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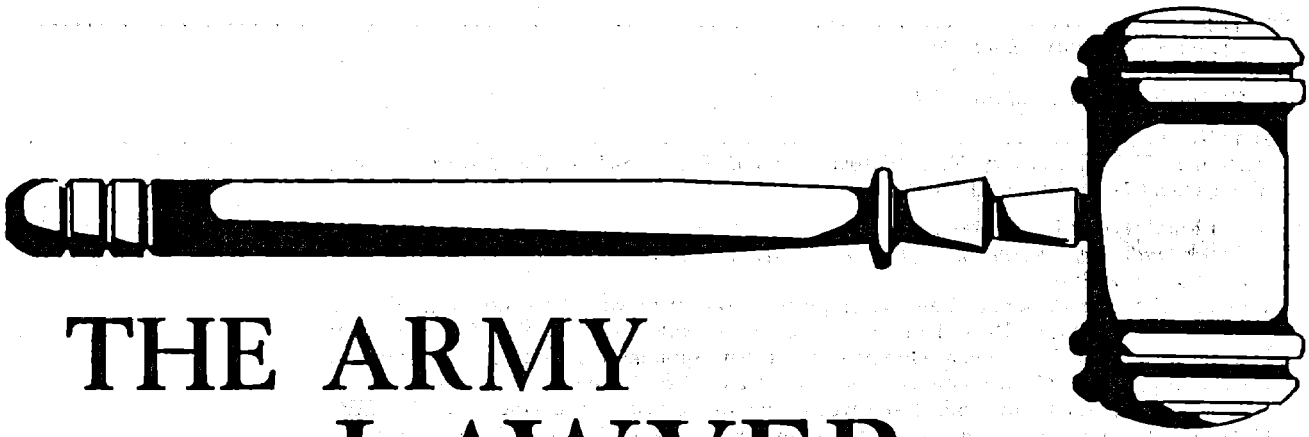

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The Government Right to Offset Under the Debt Collection Act of 1982: A Primer for the Legal Assistance Attorney

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Introduction

Legal assistance attorneys routinely advise soldiers who have debts in amounts that range from the minuscule to the overwhelming. The United States Government is often the creditor. Consider the following situations:

—Lieutenant Newby chose to ignore his bank's demand to repay his federally guaranteed student loan. The installation Finance and Accounting Office (FAO) has now sent him notice of a "salary offset."

—A report of survey officer found Sergeant Smith pecuniarily liable on a Report of Survey for loss of government property. Smith's "barracks lawyer" told him that finance could not collect from Smith's pay without following the procedures in something called a "government debt collection act."

—Major Macho drew BAQ at the with-dependents rate for a year, but saw no need to support his wife while he was on an unaccompanied tour in Korea. The FAO has notified him that it is going to recoup this amount from his salary because he did not support his wife.

—Specialist Jones's enlistment ends this month. He does not believe that the government will ever collect from him the two thousand dollar loss it suffered when he left his personal arms and equipment unsecured during a unit convoy.

Although the Debt Collection Act of 1982 [1] (DCA) does not apply in all of these situations, legal assistance attorneys must know when the DCA does apply and how it affects their clients' rights. The DCA gives the Federal Government the right to exercise administrative offset [2] and salary offset [3] against funds that the government must otherwise pay to individual and corporate debtors. Along with the Federal Government's statutory right to offset income tax refunds, [4] these provisions provide the government with an effective and flexible range of collection techniques. All three offset provisions provide certain procedural rights to debtors and, as general offset statutes, all are subordinate to statutes that establish specific federal rights to offset. [5] This article will provide a brief overview of the DCA; analyze the salary, administrative, and tax refund offset statutes; and, in conjunction with this analysis, discuss defenses and negotiating strategies for legal assistance clients facing government offset.

Background

In November 1980 the Office of Management and Budget (OMB) reported that delinquent debts to the United States Government totaled approximately $25.2 billion. [6] Of this, $13.2 billion was for unpaid taxes, $7.7 billion was for unpaid loans, and the remainder was for overdue interest and overpayments to beneficiaries of federal programs. [7] Concerned by the backlog of debts identified in the 1980 report and subsequent OMB reports, Congress passed the DCA two years later. Through the DCA, Congress intended to reduce the backlog of debts to the Federal Government. [8]

Overview of Provisions of the Debt Collection Act

The DCA provides federal agencies with an effective means of collecting debts. Its salary and administrative offset provisions are general statutory rights to offset. [9]

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[1] Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 28 U.S.C., and 31 U.S.C.).

[2] 31 U.S.C. § 3716 (1982).

[3] 5 U.S.C. § 5514 (1982 & Supp. IV 1986).

[4] Pub. L. No. 98-369, 98 Stat. 1153 (1984) (codified at 31 U.S.C. § 2720A (Supp. IV 1986)).

[5] *See, e.g.*, 5 U.S.C. § 5514(c) (Supp. IV 1986) (salary offset statute in section 5514(a) does not modify preexisting statutes concerning forfeitures of pay and allowances). For the Army and the Air Force, 37 U.S.C. § 1007 (1982) provides specific statutory authority for military salary deductions for pecuniary liability in reports of survey as well as for other administrative deductions. *See infra* text accompanying notes 45-49. *See also* 64 Comp. Gen. 142, 146 (1984) (salary offset and administrative offset under the DCA provide generalized authority to collect debts owed to the United States).

[6] S. Rep. No. 97-378, 97th Cong., 2d Sess. (1982).

[7] *Id.*

[8] *Id.* Congress was particularly concerned because civilian employees, unlike soldiers and airmen, were not subject to salary offset for debts such as those arising from reports of survey. The DCA gave all federal agencies salary offset power. The DOD implemented this authority through Dep't of Defense Directive 7045.18, Collection of Debts Due the United States (Mar. 13, 1985). The Army's implementation has been through its Debt Collection Handbook for Civilian Employees (1987). The Director of Finance and Accounting will incorporate this handbook into the next version of Army Reg. 37-105, Financial Administration: Finance and Accounting for Installations—Civilian Pay Procedures (4 May 1984) (telephone interview with representative of the Legal Office, U.S. Army Finance & Accounting Center, Fort Benjamin Harrison, Indiana (3 Mar. 1989)). Civilian employees pending pecuniary liability under a report of survey are eligible for legal assistance. *See* Army Reg. 27-3, Legal Services: Legal Assistance, para. 2-4a(8)(b). Therefore, legal assistance attorneys should have a working knowledge of the statutory underpinnings of offset against civilian employee pay.

[9] *See supra* note 5.

Although specific offset statutes have priority over the DCA and are not affected by it, the DCA gives the Federal Government access to a wide range of monies and offset techniques that it may use to liquidate debts. Any person, corporation, or entity other than another federal agency is subject to offset under the DCA. [10]

To enhance the effectiveness of existing claims collection procedures, [11] Congress also included a variety of other collection-related provisions in the DCA. [12] In addition to the administrative and salary offset provisions discussed below, the DCA allows federal agencies to notify consumer reporting agencies when individuals are overdue in reimbursing the government. [13] The DCA also allows federal agencies to contract with debt collection agencies for their services in recovering debts to the government. [14] It permits the Internal Revenue Service (IRS) to release debtors' mailing addresses to other federal agencies and to consumer reporting agencies that prepare credit reports on taxpayers for federal agencies. [15] The DCA requires that agencies administering federal loan programs obtain social security numbers from applicants, thereby enhancing the agencies' ability to locate debtors through IRS records. [16] The DCA also clarified rules in the Federal Claims Collection Act [17] for charging interest, penalties, and processing fees for delinquent debts. [18]

In one of the more significant changes in the DCA, Congress amended the six-year statute of limitations for government claims to provide that agencies may now take administrative setoff until ten years after a debt accrues. [19] Although the six-year statute of limitations remains an effective limit on the time in which an agency may litigate a debt and obtain a judgment, the statute does not limit administrative setoff to six years if agencies determine that collection is cost-effective. Several courts have had the opportunity to review this change in the past few years. These courts have consistently upheld federal offset action more than six years after debts accrued. [20]

Additionally, in 1986 Congress established a three-year pilot program that authorizes the Attorney General to contract with private attorneys for legal services in debt collection. [21] These private attorneys may negotiate, compromise, and litigate debt collection actions on behalf of the Federal Government. [22] These and other changes in the DCA [23] have strengthened the government's ability to collect debts, particularly through setoff actions. [24]

Salary Offset

Purpose

Congress's resolve to strengthen federal debt collection authority is best illustrated by the expansive scope of salary offset under the DCA. Section 5 of the DCA authorizes federal agencies to deduct, on a monthly basis, fifteen percent of the disposable pay of soldiers and civilian employees who owe past-due debts to the agencies. [25]

The salary offset statute defines pay in broad terms. "Pay" includes not only authorized pay, special pay, and incentive pay, but also retired pay and retainer pay. [26] Accordingly, retired soldiers are not beyond the purview of agency authority under the salary offset statute. The statute defines "disposable pay" as pay remaining after agencies deduct amounts federal law

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[10] *See* Federal Claims Collection Standards, 4 C.F.R. § 101.2(a) (1988) [hereinafter FCCS].

[11] *Id.* The FCCS uses the terms "debt" and "claim" interchangeably, as will this article. For purposes of this article, the terms "setoff" and "offset" are also synonymous. A debt is delinquent when a debtor fails to pay it by the time specified in an agency demand letter or by the time established contractually. *Id.*

[12] *See generally* Rigg, *Intercept of Tax Refunds to Offset Debts Owed Federal Agencies: Part I*, 20 Clearinghouse Rev. 557 (1986); Calvert, *Federal Debt Collection Act of 1982 Adopted*, 88 Com. L. J. 37 (1983); Ward, *Debt Collection Act of 1982*, 26 Res Gestae 252 (1982).

[13] 31 U.S.C. § 3711(f) (1982).

[14] *Id.* § 3718(a) (1982).

[15] 26 U.S.C. § 6103(m) (1982).

[16] *See, e.g., id.* § 6103(m)(4).

[17] *Id.* §§ 3701, 3702, 3711-3720A (1982 & Supp. IV 1986).

[18] *Id.* § 3717 (1982).

[19] 31 U.S.C. § 3716(c) (1982). *See also* 28 U.S.C. § 2415(i) (1982).

[20] *See* Thomas v. Bennett, 856 F.2d 1165, 1169 (8th Cir. 1988); Gerrard v. United States, 656 F. Supp 570, 574 (N.D. Cal. 1987).

[21] 31 U.S.C. § 3718(b) (Supp. IV 1986).

[22] *Id.*

[23] The DCA makes it a federal offense to kill a federal debt collector. 18 U.S.C. § 1114 (1982). The DCA also allows the IRS to disclose delinquent tax accounts to federal agencies administering loan programs. 26 U.S.C. § 6103(l) (1982).

[24] While this article focuses primarily on the effect of the DCA on soldiers' salaries and allowances, the DCA also affects civilian employees, in many cases to a greater extent than it affects soldiers. *See supra* note 8.

[25] 5 U.S.C. § 5514(a)(1) (1982).

[26] *Id.* The Comptroller General has held that the statutory definition of "retired pay" pertains to military retired pay only. 64 Comp. Gen. 907, 909 (1985). Agencies must use administrative offset under 31 U.S.C. § 3716 to reach retirement fund payments to retired civilian employees. 64 Comp. Gen. 907, 909-10.

requires agencies to withhold. [27] Withholdings include: 1) fines and forfeitures imposed by courts-martial or by commanders under article 15 of the Uniform Code of Military Justice; 2) federal, state, and local income taxes; 3) normal retirement contributions; 4) Survivor Benefit Plan contributions; and 5) Serviceman's Group Life Insurance premiums. [28] Because agency finance offices routinely withhold these amounts anyway, disposable pay is essentially what a soldier or employee hopes to receive at the end of the month. Salary offset, therefore, has a large corpus of pay from which a creditor agency may take its fifteen percent.

Procedures

Under the DCA, an agency must give debtors a minimum of thirty days written notice of the agency's intent to collect debts through deductions from pay. [29] The notice must include the nature and amount of the debt and an explanation of rights under the Act. [30] The notice must further advise debtors that they have the right to inspect and copy records pertaining to the debt, to negotiate and conclude a written agreement scheduling repayment to the agency, and to request a hearing. An agency must grant a hearing when debtors petition for the hearing within fifteen days after they receive notice of the government's intent to begin involuntary deductions from their pay. [31]

The DCA provides additional procedural protections to debtors. Heads of creditor agencies may not control the officials who conduct hearings under the salary offset procedures. [32] Therefore, when a debtor to the Army is facing salary offset under section 5 of the Debt Collection Act, the hearing official cannot be from the Department of the Army. Department of Defense (DOD) regulations direct DOD creditor agencies to use hearing officials from other DOD agencies when possible. [33]

Each DOD component is responsible for selecting individuals to serve as hearing officials when other military services request such assistance. Hearing officers will ordinarily be grievance or appeals examiners, judge advocates, attorney advisors, or others with proper training and experience. [34]

When a soldier or a DA civilian employee requests a hearing under the salary offset procedure, the Collections Division, United States Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana, is responsible for selecting which DOD component will conduct the hearing. [35] Conversely, when a soldier or DA civilian owes a debt to another federal agency or DOD component, that agency or component is responsible for ensuring the debtor is afforded all due process rights, including a hearing before salary offset begins. [36] Furthermore, the creditor agency must certify to the Army FAO that the agency followed due process procedures under the salary offset statute. [37] Once the processing Army FAO receives the certification, however, the FAO is not authorized to question the merits of the debt involved or allow the debtor to challenge the debt or its amount. [38]

Department of Defense regulations implementing section 5 of the DCA provide further guidance to the military services. Oral hearings under the DCA will be informal, but both the government and the debtor may present evidence, witnesses, and arguments. [39] Debtors must pay for their personal transportation to the hearing, their representation, and their expenses in inspecting and copying documents. [40] Hearing officers have sixty days after hearings in which to provide debtors written notice of the officers' decisions. [41]

Department of Defense regulations also require collecting officials to be reasonable in setting the amount of monthly deductions. The amount deducted may not exceed fifteen percent of the employee's disposable income. [42] If the employee's living expenses and other debts indicate that fifteen percent of disposable pay may

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[27] *Id.*

[28] 32 C.F.R. § 90.3(c) (1987).

