DFR, and PCF

Major Paul Capofari
Criminal Law Division, OTJAG

Introduction

Does your unit have an AWOL problem?

Soldiers who are Absent Without Leave (AWOL) are then dropped from the rolls (DFR) of their unit and returned to their unit only in the limited circumstances outlined in paragraph 4-5 of Army Regulation (AR) 630-10. [1] The vast majority of soldiers returning to military control after being DFR are processed by the nearest personnel control facility (PCF). Most often these soldiers are discharged for the good of the service under Chapter 10, AR 635-200 and receive an Other Than Honorable (OTH) Discharge. [2]

Units experiencing high AWOL rates just before deployment to the National Training Center or REFORGER often need a stronger deterrent than the OTH discharge that may be given under Chapter 10. In these circumstances, the unit may need to court-martial the soldier to demonstrate the serious nature of the absentee problem. How does the prosecutor ensure that appropriate disciplinary action is taken?

Paragraph 4-5, AR 630-10

AR 630-10, Absent Without Leave and Desertion, governs the disposition of absent soldiers. Paragraph 3-2 defines when an absent soldier may be dropped from the rolls of a unit. [3] The regulation refers to soldiers dropped from the rolls as deserters. [4] Paragraph 4-5 sets out limited circumstances when such soldiers may be returned to their unit upon their return to military

[1] Army Reg. 630-10, Absence Without Leave and Desertion (1 July 1984).

[2] Army Regulation 635-200, Chapter 10 (5 July 1984).

[3] Grounds for listing a soldier dropped from the rolls include:
a. unauthorized absence for 30 consecutive days.
b. the commander believes a soldier has sought asylum in a foreign country or is living in a foreign country for reasons not related to duty.
c. if the commander reasonably believes the soldier left to avoid hazardous duty or left with the intent to remain away permanently.
d. if the soldier fails to return to the unit two or more times after returning to military control at another location.
e. if the soldier has been charged with two or more AWOL offenses and departs AWOL again.
f. if a soldier escapes from post trial confinement. AR 630-10, para. 3-2.

[4] *Id.* para. 3-1.

control. Installation coordinators appointed by the installation commander [5] forward the records of soldiers who have been DFR to the U.S. Army Deserter Information point (USADIP) at Fort Benjamin Harrison, Indiana. [6] This is accomplished by means of a "DFR packet," which includes sworn charges against the soldier. [7] Once the soldier is returned to military control, USADIP directs the soldier's assignment: either back to the unit, to the nearest PCF, or to the confinement facility (if the soldier was AWOL *from confinement*).

Return to the Unit

USADIP will return a DFR soldier to his old unit, rather than a PCF, when there are serious charges other than the AWOL (paragraph 4-5*b*(2)), or when return to the unit is in the best interests of the Army (paragraph 4-5b(5)).

Other Serious Charges

Soldiers will be returned to their units when they are "to be tried on serious charges other than the current unauthorized absence." [8] Army regulations are not specific as to who is to be notified in the unit, the level of unit, or who actually determines whether the charge "other than the current absence" is a serious offense.

The Manual for Courts-Martial does provide some guidance in defining the term "serious offense." Generally, a serious offense will, if tried at a general court martial, authorize a maximum punishment of a dishonorable discharge or confinement for more than one year. [9] This is the standard the USADIP employs.

Remember that the serious charges must be something other than the current unauthorized absence. For this reason, an AWOL specification alleged with the aggravating factor of AWOL for the purpose of missing hazardous duty will not trigger the 4-5b(2) inquiry. Similarly, an article 85 charge of desertion will not trigger the inquiry. Thus, if the gravamen of the misconduct is missing movement, the charge sheet placed in the DFR packet should reflect both that charge and the AWOL charge. Although such charges do not guarantee the return of the soldier, they should begin the paragraph 4-5b(2) inquiries.

When the maximum punishment on the additional offenses is a dishonorable discharge or confinement for more than one year, USADIP notifies the unit when the soldier returns to military control. The unit will have the opportunity to get the soldier back in order to dispose of both the AWOL and the serious offense. Considerations such as the availability of evidence, location of witnesses, present mission of unit, and the local disciplinary needs are all factors that should go into the decision to return the soldier to the unit.

USADIP tries to contact the battalion commander or the Office of the Staff Judge Advocate, but, conceivably, it could be the battalion legal clerk who is notified and decides whether to send the soldier to the PCF. Local prosecutors should become involved in this decision. It is a waste of Army assets to return a soldier to his unit and then dispose of his misconduct by an administrative discharge.

What Will Best Serve the Interests of the Army

A soldier will be returned to the unit when there exist "reasons that will best serve the interest of the Army" as determined by the Commander, Military Police Operation Agency. [10] This field operating agency of the Deputy Chief of Staff for Operations (DCSOPS) is located in the Nassif Building in Falls Church, Virginia. They will respond to written requests from units to return a soldier for court-martial instead of the routine assignment to a PCF. The unit may place such a written request in the DFR packet that is forwarded to USADIP. The request may also be submitted after the unit is informed that the soldier has returned to military control.

The contents of the DFR packet include Department of the Army (DA) Form 4187, Personnel Action. This document contains a remarks section where the unit should place the justification for return of the soldier for trial. The DA Form 4187 and the charge sheet are the most important parts of the DFR packet. Prosecutors should take an interest in the DFR packets their units prepare and should assist commanders in writing tenable justifications.

The justification for return of the soldier for trial should cite paragraph 4-5b(5), and contain reasons particular to the soldier. A justification that contains generalizations about the unit "AWOL problem" will not be as persuasive as the individual circumstances of the particular absence. Articulate the burden to the unit that this particular AWOL caused, the additional work required of the other soldiers, and the adverse impact on unit mission performance or training. For example: "AWOL occurred immediately prior to a significant unit training exercise. His absence disrupted the cohesion of the firing crew, forced others to work extra hours and

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[5] *Id.* para. 1-4 f.

[6] *Id.* para. 3-6.

[7] The DFR packet will include among other things the personnel documents reflecting the change of status to AWOL and DFR (Department of the Army Form 4187), the charge sheet (Department of Defense Form 458), and the Deserter/Absentee Wanted by the Armed Forces form (Department of Defense Form 553). *See* AR 630-10, Table B-1.

[8] Army Reg. 630-10, para. 4-5b.(2)

[9] Manual for Courts Martial, 1984, Part IV, para. 95 (defines a serious offense as "any offense punishable under the authority of the code by death or by confinement for a term exceeding 1 year." *See also* Part V, para. 1e: "Ordinarily, a minor offense is an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial." This necessarily implies that offenses that may be so punished are serious offenses.

[10] Army Reg. 630-10, para. 4-5b.(5).

perform maintenance normally assigned to this AWOL soldier. This absence caused the cancellation of a live fire exercise."

Use the remarks section of the DA Form 4187 to note if the soldier had any type of security clearance, or if the soldier is a suspect in any ongoing police investigation.

Soldier Under Investigation

A soldier could depart AWOL while under investigation for another offense. If this soldier is eventually DFR, the DFR packet must notify USADIP that the soldier was under investigation. Without such notice, the soldier might be processed through PCF channels and receive an administrative discharge. He could escape prosecution for any crimes the investigation disclosed. Notifying USADIP of the investigation supports the argument that returning the soldier to the original installation is in the best interests of the Army.

If the soldier is titled in a CID investigation after DFR, the CID should forward the information to USADIP and issue an arrest warrant for the soldier. This will be in addition to the Deserter/Absentee Wanted by the Armed Forces form that will already have been issued. [11]

After the soldier's return to military control, the additional investigations will come to USADIP's attention when they attempt to clear the desertion warrant. [12] USADIP will issue notification to see if the soldier should be returned to the unit or sent to a PCF.

Once again it is important for the local prosecutor to become involved in the decision to return and try the soldier. USADIP will notify the CID when the soldier returns to military control. [13] Local prosecutors should ensure that their region's CID is kept informed about soldiers who should be returned to the unit for trial.

Charges may be preferred against a soldier who is AWOL or DFR. If the local CID or MP's title a soldier for an offense, a charge sheet should be prepared with additional charges and forwarded to USADIP for inclusion in the soldier's DFR packet.

Conclusion

The time to determine whether an AWOL soldier needs to be returned to the unit for disciplinary action is when the soldier first goes AWOL. Prosecutors should be involved in the preparation of the DFR packet, and should include the necessary justification to return the soldier for trial. The prosecutor should facilitate liaison among those who have an interest in the AWOL. If USADIP contacts the soldier's unit and reaches the battalion legal clerk, that clerk should refer the call to the criminal law section of the SJA office.

In sum, the time to act on AWOL is now. Everyone admits that absenteeism in the Army is at an historic low. But the time to fix the levee is when the river is dry. Don't wait for a flood to examine the procedures in your command for controlling AWOL's. Make an examination: Does your unit have an AWOL problem?

[11] *See* Army Reg. 190-9 (15 July 1980).

[12] *See Id. para.* 3-3g.

[13] *Id.* para. 3-3j.

Contract Appeals Division—Trial Note

Hindsight—Litigation That Might Be Avoided

Major R. Alan Miller
Trial Attorney

This is part of a continuing series of articles discussing ways in which contract litigation may be avoided. The trial attorneys of the Contract Appeals Division will draw upon prior experiences and share their thoughts on avoiding litigation or developing the facts in order to ensure a good litigation posture.

Problem

The contracting office has forwarded for your review a contractor's claim for additional costs under a fixed-price construction contract for the renovation of 400 sets of family quarters on post. The contract called for the contractor to provide all labor and materials for removal of all existing gutters and downspouts, replacement of rotted fascia (the boards to which the gutters are attached), installation of new fascia as needed, and installation of new gutters and downspouts. The amount of fascia to be replaced was estimated to be 80,000 linear feet. Upon review, you determine that the contract did not contain a "Variations in Estimated Quantities" clause. You further discover that the engineer action officer based his estimate on ten years previous experience as a post engineer at another installation. You cannot find any other support for the estimate.

While the estimate called for replacement of 80,000 linear feet of fascia, the amount actually replaced was 59,000 linear feet. The contractor has submitted invoices showing it had to pay a higher price than it bid for the fascia due to purchase of lesser amounts. Believing that a contractor is at risk when it bids on an estimate, the contracting officer is inclined to deny the claim.

Analysis

Before analyzing this problem, a common misconception must be dispelled. Many people believe a contractor is required to bear the burden when actual figures vary from government estimates. This simply is not true. A contractor is not required to suffer due to unreasonable estimates. [1] All too often, contracting officers expect that language putting contractors on notice that the figures provided in the solicitation are only estimates, or that payment will be based solely on actual quantities used or supplied, relieves the government of all responsibility for erroneous estimates. While that type of language may soothe a professional conscience, it is not a panacea for poor formulation of estimates.

Two-Step Approach

The resolution of the question of estimated quantities lies in a two-step analysis. You must first determine if the manner in which the estimate was formed was reasonable. The next determination must be whether the contractor relied on the estimate in preparing its bid. Without reliance, the contractor cannot claim to have been prejudiced and will not recover.

Rules of Reasonableness

The determination of reasonableness depends, of course, upon the particular circumstances of each case, but there are some general rules that should be followed. Estimates should be based on all available information. [2] Actual figures from contracts from previous years must be considered, if such information is available. The boards have ruled against the government for failing to obtain information on similar contracts at other installations. [3] The most sensible approach is to use all information reasonably available under the circumstances. [4]

Adjustments in estimates should be made for seasonal fluctuations, training cycles, holidays, or any other factors that can have an effect on the amounts subject to the estimate. Data indicative of trends or patterns must be considered. The information used must also be as current as possible in order to ensure the accuracy of the estimate. [5]

Another factor to consider is the experience of the person making the estimate. If the estimator has little or no experience, the other factors considered by the boards will take on more significance. Accordingly, the use of experienced personnel in formulating estimates is a must. Should an experienced person not be available, then the estimate should be specifically reviewed by supervisors and counsel; in short, efforts should be made to take advantage of whatever expertise exists.

Other Considerations

In several cases, boards have considered the difference between the actual and estimated figures as a determinative factor in the validity of the estimate. In fact, in one case, the Agriculture Board of Contract Appeals implied that if the difference between actual figures and the estimate is too great, Appellant could have a prima facie case. [6] At least one case has considered the fact that estimates were reduced by a significant percentage in following years to be indicative of negligent preparation. [7] While the variance between actual and estimated figures cannot be readily controlled, it may well be one factor to consider in discussing settlement at the local level.

Reliance and the Burden of Proof

As a general rule, if the contractor cannot show reliance on the estimate in formulating its bid, then there will be no recovery. [8] It is interesting to note, however, that there is confusion as to which party has the initial burden of proof in cases involving estimates. Normally, the party alleging the failure should have the burden of proving it. In fact, in an older decision, the Claims Court so held. [9] Still, at least two recent board decisions have placed the burden on the government to show that the estimate was prepared with due care. [10] As a result, the government must be prepared to bear the burden of showing the use of due care in the initial formulation of the estimate.

Variation in Estimated Quantities Clause

The FAR requires the use of the "Variation in Estimated Quantity" clause at § 52.212-11 in fixed-price construction contracts and the use of the "Variation in

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[1] Travis T. Womack, Jr., *et. al.* v. United States, 389 F.2d 793 (Ct. Cl. 1968).

[2] *But see* Machlett Labs, ASBCA No. 16194, 73-1 BCA ¶ 9929 (good faith standard); Chemical Technology, Inc. v. United States, 645 F.2d 934 (Ct. Cl. 1981) (strict liability for all government information).

[3] In one case, the Court of Claims held the government responsible for virtually any and all information, regardless of where in the government it was held or who held it. *Chemical Technology*, 645 F.2d 934.

[4] McCotter Motors Inc., ASBCA No. 30498, 86-2 BCA ¶ 18,784; 94,650.