[29] 5 U.S.C. § 5514(a)(2) (1982).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] 32 C.F.R. § 90.6E (1987).

[34] *Id.*

[35] U.S. Army Finance and Accounting Center Debt Management Handbook, para. 18d (13 Feb. 1987) [hereinafter Debt Handbook]. The Director of Finance and Accounting will incorporate the Debt Handbook into Army Reg. 37-1, Financial Administration: Army Accounting Guidance (16 Mar. 1988) (telephone interview with representative of Legal Office, U.S. Army Finance & Accounting Center, Fort Benjamin Harrison, Indiana (8 Mar. 1989)).

[36] 32 C.F.R. § 90.6E (1987).

[37] *Id.*

[38] Debt Handbook, para. 25b.

[39] 32 C.F.R. § 90.6E (1987).

[40] *Id.*

[41] *Id.*

[42] *Id.*

create a financial hardship, the agency should lower the amount of the deduction. The amount of deduction ordinarily should ensure that FAO liquidates the debt in three years. [43] Additionally, under the regulation, the FAO must give priority to DOD when a debtor owes other federal agencies. [44]

Persons Affected by Salary Offset

Soldiers and DA civilians are commonly indebted to the government through pecuniary liability in reports of survey. Although DA uses the DCA to offset the salaries of civilian employees who have been held pecuniarily liable in reports of survey, DA does not use the DCA as authority to collect these debts from soldiers. [45] Congress provided specific statutory authority elsewhere in the United States Code for DA to deduct from military pay "[t]he amount of any damage . . . to arms or equipment caused by the negligence of a member of the Army." [46] When an approving authority approves a surveying officer's assessment of pecuniary liability, FAO may immediately begin deductions from a soldier's pay. Because the Army takes these deductions under specific statutory authority as implemented by separate DA regulations, [47] the approving authority may direct FAO to begin deductions from military pay without observing the procedural requirements in the DCA. Therefore, the DCA does not apply to the hypothetical Sergeant Smith, because his indebtedness arose from a report of survey.

Similarly, other provisions of the United States Code provide specific authority for the military services to take monthly deductions from the pay of soldiers "who are administratively determined to owe the United States or its instrumentalities." [48] In fact, Department of Defense (DOD) policy is to collect soldiers' debts to DOD through this authority rather than through the DCA. For example, Major Macho is indebted to the Army. He drew BAQ allowances improperly because he failed to support his wife. The government will collect on this debt under specific statutory authority rather than under the DCA. [49]

Soldiers are, however, subject to salary offset under the DCA in several circumstances. When agencies outside DOD certify their compliance with salary offset procedures, the Army uses salary offset under section 5 of the DCA to collect soldiers' debts to these agencies. [50] For example, if the Department of Education (DOE) submits proper certification, the Army will offset soldiers' salaries under the DCA to collect overdue payments for student loans.

In the first hypothetical situation above, the DOE could request that the Army offset Lieutenant Newby's salary. The DOE must first certify to the Army that it has complied with the procedural requirements of the DCA. After the DOE submits this certification, the Army must begin salary offset. Department of Defense regulations do not allow the Army to entertain Lieutenant Newby's challenge to the debt or to the amount of offset in this situation. Newby must raise his challenge earlier in the process, during the hearing that the DOE must offer him.

Salary offset under the DCA also affects soldiers who retire from service with outstanding debts. The statutory language in the DCA, as well as in the implementing regulations issued by GAO and DOD, [51] establish salary offset as a very effective option for the Department of the Army. If Specialist Jones in the last hypothetical were about to retire, rather than separate, the government would collect any remaining debt from his retirement pay after he retired.

Practical Considerations

Whether the DCA applies to a particular debt is important to legal assistance attorneys because of the procedural protections in the DCA. Section 5 of the DCA provides soldiers facing deductions substantially more due process before salary offset than they will receive under the report of survey procedure. [52] When commanders hold soldiers pecuniarily liable under reports of survey for the loss of arms or equipment, the fifteen percent limitation on deductions from pay under the DCA is inapplicable. The specific statute authorizing reports of survey requires only that FAO take deductions from disposable pay. [53]

Attorneys advising soldiers who have received notice that non-DOD agencies intend to invoke salary offset should ensure that the creditor agencies have met the requirements of the DCA. Attorneys should pay particular attention to whether debtors received sufficient writ-

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[43] *Id.*

[44] *Id.*

[45] Department of Defense Military Pay and Allowances Entitlements Manual, para. 70703 (9 Mar. 1987) [hereinafter DOD Pay Manual]; Debt Handbook, para. 11. *See supra* note 8.

[46] 37 U.S.C. § 1007(e) (1982). For a discussion of the report of survey statute, see *supra* note 5.

[47] Debt Handbook, para. 11.

[48] 37 U.S.C. § 1007(c) (1982). *See also* DOD Pay Manual and Debt Handbook.

[49] The government will collect the overpayment to Macho under 37 U.S.C. § 1007(c), because section 1007(c) provides specific authority for such deductions.

[50] 32 C.F.R. § 90.6E (1987).

[51] 4 C.F.R. § 102.4 (1988). The Comptroller General and the Attorney General jointly issued this regulation. Accordingly, the regulation serves as a guide to federal agencies in debt collection efforts ranging from administrative assertions to federal litigation.

[52] *See generally* Army Reg. 735-5, Property Accountability: Policies and Procedures for Property Accountability, para. 14-21 (15 Feb. 1988).

[53] 37 U.S.C. § 1007(e) (1982).

ten notice of rights, including the right to a hearing. The Comptroller General requires that the salary offset procedure be used whenever an agency attempts to recoup erroneous payments, even when fraud is involved. [54] Therefore, even if creditor agencies initiate administrative offset for an alleged overpayment, debtors are still entitled to the due process required by salary offset under the DCA.

The right to a hearing conducted by an official not under the control of the head of the creditor agency can pose a coordination problem for a collecting agency. A legal assistance attorney should be aware of the logistical difficulties facing a creditor agency. Debtors may find some relief from the amount of a debt or the size of salary deductions by using waiver of the hearing as a bargaining chip with collecting officials. If the agency has already conducted a hearing, an attorney should ensure that the creditor agency complied with procedural requirements. Obviously, the hearing official should not have been from the creditor agency. If a student loan is involved, for example, the hearing officer should not have been from the DOE. Procedural errors of this nature should be the source of at least temporary relief from debt collection by salary offset.

Administrative Offset

Purpose

Section 10 of the DCA amended the Federal Claims Collection Act of 1966 [55] to allow the United States to exercise administrative offset of money otherwise payable to debtors. [56] The DCA defines administrative offset as "the withholding of money payable by the United States to . . . a person to satisfy a debt owed the United States by that person." [57] Administrative offset differs significantly from salary offset. These differences are both substantive and procedural in nature and involve the amount and source of deductions as well as due process prerequisites to offset.

Procedures

Under administrative setoff, all amounts the government pays to a debtor are potentially subject to offset. [58] The DOD does not, however, use administrative offset to collect pay that is also subject to salary offset. [59] By following this policy, DOD does not have to observe the procedural prerequisites to salary setoff. Instead, DOD collects from allowances such as basic allowance for quarters and basic allowance for subsistence or from other non-salary sources. [60] Theoretically, the DOD may setoff up to two-thirds of pay under the DCA administrative setoff statute. [61] The DOD policy restricting setoff to allowances and amounts other than pay, however, will result in considerably smaller setoffs. Nevertheless, when a debtor separates from service, a DOD agency may administratively offset up to 100 percent of final pay as well as allowances and lump-sum leave payments in satisfaction of the individual's debts to the government. [62]

Unlike salary offset, creditor agencies must attempt to collect payment under the provisions of the Federal Claims Collection Act (FCCA) before they may exercise administrative offset. [63] The Federal Claims Collection Standards (FCCS), which implement the FCCA, require, in part, three "progressively stronger" written demands for payment at thirty-day intervals. [64] Department of Defense implementing regulations, however, allow an agency to omit FCCA collection attempts if necessary to protect the government's interests, such as when the statute of limitations is about to run. [65] Additionally, under the FCCA the head of an agency may compromise claims up to $20,000 or suspend or end collection action when the debtor will likely never have the ability to pay or collection costs will exceed the debt in question. [66]

If a DOD agency has been unsuccessful in its attempts to collect a debt under the FCCA, the agency may then consider administrative setoff under the DCA. Proposed Army regulations [67] require that Army FAO's provide

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[54] Army Comp. Gen. B-224750 (25 Sept. 1987). Arguably, this opinion is in conflict with DOD policy to not grant salary offset procedures to soldiers who are subject to administrative deductions under 37 U.S.C. § 1007(c). If FAO determines that MAJ Macho fraudulently drew BAQ at the with-dependents rate, under this Comptroller General decision the DOD must grant MAJ Macho the due process required by salary offset under 5 U.S.C. § 5514.

[55] Pub. L. No. 89-508, 80 Stat. 308 (1966) (codified as amended in 31 U.S.C. §§ 3701, 3702, 3711-3720A (1982 & Supp. IV 1986)).

[56] 31 U.S.C. § 3716 (1982).

[57] *Id.* § 3716(d).

[58] 32 C.F.R. § 90.6F.1 (1987). When debtors declare bankruptcy, however, the majority of federal courts do not allow federal agencies to use administrative offset under 31 U.S.C. § 3716 against monies owed to the debtor. *See, e.g.*, *In re* Mehrhoff, 88 Bankr. 922, 929-34 (Bankr. S.D. Iowa 1988); *In re* Butz, 86 Bankr. 595, 601-02 (Bankr. S.D. Iowa 1988); *In re* Britton, 83 Bankr. 914, 917 (Bankr. E.D.N.C. 1988). *But cf.* United States v. Rinehart, 88 Bankr. 1014, 1017-18 (D.S.D. 1988).

[59] 32 C.F.R. § 90.6F.1 (1987).

[60] *Id.*

[61] Debt Handbook, para 12 - 13, *See also* DOD Pay Manual, para. 70704a(4).

[62] DOD Pay Manual, Rule 2, Table 7-7-6, Note 2 and para. 70704a(4). *See* 64 Comp. Gen. Dec. 907, 911-12 (1985) (administrative offset procedures under the DCA control agency deductions from an employee's final pay check and lump-sum leave payment).

[63] 31 U.S.C. § 3716(a) (1982).

[64] 4 C.F.R. § 102.2(a) (1988).

[65] 32 C.F.R. § 90.6F (1987).

[66] 31 U.S.C. § 3711 (1982).

[67] Debt Handbook. *See supra* note 35.

debtors the following due process before the FAO's begin administrative setoff:

1) a minimum of thirty days written notice of the nature and amount of the debt and of the government's intent to collect the debt through administrative setoff;

2) the opportunity to inspect and copy government records concerning the debt;

3) the opportunity to request agency review of its determination of indebtedness;

4) the opportunity to discuss and conclude a written agreement with the agency for repayment of the debt; and

5) the opportunity to request that the agency waive or remit the debt. [68]

Additionally, the FCCS entitle a debtor to an informal oral hearing in several circumstances. An agency should grant an oral hearing when the debtor requests waiver of indebtedness and the agency must decide issues of credibility and veracity in connection with the request. [69] An agency should also conduct an oral hearing if the debtor requests that the agency reconsider the debt and available documentary evidence is insufficient to prove the debt. [70]

As a practical matter, documentary evidence is usually sufficient to establish the existence of a debt. The FCCS allow creditor agencies to determine which debt collection systems do not involve credibilty and veracity issues and to exempt these systems from oral hearing requirements. [71] Government loans, for example, typically involve few credibility or veracity issues because agencies usually keep sufficient documentary evidence of these debts.

Persons Affected by Administrative Offset

The DOD uses administrative offset under the DCA in three general circumstances. First, as discussed in connection with salary offset, federal law does not provide a specific statute authorizing offset of government civilians' pay in collection actions such as reports of survey. Therefore, an Army FAO may elect to use either administrative offset or salary offset under the DCA when civilian employees are indebted to the Army. [72]

Second, DOD uses administrative offset under the DCA when DOD components refer debts to federal agencies outside DOD for collection. [73] In light of the burdens salary offset imposes on creditor agencies, this policy is probably the most practical alternative. Otherwise, to accomplish salary offset, the DOD creditor agency must coordinate not only with the federal agency employing the debtor, but also with an agency for a hearing officer. The debtor's employing agency can simplify this process if it agrees to furnish the hearing official. If the debtor is not a DOD employee, however, DOD policy directing use of DOD hearing officers would interfere with such a plan.

Third, DOD uses administrative offset under the DCA as its primary authority to collect debts owed by "out of service debtors." [74] Soldiers who separate before they retire are most likely to be affected by administrative offset in this area. An out of service debtor is "[a] former civilian employee or member of the armed forces who no longer receives any compensation from the federal government." [75] If soldiers separate from service before they are eligible for retirement, the Army will use administrative offset from final pay and allowances to liquidate their remaining debts. Ordinarily, the maximum amount that FAO may collect is two-thirds of the debtor's pay, less the amounts FAO uses to determine disposable pay. [76] The two-thirds limitation does not apply when a soldier or civilian employee separates voluntarily or when the Army discharges enlisted soldiers for fraud, desertion or mental incompetency. [77]

Administrative offset under the DCA does not apply to the hypothetical case of Specialist Jones if his indebtedness arose from a report of survey. The specific statutory authority for reports of survey controls such a collection. The FAO will, however, collect other indebtedness, such as overdue loans, through administrative offset of his final pay and allowances under the DCA. If Jones' final pay and allowances are insufficient, the government may consider tax refund offset.

Practical Considerations

Although creditor agencies have ten years in which to seek administrative offset, the six-year statute of limitations is still effective for litigation purposes. Agencies may not litigate debts more than six years after the debts accrue. [78] Therefore, neither the Department of Justice

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[68] *Id. See also* 32 C.F.R. § 90.6F (1987).

[69] 4 C.F.R. § 102.3(c)(1) (1988).

[70] *Id.*

[71] *Id.* § 102.3(c)(2).

[72] Debt Handbook, para. 11. For reports of survey, the Debt Handbook directs salary offset, but agencies may liquidate other types of civilian employee indebtedness by administrative offset.

[73] *Id.* para. 8a.

[74] 32 C.F.R. § 90.6F.1. (1987).

[75] *Id.* § 90.3(g).

[76] Debt Handbook, para. 12 - 13.

[77] DOD Pay Manual, Rule 2, Table 7-7-6, Note 1.

[78] 28 U.S.C. § 2415 (1982).

nor contracted collection attorneys may obtain judgments on debts more than six years after the debts accrued. If a client's debt is more than six years past due, a legal assistance attorney may be in a better position to negotiate a repayment schedule or to reduce the amount the debtor must pay. The creditor agency may find that negotiating such a resolution is more cost effective than processing an administrative offset action.

When clients have credibility or veracity issues involving an alleged debt, to qualify for a hearing, they should immediately raise these issues. The proper vehicle for raising the issues is the debtor's response to the initial agency notification. In an unpublished decision, the Court of Appeals for the Federal Circuit held that a debtor's request for a hearing to examine legal issues was an insufficient basis for an agency to grant a hearing in an administrative offset action. [79] The debtor waived his opportunity for a hearing because he failed to specify credibility and veracity issues in his response to the agency notification. [80]

Tax Refund Offset

Purpose

Two years after Congress enacted the DCA, it added tax refund offset as yet another method of federal debt collection. [81] This enables any federal agency, including DOD, to collect past due debts whenever the IRS owes a tax refund to an agency debtor. This provision provides creditor agencies greater flexibility in collection methods as well as a wider range of potential sources for offset.

Procedures

The procedural requirements of tax refund setoff, unlike those in administrative setoff, are quite detailed. Department of the Treasury regulations prescribe when other federal agencies may submit notices of past-due debts, how the notices should be submitted, and what the notices should contain. [82] The DOD responded to these requirements by entering a memorandum of understanding with the IRS and began participating in the IRS Income Tax Refund Program in 1987. [83]

The DOD regulations establish a number of prerequisites before a DOD agency may refer past due debts to the IRS for offset. An agency must take the following actions:

1) notify debtors that their debts are past due;

2) notify debtors that the agency intends to refer their debts to the IRS for offset unless the debtors pay their debts within sixty days;

3) advise debtors of actions the debtors may take to defer or prevent offset;

4) consider debtors' responses, if any, and determine that the debts are still enforceable;

5) determine that the debts have been delinquent for at least three months, but not more than ten years;

6) conclude that the debts cannot be collected under the salary offset provisions of the DCA;

7) determine that the debts are either ineligible for administrative offset under DCA or cannot be collected by administrative offset from amounts payable to the debtors;

8) disclose the debts to a consumer reporting agency; and

9) ensure that the debts are for at least $25.00 each. [84]

Persons Affected by Tax Refund Offset

DOD agencies use tax refund offset to collect debts from soldiers and civilian employees who separate from government service before they are eligible for retirement. Because these individuals do not draw retired pay, agencies cannot rely on the offset provisions of the DCA to satisfy the individuals' debts. If the soldiers' and employees' final pay and allowances are insufficient to liquidate any remaining debts to the government, creditor agencies may use tax refund offset. In Specialist Jones's case, if his final pay and allowances were insufficient to liquidate his $2000.00 debt to the government, then the FAO could begin procedures for tax refund offset.

Department of Defense regulations prohibit DOD agencies from pursuing tax refund offset when the agencies can pursue salary offset against debtors. [85] These DOD regulations have no effect, however, when a non-DOD federal agency, such as the Department of Education, seeks offset from an active duty soldier's tax refund.

Spouses and dependents of soldiers are more likely targets of IRS setoff actions if they owe debts to DOD agencies. If soldiers' spouses and other family members are not employed by the Federal Government, these family members have no federal salary from which the agency can otherwise exercise setoff. Under these circumstances, the IRS and DOD prerequisites to tax refund setoff are met.

Practical Considerations

Each year, by 2 January, participating DOD agencies must send to the IRS magnetic tapes containing sufficient information for the IRS to identify debtors and

[79] Brant v. Cleveland Nat. Forest Svc., No. 88-1357 (Fed. Cir. Oct. 18, 1988) (WESTLAW, Allfeds library).

[80] *Id.*

[81] 31 U.S.C. § 3720A (Supp. IV 1986).

[82] 31 C.F.R. part 5 (1988).

[83] 32 C.F.R. § 90.6N.3 (1987).

[84] *Id.* § 90.6N.4.

[85] *Id.*

begin the offset process.[86] Attorneys should advise debtors who wish to avoid offset actions and receive their full tax refunds to pay their past due debts before the first of the calendar year.

Legal assistance attorneys should carefully review the tax refund offset notices their clients receive from federal agencies. If their clients are on active duty and the creditor agency is a DOD component agency, DOD regulations prohibit tax refund offset under these circumstances. Clients must respond to these notices and make their active duty status a matter of record.

Attorneys should also warn soldiers of the consequences of filing joint returns with spouses who owe past due debts to the government. They should be prepared to advise these soldiers on how to avoid the impact of tax refund offset under these circumstances.

Tax refund offset is a well-established agency means of debt collection, as evidenced by the success agencies have enjoyed in defending against legal challenges to offset of tax refunds.[87] Because the concept of income tax refund offset has survived legal attacks, legal assistance attorneys must resort to scrutinizing agency action for procedural defects. Clients who fail to assert potential procedural challenges can expect to find reduced tax refunds.

Conclusion

The Debt Collection Act of 1982 provides the Federal Government with an extensive arsenal of weapons for debt collection. The government now has a means of offsetting the salaries of civilian employees who become indebted through actions such as reports of survey. The Army, however, will not ordinarily use the DCA to offset soldiers' salaries and allowances because it has specific statutory authority for such offsets. As a result, the right to a hearing that is available to a civilian employee before salary offset action from a report of survey is not available to a soldier indebted under the same facts.

Although Congress enacted the tax refund offset statute after the DCA, it is an important component in agency collection efforts. It provides creditor agencies with the ability to reach not only those who default on loans, but, in the case of the military, to reach soldiers and civilian employees who leave service with outstanding debts. While salary offset is an effective collection technique for debts of military retirees, it cannot reach other "out of service debtors." As a last resort in this situation, tax refund offset is extremely effective.

Legal assistance attorneys should therefore understand the difference between administrative offset and salary offset under the DCA as well as the differences between these DCA statutes and the specific authority under which reports of survey are processed. They should know how each of these statutes affects their clients, and understand that federal agencies may use income tax refund setoff to satisfy debts long after their clients leave active service.

Debt Collection Act Matrix

Type of Debt	Salary Offset	Administrative Offset
Civilian employee debt to Army	yes	yes
Civilian employee debt to other agency	yes	yes
Civilian separated, not retired	N/A	yes
Civilian retired, debt at retirement	yes	yes
Civilian retired, debt after retirement	no (*Comp. Gen.*)	yes
Soldier debt report of survey	no (*use 37 U.S.C. § 1007(e)*)	no
Solider debt for administrative reasons	no (*use 37 U.S.C. § 1007(c)*)	no
Soldier debt to non-DOD agency	yes	yes
Soldier separated, not retired	N/A	yes
Soldier debt at retirement	yes (*but see 37 U.S.C. §§ 1007(c), 1007(e)*)	yes
Soldier debt after retirement	yes	yes

[86] *Id.* § 90.6N.5.

[87] *See, e.g.*, Thomas v. Bennett, 856 F.2d 1165, 1169 (8th Cir. 1988) (Secretary of Education had authority to offset income tax refund in satisfaction of student loan, even though the statute of limitations on judicial enforcement had run); Gerrard v. United States, 656 F. Supp. 570, 574-75 (N.D. Cal. 1987) (federal tax refund offset program provided Secretary of Education authority to offset tax refund after six-year statute of limitations had run; debtor had sufficient notice of offset).

Speech Before the 1989 Army Major Command EEO Officer Conference: The Army Senior Executive Service Affirmative Action Policy

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The Army's Senior Executive Service (SES) Affirmative Action policy is set out in a memorandum issued by the former Assistant Secretary of the Army, Delbert Spurlock, to the Director of the Army Staff, dated September 23, 1988. The policy, which applies to all vacant Army SES and GS/GM 15 positions, has three major elements. First, Secretariat and Army staff functional officials are required to play a more active role in the recruitment process through review of the recruitment efforts and the development of the finalist lists for these positions. Second, in those cases where either no minorities or women applied for a position or none were placed on the best-qualified list, the policy prohibits the selection of any individual for the position unless functional officials are satisfied that diligent efforts were made to locate and attract qualified minority group and women applicants. Third, if a woman or a minority group member is on the best-qualified list, the comments of the concerned functional official must be solicited and considered before selection of another competitor is permitted. My remarks this afternoon will describe the background leading to this policy, some of the legal considerations affecting the development of the policy, and the results of the policy thus far.

The first thing to consider is the legal background, because this provides the context in which the policy arose. The legal background begins with *Bakke.* [1] As you may recall, this case involved a set aside program of sixteen places out of one hundred for minority group applicants to the medical school of the University of California at Davis. The program was found to be unlawful by the Supreme Court. Writing for the Court, Justice Powell held that, under the equal protection clause, racial classifications of any sort are inherently suspect. They are permissible only if they are precisely tailored to serve a compelling governmental interest. Countering the effects of "societal discrimination" was not a compelling governmental interest. The government has a substantial interest only in correcting the effects of specific, identified discrimination. On the other hand, obtaining the educational benefits that flow from having a diverse student body was a permissible goal in view of the first amendment protection of academic freedoms. According to the Court's opinion, however, the set aside involved in the medical school's affirmative action plan was not necessary to promote its interest in diversity. Why not? Because there was a permissible alternative in the form of the Harvard plan. The Harvard plan was an affirmative action plan used for the selection of applicants for admission to Harvard College. Such a plan requires consideration of many factors, but allows race or ethnic background to be considered favorably with respect to the goal of diversity. *Bakke* was considered by some to be a breakthrough because it acknowledged there might be some circumstances in which race could be considered by a government actor.

In his dissent in the *Bakke* case, Justice Blackmun said:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot —we dare not—let the equal protection clause perpetrate racial supremacy. So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose? [2]

After *Bakke* the next case of importance is *Webber,* [3] which involved the set aside of fifty percent of the openings in an in-plant craft training program until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force. Justice Brennan wrote the opinion for the Supreme Court, holding that Title VII does not prohibit a private employer's voluntary race conscious affirmative action plan designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. Early in the opinion, however, Justice Brennan made the point that, because state action was not involved, the Court was not deciding whether the plan violated the fourteenth amendment. Rather, the Court was deciding the case strictly on Title VII grounds.

After *Bakke* and *Webber* there was great interest among Army officials in permitting the use of race and sex as non-determinative selection factors for merit promotion selections. In fact, this authority was included for a few years in the Army's merit promotion regulation (over the objections of many lawyers in the Department of Army).

More recently, in *Johnson v. Transportation Agency,* [4] the Supreme Court reviewed the affirmative action plan of the Santa Clara Transportation Agency in Santa Clara, California. The plan allowed consideration of sex as one factor in selection for promotion to positions

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[1] University of California Regents v. Bakke, 438 U.S. 265 (1978).

[2] *Id.* at 406-07.

[3] United Steel Workers of America v. Webber, 443 U.S. 193 (1979).

[4] 480 U.S. 616 (1987).

within a traditionally segregated job classification in which women were significantly under-represented. Writing for the Court, Justice Brennan upheld the state voluntary affirmative action plan, again deciding the issue solely on the basis of Title VII. No constitutional issues were raised or decided. The Brennan opinion stated that the Santa Clara plan represented a moderate, flexible, case-by-case approach to effecting gradual improvement in the representation of minorities and women in the agency's workforce. The plan was designed to eliminate an identified conspicuous imbalance in a job category traditionally segregated by race and sex. In this case there were 238 positions, none filled by women. Justice O'Connor asserted that a prima facie claim of discrimination could be shown, based on this "inexorable zero."

Justice Brennan noted that there were five reasons that the Court believed the plan neither unnecessarily trammeled the rights of male employees nor created an absolute bar to their advancement. First, there were no positions set aside for one sex. Second, sex was only one of several factors to be considered by the selecting official. Third, each woman had to compete with all the other qualified applicants. Fourth, the male competitors had no absolute entitlement to the positions. And fifth, the selecting officials could choose any of the seven individuals referred on the best-qualified list.