[5] Huff's Janitorial Service, ASBCA No. 26860, 83-1 BCA ¶ 16,518; Integrity Management International Inc., ASBCA No. 18289, 75-2 BCA ¶ 11,602.

[6] Double E Reforestation, Inc., AGBCA No. 85-109-1, 86-2 BCA ¶ 18,764; 94,508.

[7] *Integrity Management*, 75-2 BCA ¶ 11,602.

[8] Eastern Service Management Company v. United States, 363 F.2d 729 (4th Cir. 1966), Postal Vehicle Supply Service, PSBCA No. 830, 82-1 BCA ¶ 15,788.

[9] HML Corporation v. General Foods, Corp., 365 F.2d 77 (3d Cir. 1966); *accord* Logistical Support, Inc., ASBCA No. 35578, 88-1 BCA ¶ 20,469.

[10] Dynamic Science, Inc., ASBCA No. 29510, 85-1 BCA ¶ 17,710; Huff's Janitorial Service, ASBCA No. 26860, 83-1 BCA ¶ 16,518.

Quantity" clause at § 52.212-9 in fixed-price supply contracts. While the use of a variation clause is mandatory only in those specific situations, inclusion of the clause, modified for the particular circumstances, is advisable in any contract that uses estimated quantities. The clause protects the government in claims for variations which amount to less than a certain percentage above or below the estimate. For variations within the specified percentage, the contract price is paid. Variations above the specified percentage are subject to equitable adjustment upon demand of one of the parties. Nevertheless, the use of the clause only protects against claims when the estimate was reasonably developed. [11]

Conclusion

Considering the example in light of the factors outlined above, you must have more information in order to make a decision. Naturally, you will want to determine just what type of experience the engineer has had. Did it involve construction? Has the person been involved with renovation of quarters? Did the person actually visit a representative number of quarters on post in formulating the estimate? Is information available from similar contracts or from other renovation projects in the area? How current is the information used as a basis for the estimate? Has all available information been considered?

Once you have answers to these questions, you will be able to make an appropriate decision. The point to remember is that, "[p]erfection in estimating is hard to come by and is not required in any event. . . . The Government is not tasked with exactitude but with reasonableness." [12] Consequently, consideration of the factors outlined above is essential in making the reasonableness determination. Cognizance of the burden of proof makes it even more important to pay close attention to the formulation of estimates in government contracting.

[11] *See Huff's Janitorial Service*, 83-1 BCA ¶ 16,518.

[12] *McCotter*, 86-2 BCA at ¶ 94,648.

Clerk of Court Notes

Know the Regulation Department

The following excerpt from paragraph 13-11, Army Regulation 27-10, is quoted for the information of those who process court-martial cases: "The GCM authority will ensure that the Clerk of Court (JALS-CC) is expeditiously furnished copies of all transfer orders and excess leave orders or a copy of DA Form 31 . . . when an accused [with an approved sentence to a punitive discharge who is not in confinement] has been transferred from . . . [the] jurisdiction or is placed on excess leave."

Trial Counsels, Unite!

Just when we thought we had the problem licked, we counted fifty-eight cases received for appellate review in 1988 without the accused's written statement expressing a choice as to appellate counsel (military, civilian, both, or none). In another thirteen cases the statement was present in the record, but was not signed or no choice was marked. These instances represent almost four percent of the records received for appellate review.

Although no longer specifically mentioned in the Manual for Courts-Martial, the election statement is required by Courts of Military Review Rule 10 (see AR 27-13) and is referred to in item 46b of the Court-Martial Data Sheet (DD Form 494) as well as in item 3 of the Inside Back Cover, DD Form 490. The election is required in article 69(a) cases, too—in case TJAG refers the record to the Court of Military Review.

You would be amazed how often a trial counsel marks item 46b of the Data Sheet "yes," without the election being present. We become even more upset, however, when the trial counsel checks "no," but seemingly does nothing to supply the missing document! Certainly, it is the defense counsel's responsibility to obtain the client's election in the first instance. But *it is the trial counsel's responsibility to see that the record of trial sent for appellate review is complete.*

We definitely do not suggest that trial counsel withhold defense counsel's opportunity to examine the record before authentication until the accused's appellate counsel election is in hand. We do, however, suggest that the communications with defense counsel that occur incident to counsel's examination of the record and later review of the SJA's recommendation provide excellent opportunities to assure that the accused's election has been received and takes its place immediately beneath the blue cover in all cases except those in which appellate review is waived.

Summarizing Specifications in the Initial Promulgating Order

More than four years ago, the Army (and other services as well) adopted the practice of summarizing the charge sheet specifications in initial promulgating orders. All that usually is necessary is the name of the offense, the date it was alleged to have been committed, and any alleged facts (such as total dollar value) *affecting the maximum punishment.*

For the drafter of the promulgating order, the best guidelines usually are found in appendix 12 of the Manual for Courts-Martial (keep a separate copy of that

appendix in your deskbook), because appendix 12 shows the succinct names of most offenses and lists the factors, such as value of property or use of a firearm, affecting the maximum punishment. In those instances in which the name of the offense does not seem sufficiently descriptive, consult the paragraph and subparagraph headings in part IV of the Manual.

Illustrations of correct summarization can be found in appendix 17 of the Manual and in figure 12-1 of AR 27-10 (pages 72 and 73 of the March 1988 edition). Note that a few broadly-named offenses, such as dereliction of duty and disobedience of orders, require brief explanation, but it is never necessary to describe the details of an indecent assault or to list items of property stolen or damaged. Doing so only invites problems of drafting when the plea or the findings included exceptions and substitutions having nothing to do with the maximum punishment elements.

Therefore, it is not necessary—nor desirable—to write:

> On or about 8 April 1988, make and utter to the Army and Air Force Exchange service a certain check for the purpose of obtaining things of value and/or lawful U.S. currency, of a total value of $ 50.00 in lawful U.S. currency, and did thereafter dishonorably fail to maintain sufficient funds in the American Express Bank for payment of such check in full upon its presentment for payment. Plea: NG. Finding: NG.

Indeed, that is not a summary; it is the full specification without the accused's name and with an ungrammatical verb.

Instead, for the above article 134 violation, just say:

> On or about 8 April 1988, made and uttered a worthless check in the amount of $50.00, dishonorably failing to maintain sufficient funds. Plea: Not Guilty. Finding: Not Guilty. [Note that pleas and findings are to be spelled out; see AR 27-10.]

Similarly, an article 123a specification might be summarized as follows:

> On or about 8 April 1988, with intent to defraud and for the procurement of currency, made and uttered a check in the amount of $50.00 without sufficient funds. Plea: Guilty. Finding: Guilty.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ

Introduction

Within the past few months the Court of Military Appeals has decided two important cases [1] addressing the types of activities prohibited as conduct unbecoming an officer and gentleman in violation of article 133. [2] This note will briefly examine these decisions and evaluate whether the scope of article 133 has been expanded or restricted by this recent decisional law.

In General

The 1984 Manual for Courts-Martial definition of conduct unbecoming an officer and a gentleman includes a personal and a professional component. [3] The charged misconduct must seriously compromise the officer's standing both in an official capacity as an officer, and a personal capacity as a gentleman. [4] These dual require-

[1] United States v. Guaglione, 27 M.J. 268 (C.M.A. 1988); United States v. Norvell, 26 M.J. 477 (C.M.A. 1988).

[2] Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (1982) [hereinafter UCMJ].

[3] The Manual provides:

> Conduct violative of [article 133] is action or behavior in an official capacity, which, in dishonoring the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring and disgracing the officer personally, seriously compromises the person's standing as an officer.

Manual for Courts-Martial, United States, 1984, Part IV, para. 59c(2) [hereinafter MCM, 1984].

[4] United States v. Giordano, 35 C.M.R. 135, 139-40 (C.M.A. 1964); *see also* United States v. Sheehan, 15 M.J. 724 (A.C.M.R. 1983); United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983); United States v. Wolfson, 36 C.M.R. 722, 730 (A.B.R. 1966). In upholding article 133, the Supreme Court defined the offense as follows:

> The act which forms the basis of the charge must have double significance and effect. Though it need not amount to a crime, it must so offend so seriously against law, justice, morality, or decorum as to expose to disregard, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.

Parker v. Levy, 417 U.S. 733, 753 (1974).

ments have been traditionally recognized and uniformly accepted. [5]

In applying this two-pronged test, the courts have held commissioned officers to a higher standard of conduct than enlisted members or civilians. [6] This more demanding standard for officers reflects the special status they occupy in a hierarchical military society, [7] and the special trust and confidence that is placed in their patriotism, valor, fidelity, and abilities. [8]

Although officers are held to high standards, article 133 is not intended to reach all conduct that falls short of that expected of an ideal officer. [9] Accordingly, courts have declined to punish all minor derelictions as violations of article 133, recognizing that the offense "is reserved for serious delicts of officers and 'should not be demeaned by using it to charge minor delinquencies.'" [10] For example, failing to meet a suspense date or arriving 15 minutes late for a meeting, even though violations of the UCMJ, were insufficient to constitute misconduct in violation of article 133. [11] On the other hand, misconduct constituting an article 133 offense need not necessarily violate another punitive article or otherwise be criminal. [12]

United States v. Norvell

The accused in *Norvell*, an Air Force captain and nurse, received an order to submit a urine sample in conjunction with a random drug testing program. [13] She then used a catheter to inject a saline solution into her bladder, and later provided the saline as a urine sample. [14] During an overnight exercise four days later, the accused told an enlisted person how she had used marijuana and then catheterized herself to avoid being detected. [15] The accused's act of catheterizing herself and providing a false urine sample formed the basis for one article 133 charge; her act of communicating her misconduct to an enlisted person provided the basis for a second article 133 charge. [16]

The Court of Military Appeals affirmed the accused's conviction of both offenses and, in doing so, dispensed with several defense contentions. First, the court found that the two offenses were not multiplicitous for any purpose. [17] In connection with this, the court stated that private misconduct that an accused intends to be secretive can nonetheless violate article 133 once it becomes known to others. [18] The court also found that the gravamen of the second offense was the communication of the misconduct and not the misconduct itself; in other words, the communication was a separate offense that could constitute an article 133 violation even if false. [19]

Second, the court found that the specification for the first charge (the catheterization and providing a false sample), to which the accused pled guilty, was sufficient to withstand a broadside, appellate challenge. [20] In support of its holding, the court reaffirmed that an offense need not otherwise be criminal to violate article

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[5] *See, e.g.*, W. Winthrop, Military Law and Precedents 713 (2d ed. 1920 Reprint); *see also* J. Snedeker, Military Justice Under the Uniform Code 889 (1953); G. Davis, A Treatise on the Military Law of the United States 470 (1913); *see generally* G. Ackroyd, *The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice*, 35 St. Johns L. Rev. 264 (1961).

[6] United States v. Tedder, 24 M.J. 176, 182 (C.M.A. 1987); *see also* United States v. Court, 24 M.J. 11, 17 n.2 (C.M.A. 1987) (Cox, J., concurring).

[7] The Court of Military Appeals, in describing the special status of officers, has stated:

> In short, the Armed Services comprise a hierarchial society, which is based on military rank. Within that society commissioned officers have for many purposes been set apart from other groups. Since officers have special privileges and hold special positions of honor, it is not unreasonable that they be held to a higher standard of accountability.

United States v. Means, 10 M.J. 162, 166 (C.M.A. 1981).

[8] Orloff v. Willoughby, 345 U.S. 83, 91 (1953).

[9] *See, e.g.*, United States v. Sheehan, 15 M.J. 724 (A.C.M.R. 1983). In setting forth aspirational standards found in the ideal officer, the Manual provides: "There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty." MCM, 1984, Part IV, para. 59c(2). The Manual provides the following guidance in applying these standards:

> Not everyone is or can be expected to meet unrealistic high moral standards. . . . There is a limit of tolerance based on customs of the service and military necessity below which the personnel standards . . . cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman.

[10] United States v. Clark, 15 M.J. 594 (A.C.M.R. 1983) (quoting United States v. Wolfson, 36 C.M.R. 722, 731 (A.B.R. 1966)); *accord* W. Winthrop, *supra* note 5, at 712-13; G. Davis, *supra* note 5, at 469.

[11] *Sheehan*, 15 M.J. 724 (A.C.M.R. 1983); *see generally* W. Winthrop, *supra* note 5, at 711.

[12] *Tedder*, 24 M.J. 176 (C.M.A. 1987); United States v. Taylor, 23 M.J. 314 (C.M.A. 1987) (officer requested that another person commit an offense); United States v. Lindsay, 11 M.J. 550 (A.C.M.R.), *pet. denied*, 11 M.J. 361 (C.M.A. 1981) (officer lied to a criminal investigator).

[13] *Norvell*, 26 M.J. at 478.

[14] *Id.*

[15] *Id.* at 478, 480.

[16] *Id.* at 478.

[17] *Id.* at 478-79.

[18] *Id.* (citing *Lindsay*, 11 M.J. 550 (A.C.M.R.), *pet. denied*, 11 M.J. 361 (C.M.A. 1961) and United States v. Halliwill, 4 C.M.R. 283 (A.B.R. 1952)). *Halliwill* also clearly establishes that article 133 applies equally to female officers. 4 C.M.R. at 287.

[19] *Norvell*, 26 M.J. at 479.

[20] *Id.* at 479-81 (citing United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953)); *see also* United States v. Watkins, 21 M.J. 208 (C.M.A. 1986); United States v. Hoskins, 17 M.J. 134 (C.M.A. 1984).