Army officials immediately raised the question: If Santa Clara Transportation Agency, a government unit, can do this, why can't the Army? The answer lies in the Constitution. The constitutional issues were raised in *Wygant v. Jackson Board of Education.* [5] This involved a different sort of set aside from the one in *Bakke.* In this case there was a collective bargaining agreement between the teachers and the Jackson Board of Education. The bargaining agreement provided that, in the event of a layoff, the teachers would be laid off in reverse order of their seniority—except that the percentage of minority group teachers laid off could not exceed the percentage of minority group teachers employed at that time. The district court held that the racial preferences were a permissible attempt to remedy societal discrimination in order to provide role models for minority school children. The Supreme Court reversed, holding that this provision of the bargaining agreement violated the equal protection clause of the fourteenth amendment. Justice Powell, writing for the Court, held that a governmental classification or preference based on race or ethnic group must be justified by a compelling government interest and that the means chosen to effectuate the purpose must be narrowly tailored to the achievement of that goal. Providing minority faculty role models was an insufficient interest. A public employer must have convincing evidence of prior discrimination in its own employment practices before it embarks on an affirmative action plan. Justice O'Connor, a key voter in this case and others, indicated in her concurring opinion that the state must have a firm basis for believing that remedial action is required. The state can undertake an affirmative action program to further a legitimate remedial purpose provided that the means to implement the purpose do not unnecessarily trammel the rights of innocent individuals. [6]

These Supreme Court cases lead to the conclusion that, without convincing evidence of past discriminatory practices by Army activities, Army officials *cannot* consider race or sex as a selection factor. This conclusion is reinforced by subsequent circuit court decisions. There have been at least ten circuit court cases involving affirmative action plans decided since *Wygant* and *Johnson.* [7] In these ten cases all the affirmative action plans involved race and sex preferences. In nine of these cases the courts disapproved of the plans, either because there had not been an adequate finding of past discriminatory practices by the employer or agency, or because the plans had not been narrowly tailored to remedy identified discrimination. The only case upholding an affirmative action plan was *Higgins v. City of Vallejo.* [8] *Higgins* permitted the selecting official to consider race or sex as a favorable factor when selecting from the top three best-qualified candidates on a referral list. The Supreme Court denied certiorari in this case on February 27, 1989. When you read the circuit court opinion carefully, you will see that the court upheld the plan because the California Fair Employment Practices Commission had found evidence of past discriminatory practices by the city. Thus, *Higgins* is entirely consistent with *Bakke* and *Wygant.*

Based on *Johnson, Wygant,* and the ten circuit court cases, there is a consensus among the Army lawyers I have spoken with that Army affirmative action plans involving race and sex preferences or set asides are permissible only under the following conditions: First, the percentage of women and minority groups in the Army activities' workforce must be compared to the percentage in the relevant labor pool. This comparison must demonstrate a significant disparity that cannot be explained by societal discrimination alone. Second, there must be other evidence that could support the conclusion that the activity concerned has engaged in discriminatory practices in the past. Third, on the basis of this statistical and other evidence, the activity concerned must establish an affirmative action plan tailored to remedying this arguable discrimination. Fourth, the plan

[5] 476 U.S. 267 (1986).

[6] *Id.* at 287.

[7] Barhold v. Rodriguez, 863 F.2d 233 (2d Cir. 1988); Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984), *remanded*, 481 U.S. 1001 (1987), *aff'd*, 836 F.2d 1034 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1310 (1989); Michigan Road Builders Assn, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987); Birmingham Reverse Discrimination Emp. Litigation, 833 F.2d 1492 (11th Cir. 1987); Hammond v. Barry, 826 F.2d 73 (D.C. Cir. 1987), *remanded*, 108 S. Ct. 2023, *aff'd*, 841 F.2d 426 (1988); J. A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 109 S. Ct. 706 (1989); Ledoux v. Greene, 820 F.2d 1293 (D.C. Cir. 1987); Britton v. South Bend Community School Corp., 819 F.2d 766 (7th Cir. 1987); San Francisco Police Off. Ass'n v. San Francisco, 812 F.2d 1125 (9th Cir. 1987); Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989).

[8] 823 F.2d 351 (9th Cir. 1987).

must permit optional consideration of race or sex at the point in the competitive process at which the selecting official is free to choose anyone on the referral list. Finally, the plan must include only general goals for the gradual employment of women and minorities in the jobs and occupations in question, not rigid quotas that must be met.

In light of this background, I want to discuss the events leading to the development of the Army SES Affirmative Action Plan. First of all, a Senior Executive Service Candidate Development Program is required by the Civil Service Reform Act. [9] The law requires agencies, under Office of Personnel Management guidance, to provide for the systematic development of candidates for the SES. The Army has developed a competitive evaluation process to select participants for its program. In late 1986 a pool of competitors was being assembled. A couple of the applicants complained to Mr. Spurlock that the selection process for that pool was biased. As part of his effort to look into that complaint, Mr. Spurlock called for a review of career program statistics. Upon review he observed there was a large pool of white male candidates at the GM-15 level. When Mr. Spurlock reviewed these statistics, he saw that filling SES vacancies from this pool would block opportunities for minorities and women for many years to come. As a result of this conclusion, in June 1987 he directed the cancellation of the program. For the next several months, he searched for a solution. Subsequently, the Chief of Staff of the Army and the Secretary of the Army issued a joint memorandum dated July 20, 1988, to the Secretariat, Army staff, and major commands, directing the assessment of women and minority group employees at the GS/GM-13 through 15 level and requiring a plan for improving their representation. The Assistant Secretary also requested the development of an SES Affirmative Action Program that would entail involvement of Secretariat functional officials and career program chiefs to a greater degree than they had been before. As Mr. Spurlock stated in his September 23, 1988, memorandum, "We have succeeded in advancing minority members and more recently women in the uniformed military structure by understanding the strategic and operational value of minorities and women in leadership positions. We can do no less in the civilian side of our structure." The Army SES program is the result of this guidance.

The theory of the Army's plan is that there are well-qualified minority group members and women in the general labor force. Nevertheless, because their numbers are not plentiful, particularly in the technical disciplines such as engineering and science, extra effort is required to find and attract such persons to employment with the Army. Once found, well-qualified minorities and women should be able to compete successfully under valid qualification standards and procedures applicable to all candidates. Their rates of employment in senior positions, however, suggest the need for careful monitoring of the personnel process to ensure that they receive full and fair consideration. Thus, the essence of the Army plan is to require responsible decisionmaking and oversight at key stages of the recruitment process for positions at the GS/GM 15 and SES levels.

The first step in any recruitment process is to make contact with potential applicants. At this first stage, the Army plan simply requires that diligent efforts be made to locate and attract qualified minority and women applicants.

The second step in the federal civil service recruitment process is to narrow the large group of applicants to a smaller group of best-qualified finalists from which the final selection will be made. Narrowing is to be accomplished against predetermined job qualification requirements. Of course, the qualification requirements must be valid, and they need not and should not be altered to enhance the prospects of any candidate or group of candidates. At this stage, the Army plan simply requires senior functional officials to monitor the process by which the best-qualified list is developed.

The third step of the recruitment process is the selection of one candidate from among the best-qualified candidates referred for the job. At this stage, the Army plan requires more involvement of senior functional officials in the event that a woman or minority group member is on the best-qualified list but is not proposed for selection. In this circumstance, the functional official reviews information furnished by the local selecting official to ensure that all best-qualified women and minority group candidates for the vacancy have been fully and fairly considered. The local selecting official may not complete the selection decision until he or she has considered advisory comments from the reviewing functional official. [10]

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[9] 5 U.S.C. § 3396 (1982).

[10] An earlier version of the plan, dated September 2, 1988, focused on the selection decision in a different way:

(3) An individual minority or woman who is referred among the best qualified group under authorized criteria shall be selected for that position unless it is clearly demonstrated to the satisfaction of the Career Program Functional Chief for GM-15 or OSA Functional Official for SES that the proposed selectee is a demonstrably superior candidate for that position.

This provision was designed to answer Justice Blackman's question in *Bakke*: "Among the qualified, how does one choose?" This earlier version of paragraph (3) of the Assistant Secretary's memorandum would have speeded up the recruitment process. This provision was based on the view that all candidates on a best-qualified list are considered to be roughly equal in qualifications. That being the case, if the local selecting officials could not identify other, demonstrably superior candidates, it must be because the women or minority group candidates were judged to be equal or better in qualifications. If better qualified, one of the minority group or women candidates should have been selected in the first place. If equally qualified, a minority group or woman candidate had as much right as anyone else to be selected. If the selecting official could not make up his or her mind on the merits, the Assistant Secretary's memorandum would have made the choice, thereby precluding arbitrary decisionmaking. Because of the clause allowing for selection of demonstrably superior candidates, this provision did not trammel on anyone's rights; it did not prevent a non-minority or male from being selected for any position. The use of the term "demonstrably superior candidate" results in a requirement to demonstrate that one person is better qualified than another. That is all it meant, and it is no more than what is required in any event. But a number of persons were unconvinced by this theory, and the Assistant Secretary was persuaded to withdraw this requirement on the ground that it could be construed to create an unjustified selection preference based on race or sex.

In my opinion, the Army plan is permissible under *Johnson*, *Wygant*, and the circuit court decisions that followed them, because the Army plan neither grants any preferences based on race or sex nor trammels on the rights and legitimate expectations of innocent individuals. Why not? Because the plan does not permit consideration of race or sex as part of the selection decision. In this sense it is a step back from the Santa Clara Transportation Agency plan described in *Johnson*. Additionally, the plan does not include quotas or set asides. Rather, every individual can compete for every job; selections are to be based on merit only. Moreover, although the Army plan is not a true affirmative action plan in the *Bakke*, *Webber*, *Wygant* mold, it has many of the attributes of an acceptable plan. A statistical compilation has been made that shows low rates of employment of minority group members and women in senior Army civilian positions. Additionally, the plan includes only a generalized aspirational goal for the gradual improvement in employment of such individuals. Therefore, I believe the Army plan will withstand judicial scrutiny.

What are the results of the Army plan so far? We now have six months of experience from October 1, 1988, through March 31, 1989. During this period, seventeen individuals have been selected for Army Senior Executive Service positions. Four of these seventeen individuals are women or minority group members: two of each. That works out to just under a twenty-five percent selection rate. This is a huge improvement over their representation cited in Mr. Spurlock's memorandum of September 23, 1988, in which he points to representation rates of only 3.5 percent minorities and 2.8 percent women.

What about GS/GM-15? During this same six-month period, the Army has added 142 individuals to its rolls at this grade level. Of these 142, 43 are women or minority group members (24 of each, 43 total after eliminating double counting). That works out to a selection rate of thirty percent.

On the basis of these statistics, my guess is that the Army plan is working, perhaps even more effectively than the Assistant Secretary expected. It has been accomplished without quotas, set asides, preferences, or changed qualification requirements. The Army should be proud.

Mental Health Treatment and Military Confinement

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Introduction

The military judicial system allows for a wide range of dispositions when dealing with service members who have committed offenses set forth in the Uniform Code of Military Justice. These dispositions range from verbal or written reprimands to fines, confinement, and death. Many times dispositions also include consideration for rehabilitation and mental health treatment of the offender. Treatment needs are often considered when adjudicating crimes such as murder, assault, and sexual offenses. In some cases, these offenders have suffered from severe psychological dysfunction or grave personality defects. Professional therapy and counseling may be able to help the individual change behavior and address some of the related psychological problems.

Encouraging the military offender to participate in mental health treatment is consistent with the military's goal of providing comprehensive health care for its service members. Unfortunately, the range of alternatives available to provide mental health treatment to military offenders is not always well understood. In particular, there appears to be undesirable variability in the way in which confinement and treatment are combined in an attempt to satisfy competing sentencing objectives. This article is designed to: 1) present information on sentencing alternatives that include consideration of mental health treatment needs; 2) describe the mental health services available at the United States Disciplinary Barracks; and 3) provide information on the limitations inherent in providing mental health treatment in a prison environment.

Sentencing Alternatives

When considering various sentencing alternatives in a trial by court-martial, the judicial system's primary concern is to arrive at a just disposition for the offender. The sentence serves several purposes, which include protection of society (incapacitation), punishment of the criminal (retribution for the offense), rehabilitation, and deterrence. Difficulties inevitably arise when consideration is given to balancing these multiple objectives. This task becomes even more difficult when mental health treatment is also desired as a component of the rehabilitative process.

There are several sentencing alternatives available to the judicial system. The selection depends upon whether confinement or treatment is the primary objective. These alternatives include:

1. Confinement: The primary concern is punishment

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and the protection of society, and treatment is clearly secondary.

2. Treatment: The primary concern is to give the offender (and sometimes the offender's family) clinical treatment, and confinement is secondary or desireable only to ensure compliance.

3. Concurrent Treatment and Confinement: Both treatment and confinement are seen as necessary to give the offender an opportunity at proper rehabilitation.

A Case in Point

To illustrate the sentencing trade-offs, consider the case of a military member who has been convicted of sexually abusing a child. This crime brings out emotional responses from all parties involved. The decisions concerning the most effective manner to deal with the offender, the offender's family, and the victim are affected by personal reactions to the offense and a lack of information. There is generally empathy for the family and the child who has been victimized. On the other hand, there may be disgust for the perpetrator. Yet, when faced with the reality that the offender will serve a sentence and eventually be released from prison, the issue of rehabilitation requires consideration. While the military may want to punish the offender, it is also concerned with recidivism. One method to decrease the probability of recidivism is through mental health treatment.

Assuming that the judicial system decides that there are specific mental health needs related to the offense, how should the treatment be administered? Treatment can be offered before, during, after, or in place of incarceration. Some offenders will require mental health treatment in more than one phase. When the full range of treatment options are considered, treatment does not necessarily have to conflict with the confinement objectives of the military.

Confinement

Confinement may be chosen as the appropriate disposition for several reasons. An offender may be sentenced to confinement for the protection of society. This may be necessary to prevent repeated criminal behavior. Confinement also serves to remove the offender from the home environment. This prevents the family system from reestablishing a pathological pattern of behavior that may have contributed to the offense. Quite often, the offender is considered to be unfit for future military service, as well as being guilty of specific wrongdoings. Hence confinement, which removes him from the local environment and eventually from service, may be warranted. Confinement can also serve to deter others by sending a message about the consequences of such an offense. This option would often be considered for an offender with an extended period of offensive behavior, multiple victims, or when the offender has proven resistant to treatment.

Treatment may be considered when confinement is the primary objective, but consideration of its quality, content, or availability are clearly secondary. Additionally, the confinement setting is generally not important, as long as security and general correctional treatment can be provided. If the offender returns home after confinement, it is desirable to ensure that follow-on treatment is provided. This can be accomplished through a parole plan that requires successful participation in a comprehensive, family therapy program.

Treatment

Treatment should be given primary concern when the offender is clearly motivated to change his or her behavior and when adequate treatment programs are available. This is frequently considered for cases in which the victim of the offense is a member of the family. The primary goal of sentencing is to ensure treatment participation and compliance in order to change the pattern of offense behavior. In this case, confinement may not be the disposition of choice, but may actually be seen as the last resort. To accomplish this, offenders should be able to receive a suspended sentence that is contingent on treatment completion. This option provides a strong incentive for the offender to participate and change. If change does not occur, it also ensures that confinement will be imposed to break the cycle without having to resort to a second trial.

Concurrent Treatment and Confinement

When the judicial system decides to give the offender mental health treatment during confinement, generally, the primary alternative considered is to sentence the individual to the United States Disciplinary Barracks (USDB). This option is often chosen without full knowledge of the services available in this location. The extent of services available and the limitations on mental health treatment at the USDB are described in the remainder of this article. It is hoped that more awareness about the mental health services available will result in improved and enlightened sentencing.

United States Disciplinary Barracks

Mission

The USDB is the military's primary, multi-service, maximum security prison. It confines approximately 1500 inmates from all branches of the service. It has the mission to provide correctional treatment and training as well as confinement in a safe, secure environment. The overall objective of the USDB is to return inmates to civilian life as useful citizens with improved attitudes and motivation. Ideally, inmates acquire marketable skills and improved coping strategies that will help them to learn responsible behavior. The philosophy of military corrections at the USDB is clearly rehabilitative and is expressed in the motto of the institution, "Our Mission, Your Future."

Mental Health Organization

At the USDB, the Directorate of Mental Health (DMH) provides mental health services for inmates. This directorate employs more than forty mental health practitioners and consists of social workers, behavioral science specialists, a psychologist, a psychiatrist, a researcher, and a civilian clerical support group. It also utilizes students, Red Cross Volunteers, and visiting reserve officers. These service providers are organized

into four divisions and interact to provide a broad spectrum of services for the military offender.

Mental Health Service Recipients

All inmates are assigned a mental health counselor and receive an initial interview and psychological testing. The extent to which inmates receive mental health services while confined at the USDB depends largely on individual motivation for change. Very few inmates are considered to have significant mental illness; however, all are encouraged to participate in counseling programs related to their confining offenses. Individual treatment is generally provided primarily to those most in need or those desiring such services. Inmates are not forced to receive mental health service. They may refuse all treatment, regardless of their confining offense. They realize, however, that refusal to participate in counseling greatly reduces the likelihood that the mental health staff will submit positive recommendations for parole and custody upgrade.

Range of Mental Health Services

Mental health services are provided to inmates both individually and in groups. Individual treatment is provided for inmates who have a specific mental health problem or who desire assistance with general adjustment issues. In contrast, group treatment programs are generally directed toward criminal acts, such as sexual offenses against children, larceny, drug and alcohol abuse, rape, and assault. They may also provide information to inmates on such topics as social skills, assertiveness training, coping strategies, and sexual knowledge (see Chart 1 for information on the specific groups, nature, and duration).

Focus of Treatment

The focus of most mental health services provided at the USDB is to help the inmates explore the thoughts and actions related to their offenses. Counseling is not designed to "cure" the offender. Instead, the counseling encourages inmates to take responsibility for previous criminal actions, to understand the underlying causes of their unacceptable behavior, and to recognize the precursors and thought patterns associated with their offenses. They are encouraged to work on personal growth in an effort to decrease the likelihood of future harmful behaviors. While most inmates do not require treatment for "mental illness," they can benefit from the generalized programs offered by the mental health staff.

A few service members sentenced for confinement suffer from serious psychological problems requiring intensive, one-on-one clinical therapy. In some of these cases, the treatment concentrates on a mental illness or disorder that was directly related to the specific confining offenses. It is rare, however, that an inmate is convicted of an offense directly attributable to a mental disorder, and treatment based on this criterion only involves a small percentage of the population.

Mental Health Service Limitations

The Confinement Setting

The USDB devotes significantly more resources to inmate mental health care than do federal or state prisons. Nevertheless, this care is still administered in a confinement setting that must remain safe and secure. Accordingly, both the amount of treatment and the range of treatment options offered to the inmates are limited to some degree. Furthermore, it is clear that treatment offered to inmates in a prison atmosphere is affected by the overall prison environment.

The amount of mental health services at the USDB is limited by staff size, security considerations, and other institutional requirements limiting inmate availability. Inmates receive an average of one individual counseling session per month. If they participate in group programs that are available, they can also receive several hours of group contact per month.

The situation is quite different in a facility that primarily focuses on mental health treatment. For example, a medical confinement facility or inpatient hospital setting may provide weeks or months of intensive therapy devoted solely to the psychological issues surrounding a specific offense. As a result, in a treatment facility all the energies of the individual can be directed toward the psychological aspects of the deviant behavior. In addition, release from the program is often contingent on positive change rather than "time served." This type of treatment simply cannot be provided in a prison setting.

The range of treatment options available in prison is also substantially reduced. Due to security restrictions and logistical considerations, family member involvement in the treatment process is limited. Prisons, including the USDB, are often located far from the family home. This reduces the options for family and marital therapy and results in family members receiving mental health services separate from those of the inmate. In contrast, a typical medical treatment facility can offer treatment programs that integrate family members into the entire process.

Mental health treatment in any confinement facility is also limited by the overall prison environment. The personal growth that takes place in a prison is not subject to the same stresses present in everyday living. The rules of conduct limit normal interpersonal relations, especially with members of the opposite sex. Access to alcohol and drugs is also reduced. Thus, when an inmate is successful in casting off old behaviors and thinking patterns, his or her changed state is still not tested under "real life" circumstances. In a nonprison, clinical setting, treatment can be more easily integrated into the patient's normal living pattern, thus increasing the likelihood of lasting change.

Confidentiality

Confined service members often have a negative attitude toward the mental health system. A major reason for this negativity is a misunderstanding of the limits on confidentiality of mental health services. The concept of physician-patient confidentiality is well established in the civilian medical community. Confidentiality means that communications between the physician and the patient is privileged and cannot ordinarily be divulged to a third party without the patient's permission. The physician-patient relationship has been extended to most mental

health providers. When a service member receives treatment in a military medical facility, however, confidentiality and privileged communication are limited.

Inmates may be suspicious of the mental health system for several reasons. In many cases, inmates have received counseling or therapy prior to their courts-martial. Information obtained from this treatment may have been used as evidence in their court-martial. For example, consider the case of a service member who had entered a government sponsored drug and alcohol rehabilitation program and was given the opportunity to receive treatment and return to service. Any information that the individual divulged during treatment could become a matter of record. Comments that the service member made about his or her family or military associates may have seemed harmless at the time. Nevertheless, the government could use the comments of the accused to rebut character evidence presented by the accused at trial.

In other cases, it may even have been the mental health system that first became aware of the service member's illegal activities and made the report to the authorities that resulted in the preferral of charges. For example, all medical authorities are legally obligated to report instances of sexual offenses against children. Often these service members assumed that they had a right to privileged communication in therapy, and they may have thought that statements made during this treatment could not be used against them. Such confidentiality generally does not exist in the military health care system. All health records and medical test results are the property of the government and can be subpoenaed as evidence.

Inmates who arrive at the USDB are briefed on the limitations of confidentiality in the prison setting. They are made aware that any information that they give to a mental health staff member can be used in the evaluation of their potential for rehabilitation. Furthermore, they realize that their mental health counselor plays a significant role in determining the institution's recommendation for parole and institutional privileges. In light of these factors, it is not surprising that many inmates resist treatment, are less than honest with their mental health counselors, or feel pressured into cooperating with mental health staff members.

These limitations on the provision of mental health services in confinement should not be considered as justification for not confining criminal offenders. While mental health services provided in a treatment facility are certainly more extensive than those offered in any prison, service members are sent to prison for breaking laws. If mental health treatment is the sole objective, a service member should not be sent to prison. Rather, outpatient or inpatient mental health services should be mandated. If, however, confinement is determined to be an appropriate disposition, mental health services may be provided in this setting. Although the USDB offers significantly more mental health services than the majority of other prisons, the sentencing authority needs to consider the limitations that have been discussed.

Conclusion

Ensuring that military offenders receive appropriate mental health treatment is an important consideration for the judicial system. Greater knowledge of the alternative methods and locations available for providing mental health treatment to military offenders will allow better decisions about appropriate dispositions. When considering confinement, it is important to understand how this disposition limits both the amount of treatment and the range of treatment options offered. The USDB has the mission to provide confinement and correctional treatment. It is a prison and does not have the capacity nor resources to serve as a mental health treatment hospital or medical rehabilitation center.

Because mental health treatment in prison is not mandatory, there is no assurance that an offender sentenced to prison will receive any treatment at all. The extent to which inmates receive mental health services while confined depends largely on individual motivation for change. Some inmates are not motivated for change and are uncomfortable in dealing with the risks of change and growth. In addition, given the contingencies that exist in a prison environment, a superficial "playing of the game" may be the only outcome. In some cases, mental health treatment has little effect on personal change or decreasing the likelihood of recividism. In any case, inmates have to accept the major burden of rehabilitation, and the judicial system must understand the difference between a prison and a treatment center.

If mental health treatment is the primary goal for an individual, then confinement is not the appropriate disposition. Although inmates can benefit from the mental health services that are offered in prison, these services are limited. Sentencing authorities must be cognizant of these limitations and must understand that prison is not the universal panacea for all criminal behavior.

Chart 1

USDB Mental Health Groups

Title	Duration	Description
Assaultive Offenders	50 Hours	Participants have an assaultive or explosive history. Consists of some didactic material on communication and group dynamics with a primary emphasis placed on the development and practice of behaviors that effectively replace a power oriented lifestyle.

Title	Duration	Description
Child Sex Offenders	50 Hours	Participants have committed a sexual offense against a child and admit to their offense. Aimed at increasing insight into situational, emotional, cognitive, and behavioral antecedents of the offense. Participants are encouraged to develop alternative coping techniques through a combination of structured exercises, group interaction, and didactic material.
Reality Therapy	16 Hours	Participants have difficulties accepting responsibility for their actions. This primary didactic group emphasizes current behavior. Participants are encouraged to develop skills in self-discipline, values clarification, and acceptance of responsibility through exposure to information, structured exercises, and group discussion.
Women, Attitudes & Stereotypes	16 Hours	Participants are confined for a crime against women or have a history of problematic relationships with women. The group examines attitudes and stereotypes toward women, and the group members' relationships with women in their lives.
Social & Coping Skills	16 Hours	Participants are deficient in basic interpersonal and coping skills. Sessions include role-playing potentially problematic situations and teaching appropriate assertive behaviors.
Women's Skills Development	16 Hours	Participants are female inmates. Emphasis is placed on developing insight, coping, and interpersonal skills through group discussion and structured exercises.
Sex Education, Knowledge & Attitudes	16 Hours	Participants require increased awareness of sex related issues. This didactic group uses group discussion and presentation of informational material.
Drug & Alcohol Related Issues	16 Hours	Participants have a confining offense involving alcohol or substance abuse or have had a history of substance abuse. Group discussions focus on educational material that outlines the patterns and impact of substance abuse.
Stress Management in Confinement	4 Hours	Participants are taught appropriate stress reduction skills.
Advanced Stress Management	12 Hours	Participants have adjustment problems related to confinement. This group builds on knowledge already acquired during the basic stress management course.
Relaxation Training	12 Hours	Participants are taught systematic deep muscle relaxation and guided imagery to expand their coping skills.
Larceny Group	16 Hours	Participants are confined for crimes involving property. Sessions are designed to identify cognitive antecedents of criminal behavior and include a combination of lectures and structured exercises.

Chart 2

The following are on-going, self-help support groups that are primarily facilitated by inmates.