133. [21] Moreover, the communication at issue need not be delivered in an unbecoming manner to constitute conduct unbecoming an officer. [22] The court observed finally that the accused's disclosure was unbecoming in that it could undermine the effectiveness of drug abuse programs that rely on urinalysis. [23]

In many respects, *Norvell* merely plows old ground. Courts have uniformly found that acts of dishonesty, deception, and untrustworthiness, such as those at issue in *Norvell*, seriously compromise an officer's personal and professional standing. [24] For example, convictions have been affirmed for lying to military law enforcement investigators, [25] lying to a superior to obtain a pass, [26] lying to an investigator attempting to determine responsibility for damaging a military vehicle, [27] forging false permanent change of station orders to gain the benefits of a military clause in an apartment lease, [28] driving in violation of a civilian state judge's order, [29] and requesting another to commit a larceny. [30]

Norvell's most important impact, therefore, is not in defining the scope of article 133. Rather, *Norvell* is significant in that it explicitly limits appellate attacks relating to the sufficiency of article 133 specifications when the accused has plead guilty. The court is clear in explaining that the accused's arguments, while certainly appropriate for and perhaps persuasive to a fact finder, are insufficient when made in connection with an attack first launched on appeal. [31] In such cases, the appellate court will merely view the alleged conduct to see if, as a matter of law, it could reasonably constitute an article 133 violation. This is certainly a lower standard for review than is applied to contested cases such as *Guaglione*, which will be discussed next.

United States v. Guaglione

The accused in *Guaglione*, an Army lieutenant, accompanied four enlisted teammates to two houses of prostitution following a unit softball game. [32] These brothels were located in a "red-light district" in Frankfurt where prostitution was legal. [33] The area had not been put off-limits to American military personnel. [34] Although some of the enlisted soldiers apparently procured sex, the accused did not. [35] The accused instead limited his activities to looking at and commenting on the physical charms of the hostesses. [36]

Based upon these facts, the Court of Military Appeals reversed the accused's conviction for conduct unbecoming an officer and a gentleman. The court acknowledged that among the examples of unbecoming conduct listed in the Manual is "public association with known prostitutes." [37] The court, however, construed the term "association" to require physical contact "or, if not physical, [the contact] must be continued over a substantial period of time." [38] The court also distinguished an early Army Board of Review case that affirmed the conviction of an officer who visited a house of prostitution. [39] Unlike the earlier case, the accused in *Guaglione* did not enter the house of prostitution for the purpose of engaging in sexual intercourse, nor was the brothel clearly marked as being off-limits. [40]

The court was also troubled that the accused may have lacked notice that his conduct was unbecoming. [41] In this regard, the court noted that the accused's participation as a member of an athletic team with enlisted soldiers would inevitably lead to some relaxation of the normal

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[21] *Norvell*, 26 M.J. at 481; *see supra* note 12.

[22] *Norvell*, 26 M.J. at 481 (*citing Taylor*, 23 M.J. at 318).

[23] *Norvell*, 26 M.J. at 481.

[24] *E.g.*, *Lindsay*, 11 M.J. at 552.

[25] *Id.*; *see also* United States v. Gomes, 11 C.M.R. 232 (C.M.A. 1953) (lying to an F.B.I. agent).

[26] *Sheehan*, 15 M.J. at 727.

[27] United States v. Daggett, 29 C.M.R. 497 (C.M.A. 1960).

[28] United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984).

[29] United States v. Bonar, 40 C.M.R. 482 (A.B.R. 1969).

[30] *Taylor*, 23 M.J. at 318.

[31] *Norvell*, 26 M.J. at 479-81.

[32] *Guaglione*, 27 M.J. at 269-70.

[33] *Id.* at 270-71.

[34] *Id.* at 270-71.

[35] *Id.* at 270. Likewise, the accused apparently did not encourage any of the enlisted soldiers to participate in sexual activity. *Id.* at 271.

[36] *Id.*

[37] MCM, 1984, Part IV, para. 59c(3); *cf.* United States v. Hooper, 26 C.M.R. 417, 426-27 (C.M.A. 1958) (specification alleging that a retired rear admiral had "publicly associat[ed] with persons known to be sexual deviates, to the disgrace of the armed forces" held sufficient under article 133); *see also Guaglione*, 27 M.J. at 272 n.2, and the cases cited therein.

[38] *Guaglione*, 27 M.J. at 272.

[39] United States v. Rice, 14 C.M.R. 316 (A.B.R.), *pet. denied*, 15 C.M.R. 431 (C.M.A. 1954).

[40] *Guaglione*, 27 M.J. at 272.

[41] *Id.*; *cf.* United States v. Johanns, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985) (fraternization).

superior-subordinate relationship. [42] This predictable result, the court found, must be considered when determining whether the accused's conduct breached a custom of the service. [43] In connection with this, the court observed that none of the "expert witnesses" who testified on the issue- the accused's brigade, battalion, and battery commanders, and first sergeant—was prepared to characterize the accused's conduct as unbecoming an officer and a gentleman. Instead, most considered his actions as reflecting "poor judgment." [44]

The result in *Guaglione* is consistent with decisional law. Courts and boards have historically concluded that immoral behavior can constitute an article 133 violation. Convictions have been affirmed, for example, for performing acts of sodomy, [45] posing as a medical doctor to perform physical examinations of women, [46] indecent assault, [47] forcible sodomy, [48] and sex-related fraternization. [49] Convictions have also been affirmed for offenses that may not be actionable under most state criminal codes, including adultery, [50] consensual sodomy, [51] and openly associating with an employee of a restaurant that was a known meeting place for homosexuals. [52] Courts have looked to all the attendant circumstances of such conduct, [53] and affirmed convictions only if no reasonably prudent officer would doubt that the particular acts were "so debilitating of the dignity required by an officer's obligations as to disgrace him as an officer and a gentleman." [54]

A similar analysis is applied to article 133 charges based on misconduct with enlisted members. Convictions have been affirmed for loaning money to enlisted members and charging fifty percent interest, [55] receiving money from an enlisted member to obtain a discharge, [56] soliciting an enlisted member to blackmarket, [57] smoking marijuana with an enlisted member, [58] and performing acts of consensual sodomy with enlisted members off the installation. [59] Clearly, however, not all acts of misconduct by an officer with enlisted members constitute an article 133 violation. Fornication, [60] smoking marijuana, [61] and borrowing money from an enlisted member [62] do not necessarily violate article 133. The test, again, is the notoriety and impact of the misconduct, and the adequacy of the notice to the accused.

The most intriguing aspect of the *Guaglione* decision instead concerns the language used by the court in discussing the scope of misconduct reached by article 133. The court writes that the misconduct at issue "[i]n general, . . . must be so disgraceful as to render an officer *unfit for service*." [63] The court continues that "[t]his requirement for conviction is consistent with the mandatory dismissal of an officer that was prescribed by the Articles of War (AW) for unbecoming conduct." [64]

Depending on the interpretation given to the words "unfit for service," the court has created an overly-restrictive standard for finding an article 133 violation. An officer can certainly be fit for duty in some respects,

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[42] *Guaglione*, 27 M.J. at 272.

[43] *Id.*

[44] *Id.*

[45] United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982), *set aside in part*, 24 M.J. 238 (C.M.A.), *aff'd in part*, 25 M.J. 564 (A.F.C.M.R. 1987); *see also* United States v. Coronado, 11 M.J. 522 (A.F.C.M.R. 1981).

[46] United States v. Reed, 9 C.M.R. 396, 398 (A.B.R.), *pet. denied*, 10 C.M.R. 159 (C.M.A. 1953).

[47] United States v. Parini, 12 M.J. 679 (A.C.M.R.), *pet. denied*, 13 M.J. 210 (C.M.A. 1981).

[48] United States v. Wilson, 14 M.J. 680 (A.F.C.M.R.), *pet. denied*, 15 M.J. 279 (C.M.A. 1982).

[49] *Parini*, 12 M.J. 679 (A.C.M.R.), *pet. denied*, 13 M.J. 210 (C.M.A. 1981).

[50] United States v. Jefferson, 14 M.J. 806 (A.F.C.M.R. 1982).

[51] *Newak*, 15 M.J. at 542.

[52] United States v. Yeast, 36 C.M.R. 890, 908-09 (A.F.B.R. 1966). Major Yeast was also convicted of soliciting an airman to pose nude for a picture, and lewd and lascivious acts with an airman.

[53] In *Jefferson*, the following factors were provided for determining whether conduct violates article 133: 1) the nature of the acts; 2) the place they occur; 3) whether others were present; 4) whether a military relationship existed between the officer and the other party; and 5) the likely effects of the incident on others. 14 M.J. at 809.

[54] *Id.* (quoting *Parini*, 12 M.J. at 684).

[55] *Giordano*, 35 C.M.R. at 140.

[56] United States v. Gunnels, 21 C.M.R. 925 (A.B.R. 1956).

[57] United States v. Powless, 7 C.M.R. 260 (A.B.R.), *pet. denied*, 7 C.M.R. 84 (C.M.A. 1953).

[58] *Newak*, 15 M.J. 541 (A.F.C.M.R. 1982); United States v. Graham, 9 M.J. 556 (N.M.C.M.R. 1980).

[59] *Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981).

[60] *Johanns*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985).

[61] United States v. DeStefano, 5 M.J. 824 (A.C.M.R. 1978).

[62] United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983).

[63] *Guaglione*, 27 M.J. at 271 (emphasis added).

[64] *Id.*

such as technical competence, and nonetheless engage in unbecoming conduct. Moreover, as dismissal is no longer a mandatory punishment for an article 133 violation, an officer logically could engage in unbecoming conduct and yet be fit for further military service, perhaps following an appropriate punishment. The quoted words are, at best, merely a confusing restatement of the well established two-prong test. Until this language in *Guaglione* is clarified or explained, trial practitioners and the lower courts should construe it consistent with traditional standards requiring the official and personal components. Major Milhizer.

Recent Applications of the Mistake of Fact Defense

Two recent cases illustrate how the applicability of the mistake of fact defense [65] can turn upon the nature of the offense charged. Specifically, whether an accused can avail himself of the defense may depend on whether the charged crime is a specific intent offense, a general intent offense, a strict liability offense, or an offense that requires some other, "intermediate" criminal state of mind.

In *United States v. Turner* [66] the accused was charged with larceny [67] of two automobile engines. The accused contended that he honestly believed that the engines were not government property and that he could therefore lawfully receive them. [68] In reaching this conclusion, the accused relied in part on the statements of an enlisted solider who provided the engines to him. [69]

The accused's protestations of mistake appear objectively unreasonable. [70] The standard for the mistake of fact defense for specific intent crimes such as larceny, [71] however, is subjective. [72] Therefore, an honest but unreasonable belief by the accused that he was entitled to receive the engines is sufficient to constitute the mistake of fact defense. [73] In *Turner,* therefore, the accused's mistaken belief was adequate to raise the defense. [74] Accordingly, the military judge's failure to instruct upon mistake of fact resulted in reversible error. [75]

A different standard is used for general intent offenses, as illustrated by *United States v. Davis.* [76] In *Davis* the accused defended against a rape charge [77] on the basis of mistake of fact. [78] In this regard, the evidence showed that the accused entered a friend's room and saw his friend having intercourse with an unknown woman. [79] The accused thereupon helped his friend force the woman back down to the floor and held her by the shoulders while his friend again had intercourse with her. [80] The woman struggled and kicked throughout the attack. [81] When the woman refused to perform oral sodomy on the accused, his friend punched her in the stomach while the accused applied pressure to

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[65] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(j) [hereinafter R.C.M.], provides:
Ignorance of mistake of fact. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

[66] 27 M.J. 317 (C.M.A. 1988).

[67] A violation of UCMJ art. 121.

[68] *Turner*, 27 M.J. at 218-19.

[69] *Id.* When the accused asked the soldier where he obtained the engines, the soldier replied: "Don't worry about it Sir, I have friends." *Id.* at 218.

[70] As Judge Cox observed in his concurring opinion, "Given the facts of this case, especially considering the rank, position, education, and training of [the accused], it is difficult for me to believe that he could entertain any belief that he could lawfully receive these two engines from a subordinate junior enlisted soldier." *Id.* at 222 (Cox, J., concurring).

[71] MCM, 1984, Part IV, para. 46c(1)(f)(i) (for the offense of larceny, the government must prove beyond a reasonable doubt that the accused had a specific intent to steal).

[72] R.C.M. 916(j).

[73] *See generally* United States v. Greenfeather, 32 C.M.R. 151, 156 (C.M.A. 1962); United States v. Sicley, 20 C.M.R. 118, 128-29 (C.M.A. 1955); *see also* United States v. Smith, 14 M.J. 68 (C.M.A. 1982); United States v. Hill, 13 C.M.R. 158 (C.M.A. 1962); United States v. Mack, 6 M.J. 598 (A.C.M.R. 1978).

[74] *Turner*, 27 M.J. at 221. Although the mistake of fact defense is typically raised by the testimony of the accused, United States v. McFarlin, 19 M.J. 791, 793 (A.C.M.R. 1985); *see* United States v. Pruitt, 38 C.M.R. 236 (C.M.A. 1968); United States v. Bell, 40 C.M.R. 825 (A.B.R. 1968), the accused's state of mind can be shown by other kinds of evidence, including circumstantial evidence. *McFarlin*, 19 M.J. at 793; United States v. Janis, 1 M.J. 395 (C.M.A. 1976); United States v. Miller, 7 C.M.R. 70 (C.M.A. 1953); *see generally* R.C.M. 916(b).

[75] *Turner*, 27 M.J. at 221; *see generally* R.C.M. 920(e)(3); *McFarlin*, 19 M.J. at 793; *see also* United States v. Jett, 14 M.J. 941, 943-44 (A.C.M.R. 1982) (military judge has no duty to instruct on the defense absent some evidence from which the inference of an honest mistake can be drawn).

[76] 27 M.J. 543 (A.C.M.R. 1988).

[77] A violation of UCMJ art. 120.

[78] *Davis*, 27 M.J. at 544.