Title	Description
Alcoholics Anonymous (AA)	Participants have identified a problematic pattern of alcohol abuse/dependency in their lives. This is a local chapter of the national organization.
Narcotics Anonymous (NA)	Participants have identified a problematic pattern of drug abuse/dependency in their lives. This is a local chapter of the national organization.
Retrospection, Responsibility, Resolve & Restitution (R4)	Participants have committed sex-related crimes. Sessions explore criminal antecedents and identify alternative behavior patterns.
Adult Children of Alcoholics (ACOA)	Participants with a pattern of substance abuse in their family of origin explore how this may have contributed to their present cognitive/behavioral patterns.
Afroamerican Cultural Organization	Participants are of African descent and discuss a wide range of cultural issues.
Latin Studies	Participants are of Hispanic descent and discuss a wide range of cultural issues.
Meditation	Participants are taught techniques of moving meditation (Tai-Chi).

DAD Notes

Drunken Driving as an Article 133 Violation

The Defense Appellate Division has recently examined whether simple drunken driving is sufficient to constitute conduct unbecoming an officer in violation of article 133. [1] Two recent Court of Military Appeals decisions, *United States v. Guaglione* [2] and *United States v. Norvell*, [3] addressed the type of activities constituting conduct unbecoming an officer. The issue for consideration is what type of activities are prohibited by article 133 in the wake of these and other decisions. [4] With specific regard to drunken driving, the question is whether the drunkenness or the driving, standing alone, was so disgraceful as to render the officer unfit for service or to stigmatize the officer as morally unfit to be an officer.

It is clear that a higher standard of conduct is demanded of officers than is required of enlisted personnel. [5] In addition, an officer's conduct may be unbecoming under article 133 even though it is meant to be private. [6] Yet, not every deviation from the high standard of conduct required of an officer constitutes conduct unbecoming an officer. [7]

Recent cases have emphasized that not all conduct that is poor judgment is sufficiently unbecoming conduct to violate article 133, because the conduct may not seriously compromise the accused's standing as an officer. For example, entry into a legalized house of prostitution without participating in any sexual activity or encouraging accompanying soldiers to engage in sexual activity, although perhaps poor judgment, was not conduct so disgraceful as to render the officer unfit for service and therefore did not constitute conduct unbecoming an officer. [8] It was not a violation of article 133 for an officer to engage in mutually voluntary, private, non-deviate sexual intercourse with an enlisted woman who was not under his command or his supervision. [9] Finally, a lieutenant colonel who took nude photographs of a civilian waitress whom he supervised at the officer's open mess did not violate article 133 where the nude photographs were taken with the consent of the subject and were not used for any illicit purpose. [10]

Previous cases relating to excessive use of alcohol and drunk and disorderly conduct as a violation of article 133 have turned upon more than merely the officer's degree of intoxication; the courts have considered the time, place, occasion, and other attendant circumstances of the officer's conduct. [11] The simple drunken driving case is distinguishable from earlier alcohol-related cases of officer misconduct found to be in violation of article 133. Consider the outrageous nature of the conduct in these three cases. First, an enlisted man discovered an officer who was intoxicated, partially undressed, and in bed with a female civilian employee whom he supervised; the officer was found guilty of a violation of article 133. [12] In another case, a field grade officer, while drunk and in uniform, violently attacked a German female and an enlisted soldier. Several civilians and soldiers observed his actions. [13] Finally, a field grade officer was twice involved in motor vehicle accidents while in uniform. The accidents attracted a great deal of attention as they occurred in the early afternoon at two busy

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[1] Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (1982) [hereinafter UCMJ]. The Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984] provides: "Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character . . ., or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." MCM, 1984, Part IV, para. 59c(2).

[2] 27 M.J. 268 (C.M.A. 1988).

[3] 26 M.J. 477 (C.M.A. 1988).

[4] For a discussion of the effect of these decisions on the scope of article 133, see generally TJAGSA Practice Note, *Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, The Army Lawyer, Feb. 1989, at 62.

[5] *See* United States v. Means, 10 M.J. 162 (C.M.A. 1981).

[6] *Norvell*, 26 M.J. at 477.

[7] United States v. Wolfson, 36 C.M.R. 722 (A.B.R. 1966).

[8] *Guaglione*, 27 M.J. at 272.

[9] United States v. Johanns, 20 M.J. 155 (C.M.A. 1985), *cert. denied*, 474 U.S. 850 (1985).

[10] United States v. Shober, 26 M.J. 501 (A.F.C.M.R. 1986).

[11] Formerly, an example of a violation of article 133 was "being grossly drunk and conspicuously disorderly in a public place." The words "grossly" and "conspicuously" were removed from the example of this offense in MCM, 1984, Part IV, para. 59c(3). The ultimate issue is not merely whether the officer's intoxication was "gross" or "simple," but that is one factor for consideration in the totality of the circumstances of the conduct.

[12] United States v. McGlone, 18 C.M.R. 525 (A.B.R. 1954).

[13] United States v. Akins, 4 C.M.R. 364 (A.B.R. 1951).

intersections. The officer, when apprehended by civilian authorities, exhibited slurred speech, bloodshot eyes, and total loss of motor coordination. [14]

In the simple drunken driving situation, the argument is that adequate aggravating circumstances do not exist to support a conviction for a violation of article 133. Trial defense counsel in officer misconduct cases should take the government to task in proving that the accused's actions amounted to a violation of article 133. If the specification appears to be inappropriately charged under article 133, counsel should consider a motion to amend the charge under Rule for Courts-Martial 906(b)(4) [15] or seek a dismissal of the charge for failure to state an offense. Where counsel believes the government's evidence has established only poor judgment and not actions amounting to conduct unbecoming an officer, a motion for a finding of not guilty under R.C.M. 917 should be made. Counsel should examine the *Guaglione* opinion and be prepared to argue that the offending conduct does not render the officer unfit for service and consequently does not constitute unbecoming conduct. [16] Captain Allen F. Bareford.

Use of a Prior "Record of Trial" in Aggravation

Occasionally, trial defense attorneys must represent an accused who has a history of past misconduct. In such cases, that information could cause the sentencing authority to sentence the accused to a punishment greater than that warranted by the offenses of which the accused has been convicted. When such information is offered as part of a "record of trial" of a previous court-martial, under what circumstances is such evidence admissible? For that matter, what constitutes a "record of trial" of a previous court-martial? The recent case of *United States v. Charley* [17] addressed those issues.

In *Charley* the Army Court of Military Review held that the military judge committed prejudicial error in admitting a summary court-martial (SCM) "record of trial," including its attached documents. Sergeant (SGT) Charley was on terminal leave, having served twenty years in the Army, when he was court-martialed and convicted of three specifications of making and uttering worthless checks. During the sentencing phase of trial, the trial counsel limited his aggravation evidence to the introduction of documents (including the SCM "record of trial") and successfully argued before court-members that, based on those documents, SGT Charley should be punitively discharged from the Army.

Over defense objection, the military judge admitted a SCM record that had been significantly expanded by attachments. This "record of trial" not only contained a Department of Defense (DD) Form 2329, [18] but also included a Criminal Investigation Command (CID) Report of Investigation, three sworn statements unfavorable to the accused, sworn admissions of the accused, a letter of reprimand, and post-trial matters submitted to the convening authority. The record indicated that SGT Charley had been convicted of wrongful appropriation. The CID report, however, alleged that he committed larceny, and the letter of reprimand dealt with an offense unrelated to the conviction (uttering a bad check). The defense counsel objected to the attachments on grounds of relevancy, but the trial counsel argued that this additional information was part of the record and admissible as evidence of SGT Charley's lack of rehabilitative potential. The judge admitted the entire record.

Rule for Courts-Martial 1001(b)(3) [19] allows the trial counsel to offer into evidence any prior civilian or military convictions of an accused. The record of the prior conviction may be used to prove that conviction. [20] In *Charley*, however, the Army court ruled that, except for the post-trial submissions, the attachments were not part of an SCM record. Even if they were, "an independent showing of their relevancy is necessary as a requisite to admissibility." [21]

The court then opined that caselaw did not favor government attempts to introduce entire records of trial into evidence during sentencing proceedings and that, as a general rule, the government's introduction of verbatim and summarized trial records should not be permitted. After analyzing and distinguishing *United States v. Wright* [22] and *United States v. Nellum* [23] (two cases that upheld the admission of portions of prior records of trial), the court concluded that the relevancy of portions of records of trial or attachments to them had to be individually determined by the military judge. The court then ruled that attached documents cannot be "bootstrapped" into evidence as part of a record of trial if there is an objection. [24]

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[14] United States v. Schumacher, 11 M.J. 612 (A.C.M.R. 1981).

[15] MCM, 1984, Rule for Courts-Martial 906(b)(4) [hereinafter R.C.M.].

[16] *Guaglione*, 27 M.J. at 271.

[17] ACMR 8801178 (A.C.M.R. 29 June 1989).

[18] This form usually contains only procedural information, the pleas, findings, and sentence of a SCM. This normally comprises the SCM record of trial. *Charley*, slip op. at 2.

[19] R.C.M. 1001(b)(3).

[20] R.C.M. 1001(b)(3) discussion.

[21] *Charley*, slip op. at 2-3.

[22] 20 M.J. 518 (A.C.M.R.), *pet. denied*, 21 M.J. 309 (C.M.A. 1985).

[23] 24 M.J. 693 (A.C.M.R. 1987).

[24] *Charley*, slip op. at 3-4.

Consequently, the court found the CID report inadmissible under Military Rule of Evidence 803(8). [25] The letter of reprimand was also found to be erroneously admitted, because the record failed to establish a proper independent basis for either its relevancy or admissibility. Finally, the court found that the post-trial matters submitted to the convening authority, although appearing to be part of the SCM record of trial, were not admissible as evidence of a lack of rehabilitation potential or as part of the SCM record of trial. The government failed to meet its burden of showing that the submissions "were independently admissible and should be considered by the members during their sentencing deliberations." [26]

In its decision, the Army court noted that, due to the adversarial nature of the sentencing process and the inflexibility of the rules limiting accurate sentencing information (i.e., R.C.M. 1001), the fact that the process may often benefit the accused represents "the systematic costs of having court members determine sentences." [27] Because the documentary evidence was admitted erroneously and the trial counsel clearly exploited that evidence in his sentencing argument to the court members, the Army court held that the error materially prejudiced SGT Charley's right to a fair trial.

In addition to clarifying the evidentiary status of records of trial, the *Charley* case provides guidelines for trial defense counsel in evaluating the admissibility of derogatory information on sentencing. Timely objections to inadmissible evidence during the sentencing phase of trial are necessary in order to limit the chance for sentence enhancement and to preserve the issue for appeal. Captain Alan M. Boyd.

Kidnapping: How Far Is Enough?

What circumstances must exist in order to convict a soldier for kidnapping? Need the detention last for a substantial period of time? Must the asportation be for a great distance? For example, does a kidnapping take place when Mr. B forces Miss C into his car where he rapes her, then drives for a block and pushes her out of the car? What if a store clerk is robbed, tied up, and locked in a shed right behind the store?

The analysis of this issue is complex and the determination varies with the definition of kidnapping applied to the facts. Under the traditional or majority view, [28] both Miss C and the clerk were kidnapped. The result is the opposite, however, when the minority view is applied. [29]

A military accused can be prosecuted for kidnapping under three distinct theories: 1) as a violation of state law under the Assimilative Crimes Act; [30] 2) as a violation of federal law pursuant to the Lindbergh Act; [31] and 3) as conduct that is service discrediting or contrary to good order and discipline in the armed forces under article 134. [32] Thus, either the traditional view or the minority view may be applied in courts-martial, depending upon which theory the government uses to prosecute the case. This anomaly in military practice can cause confusion in charging, prosecuting, and defending kidnapping cases.

The Army Court of Military Review has recently addressed kidnapping in the military in *United States v. Lewis*. [33] A review of the record of trial in *Lewis* indicates that the accused pleaded guilty to kidnapping and admitted the following facts. The alleged victim, Miss K, without invitation, jumped into the cab occupied by the accused and willingly accompanied him to his hotel room, where they discussed various sums of money in exchange for sex. Failing to agree upon a price, the accused and Miss K went to dinner. After dinner they returned to the hotel room and resumed negotiations. When they failed to reach an agreement on the sum, Miss K attempted to leave. The accused blocked the exit, slapped her, and carried her to the bed where he indecently assaulted her. During the assault, the accused held a knife to Miss K's throat. He then released her and told her to get dressed and leave the room. He refused to let her use the telephone. After

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[25] MCM, 1984, Mil. R. Evid. 803(8) [hereinafter Mil. R. Evid 803(8)] (public reports admissible as exception to hearsay, "excluding... matters observed by police officers and other personnel acting in a law enforcement capacity").

[26] *Charley*, slip op. at 5.

[27] *Id.*, at 6.

[28] The traditional view is that any seizing and carrying away of the victim is sufficient to sustain a conviction for kidnapping without regard to duration, distance, or circumstances.

[29] The minority view, adopted by the MCM, 1984, Part IV., para. 92c(2), requires that the holding be more than a momentary or incidental detention committed as part of another crime.

[30] 18 U.S.C. § 13 (1982). The laws of states are applied in areas of federal jurisdiction to punish crimes not specifically addressed by Congress.

[31] 18 U.S.C. § 1201(a) (1982):
Whoever unlawfully seizes, confines, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person except in the case of a minor by the parent thereof, when (1) the person is willfully transported in interstate or foreign commerce; (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States . . .; (3) any such act is done within the special aircraft jurisdiction of the United States . . .; (4) the person is a foreign official . . ..

[32] UCMJ art. 134. The offense requires: 1) that the accused seized, confined, inveigled, decoyed, or carried away a certain person; 2) that the accused then held such person against that person's will; 3) that the accused did so willingly and wrongfully; and 4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[33] ACMR 8800838 (A.C.M.R. 7 June 1989). The Army Court of Military Review first addressed the anomalous military kidnapping laws in United States v. Jeffress, 26 M.J. 972 (A.C.M.R. 1988), *pet. granted*, 28 M.J. 154 (C.M.A. 1989). *See* TJAGSA Practice Note, *The Military's Anomalous Kidnapping Laws*, The Army Lawyer, Dec. 1988, at 32.

Miss K dressed, the accused forced her to leave without her coat and shoes.

The Army Court of Military Review addressed the issue of whether the detention of Miss K was kidnapping. The court noted that the definition of kidnapping in UCMJ article 134 originally adopted the traditional view from federal statutory law. [34] The President, however, adopted the "emerging minority view" in the 1984 Manual change. In *Lewis* the Army court held the plea improvident, stating that "[e]vidence of detention other than that necessarily resultant from appellant's assaultive and threatening conduct against the victim is *de minimis*." [35] Thus, the Army court essentially applied the modern theory. In so holding, the court noted its prior decision in *United States v. Jeffress*. [36] The Army court in *Jeffress*, citing UCMJ articles 36 and 56 [37] and *Ellis v. Jacob*, [38] held that the President's rulemaking authority does not extend to matters of substantive military criminal law and, therefore, the attempt to adopt the minority view was invalid. The Court of Military Appeals has not yet directly addressed the 1984 Manual's kidnapping provision. The court has granted review of the *Jeffress* decision, and the kidnapping issue will be addressed by the court in the near future. [39]

The law is in a state of flux concerning kidnapping. The President has adopted the emerging minority view, thus substantially changing the traditional approach, but the Army Court of Military Review has ruled that this change is beyond the powers of the President. [40] Therefore, at present, it appears the traditional definition of kidnapping is still in effect. Defense counsel should continue to analyze and assess kidnapping charges with reference to the traditional view and not rely solely on the Manual description of the offense. Pending the ultimate resolution of *Jeffress* by the Court of Military Appeals, an accused presently relies on a "momentary" or "incidental" movement defense at his peril when charged with kidnapping under military law as conduct service discrediting or contrary to good order and discipline. Defense counsel should remain aware, however, that the favorable minority view (excluding "incidental" or "momentary" detentions from the scope of kidnapping) may still be available to the defense if the accused is charged under an assimilated state statute. [41]
Captain Pamela J. Dominisse.

Handling Permissive Inferences

At a court-martial with members, the military judge must instruct each member to resolve any reasonable doubt of guilt in favor of the accused. [42] Instructions on permissive inferences, [43] however, may invite the members to do the opposite. For example, in a bad-check case, the judge will tell members they can infer the knowledge and intent elements of the offense from evidence that the accused failed to cover his or her check within five days after receiving notice of its dishonor. [44] Framed as something the law permits but does not require, the instruction encourages a finding based on what the law allows rather than what the member personally finds from the evidence. It invites the member to resolve in favor of the government what may be, in the juror's mind, a reasonable doubt of the accused's guilt.

Though not required, these instructions are constitutionally sound as long as the logic of the inference is reasonable. [45] Therefore, getting the judge to drop the instruction is unlikely. Defense counsel may nevertheless persuade the judge to tailor the instruction so that it more precisely performs its only legitimate function—providing an example of how circumstantial evidence works. [46] Counsel can make two requests: 1) give the permissive-inference instruction with the instructions on circumstantial evidence rather than with those on the elements of the offense; and 2) phrase the instruction as an example of how circumstantial evidence works rather than as a special conclusion that the law permits if the

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[34] 18 U.S.C. § 1201(a) (1982); *see supra* note 31.

[35] *Lewis*, slip op. at 4.

[36] United States v. Jeffress, 26 M.J. 972 (A.C.M.R. 1988); *pet. granted*, 28 M.J. 154 (C.M.A. 1989).

[37] Article 36 provides, in pertinent part, that pretrial, trial, and post-trial *procedures* may be proscribed by the President. Article 56 states that the punishment that a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

[38] 26 M.J. 90 (C.M.A. 1988).

[39] The issue on which the petition was granted was:
Whether appellant's plea of guilty to kidnapping is improvident in light of the fact that appellant moved the victim an inconsequential distance and detained her only long enough to complete another charged offense.
28 M.J. 154.

[40] *Jeffress*, 26 M.J. at 975.

[41] *Id.* at 974 (interpretation of state statute by state appellate court's determine whether traditional or modern view governs).

[42] UCMJ art. 51(c)(2); R.C.M. 920(e)(5)(B).

[43] *E.g.*, Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982) [hereinafter Benchbook]. *See* paras. 3-76.1 to 3-76.6 (C3, 15 Feb. 1989) (various dealings with drugs may be inferred to be wrongful in the absence of evidence to the contrary), 3-90 (C3, 15 Feb. 1989) (for larceny, may infer accused took property discovered in his knowing, conscious, and unexplained possession; failure of custodian to account for property when an accounting is due permits an inference that the custodian has wrongfully withheld the property).

[44] Benchbook, para. 3-95b note 2 (C2, 15 Oct. 1986); *see* UCMJ art. 123a.

[45] Francis v. Franklin, 471 U.S. 307, 314-15 (1985) (dictum); County Court of Ulster v. Allen, 442 U.S. 140, 168 (1979).

[46] *See* Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 138a(2) ("permissible inferences . . . are merely well-recognized examples of the use of circumstantial evidence"); Benchbook, para. 7-3, note 1.

panel cannot otherwise resolve the issue. Additionally, counsel may want to suggest that the judge include an inference consistent with the defense's theory of the case.

The origins of these instructions reveal their menace and why modifying them will better serve the factfinding process. Generally, permissive inferences are remnants of legislative attempts to ease the government's burden of proof. [47] Many of the jury instructions spawned by these attempts have proven unsound, essentially on two rationales: 1) they shift the burden of proof to the accused; and 2) they impinge upon the accused's right to have the jury decide his case. [48] These attempts have been saved on appeal, however, by judges who phrase their instructions to colorably fit within a proper part of the factfinding process, that is, the drawing of inferences. [49]

Inferences are critical to the factfinding process. They bridge circumstantial evidence and the ultimate issues in a case. In a criminal case, the factfinder is looking for discrete aspects of a past event, namely, the elements of a crime. By the time of trial, what remains of the event, broken off from the past as it is, will always be fragmentary—a fingerprint, the memory of a witness, broken pieces of glass. These fragments may or may not directly portray the discrete aspect for which the factfinder is searching. When they do, the fragments are direct evidence, and resolving their credibility resolves the issue. When they do not, they are circumstantial evidence and, even after sorting out credibility, the factfinder still must use his or her common sense and general knowledge [50] to infer or not infer the ultimate fact. Circumstantial evidence, then, is evidence which, even if believed, necessitates the drawing of an inference to reach the ultimate fact.

Drawing the inference is solely the function of the factfinder, [51] not, as the permissive-inference instructions suggest, a function of the law. The instructions can probably pass constitutional muster in their present form, [52] but, coupled as they are with the instructions on the elements of the offense and phrased as something the law allows, they nevertheless remain a thorn for the presumably innocent accused. While their language no longer denotes their original function, the connotation remains: If the government proves predicate-fact *A* beyond a reasonable doubt, the panel can find ultimate-fact *B*, regardless of whether, upon reflection, the evidence has left a reasonable doubt in the juror's mind about ultimate-fact *B*.

Therefore, in a urinalysis case, for example, defense counsel should ask the judge to modify the standard instruction on inferring wrongfulness and, instead of giving it with the description of the elements of wrongful drug use, give it with the instructions on circumstantial evidence. The circumstantial evidence instructions now in the Benchbook already provide a place for instructions on permissible inferences. [53] Using the model already in the Benchbook, the inference instruction could be modified as indicated in the sample below. Italicized sections are recommended additions to the existing instruction. Lined through sections indicate recommended deletions.

> *Here are two examples of how circumstantial evidence might work.* In this case, evidence has been introduced that *the accused's urine contained a metabolite derived from marijuana.* Based upon this evidence, *as well as your common sense and general knowledge,* you may justifiably infer that *the accused used marijuana and that such use was wrongful, that is, the accused knew the contraband nature of the marijuana and had no legal justification or excuse for using it.* ~~The drawing of this inference is not required and the weight and effect, if any, will depend upon the facts and circumstances as well as other evidence in the case.~~ *On the other hand, evidence has also been introduced that appellant is a law-abiding citizen. Based upon this evidence, as well as your common sense and general knowledge, you may justifiably infer that the accused did not know the contraband nature of the marijuana. These are merely examples. What inferences you draw depends on your independent assessment of the evidence. Nevertheless, if you cannot in good conscience draw an inference necessary for a finding of guilt, you must acquit the accused.*

Such an instruction properly focuses the panel on its responsibility as the factfinder. The permissive inference instructions that now appear with the elements of an offense are unnecessary and may invite a panel to abdicate its responsibility by letting the instruction draw the necessary inference for them. Inferences are for human beings to make. If a panel member, in good conscience, cannot make a necessary inference in a case, then a reasonable doubt exists; an instruction should not invite a member to ignore it. Captain Brian D. Bailey.

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[47] *E.g.*, UCMJ art. 123a; *see generally* Anderson, *Article 123(a): A Bad Check Offense for the Military*, 17 Mil. L. Rev. 145 (1962). The inference of wrongfulness in military drug offenses comes from a federal statute, since repealed, that made possession of a narcotic drug presumptive proof that its possessor knew of its importation. United States v. Greenwood, 19 C.M.R. 335, 338-39 (1955).

[48] *E.g.*, Carella v. California, 57 U.S.L.W. 4731 (U.S. 1989) (per curiam) (reversing a lower court decision that had upheld this jury instruction: "any person who . . . wilfully and intentionally fails to return [a rented] vehicle to its owner within five days after the lease . . . has expired shall be presumed to have embezzled the vehicle").

[49] *E.g.*, County Court of Ulster v. Allen, 442 U.S. 140 (1979) (upholding an instruction based on a New York statute that made the presence of a firearm in an automobile presumptive evidence that everyone present in the vehicle possessed the firearm).

[50] *See supra* note 46; *cf.* Benchbook, para. 2-29.1 (C2, 15 Oct. 1986) ("you are expected to utilize your own common sense, your knowledge of human nature and the ways of the world").

[51] *See Carella* at 4732-33 (Scalia, J., concurring); *cf.* Bollenbach v. United States, 326 U.S. 607 (1946).

[52] *Cf.* United States v. Pasha, 24 M.J. 87 (C.M.A. 1987) (inference of "taking" in larceny case from evidence of possession); United States v. Ford, 23 M.J. 331 (C.M.A. 1987) (inference of "wrongfulness" from evidence of drug use).

[53] Benchbook, para. 7-3, note 1.

Trial Counsel Forum

When the Bough Breaks: Parental Discipline Defense in Child Abuse Cases

Major James Hohensee
Trial Counsel Assistance Program

Many trial counsel seek advice from the Trial Counsel Assistance Program regarding child physical abuse cases. [1] Many of these inquiries center on questions concerning parental discipline. Will parental discipline pose a defense to physical abuse of the child? Where is the line between discipline and abuse? Does the intent of the parent govern or is there a societal standard? This article will explore some of these questions.

Once a defense is placed in issue, Rule for Courts-Martial 916(b) [2] requires the government to prove beyond a reasonable doubt that the defense did not exist. A problem facing any prosecutor challenged by the "discipline defense" is defining exactly what the "defense" is and what element(s) of the offense it concerns. The "parental discipline" question is extraordinarily complex. It embraces a number of defenses and legal concepts. Before a prosecutor can defeat a defense beyond a reasonable doubt, he or she must know what the defense is. Untying the Gordian knot of parental discipline can be a source of considerable frustration.

It is not the purpose of this article to provide a comprehensive review of the law surrounding the potential charges in child physical abuse cases. Nonetheless, a review of some of the military offenses involved in child physical abuse will help the subsequent analysis of the "discipline defense." Civilian offenses will generally follow similar patterns.

Military Charges Likely in Child Physical Assault Cases

The offense charged in a child physical assault case will depend on whether the assault results in death. Where death has resulted, the Uniform Code of Military Justice [3] allows for charges of murder under article 118 (1) and (2), [4] manslaughter under article 119, [5] or negligent homicide under article 134. [6] Where death does not result, assault offenses under article 128 [7] and assault with intent to kill under article 134 [8] will be implicated. Maiming under article 124 [9] is also a potential charge where a child is seriously injured by an assault but does not die.

For purposes of discussing the "discipline defense," it is important to recognize that some of these offenses require a specific intent, while others require only general intent. Article 118(1) requires a premeditated design to kill the victim. [10] Unpremeditated murder under article 118(2) and voluntary manslaughter under article 119(a) require a specific intent to kill or inflict great bodily harm. [11] Article 119(b)(2), involuntary manslaughter, and article 134, negligent homicide, require only a general intent, because they are crimes of negligence. Article 128 includes the general intent offenses of simple assault, [12] assault consummated by a battery, [13] assault consummated by a battery on a child under the age of sixteen, and aggravated assault with a means or force likely to inflict grievous bodily harm. [14] It also includes the specific intent offense of intentionally inflicting grievous bodily harm. [15] The article 134

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[1] "Physical abuse" is used here to differentiate these offenses from those child abuse cases that are sexual in nature.

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(b) [hereinafter R.C.M. 916(b)].

[3] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

[4] UCMJ art. 118 (1) and (2).

[5] UCMJ art. 119.

[6] UCMJ art. 134.

[7] UCMJ art. 128.

[8] UCMJ art. 134.

[9] UCMJ art. 124.