[79] *Id.*

[80] *Id.*

[81] *Id.*

her face. [82] The accused thereafter had intercourse with the woman while his friend was answering the door. [83]

The accused's alleged mistake as to consent is insufficient to constitute a mistake of fact defense for rape. [84] Mistake of fact would apply to the issue of consent for a general intent offense such as rape only if the accused honestly and reasonably believed the victim was consenting to intercourse with him. [85] As any such belief would be unreasonable under the facts of this case, the defense did not apply. [86]

Two other standards are used in applying the defense. Certain offenses, such as a dishonorable failure to pay just debts or bad check offenses charged under article 134, impose a requirement for a special degree of prudence. [87] If the accused's mistake or ignorance is the result of bad faith or gross indifference, it will not be exonerating even if honest. [88] Other offenses, such as carnal knowledge [89] and improper use of a countersign, [90] have no *mens rea* requirement. Mistake of fact is not an available defense for these strict liability crimes. [91]

Besides negating a mental state required to establish an element of the charged offense, the mistaken belief must be one which, if true, would be exonerating. In other words, the intent to commit the attempted illegal act transfers to the offense actually committed. Thus, the accused's mistaken belief that the illegal drug he possessed was one other than the illegal drug charged will not be a defense. [92] Similarly, the belief that homicide victims were detained prisoners of war (PW's) rather than noncombatants will not operate as a defense to murder, because killing PW's constitutes the same crime. [93] Major Milhizer.

PX Detectives Must Give Article 31 Warnings

The Court of Military Appeals recently announced that civilian detectives employed by the Army and Air Force Exchange System (AAFES) must read article 31 [94] warnings before questioning soldiers suspected of stealing exchange property. Judge advocates who prosecute or defend soldiers charged with shoplifting must now consider the admissibility of the soldier's statement to AAFES detectives, as well as subsequent statements to military authorities. Furthermore, trial counsel and AAFES officials must consider what training they should give to AAFES detectives. This note addresses the holding, rationale, and implications of *United States v. Quillen*. [95] It proposes a cautious and conservative approach to training AAFES detectives.

Facts

Mrs. Holmes, a civilian store detective employed by AAFES, observed SPC Quillen gluing security tapes on one box containing a movie camera and on another box containing a video cassette recorder (VCR). The security tapes are used by AAFES to indicate that merchandise has been purchased. Unfortunately for SPC Quillen, the security tape he used was a different color than the tape being used by the exchange that day. Mrs. Holmes continued to observe Quillen, and eventually stopped him after he left the exchange. After displaying her detective's credentials and obtaining Quillen's military identification card, Mrs. Holmes and an assistant detective escorted Quillen to the exchange manager's office where she questioned Quillen about the suspected larceny. She did not advise Quillen of his rights under article 31 or *Miranda*. [96] Quillen responded that he had purchased the items earlier in the day, but had lost the receipt. This statement was later used to undermine his

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[82] *Id.*

[83] *Id.*

[84] *See* R.C.M. 916(j).

[85] United States v. Taylor, 26 M.J. 127, 128 (C.M.A. 1988); United States v. Carr, 28 M.J. 297 (C.M.A. 1984); *see generally* Wilkins, *Mistake of Fact: A Defense to Rape*, The Army Lawyer, Dec. 1987, at 4. Moreover, even though indecent assault is a specific intent offense, (MCM, 1984, Part IV, para. 63b(2); United States v. Jackson, 31 C.M.R. 738 (A.B.R. 1962)), an honest and reasonable mistake of fact as to the victim's consent is required. *McFarlin*, 19 M.J. at 793. This is because the mistake in question does not relate to the accused's intent. *Id.*; R. Perkins & R. Boyce, Criminal Law 1044-48 (3d ed. 1982).

[86] Davis, 27 M.J. at 544 (citing United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987)).

[87] MCM, 1984, Part IV, paras. 78 and 71c.

[88] R.C.M. 916(j) discussion.

[89] A violation of UCMJ art. 120; *see* MCM, 1984, Part IV, para. 45c(2).

[90] A violation of UCMJ art. 101; *see* MCM, 1984, Part IV, para. 25c(4).

[91] R.C.M. 916(j) discussion.

[92] United States v. Jefferson, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking it was hashish); United States v. Coker, 2 M.J. 304, 308 (A.F.C.M.R. 1976), *rev. on other grounds*, 4 M.J. 93 (C.M.A. 1977) (accused's belief that drug he sold was a contraband substance other than the charged substance not a defense); United States v. Anderson, 46 C.M.R. 1073, 1075 (A.F.C.M.R. 1973) (accused may not defend against charged LSD offense with belief he possessed mescaline); *see* United States v. Mance, 26 M.J. 244, 254 (C.M.A. 1988); United States v. Rowan, 16 C.M.R. 4, 7 (C.M.A. 1954).

[93] United States v. Calley, 46 C.M.R. 1131, 1179 (A.C.M.R.), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973). The requisite mental state for the charged offense of murder was met by the accused's intent to kill those he believed to be detained PW's.

[94] UCMJ art. 31.

[95] United States v. Quillen, 27 M.J. 312 (C.M.A. 1988).

[96] Miranda v. Arizona, 384 U.S. 436 (1966).

defense at trial that a stranger had left the stolen items with him in the store, and Quillen had left the store only to attempt to return the items to the stranger.

Mrs. Holmes determined through store records that neither the movie camera nor the VCR had been sold that day. She notified the Air Force Security Police and waited with Quillen until the police arrived and apprehended him. The police advised Quillen of his rights, Mrs. Holmes questioned him again, and he again stated he had purchased the items. At trial, Quillen's counsel moved to suppress both the warned and unwarned statements given to Mrs. Holmes.

Holding and Rationale

The Court of Military Appeals, in an opinion authored by Judge Sullivan and concurred in by the Chief Judge, held that "this base exchange detective should have advised appellant of his rights under Article 31(b), UCMJ, 10 USC § 831(b), prior to questioning him about this suspected shoplifting offense." [97] Accordingly, the accused's unwarned statements were inadmissible.

The court found that Mrs. Holmes was an "instrument of the military." [98] As such, case law [99] and Military Rules of Evidence 304 [100] and 305 [101] required her to advise the accused of his article 31(b) rights. Interestingly, the United States Army Court of Military Review (ACMR) had held that rights warnings were not required because Mrs. Holmes was acting in a "private capacity as an employee of AAFES" and "not as an instrument of the military." Judge Cox, in dissent, agreed with ACMR.

Three factors influenced the Court of Military Appeals in reaching its conclusion. First, AAFES is not a private retailer, but is instead under the control of military authorities. Therefore, the position of store detective is "governmental in nature and military in purpose." [102] Second, the court noted that military authorities are responsible for prosecuting those who commit crimes in base exchanges. AAFES employees are responsible for developing information about criminal conduct, detaining suspects, and filing reports with the appropriate military authorities. This led the majority to conclude that the detective was acting at the behest of military authorities and in furtherance of the military's duty to investigate crime. [103] Finally, because Mrs. Holmes displayed her badge, requested Quillen's identification card, and followed an official routine, the court found that Quillen perceived Mrs. Holmes' inquiry to be more than casual conversation. [104] Using its established analysis, [105] the court concluded that AAFES detectives were required to give article 31 warnings if military authorities intended to use Quillen's statements. [106]

Implications and Recommendations

The court's holding is a limited one, but it has broad implications. The specified issue asked whether article 31 or *Tempia* [107] rights were required. The holding, however, is grounded only in article 31, and requires the store detective to advise a soldier of only article 31 rights. *Miranda-Tempia* warnings, which are triggered by custodial interrogation by police, are not required. In dissent, Judge Cox points out that, "[f]or a variety of reasons, state courts 'generally have declined to expand' the requirements of *Miranda v. Arizona* . . . ' to privately employed' security personnel." [108] This may explain why the majority based its decision solely on article 31.

Because the decision is based only in article 31, several issues arise. First, should military suspects be advised of the right to counsel? Article 31(b) does not include a warning about a right to counsel; *Miranda* established that warning. Therefore, a strict interpretation of the court's holding does not require counsel warnings. Of "great significance" to the court, however, was the fact that Quillen was not questioned at the initial stop, but was instead escorted to the manager's office and questioned there. [109] Judge Cox correctly points out, "Under Article 31, custody is of no legal consequence." [110] The majority's concern with custody may indicate that *Miranda* warnings will be required in a future case.

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[97] *Quillen*, 27 M.J. at 313.

[98] *Id.* at 314.

[99] The court cites as support for this proposition United States v. Grisham, 16 C.M.R. 268, 271 (C.M.A. 1954); United States v. Aau, 30 C.M.R. 332 (C.M.A. 1961); and United States v. Penn, 39 C.M.R. 194, 199 (C.M.A. 1969).

[100] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 304 (C3, 1 June 1987) [hereinafter Mil. R. Evid.].

[101] Mil. R. Evid. 305.

[102] *Quillen*, 27 M.J. at 314.

[103] *Id.* at 314-15.

[104] *Id.* at 315.

[105] The established analysis is set forth in United States v. Duga, 10 M.J. 206 (C.M.A. 1981), which establishes a two-part test. First, is the questioner subject to the code acting in an official capacity? Second, did the person questioned perceive that the inquiry involved more than casual conversation? Here, the first part of the test was met when the court determined that Mrs. Holmes was acting at the behest of military authorities in a governmental position. The court specifically found the second part of the test was met. *Quillen*, 27 M.J. at 315.

[106] *Quillen*, 27 M.J. at 315.

[107] United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967). *Tempia* applied the *Miranda* warnings to the military.

[108] *Quillen*, 27 M.J. at 316 n.2.

[109] *Id.* at 315.

[110] *Id.* at 317.

Cautious trial counsel and AAFES officials should advise AAFES detectives to read both article 31 and *Miranda* warnings to military personnel suspected of shoplifting. [111] This is particularly important because most discussions about suspected shoplifting occur in the custodial setting of an AAFES office. While the AAFES office ensures a measure of privacy for both the suspected shoplifter and the AAFES detective, a trial counsel may be hard pressed to argue that this is not "custody" for *Miranda-Tempia* purposes. This is especially true if the AAFES detective displays credentials or a badge, asks for and retains the suspect's identification card, and requests the suspect to accompany him or her to the manager's office. Under these circumstances, the normal exchange patron would probably not feel free to leave.

A second, related issue arising from the decision's basis in article 31 is whether a soldier's family members (or other civilians) should be read rights warnings when they are suspected of shoplifting. Clearly the decision does not require detectives to read warnings to civilians, and the exclusionary rule of article 31(d) applies only to trial by court-martial. Civilian courts, however, may find persuasive the Court of Military Appeals' characterization of AAFES detectives as "governmental in nature and military in purpose." Faced with a custodial interrogation by a "governmental agent" (the AAFES detective), the civilian court could easily impose a *Miranda* warning requirement. This potential result will lead the cautious trial counsel who must prosecute civilian offenders in federal court to advise AAFES detectives that all shoplifting suspects should be given article 31 and *Miranda* warnings. This policy has the added benefit of creating only one procedure for detectives to follow with all suspects.

The opinion contains troubling dicta concerning questioning that may continue to be permissible prior to rights warnings. Judge Sullivan writes, "[H]e was not simply asked to produce his receipt for merchandise, a practice to which we have no objection on constitutional or codal grounds." [112] This indicates that the majority would allow an AAFES detective to ask a suspect to produce a receipt even though the detective gave no rights warning. Judge Sullivan does not explain why this unwarned questioning should be permitted, but cites as authority for this proposition his opinion in *United States v. Lee*. [113] That case dealt with regulatory requirements, designed to prevent black marketing in Korea, that a soldier show continued possession or lawful disposition of duty-free items. Judge Sullivan, writing the opinion of the court in *Lee*, held that the regulation as applied to the accused was unconstitutional. [114] Each judge, however, filed a separate opinion. Chief Judge Everett's opinion stated that failure to produce the regulatorily required documentation for duty-free goods has "the testimonial aspect of constituting an implied admission by the accused that no such data exist." [115] He decided that a regulation cannot compel a soldier to present such documentation. The Chief Judge's opinion in *Lee* appears inconsistent with the dicta of *Quillen*. If a shoplifting suspect fails to produce a receipt or responds that he has no receipt, that may have the testimonial aspect of constituting an implied admission that no receipt exists and the goods are stolen. The detective who already suspects the accused of shoplifting is asking for a receipt in order to obtain additional incriminating evidence. It seems that rights warnings should precede this request for incriminating testimonial evidence, just as they must precede a request to a soldier suspected of black marketing to produce documentation. [116] Prudent prosecutors should advise AAFES detectives that the better approach is to read article 31 warnings before asking *any* questions. Defense counsel faced with a client's unwarned failure to produce a receipt should return to the Chief Judge's opinion in *Lee* to craft a suppression motion.

Conclusion

Quillen presents counsel with a new rule of law: AAFES detectives must read article 31 warnings before questioning soldiers suspected of shoplifting. Like all new rules, however, it also presents new issues. Cautious counsel and AAFES officials can carefully address those issues in two ways. First, they can advise AAFES detectives that they should not question soldiers who are suspected of shoplifting, but instead should detain the suspect, notify military police, and allow them to investigate the case. Second, they can advise detectives to read both article 31 and *Miranda* rights before asking any questions of suspects who are either soldiers or civilians. MAJ Gerstenlauer.

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[111] Dep't of Army, Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1984), and GTA 19-6-5, How to Inform Suspect/Accused Persons of Their Rights (July 1985), each contain complete rights warnings. The rights warnings printed there are those required by both *Miranda* and article 31.

[112] *Quillen*, 27 M.J. at 315.

[113] United States v. Lee, 25 M.J. 457 (C.M.A. 1988).

[114] *Id.* at 459-60.

[115] *Id.* at 465.

[116] The Chief Judge based his opinion in large part on United States v. Doe, 465 U.S. 605 (1984). That case dealt with grand jury subpoenas of the business records of a sole proprietorship. The court held that even though the business records were not themselves privileged, the act of producing those documents may be privileged. The court reasoned that producing the documents would require the individual to tacitly admit that the requested documents exist, that he possessed or controlled the documents, and he believed that the papers are those described in the subpoena. Similar reasoning applies to the unwarned request of a suspect for a cash register receipt. Although the cash register receipt is not itself protected by the privilege, the suspect's failure to produce a receipt may tacitly admit that no receipt exists, and the individual believes no receipt for the allegedly stolen merchandise exists. The government could seek to use the suspect's response or failure to produce a receipt to draw the inference that the goods were stolen. Counsel should also read Doe v. United States, 108 S. Ct. 2341 (1988); and Braswell v. United States, 108 S. Ct. 2284 (1988). These cases attest to the continued vitality of the rationale of *Doe* and illustrate the limits of the privilege's protections.

Legal Assistance Items

The following articles include both those geared to legal assistance attorneys and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS-ADA-LA, Charlottesville, VA 22903-1781, for possible publication in *The Army Lawyer*.

Consumer Law Note

How Can They Violate The Law?
Let Me Count The Ways

Although the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693 (1982), is unfamiliar to many attorneys, most are acquainted with some of the following acts that are contained within that umbrella statute:

1. The Truth in Lending Act, which mandates disclosures for open- and closed-end consumer credit plans, limits the liability of credit card holders, and directs a level of candor in advertising claims. 15 U.S.C. §§ 1601-1667.

2. The Fair Credit Billing Act, which requires creditors to resolve consumers' billing disputes expeditiously. 15 U.S.C. § 1666.

3. The Fair Credit Reporting Act, which places limits on the information consumer reporting agencies can disclose and the circumstances under which they may make such disclosures. 15 U.S.C. §§ 1681-1682.

4. The Equal Credit Opportunity Act, which prohibits discrimination in the extension of credit based on race, color, religion, national origin, sex, marital status, age, income based on a public assistance program, or the good faith exercise of rights granted by the Consumer Credit Protection Act or equivalent state laws. 15 U.S.C. § 1691.

5. The Fair Debt Collection Practices Act, which limits the circumstances under which debt collectors can contact third parties to seek repayment of a debt. 15 U.S.C. § 1692.

6. The Electronic Fund Transfer Act, which governs the rights and liabilities of those who use automated teller machines. 15 U.S.C. § 1693.

These acts encourage enforcement by administrative agencies such as the Federal Trade Commission (FTC), (which most typically issues cease and desist orders), authorize criminal sanctions in some circumstances, and permit wronged consumers to recover actual damages, attorneys' fees, court costs, and statutory damages. In addition to these federal acts, states often enact provisions modeled on the federal statutes that provide even greater remedies for the consumer, such as punitive (treble) damages.

Given the apparent abundance of protective legislation and the numerous enforcement vehicles, those encountering suspicious advertising, billing, credit reporting, credit extending, debt collection, and banking practices typically assume that these practices must be lawful or they would have been stopped by aggressive consumer advocates or law enforcement agencies. This assumption is often inaccurate. Consumer advocates can become involved only in cases of which they are aware, and law enforcement agencies lack the resources to pursue all violators, and therefore pursue only those creating the greatest economic impact or whose transgressions are the most widely publicized.

In a case that definitely caught the attention of the FTC, Debt Collectors, Inc. recently agreed, under the terms of a consent decree filed in the U.S. District Court for the Southern District of Texas in settlement of FTC charges, to pay a $155,000 civil penalty based on charges that its collection practices violated the Fair Debt Collection Practices Act. The complaint charged that the Texas collection agency's employees violated the Act by: harassing consumers with threats of imminent court action, arrest, imprisonment, deportation, and garnishment; using obscene and profane language; threatening violence; falsely representing that the collector was a lawyer or law enforcement official; calling consumers at inconvenient times and locations; communicating with third parties for purposes other than acquiring the location of the consumer without court permission or consent of the consumer; and falsely representing the character, amount, and legal status of the debts, all in violation of 15 U.S.C. § 1692.

So, the next time your client receives a request for payment that looks like a court summons, or the client is phoned by the debt collector late at night, or the caller uses obscene or abusive language, don't assume these practices are lawful. Check the law and report abuses to the local consumer protection office, the attorney general's office, and the district attorney. Your client might not be the only victim, and the violator may not be too big to tackle.

Professional Responsibility Note

Three States Adopt New Legal Ethics Rules

Rhode Island and West Virginia have been added to the growing number of states that adopted the American Bar Association Model Rules of Professional Conduct. ABA/BNA Law. Man. Prof. Con. § 01:3. The California Supreme Court also approved amendments to its Rules of Professional Conduct, which follow neither the ABA Model Rules nor the ABA Code. As of January 1, 1989, twenty-nine states have legal ethical rules patterned after the ABA Model Rules. In addition, North Carolina, Oregon, and Virginia have amended ethical rules incorporating the substance of many of the Model Rules.

West Virginia's new Model Rules will take effect on January 1, 1989. West Virginia's version of the Rules differs from the ABA Model Rules in that West Virginia's version imposes a relaxed standard of confidentiality. West Virginia Rule 1.6 allows attorneys to reveal client information to prevent the commission of any crime. The Model Rule version of Rule 1.6 allows attorneys to reveal information concerning a prospective crime only to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm. Under Army Rule 1.6, attorneys must reveal information necessary to prevent a client from committing an offense "likely to result in imminent death or substantial bodily harm, or signifi-

cant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system." Dep't. of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 1.6 (31 Dec. 1987).

West Virginia's version of the Model Rules also adds a provision allowing attorneys to forward cases to specialized attorneys and split fees. Also modified are provisions relating to client funds, lawyer advertising, and lawyer solicitation. ABA/BNA Law. Man. Prof. Con. § 01:29.

Rhode Island's version of the Model Rules modifies Rule 1.5 by stating that agreements relating to contingent fees "should" be in writing. ABA Model Rule 1.5 requires that such agreements be in writing. The Rhode Island rule on successive government and private employment is, on the other hand, much stricter than the Model Rule. Rhode Island's Rule 1.11 provides that any government lawyer's participation in a matter as a public officer disqualifies the lawyer from thereafter representing a civilian client in the matter. The Model Rules prohibit successive representation only where the lawyer personally and substantially participated.

Rhode Island also modified Model Rule 7.3 by prohibiting written communication to prospective clients under several specific circumstances. A permissible written communication must be identified as an advertisement, and a copy of the communication must be sent to the state disciplinary counsel. Rhode Island also added a provision to its version of Rule 8.4 to specifically prohibit harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex.

California made several significant changes to its unique ethics code to become effective on May 27, 1989. The California Rules have been reordered and renumbered as part of the amendment process. The format followed by the Rules is to state a "blackletter" rule and follow it with a discussion providing guidance for interpreting the rule.

The recent amendments modify the California Rules on advertising and solicitation, on the sale of a law practice, and on conflicts of interest. A new rule, California Rule 3-600, was adapted from Model Rule 1.13 to regulate the lawyer when representing an organization. Like the ABA Model Rules, the California Rule makes clear that the organization itself is the client. California Rule 3-600 prohibits organizational attorneys from going outside the organization to resolve a wrong, and provides guidance on the lawyer's obligation within the organization.

Interestingly, the California Supreme Court refused to adopt a new proposed rule on client confidentiality. The retained provision, California Business and Professions Code Section 6068(e), provides that the lawyer has a duty to maintain inviolate client confidences and secrets. 4 ABA/BNA Law. Man. Prof. Con. 415 (December 21, 1988).

The comments to the Army Rules of Professional Conduct state that even though Army attorneys must follow the Army Rules, they must also comply with the ethical rules adopted by their licensing states. Dep't. of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 8.5 comment (31 Dec. 1987). Thus, Army attorneys licensed in California, Rhode Island, or West Virginia should become familiar with the new rules adopted by their states and conform their conduct accordingly. If any of the state rules conflict with the Army rules, however, attorneys working for the Army must comply with the Army Rules. MAJ Ingold.

Claims Report

United States Army Claims Service

The Rules of Professional Conduct For Lawyers: An Army Claims Perspective

James W. Akridge, Major Bradley Bodager,
Major Roderick H. Morgan, James A. Mounts, Jr.
*United States Army Claims Service**

During casual conversation, an acquaintance tells you she was recently the victim of an accident caused by the Army. Would it be ethically appropriate for you to suggest she consider filing a claim? Can you suggest an amount to claim or complete the paperwork for her? Should she be advised to seek her own counsel? What are the rules? What are your obligations and restrictions?

The Department of the Army "Rules of Professional Conduct for Lawyers"[1] (Rules) were promulgated by the Office of The Judge Advocate General in December 1987. Acknowledging that definitive interpretation of these Rules is the exclusive province of The Judge Advocate General, this article will attempt to review the Rules' guidance to the unique problems of the Army claims system and, in particular, the Claims Judge Advocate (CJA) and Claims Attorney.

**This article is intended to stimulate thought concerning the ethical responsibilities of claims judge advocates and claims attorneys. As such, it does not represent official policy or guidance promulgated by either The Judge Advocate General or the Commander, U.S. Army Claims Service.*

[1] Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter Rules].

Scope of the Rules

The Rules state that "lawyers" shall be governed by these Rules of Professional Conduct.[2]

> "Lawyer" means a person who is a member of the bar of a Federal court, or the highest Court of a State or Territory, or occupies a comparable position before the courts of a foreign jurisdiction and who practices law under the disciplinary jurisdiction of The Judge Advocate General. This includes judge advocates, members of the Judge Advocate Legal Service, and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial.[3]

Is this definition of lawyers comprehensive enough to extend the scope of the Rules to all Army claims lawyers? Judge advocates are expressly included; Army civilian attorneys are within the Rules if they are members of the Judge Advocate Legal Service.[4] Even though they may be designated "Claims Attorneys" per Army Regulation 27-20,[5] civilian Corps of Engineer and Army Materiel Command lawyers do not fall within the qualifying authority of The Judge Advocate General and are not within the defined scope of the Rules.[6]

While most Army claims lawyers are subject to the Rules when dealing with the civilian lawyer representing a claimant, the purely civilian lawyer does not appear to be expressly governed by the Rules. Pursuing a claim under various federal statutes is very different from an appearance before a court-martial, and would not seem to bring the civilian attorney within the category of one "who practices law under the disciplinary jurisdiction" of TJAG. Attorneys for claimants presumably would be bound only by the precepts of their respective bar memberships and jurisdictions of practice. The following example highlights such an issue that an Army claims lawyer might encounter.

Captain Lee, the CJA for Fort Grant, Virginia, received a claim under the Federal Tort Claims Act (FTCA)[7] signed by a Virginia civilian attorney for the claimant. In response to Captain Lee's letter to the civilian attorney, explaining the requirement of representative authority, as well as limits on attorney's fees, the civilian attorney submitted a copy of his retainer agreement signed by the claimant. The claimant agreed to pay 33 per cent of any administrative settlement and 40 percent of any recovery after suit is filed. Captain Lee informed the civilian attorney by letter that the limitations on fees for purposes of administrative settlement under the FTCA are 20 percent.[8] The civilian attorney responded that he would comply with this limitation.

Several months after the settlement of this claim, the claimant wrote Captain Lee a letter thanking him for his prompt and courteous actions and praising her attorney because he reduced his fee from 33 percent to 30 percent. Captain Lee decides to send a copy of the claimant's letter to the civilian attorney and ask for confirmation of whether he charged more than 20 percent. The civilian attorney responds that the 30 percent fee was proper under Virginia law, and he does not intend to do anything further in this matter.

The civilian attorney has deceived Captain Lee and the claimant in the matter of the fee and violated the fee limitations of the FTCA. The penalty for charging or collecting fees in excess of 20 percent under these circumstances is a fine of not more than $2,000 or imprisonment of not more than one year or both.[9] The Virginia Code of Professional Responsibility defines professional misconduct to include a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.[10] The civilian attorney has certainly engaged in professional misconduct under this definition. Likewise, the same misconduct would be punishable under the Rules.[11]

Captain Lee is tempted to reply to the claimant, but looks at Rule 4.2 concerning communication with persons represented by counsel and notes the following: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[12] This rule raises several issues in this context.

Captain Lee analyzes the problem by considering whether the attorney-client relationship has been terminated. Since he has no information to the contrary, he considers the relationship to be still existing. He would feel uncomfortable arguing that the issue of the fee is outside the scope of representation—it is integral to the representation agreement. Finally, based on past contacts, he seriously doubts that the civilian attorney would give him permission to communicate with the claimant.

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[2] Rule 8.5.

[3] Rules preamble at 3-4.

[4] Army Reg. 27-1, Legal Services: Judge Advocate Legal Service, para 2-1 (Discussion Draft 1988) [hereinafter draft AR 27-1].

[5] Army Reg. 27-20, Legal Services: Claims, para. 1-6 (10 July 1987) [hereinafter AR 27-20].

[6] *See* Gen. Orders No. 26, HQ, Dep't of Army (15 May 1988), *reprinted in* The Army Lawyer, June 1988, at 3.

[7] 28 U.S.C.A. §§ 2671-2680 (West Supp. 1988).

[8] 28 U.S.C.A. § 2678 (West Supp. 1988).

[9] 28 U.S.C.A. § 2678 (West Supp. 1988).

[10] Va. Code Ann., Rules, part 6, § II, DR 1-102(A) (1988).

[11] Rules 8.4(b) and (c).

[12] Rule 4.2.

Absent the civilian attorney's consent, the remaining exception to the Rule is whether the proposed contact is authorized by law. The comment to Rule 4.2 states that a lawyer having independent justification for communicating with the other party is permitted to do so. The comment does not explain whether an "independent justification" that falls short of being affirmatively authorized by law is permissible under Rule 4.2. Captain Lee wonders whether this is the kind of communication contemplated by the exception. Several reasons have been cited as justifying the no-contact rule.[13] Captain Lee is not attempting to "steal" the client, nor is he acting to directly benefit his client, the Army, since the claim has been concluded. As the communication is purely to benefit the client and is not being made to take advantage, it arguably falls outside the rationale and prohibition of the Rule. Perhaps this best explains what is meant by "independent justification" as used in the comment.

Given that the civilian attorney has violated the rules of his governing bar and the equivalent standards of our Rules, is Captain Lee obliged to do more? Rule 8.3(a) states:

> A lawyer having knowledge that another lawyer has committed a violation of these Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall report such a violation pursuant to regulations promulgated by The Judge Advocate General.

If he has any doubts, Captain Lee should feel encouraged to discuss with his supervisory lawyer whether the improper fee collection raises a substantial question of fitness to practice.[14] A literal reading of Rule 8.3(a) would not require Captain Lee to report the civilian attorney to The Judge Advocate General because the Virginia lawyer is not "under the jurisdiction" of these Rules; he does not fit within the Rules' definition of "lawyer."

The comment to Rule 8.3, however, includes the statement: "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of these Rules of Professional Conduct *or other such rules*" (emphasis added). Ultimately, the question is not whether any particular rule specifically creates a duty to report, but whether any given conduct *should* be reported. In other words, none of these rules should be read too literally when doing so would cause an anomalous result. In addition to using the reference to "other such rules," the comment to Rule 8.3 stresses the importance of reporting a violation where the victim is unlikely to discover the offense. In this case, the claimant is highly unlikely to discover the improper fee collection unless Captain Lee affirmatively acts to remedy the situation.

Some variations on the hypothetical provide even more interesting problems. If we assume that Captain Lee is a member of the Virginia bar, would he be obliged by those rules to report the misconduct to the Virginia bar authorities? Rule 8.5, Jurisdiction, and the comments thereto explain that Army lawyers remain bound by their state bar rules when they are not in conflict with Army Rules.

What if Captain Lee construes the language of the comment to Rule 8.3 to mean that he is compelled to report the civilian attorney under the Army Rules? If he does, he now has two obligations to report the misconduct to different authorities.

Are these obligations in conflict? If the Army's reporting requirement is an *exclusive* one, then Rule 8.5, Jurisdiction, would mean the Army Rules preempt the conflicting Virginia bar reporting requirement.[15] Although the Rules and comments are silent as to their exclusivity in this regard, the intent could be inferred if the purpose for the reporting requirement was known.

If the intent is to create a screen so that unsupported complaints against Army lawyers are not reported to state bar authorities, then the scheme should be considered exclusive. Furthermore, The Judge Advocate General might be legitimately concerned that Army lawyers may file poorly supported complaints against members of the civilian bar, thus undermining efforts to maintain good relations with the civilian legal community. This thinking would also support a position that the reporting procedures in AR 27-1 should be exclusive.[16]

If the Army scheme is intended to provide a management tool by feeding early reports to higher management levels, then the scheme need not be exclusive. Most lawyers are acutely aware that routine background checks include inquiries into disposition of allegations of professional misconduct made against them.

In sum, the scheme may have limited management utility if it is not exclusive because every lawyer with personal knowledge of substantial acts of professional misconduct will be obliged to report directly to the respective disciplinary authorities. Absent a clear indication that the scheme is exclusive, and coupled with an apparent rationale for a non-exclusive scheme, CPT Lee should seek advice through his supervisory chain with a view toward reporting the violation to state authorities, either independently or through TJAG.

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[13] C. Wolfram, Modern Legal Ethics § 11.6 (1986).

[14] Rules 5.1 and 5.2.

[15] For a discussion of some of the problems Army lawyers might anticipate in the area of conflicting claims to jurisdiction, see Burnett, *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers*, The Army Lawyer, Feb. 1987, at 19.

[16] Draft AR 27-1 sets out the forthcoming requirements for Army lawyers to report ethical misconduct to The Judge Advocate General. Paragraphs 6-5a and c require approval of The Judge Advocate General before commencing investigations of alleged professional misconduct by judge advocates or Army civilian attorneys under their qualifying authority. Paragraph 6-11c provides that upon a determination by TJAG that a violation of the Army Rules of Professional Conduct for Lawyers, the Code of Judicial Conduct, or other applicable standard has occurred, TJAG may cause the Executive to report that fact to the governing bar of the attorney concerned, if the violation warrants such action.

Suppose this same factual situation had arisen under the Military Claims Act (MCA).[17] Attorney fees are not limited under the enabling statute; however, such fees are limited by AR 27-20:

> In the settlement of any claim pursuant to 10 USC 2733 and this chapter, attorney fees will not exceed 20 percent of any award, provided that when a claim involves payment of an award over $1,000,000, attorney fees on that part of the award exceeding $1,000,000 may be determined by the Secretary.[18]

Therefore, the civilian attorney would not have violated a specific statute with a criminal penalty as under the FTCA; but by sending a letter informing Captain Lee that he would comply with the fee restrictions of the regulation and then failing to do so, he has engaged in conduct involving dishonesty and deceit to his client and to Captain Lee. Under these circumstances, his conduct could possibly be reported as a violation of the Virginia rules.[19]

As a final note regarding the scope of the Rules, Rule 5.3(b) gives guidance concerning the lawyer's responsibilities regarding nonlawyer assistants. The CJA will have paralegals, such as claims investigators and claims adjudicators, working for him or her, who will normally have direct contact with claimants. The CJA must make reasonable efforts to ensure that their conduct is compatible with the professional obligations of a lawyer.

Roles of the Army Claims Attorney

The Rules' preamble identifies five specific professional relationships of the lawyer: negotiator, counselor, advocate, evaluator, and intermediary between clients. These roles are not conducted in a vacuum.

The preamble and scope explain that the Rules are to be understood in the context of several legal relationships. These Rules presuppose a larger legal context shaping the lawyer's role. That context includes statutes and court rules relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules may determine whether a lawyer-client relationship exists.[20]

The Army claims program includes the FTCA, the MCA, the Act authorizing payment of personnel claims (PCA),[21] the Federal Medical Care Recovery Act (FMCRA),[22] and the Federal Claims Collection Act (FCCA),[23] each with their implementing regulations. In administering these authorities, the Army claims lawyer usually acts as investigator, manager, adjudicator, negotiator and less frequently, advocate.[24]

The relationships that are established between claims personnel and claimants among the various claims programs can be fitted to a sliding scale of cooperation. At one end, claims adjudicators stand as neutral decision makers somewhat akin to administering inchoate entitlements (e.g., PCA claims), while on the other end, the parties stand in an adversarial, or bargaining relationship (e.g., some FTCA claims when approached as a mere prerequisite to litigation).[25]

Administration of the PCA is expected to be conducted along the lines of an entitlement as it provides the authority for the settlement of claims for loss, damage, or destruction of personal property of military personnel or civilian employees incident to their service. Because the PCA is intended as a benefit of employment or service, there is an implicit understanding that the claims office will provide assistance to claimants, and that claimants need not obtain their own attorney. Claims personnel should avoid an adversarial posture and maintain an impartial attitude throughout the processing of a PCA claim, much like a negotiator or intermediary between clients.

Rule 4.3, concerning an Army lawyer's dealing with unrepresented persons, demonstrates this conclusion:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In a typical situation, an unrepresented PCA claimant seeks compensation for household goods damaged in transit. It is inappropriate to require the claims adjudicator (lawyer or nonlawyer) to advise the claimant that he will not be disinterested in adjudicating the claim! The comment to Rule 4.3 admonishes the lawyer not to

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[17] 10 U.S.C.A. § 2733 (West 1983 & Supp. 1988).

[18] AR 27-20, para. 3-19.

[19] One way to defuse the issue of overcharging by claimants' attorneys is by simply adding language to the settlement agreement to be signed by the claimant that puts the claimant on notice of the fee limitation. The issue would rarely come to the Army's attention but for a claims office's request for the retainer agreement.

[20] Rules preamble at 3.

[21] 31 U.S.C.A. § 3721 (West 1983).

[22] 42 U.S.C.A. §§ 2651-2653 (West 1973).

[23] 31 U.S.C.A. § 3711 (West 1983 & Supp. 1988).

[24] Additionally, claims lawyers are serving as counselors when they communicate with other Army claims lawyers in various echelons of the Army to recommend actions, give technical or policy guidance on specific claims, and comment on or propose legislation or Army claims policy. Since this role does not present issues unique to the Army claims lawyer, it is not analyzed here.

[25] *See generally* Bermann, *Federal Tort Claims at the Agency Level: the FTCA Administrative Process*, 35 Case W. Res. L. Rev. 509 (1984-85).

advise the unrepresented person beyond the advice to seek counsel. Literal application of Rule 4.3 under these circumstances is inappropriate and would conflict with the role of the adjudicator, as a negotiator or intermediary, assigned by Army regulations.

How far can claims personnel go in assisting claimants with their claims? AR 27-20, para. 1-10, defines the limits for release of information and assistance. While soliciting claims is not expressly prohibited and is permitted in defined circumstances,[26] it is widely believed to be unethical to precipitate a claim from someone who otherwise manifested no intent of claiming. It may, however, be in the Army's best interest in an appropriate case of clear liability to aggressively investigate, adjust, and compromise the damages rather than the present practice of passively waiting for a claim to be filed. Many insurance companies follow this affirmative policy on the theory that claims will be settled at lower cost, not to mention the benefits of a more favorable public image.

All claimants are entitled to be informed by claims personnel of procedures required by law or regulation. If necessary, claimants may be assisted in filling out claims forms, but it is expressly prohibited to suggest an amount to be claimed.[27] Claimants should know that in many cases the amount claimed will be a ceiling on the amount of recovery.

It is submitted that the clear policy of AR 27-20 is to strive for the open, objective, "entitlements" approach in all claims, including the FTCA.[28] A claim, even an FTCA claim, does not necessarily mean there is a dispute. From that perspective, the claims lawyer has an obligation to cultivate dialogue at the earliest opportunity and to lay the foundation for a mutually beneficial relationship. It should not be assumed that denial of a claim saves money and is therefore always in the Army's best interest.

How should Rule 4.3, which deals with unrepresented persons, be interpreted in the context of processing an FTCA claim? The Rule flatly prohibits any representation that the claims lawyer is disinterested. As a minimum, every unrepresented claimant should clearly understand that the Army claims lawyer does not represent him or her. In this specific context, the claims lawyer, in evaluating a claim, may not only consider the interests of the Army but also the interests of the unrepresented claimant as a derivative client, analogous to the role performed by a settlement lawyer at a real estate settlement.[29] The lawyer may be representing many interests in this situation, but if a conflict of interests develops, the lawyer has a duty to disclose to the claimant the implications of the common representation.[30] In fact, early disclosure, even before a conflict is the best procedure.

Occasionally, an unrepresented claimant will grossly undervalue a claim of clear liability. Claims personnel should consider advising the claimant to consult counsel for the limited purpose of valuing the claim. By the same token, some unrepresented claimants inflate their claims so that urging them to retain or consult counsel may be in the best interests of the Army and the claimant. Because of the dynamic nature of the relationship, there can be no precise rule in these situations; informed of the issue, lawyers must use their discretion.

Affirmative Claims Issues

The final group of issues pertain to the Army claims lawyer in the context of affirmative claims. The Recovery Judge Advocate (RJA) [31] can be confronted with an ethical dilemma when pursuing medical care recovery. Problems may arise in arriving at an appropriate attorney agreement with the injured party's civilian attorney. An RJA's duty to aggressively pursue recovery and to ensure that limited funds are equitably distributed between the government and the injured party may present ethical problems, especially in making the decision to waive or compromise the government claim. The affirmative claims attorney must be keenly aware of this potential problem.

The Federal Medical Care Recovery Act provides the military claims attorney with the following authority to pursue medical care recovery:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment . . . to a person who is injured . . . under circumstances creating some tort liability upon some third party . . . to pay damages therefore, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished. . . . [32]

RJA's with responsibility for local medical care and property damage programs are expected to conduct their recovery efforts according to standards set out in the Federal Claims Collection Standards (FCCS).[33] FCCS 102.1 mandates aggressive agency action to collect all claims of the United States and requires frequent renewal of assertion demands for the value of government rendered medical care or damaged property with consideration of every available means of recovery.

[26] AR 27-10, para. 1-10c, authorizes assistance to anyone who indicates a desire to claim and permits publication of the right to submit claims in the vicinity of a field exercise, maneuver, or disaster.

[27] AR 27-20, para. 1-10c.

[28] AR 27-20, paras. 1-1 and 1-10.

[29] *See* G. Hazard, Jr., The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 60, 321 (1986).

[30] *See* L. Patterson, Legal Ethics: The Law of Professional Responsibility § 10.06 (1982).

[31] AR 27-20, para. 14-2a.

[32] 42 U.S.C.A. §§ 2651-2653 (West 1973).

[33] 4 C.F.R. §§ 101-105 (1988).

A common practice in medical care recovery is to use written agreements between the RJA and the injured party's attorney. Such agreements are authorized but not required in the conduct of medical care recovery action.[34] Once an agreement is executed, the attorney representing the injured party's interest basically assumes control of the entire case and may present a consolidated pleading with the cost of government rendered medical care as an item of special damages. The agreement provides an opportunity to make a formal statement of the legal relationships created and should allocate responsibilities between the parties. A "representation" agreement does not establish an attorney-client relationship between the government and the injured party's civilian attorney.[35] The otherwise apparent conflict of interest is addressed in Rule 1.7, with very specific exceptions, which prohibits a lawyer from representing a client if the representation will be directly adverse to another client or if the representation of that client may be materially limited by the lawyer's responsibilities to another client. The agreement is merely documentation of an arrangement wherein the civilian attorney assumes initial control for a single consolidated demand that includes the government's lien. The agreements should be drafted to provide for dissolution without cause at the will of either party, to avoid even the appearance of a conflict and to protect the independence and fundamental representation function of each respective attorney.

Another potential ethics issue can be encountered in determining the legal consequences of a civilian attorney representing the government's interests along with those of the injured party. Rule 1.8(g), requires informed consent from multiple clients in settling aggregate claims and precludes such arrangements where more than one injured party is involved. Although the government is not formally a client, the thrust of the rule should be followed and the injured party's consent sought prior to settling the claim. Many in the civilian bar are reluctant to enter into attorney agreements due to this perceived potential conflict of interests.

The complexity of the ethical interplay is clearly demonstrated in the settlement offer phase of the recovery effort. Compromise, waiver, and termination of the claim decisions can present serious problems to the RJA. It is important to distinguish between a compromise or waiver for the benefit of the injured party and a compromise or termination of collection activity to the benefit of the tortfeasor. A compromise or waiver on behalf of the injured party is based on an equitable distribution of limited funds. This occurs when the funds available are insufficient to satisfy both the claim of the United States and that of the injured party and seeking full recovery will work an undue hardship on the injured party. A compromise or termination of collection activity on behalf of the tortfeasor is based on the government's inability to collect the full amount due on the claim.

In the simplest situation, the RJA has asserted a claim against a tortfeasor and the liability is clear. The injured party elected not to bring suit against the tortfeasor, leaving the government as the only claimant. In this situation the RJA is not faced with the issue of equitably dividing limited funds with the injured party. The objective is simply to demand money from the tortfeasor. The subjective criteria for evaluating whether the government will compromise its claim or terminate collection activity fall into three areas.

The first concern is the tortfeasor's inability to pay. A claim can be compromised if the tortfeasor has few assets and little income. Under FCCS 104.3, however, an evaluation of the tortfeasor's inability to pay should not be made without substantiation.[36] FCCS 103.2 specifically suggests securing statements from tortfeasors, under oath, listing their assets, if there is otherwise insufficient credit data available.[37] The key in this area is to remember that the government has a legitimate claim against the tortfeasor. The government retains the option of suing to enforce it.

The second area relates to litigation probabilities. If liability is questionable, a compromise may be appropriate. If the claim proves to be without merit, after further investigation, terminating collection would be appropriate.

The final criteria is the cost of collecting this claim. The general rule is that claims under $250 need not be asserted.[38] If the claim is higher, an assertion must be made. If, after investigation, it appears that collection costs do not justify further efforts, compromise or termination of collection may be appropriate.

Most cases will not be presented in the three simple situations described above. In most cases the injured party will be a claimant also. Often, the injured party, or the attorney, will negotiate a settlement with the tortfeasor or the tortfeasor's insurance company and then approach the United States with a waiver or compromise request. In this situation two independent evaluations should be made. First, the RJA must determine the ability of the tortfeasor to pay. If liability is clear and the tortfeasor has unlimited assets then there is no basis for waiving or compromising the government's claim. Assuming for the moment that limited funds are available, then a second evaluation must be made. The RJA must decide to what extent the United States will compromise its claim so that the limited available funds are equitably distributed between the government and the injured party. Additionally, the RJA must determine if undue hardship will result to the injured party if the

[34] AR 27-20, para. 14-15a(2).

[35] *See* Debt Collection Act Amendments (1986).

[36] 4 C.F.R. § 104 (1988).

[37] 4 C.F.R. § 103 (1988).

[38] AR 27-20, para. 14-4a(4).

government collects any of its claim, thus warranting a complete waiver.

For example, if the government has a $50,000 claim and the injured party has a reasonably expected verdict award of $300,000, an equitable compromise or waiver might be appropriate if there is only $125,000 insurance coverage available. The RJA will sit down with the injured party's attorney to develop the facts underlying a request for compromise or waiver. Clearly, each is representing his or her client (the Army and the injured party, respectively). Does this change if a representation agreement exists? For the RJA, there is no change; his or her client is still the Army. For the civilian attorney, it may appear that some conflict, as foreseen in Rule 1.7, exists. He or she has a primary duty to the injured party and, recognizing that the Army is represented by the RJA, may feel no real obligation to the Army, viewing the agreement not as a joint venture document but more as a matter of convenience (i.e, to keep from having the RJA dealing with the tortfeasor independently).

In this latter situation one can again raise the concept of the derivative client, and it would "cut both ways." The RJA, under the FCCS, takes on the injured party as a derivation client in evaluating the injured party's needs when put in a compromise or waiver situation. The injured party's attorney, in signing an agreement to pursue the United States' special damages along with his or her clients' general damages, arguably has taken on the United States as a derivative client. Spelling this out in the initial agreement negotiations can forestall many problems later. If nothing else, it creates an ethical aura around the agreement and makes the injured party's attorney hesitant to simply ignore it or try to "pull a fast one" on the Army.

The Rules of Professional Conduct for Lawyers and other statutes and regulations provide guidance to the claims attorney in addressing the challenges encountered while pursuing recovery actions. An RJA is allowed discretion and encouraged to use initiative in accomplishment of the affirmative claims mission. The guidance provided is but a tool to be used in conjunction with the RJA's professional training, skill, common sense, and commitment to equity and is not intended as a formula to be uniformly applied to every claim.

Conclusion

The mission of the Army claims lawyer is complex and presents many ethical challenges. Any profession, however, must be measured by its voluntary compliance with its professional rules of conduct. Claims lawyers should take the lead in the JAG Corps in wholehearted compliance and appropriate implementation of the Army Rules of Professional Conduct for Lawyers.

Claims Notes

Affirmative Claims Notes

Settlement Agreements Involving CHAMPUS-Provided Medical Care

The Assistant General Counsel for the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Ms. Roberta R. Herrick, has provided the following information concerning settlement agreements:

"It has recently come to our attention that some Claims Officers are unaware of certain provisions in the regulation governing CHAMPUS (DoD 6010.8-R). Payment may not be made under CHAMPUS for any medical service or supply to the extent that payment has been made or can reasonably be expected to be made for the service or supply under medical insurance, state worker's compensation statutes, automobile medical payment insurance policy or plan, uninsured motorist insurance, no-fault insurance or other forms of medical payments protection. When a CHAMPUS beneficiary is covered by such a plan or plans, CHAMPUS benefits will not become available until the CHAMPUS beneficiary furnishes written documentation that he or she has incurred medical expenses equal to the full amount of the payment received under the policy, or to that portion of the total payment received which was designated for medical expenses. Insurance owned by the CHAMPUS beneficiary is treated as double coverage; it does not provide a third party liability claim under the Federal Medical Care Recovery Act. If the CHAMPUS fiscal intermediary inadvertently fails to process these claims under the double coverage provisions of Chapter 8 of the regulation, recoupment may be initiated by the fiscal intermediary pursuant to the Federal Claims Collection Act. Alternatively, the provider of medical care may pursue collection of the insurance proceeds. This information should be considered when Claims Officers enter into settlement agreements. The regulation provides that Claims Officers may refer potential claims under the Federal Claims Collection Act to the General Counsel, OCHAMPUS."

In summary, Army Recovery Judge Advocates are without authority to release CHAMPUS claims when negotiating or entering into settlement agreements. In addition, Recovery Judge Advocates are without authority to include in settlement agreements promises that the United States will pay any and all past, present, or future medical bills related to the accident. Such an agreement is contrary to law and therefore void, since Congress has placed specific limitations on the CHAMPUS program regarding the types of medical bills that are payable and on the amounts that may be paid.

When questions arise regarding the authority of Recovery Judge Advocates in negotiating settlements in-

volving CHAMPUS benefits, call MAJ Morgan, Chief, Affirmative Claims Branch, USARCS at AV 923-7526. MAJ Morgan.

Release of Medical Records

Questions occasionally arise concerning the authority for releasing medical records to civilian attorneys representing parties in Federal Medical Care Recovery Act cases. These questions usually involve Freedom of Information Act (FOIA) and Privacy Act concerns of Recovery Judge Advocates and hospital administrators.

Army Regulation 340-17, Release of Information and Records from Army Files, provides specific guidance on release of medical records. Paragraph 5-101, Requests from Private Citizens, provides that commanders or chiefs of medical treatment facilities and records centers will release records and information to patients (or their representatives designated in writing) upon receipt of a written request. This paragraph further provides that the records may be furnished to the staff judge advocate of the command in connection with the government's collection of a claim. The staff judge advocate may release this information to the tortfeasor's insurer without the patient's consent.

Information released to third parties must include a statement of release conditions. The statement will specify that the information not be disclosed to other persons except as privileged communication between doctor and patient.

Recovery judge advocates must be familiar with these provisions and should follow them closely. Strict adherence to these provisions should allay FOIA and Privacy Act concerns. MAJ Morgan.

Personnel Claims Notes

Shipment Claims by Soldiers Receiving Bad Discharges in CONUS

Pursuant to a 1987 change to the Joint Travel Regulations, a soldier with dependents who is sentenced to discharge by court-martial or administratively discharged under other than honorable conditions may be entitled to a household goods shipment at government expense, even if the soldier is stationed in CONUS. For this reason, some soldiers receiving a dishonorable, bad-conduct, or other than honorable discharges in CONUS are entitled to file personnel claims for loss or damage in shipment.

A soldier receiving a discharge of this type approved after 1 September 1987, may apply through the Personnel Service Center for shipment of property and transportation of dependents at government expense. Shipment to a designated place in the United States, Puerto Rico, or a territory or possession of the United States can be authorized on a case-by-case basis by the "installation order issuing authority." Shipment must be completed within one year, and nontemporary storage is not authorized.

Claims personnel are cautioned not to automatically assume that a soldier who is sentenced to discharge by court-martial or administratively discharged under other than honorable conditions is not entitled to present a shipment claim. Mr. Frezza.

Personnel Claims Limit Raised to $40,000

Public Law 100-565 raised the maximum payment for personnel claims accruing on or after October 31, 1988 from $25,000 to $40,000. Application of this new limit depends on the date of accrual and not on the date the claim is received. Paragraph 11-6(a), AR 27-20 defines when a personnel claims accrues. Payment authority for personnel claims in excess of $25,000 has not yet been delegated to field claims offices or command claims services. If a personnel claim is fully adjudicated by a field office and determined to be meritorious in an amount in excess of $25,000, payment will be made by USARCS. Forward such files through your area claims office and/or command claims service to USARCS, ATTN: JACS-PCP. COL Gravelle.

Tort Claims Note

Recent FTCA Denials

Shipment of Privately Owned Vehicle. A claim was filed for the unnecessary removal of a catalytic convertor prior to shipment of a POV overseas due to a soldier allegedly being "misinformed" that unleaded fuel was not available in the Federal Republic of Germany (FRG). The claim was denied because unleaded fuel was then available only in some areas of the FRG and in other European countries and not commonly supplied by AAFES. Moreover, the misrepresentation exception applies to this case. *See* paragraph 3-4(k) and 4-7(j), AR 27-20.

Damage to State Property by Guardsmen. A claim was filed by the State National Guard for damage to state property caused by National Guardsmen while performing federally-funded training under 32 U.S.C. 502. The claim was denied because it was considered a claim by a property owner for damage by its own employee. Guardsmen training under 32 U.S.C. 502 remain state employees even though their torts are payable under the FTCA. *See Lee v. United States*, 643 F. Supp. 593 (D. Haw. 1986).

Medical Malpractice/Statute of Limitations. A military dependent filed a claim for damages caused by the improper stitching of her ureter during a total abdominal hysterectomy performed in 1983. Severe endometriosis was discovered during the surgery. Three days later a second surgery was performed to remove the stitch and reimplant the ureter. The patient was informed of the improper stitching of her ureter. In 1986 during pelvic surgery to remove a mass, extensive scarring related to endometriosis was discovered. A claim filed in 1987 was denied based on the statute of limitations because more than two years had passed since the claimant was put on notice of the negligent stitching of her ureter and the scarring was not caused by the improper stitch so as to extend the statute of limitations.

False Arrest. A military dependent filed a claim for false arrest (illegal detention) in an AFFES store. The arresting officer observed the claimant acting suspiciously in the store and found wrappers for knitting needles in a trash can near the claimant immediately

prior to arresting her. After her arrest, the claimant provided a sales receipt for the knitting needles she was accused of stealing. The claim was denied because the arresting officer's detention of the claimant was reasonable based on his observations of the claimant in the store and his discovery of the wrappers, which gave him probable cause to believe she had taken AAFES merchandise out of the store without paying for it. Mr. Rouse.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas.

If you have not received a welcome letter or packet, you do not have a quota.

Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1989

March 13-17: 41st Law of War Workshop (5F-F42).

March 13-17: 13th Admin Law for Military Installations Course (5F-F24).

March 27-31: 24th Legal Assistance Course (5F-F23).

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.

June 12-16: 28th Fiscal Law Course (5F-F12).

June 19-30: JATT Team Training.

June 19-30: JAOAC (Phase II).

July 10-14: U.S. Army Claims Service Training Seminar.

July 12-14: 20th Methods of Instruction Course.

July 17-19: Professional Recruiting Training Seminar.

July 17-21: 42d Law of War Workshop (5F-F42).

July 24-August 4: 119th Contract Attorneys Course (5F-F10).

July 24-September 27: 119th Basic Course (5-27-C20).

July 31-May 18, 1990: 38th Graduate Course (5-27-C22).

August 7-11: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

August 14-18: 13th Criminal Law New Developments Course, (5F-F35).

September 11-15: 7th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

May 1989

2-5: ESI, ADP Contracting, Washington, D.C.

3: IICLE, Managing Your Law Department for Top Performance, Chicago, IL.

3-4: GULC, Commercial Lease Negotiation, New York, NY.

4: FB, Basic Evidence, Ft. Lauderdale, FL.

4: FB, Basic Probate Practice, Tampa, FL.

4: FB, Current Topics in Commercial Litigation, Jacksonville, FL.

4: FB, Uniform Commercial Code, Miami, FL.

4: FB, Using Trusts in Estate Planning, Tampa, FL.

4: IICLE, Accounting for Lawyers, Chicago, IL.

4-5: UKCL, Equine Law, Lexington, KY.

4-5: SLF, Institute on Wills and Probate, Dallas, TX.

4-5: ABA, Tort and Religion Law, San Francisco, CA.

4-5: PLI, Construction Contracts and Litigation, New York, NY.

4-6: ALIABA, Fundamentals of Bankruptcy Law, Charleston, SC.

5: FB, Using Trusts in Estate Planning, Miami, FL.

7-12: NITA, Advanced Trial Advocacy Program, Gainesville, FL.

7-12: NJC, Special Problems in Criminal Evidence, Reno, NV.

8-10: GCP, Patents, Technical Data and Computer Software, Washington, D.C.

8-12: SLF, Short Course on Labor Law and Labor Arbitration, Dallas, TX.

8-12: ALIABA, Planning Techniques for Large Estates, New York, NY.

10: IICLE, Environmental Issues in Real Estate, Chicago, IL.

10-12: ALIABA, Medical Malpractice, Williamsburg, VA.

10-19: UKCL, Trial Advocacy (Intensive), Lexington, KY.

11: FB, Basic Real Estate, Miami, FL.

11: IICLE, Professional Responsibility, Chicago, IL.

11-21: NITA, Southeast Regional Trial Advocacy Program, Chapel Hill, SC.

12: PLI, Advanced Brief Writing, New York, NY.

12-13: ATLA, Proof of Damages, Baltimore, MD.

14-19: ATLA, Basic Course in Trial Advocacy, Little Rock, AK.

15-18: ESI, Contract Accounting and Financial Management, Washington, D.C.

15-19: GCP, Administration of Government Contracts, Seattle, WA.

17: IICLE, Personal Injury Anatomy, Chicago, IL.

18: FB, Family Law, Orlando, FL.

18-19: BNA, Affirmative Action Workshop, Chicago, IL.

18-19: FB, Water Law Update, West Palm Beach, FL.

18-19: PLI, Workshop on Legal Writing, New York, NY.

19: IICLE, Mineral and Oil and Gas, Mt. Vernon, IL.

19-20: PLI, Deposition Skills Training Program, New York, NY.

19-20: ATLA, Products Liability, St. Louis, MO.

22-23: BNA, Affirmative Action Workshop, Denver, CO.

22-23: PLI, Construction Contracts and Litigation, Chicago, IL.

22-26: ESI, Federal Contracting Basics, Washington, D.C.

25: IICLE, Employment Termination, Chicago, IL.

25: FB, Diagnostic Tests in Worker Compensation Cases, Miami, FL.

25-26: GULC, State and Local Taxes, Washington, D.C.

26: FB, Construction Contract, Tampa, FL.

26: NKU, Discovery and Evidence, Highland Hts, KY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 755-0083.

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

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348-6230.

AICLE: Arkansas Institute for CLE, Suite 700, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

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

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

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W., Washington, D.C. 20007-4499. (800)424-2725; (202)965-3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026. (216) 729-7996.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209. (205) 870-2865.

CLEC: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303) 871-6323.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, Chicago, IL 60611. (312) 944-0575.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 600 Apalachee Parkway, Tallahassee, FL 32301-8226. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, D.C. 20005. (202) 633-6032.

FP: Federal Publications, 1120-20th Street, N.W., Washington, D.C. 20036. (202) 337-7000.

GCP: Government Contracts Program, The George Washington University, National Law Center, T412, 801 22nd Street, N.W., Washington, D.C. 20052. (202) 994-6815.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885,, Athens, GA 30603. (404) 542-2522.

GULC: Georgetown University Law Center, CLE Division, 25 E Street, N.W., 4th Fl., Washington, D.C. 20001. (202) 622-9510.

HICLE: Hawaii Institute for CLE, UH, Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102).

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

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Center of Continuing Professional Development, Louisiana State University, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906-7587. (800) 446-3410; (804) 295-6171.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

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

MNCLE: Minnesota CLE, 40 North Milton, Suite 101,St. Paul, MN 55104. (612) 227-8266.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330. (207) 622-7523.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27612. (919) 828-0561.

NCCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, University of Houston, Law Center, University Park, Houston, TX 77004. (713) 747-NCDA.

NCJFC: National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

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

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 648-5571.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland, Hts., KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

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

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452 .

NYSTLI: New York State Trial Lawyers Institute, Inc., 132 Nassau Street, New York, NY 10038. (212) 349-5890.

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

NYUSL: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.

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

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

PTLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59604 (406) 442-7760.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211-1039. (803) 771-0333.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

SMU: Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214) 692-2644.

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

TLEI: The Legal Education Institute, 1875 Connecticut Avenue, N.W., Suite 1034, Washington, D.C. 20530

TLS: Tulane Law School, Tulane University, 6325 Freret St., New Orleans, LA 70118. (504) 865-5900.

UCCI: Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.

UDCL: University of Denver College of Law, Institute for Advanced Legal Studies, 7039 East 18th Avenue, Room 140, Denver, CO 80220. (303) 871-6125.

UHLC: University of Houston Law Center, CLE, 4800 Calhoun, Houston, TX 77004. (713) 749-3170.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMC: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 112 Tate Hall, Columbia, MO 65211. (314) 882-6487.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372-0140.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.

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

USB: Utah State Bar, 425 East First South, Salt Lake City, UT 84111. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085. (215) 645-7083.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdictions	Reporting Month
Alabama	31 January annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1989 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/ JAGS-ADK-87-1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/ JAGS-ADK-87-2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/ JAGS-ADA-86-10 (253 pgs).

AD B116100 Legal Assistance Consumer Law Guide/ JAGS-ADA-87-13 (614 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).

AD B116102 Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pps).

AD B116097 Legal Assistance Real Property Guide/ JAGS-ADA-87-14 (414 pgs).

AD A174549 All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).

AD B089092 All States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).

AD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).

AD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).

AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).

AD B090988 Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).

AD B090989 Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).

AD B116103 Legal Assistance Preventive Law Series/ JAGS-ADA-87-10 (205 pgs).

AD B116099 Legal Assistance Tax Information Series/ JAGS-ADA-87-9 (121 pgs).

AD B124120 *Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).

AD-B124194 *1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).

AD B087849 AR 15-6 Investigations: Programmed Instruction/ JAGS-ADA-86-4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).

AD B100235 Government Information Practices/ JAGS-ADA-86-2 (345 pgs).

AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).

AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).

AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

AD A199644 *The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/ JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).

AD B124193 *Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
Cir 611-88-2	Implementation of Changes to the Military Occupational Classification and Structure		14 Oct 88
Pam 360-512	Code of the U.S. Fighting Force		1988
Pam 600-2	The Armed Forces Officer		1988
UPDATE 15	Morale, Welfare, and Recreation		4 Nov 88
UPDATE 15	Message Address Directory		31 Oct 88

3. Trial Advocacy Video Tapes

Professional judge advocates are constantly improving their trial advocacy skills. The Judge Advocate General's School has numerous video tapes available for reproduction that are beneficial to trial advocates. These tapes ensure that clients (for courts or boards) are receiving the best possible representation. The following is a list of some of the available video tapes:

Number	Title and Synopsis
JA-84-0044C	*Direct and Cross-Examination, Parts I and II*, Mr. Patrick A. Williams of Williams, Donovan, Savage & Associates, Tulsa, Oklahoma, discusses direct examination, cross-examination, and expert witnesses in criminal trials.

Taped: Feb 84. Length: Part I, 47:42; Part II, 49:25.

JA-86-0032C *Zingers, Ringers, and Sandbags: Winning Trial Techniques, Parts I and II*, Mr. John Lowe, Attorney, Charlottesville, Virginia, presents an excellent overview of fundamental rules of trial advocacy. Through the use of anecdotes and personal experiences, he teaches the proper method and theory of cross-examination; how to effectively conduct voir dire; theory and practical pointers behind opening statements; and, how to conduct effective direct examination. Taped: Jan 86. Lengths: Part I, 46:49, Part II, 54:00.

JA-88-0056C *Cross-Examination and Advocacy, Parts I and II*, Mr. F. Lee Bailey, who got his start as a military defense counsel, addresses the purposes, techniques, and pitfalls of cross-examination. His discussion is interspersed with teaching points based on cases and situations he has faced. He closes with a lively question and answer session. Taped: Feb 88. Lengths: Part I, 60:00; Part II, 55:00.

JA-88-0101C *C.O.M.A. Watch, Parts I and II*, Major Harry Williams, Instructor, Criminal Law Division, TJAGSA, covers the decisions of the Court of Military Appeals since 24 M.J. 1. Significant cases are discussed as well as the judicial outlook of the judges. Taped: Aug 88. Lengths: Part I, 47:00; Part II, 18:00.

JA-88-0103C *Guest Speaker*, The Honorable Walter T. Cox, III, Judge, U.S. Court of Military Appeals, discusses developments and trends of the court. Taped: Aug 88. Length: 47:00.

JA-88-0104C *Court-Martial Personnel/Command Control, Parts I and II*, Major Gary Jewell, Senior Instructor, Criminal Law Division, TJAGSA, covers recent developments in court-martial personnel and command control. Taped: Aug 88. Lengths: Part I, 39:00; Part II, 44:00.

JA-88-0105C *Pleadings and Multiplicity*, Major Patrick Lisowski, Instructor, Criminal Law Division, TJAGSA, discusses defective specifications, amending specifications, problems with value, and multiplicity. Taped: Aug 88. Length: 51:00.

JA-88-0106C *Voir Dire and Challenges*, Major Patrick Lisowski, Instructor, Criminal Law Division, TJAGSA, discusses developments in the area of military voir dire and challenges. Topics include permissible voir dire questions, causal challenges, rating-chain challenges, victim analysis, knowledge of court members, additional peremptory challenges, and the *Batson* challenge. Taped: Aug 88. Length: 53:00.

JA-88-0107C *Pretrial Restraint*, Major James Gerstenlauer, Instructor, Criminal Law Division, TJAGSA, covers recent developments in pretrial restraint and sentence credit for pretrial restraint (including *Allen* credit, *Mason* credit, credit under R.C.M. 305 as interpreted by *Gregory*, and credit for violations of article 13. Taped: Aug 88. Length: 38:00.

JA-88-0108C *Speedy Trial*, Major James Gerstenlauer, Instructor, Criminal Law Division, TJAGSA, discusses speedy trial rules, emphasizing the 120 and 90 day rules of R.C.M. 707. Taped: Aug 88. Length: 40:00.

JA-88-0109C *Pleas/Pretrial Agreements*, Major Gary Jewell, Senior Instructor, Criminal Law Division, TJAGSA, discusses recent cases in the areas of trial agreements and the guilty plea inquiry. Taped: Aug 88. Length: 44:00.

JA-88-0110C *Fourth Amendment*, Major Patrick Lisowski, Instructor, Criminal Law Division, TJAGSA, provides an update and methodology for analyzing fourth amendment issues. His analysis focuses on administrative searches (inspections), expectations of privacy, and consent searches. Taped: Aug 88. Length: 51:00.

JA-88-0111C *Fifth Amendment*, Major James Gerstenlauer, Instructor, Criminal Law Division, TJAGSA, covers recent developments in self-incrimination, confessions, and immunity law. Taped: Aug 88. Length: 49:00.

JA-88-0113C *Sixth Amendment, Parts I and II*, Major Sarah Merck, Instructor, Criminal Law Division, TJAGSA, reviews recent sixth amendment decisions concerning an accused's rights to compulsory process, confrontation, and effective assistance of counsel. Special emphasis is placed on the relationship between the confrontation clause and hearsay evidence. Taped: Aug 88. Lengths: Part I, 50:00; Part II, 38:00.

JA-88-0114C *Crimes and Defenses, Parts I and II*, Captain Eugene Milhizer, Instructor, Criminal Law Division, TJAGSA, covers recent decisions in military offenses, inchoate crimes, substantive offenses, and special defenses. Special emphasis is placed on homicides, sex offenses, drug offenses, and attempts. Taped: Aug 88. Lengths: Part I, 50:00; Part II, 40:00.

JA-88-0115C *DNA Fingerprinting, Parts I and II*, Dr. Robert C. Shaler, Ph.D. covers the use of DNA fingerprinting in

criminal trials. Taped: Aug 88. Lengths: Part I, 46:00. Part II, 50:00.

JA-88-0117C *Insanity*, Major Harry Williams, Instructor, Criminal Law Division, TJAGSA, discusses amendments to the Uniform Code of Military Justice as guided by the Insanity Defense Reform Act as well as significant decisions of the military appellate courts concerning the insanity defense. Taped: Aug 88. Length: 23:00.

These tapes are available through the TJAGSA tape dubbing service. The School does not provide these tapes on loan. The video tape equipment produces only 3/4 inch and 1/2 inch (VHS) video cassettes. Reproductions of programs may be obtained upon request *accompanied by video cassettes of the appropriate lengths*. Tapes must be requested by title and number. Requests and tapes should be forwarded to:

The Judge Advocate General's School, U.S. Army
ATTN: Media Services Office (JAGS-ADN-T)
Charlottesville, Virginia 22903-1781

The Judge Advocate General's School is scheduled to hold the 22nd Criminal Trial Advocacy Course, 6 through 10 February 1989. Several blocks of instruction will be video taped. Notice of their availability will be published in future editions of *The Army Lawyer*.

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CARL E. VUONO
General, United States Army
Chief of Staff

Official:

WILLIAM J. MEEHAN II
Brigadier General, United States Army
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