[10] Manual for Courts-Martial, United States, 1984, Part IV, para. 43b(1)(d) [hereinafter MCM, 1984].

[11] MCM, 1984, para. 44b(1)(d).

[12] United States v. Frazier, 14 M.J. 773 (A.C.M.R. 1982), *pet. denied*, 16 M.J. 93 (C.M.A. 1983).

[13] *See* United States v. Allen, 10 C.M.R. 424 (A.B.R. 1953).

[14] *Id.*

[15] MCM, 1984, Part IV, para. 54b(4)(b)(iv).

assault offenses require the specific intent to kill. [16] Maiming has been held to be a general intent offense, but it does require a specific intent to cause some injury. [17]

Justification

The starting point for the examination of the "discipline defense" is whether or not such a defense has been recognized in the United States. No less an authority than the Supreme Court of the United States has recognized a right to employ physical force in disciplining a child. [18] In civilian jurisdictions throughout the country, the law recognizes a parent's right to physically discipline his or her child. [19] Military criminal law has also recognized a parental right to physically discipline a child. [20] Society recognizes that certain assaults are lawful, including the parent's right to physically restrain or punish a child.

This basic premise is the heart of any discipline defense. The accused individual claims that the conduct is lawful. Assaults must occur "wrongfully," that is without "legal justification or excuse." [21] Discipline provides the legal justification. The Manual for Courts-Martial terms this the defense of justification. "A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful." [22] The duty is that of a parent to provide instruction and restraint to a child.

This defense of justification is not, however, without limits. Society cannot tolerate unrestrained violence against a child committed in the name of discipline. There is a boundary or standard beyond which the "discipline defense" will not extend. Courts, however, have had difficulty defining the standard. Two schools of thought have emerged and, in some cases, have been merged. One standard looks to the parent's intent; the second applies a "reasonableness" standard to the force involved.

Intent

"A parent is not criminally liable merely because the members are of the opinion that the punishment inflicted is immoderate or excessive. To be criminally liable, the parent must inflict the injury *malo animo*, i.e., with malice." [23] Although it is the minority opinion in the United States, [24] the "malicious intent" or "cruelty" standard articulated by the Air Force Board of Review in 1960 has appeared in a number of military opinions. [25] The facts giving rise to his rule are tragic.

Airman Moore was convicted of the unpremeditated murder of his adopted daughter. In his confession, Moore indicated that he had beat his daughter with a rubber hose because she had wet her pants and disobeyed her mother. When her mother subsequently told her to go to the bathroom, the child again balked. Moore swung at her, she ducked, and he hit her, knocking her to the floor. Later that evening the child began to have labored breathing and blurry eyes. She complained of a pain in her leg. After being put to bed, she asphyxiated on her own vomit. The autopsy demonstrated that the majority of the child's body had been subjected to severe multiple blows.

At trial, the accused's wife testified that Moore had struck the child only a few times and that she had beaten the child. The panel convicted the accused of unpremeditated murder. The Air Force Board of Review affirmed the conviction, holding that the beatings were so severe that they provided sufficient evidence of the required malice. [26]

Malicious intent is more a concept of *mens rea*. Under this theory of law, the parent who strikes a child without an evil or criminal intent should escape liability. In *Mullen v. United States*, [27] for example, a mother escaped liability for keeping her children chained because the child abuse statute required a cruel state of mind.

Like *Mullen*, most of the civilian cases that are cited for this minority proposition rely on statutes that make

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[16] MCM, 1984, part IV, para. 64b(2). Although there are other intents that could give rise to an article 134 assault charge, they are not generally pertinent to child physical abuse cases.

[17] United States v. Hicks, 20 C.M.R. 337 (C.M.A. 1956). *See also* MCM, 1984, Part IV, para. 50b. The elements of maiming include an intent to cause some injury, although not necessarily the specific injury that gives rise to the charge of maiming. Thus, one can be guilty of maiming if the individual was engaged in general intent crimes of assault and battery or assault with a means or force likely to inflict grievous bodily harm if the assault results in the serious disfigurement of the victim or the loss or impairment of a member or organ of the victim's body.

[18] Ingraham v. Wright, 430 U.S. 651 (1977). The case addresses the issue of a teacher's right to use force in disciplining a child. "At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child." 430 U.S. at 661 (citations omitted).

[19] *See generally* Annotation, 1 A.L.R. 38 (4th ed. 1980).

[20] *See, e.g.*, United States v. Moore, 31 C.M.R. 282 (C.M.A. 1962); United States v. Brown, 26 M.J. 148 (C.M.A. 1988).

[21] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-102 (1 May 1982) (C1 15 Feb. 1985).

[22] R.C.M. 916(c).

[23] United States v. Moore, 30 C.M.R. 901, 910 (A.F.B.R. 1960).

[24] *See* United States v. Winkler, 5 M.J. 835, 836 (A.C.M.R. 1978).

[25] *See, e.g.*, United States v. Houghton, 31 C.M.R. 579 (A.F.B.R. 1961); *Winkler*, 5 M.J. at 836.

[26] *Moore*, 30 C.M.R. at 901.

[27] 263 F.2d 275 (D.C. Cir. 1958).

the cruel or malicious intent an element of a crime. [28] In such cases, the defense exists because of the way the statute is drafted.

The language from *Moore* regarding "malicious intent" is much broader. In theory, it is not limited to specific intent elements. In practice, however, the military courts apply the standard to counter specific intent. The Court of Military Appeals' decision in *Moore* vividly illustrates this point. [29]

In its analysis of the *Moore* case, the Court of Military Appeals concluded that the panel had been improperly instructed. The law officer instructed on the elements of unpremeditated murder. He did not instruct on any lesser included offenses. The Court of Military Appeals concluded that the panel should have been instructed on involuntary manslaughter. The court reached this decision because there was evidence that showed that Airman Moore did not intend to kill or inflict grievous bodily harm on his daughter. "[T]here is . . . in the record a plenitude of evidence which, if believed, would be inconsistent with the existence of an intent to kill." [30] The court listed a number of factors. Among them was the accused's stated purpose of correcting his daughter. The court indicates that such a purpose serves to defeat the element of "intent to kill or inflict grievous bodily harm" that is necessary to an article 118 conviction.

If the Air Force board's language is correct, the parental intent to inflict punishment would constitute a defense to any criminal responsibility because no general criminal intent, or *mens rea* is present. The Court of Military Appeals decision, however, treats the intent to punish as a defense to particular specific intent elements, not as a general defense.

In another military decision, the defense of a lack of "evil intent" was raised against the general intent offenses of maiming and assault on a child under the age of sixteen. [31] In that case, the government urged the Army Court of Military Review to reject the minority position in favor of the more widely accepted reasonableness standard. The Army court avoided the issue. "[A]ny brutal act (*i.e.* beyond reasonable limits) which results in injury is proof of malice and of guilty intent." [32] This is exactly the rationale the Air Force board used in *Moore* to provide the evidence of malice. The brutality of the attack—its unreasonable nature—supplies the evidence of "evil intent."

The "discipline defense" thus embraces at least two theories of intent. It may serve as a general denial of criminal intent or it may serve as a denial of particular elements of specific intent. In the latter theory, it constitutes a defense only to those specific intent offenses described earlier in this article. Appellate courts have employed that theory to grant relief. In the former theory, it constitutes a general defense that has not won relief in the military appellate courts.

Reasonableness

The majority view in the United States follows the objective standard of reasonableness.

> The use, attempt or offer to use force upon or toward the person of another is lawful when used in a *reasonable* and *moderate* manner by a parent or his authorized agent or a guardian in the exercise of lawful authority to restrain or correct his child or ward. [33]

This is a "reasonable parent" theory. It recognizes that there is a limit on a parent's ability to discipline, but does not specifically define those limits. It is fact specific and allows the trier of fact to consider a number of factors.

> It is not possible to legislatively lay down any fixed parameters of "reasonable discipline" of a child. Whether in any particular case the punishment inflicted was permissible or excessive must necessarily depend on the age, condition, and disposition of the child as well as the attendant circumstances. [34]

Finally, the standard is gauged by the societal standard of reasonableness. The reasonableness standard is not a measure of reasonableness as viewed by the parent. That would be nothing more than a restatement of the "malicious intent" standard. "The focus is on the welfare of the child and not on the parent's liberty of action." [35]

The language in military decisions indicates a tendency toward this standard. As noted in the discussion of intent, military courts have used the reasonableness of the force involved as a measure of malicious intent. [36]

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[28] *See supra* note 19. The cases cited in section 11[a] rely on statutes that require "cruel" or "malicious" treatment of the child.

[29] *Moore*, 31 C.M.R. at 288.

[30] *Id.*

[31] *Winkler*, 5 M.J. at 836.

[32] *Id.*

[33] State v. Singleton, 705 P.2d 825, 826 (Wash. Ct. App. 1985) (emphasis added).

[34] Kama v. State, 507 So. 2d 154, 159 (Fla. Dist. Ct. App. 1987).

[35] *Singleton*, 705 P.2d at 827. *See also* People v. Alderte, 347 N.W.2d 229 (Mich. Ct. App. 1984). *Alderte* rejects a defense claim that the reasonableness of the punishment should be viewed through the eyes of the accused. The accused claimed that he had been subjected to equally severe punishment as a child.

[36] *See Winkler*, 5 M.J. at 836.

Because those courts have found that unreasonable force satisfies the requirement of proof of a malicious intent, those decisions have, in fact, adopted the reasonableness standard. Other military decisions have used both the "evil intent" and the reasonableness standard. [37]

Model Penal Code

A third standard merits discussion because it has recently been cited by the Court of Military Appeals. [38] This is the Model Penal Code's provision regarding the use of force by a parent.

> The use of force upon or toward the person of another is justifiable if:
>
> (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
>
> (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
>
> (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. [39]

This standard focuses on the parent's belief in the necessity of the force. When that belief is reckless or negligent, the defense will fail against any offense that makes negligence or recklessness the standard for culpability. Thus, a negligent belief in the necessity of the force would allow a conviction for involuntary manslaughter under an article 119(b)(2) theory, but not a conviction for unpremeditated murder.

Accident

The standard defense of accident or misadventure is another strand in the complex web of the "discipline defense." The Manual states: "A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." [40]

This aspect of the defense arises where a child is seriously injured or killed. The parent defends on the theory that he or she was punishing the child. The extent of the injury indicates a force or means inconsistent with ordinary discipline and, consequently, a disciplinary intent. The parent responds that the injury or death occurred as an accident during the discipline. For example, the parent might claim that the child sought to avoid a spanking, twisted and fell against a sharp object. This is not a new "discipline defense," but is a traditional accident defense. The Court of Military Appeals has recognized that accidents may arise in parental discipline situations. [41]

Analysis

The "malicious intent" standard is unsatisfactory and the military courts know it. For some reason they have been unwilling to completely repudiate the concept. Perhaps this is because it is easily confused with the denial of the specific intent in certain of the offenses. The "malicious intent" standard as a general defense may be repudiated and a parent could still claim that it was not his or her intent to kill the child where that is a specific intent element. This is essentially what has happened to the defense of partial mental responsibility. [42] That defense no longer acts as a general defense to all criminal liability, but it may serve to negate specific intent.

A preliminary question in a claim of justification relying on child discipline must be: Was the assault an attempt to discipline the child? If the answer is yes, the analysis should move on to specific intent questions and questions concerning the reasonableness of force. If the answer is no, then no further inquiry need be made because no justification exists. If the parent crosses the line, giving vent to anger or hostility rather than seeking to educate and control, justification is defeated. The military courts may refuse to repudiate the "malicious intent" concept because they have confused that general, *mens rea* defense with this threshold question of justification. If that is the case, then it is time to end the confusion.

With regard to specific intent, a claim of intent to discipline may counter a specific intent to kill, absent evidence to the contrary. After all, a parent could not reasonably claim he or she sought to discipline the child by killing him or her. But should such a claim of intent to discipline be able to defeat the intent to inflict great bodily harm? Good intentions or lack of ill will do not necessarily mean that the person does not intend to inflict a particular harm. It is possible to envision a person who intends to discipline and intends to inflict great bodily harm. The person who was brutalized as a child and who views that as the proper method of discipline is one such example. [43]

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[37] *See, e.g.*, United States v. Brown, 26 M.J. 148 (C.M.A. 1988).

[38] *Id.* at 150. Although the Court of Military Appeals noted the provision of the Model Penal Code, it did not adopt them as its standard. Rather, the court conducted its analysis under both the "malicious intent" and "reasonableness" standards.

[39] Model Penal Code § 3.08 (1985).

[40] R.C.M. 916(f).

[41] *See* United States v. White, 23 M.J. 84 (C.M.A. 1986). In *White* the accused told investigators that he had attempted to hit the child with his fingers but missed. In admitting evidence of "battered child syndrome," the Court of Military Appeals noted that "the Government had to prove that the lethal blow was not the result of an accident." 23 M.J. at 87.

[42] *See* Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

[43] *See, e.g.*, *Singleton*, 705 P.2d at 826; *Alderte*, 347 N.W.2d at 229.

As noted earlier, the justification defense of discipline must have limits to prevent unrestrained violence against a child committed in the name of discipline. The "malicious intent" standard does not serve that end. Nor does it serve that end to allow a parent to intentionally inflict great bodily harm and deny malicious intent because the parent also intended to discipline the child. The "discipline defense" should extend into the area of parental intent only to the extent that it is a threshold question of the justification or accident defenses and to the extent that it counters a specific intent to kill. Beyond that, the proper measure of the justification defense is the reasonableness of the force employed. Justification requires that the legal duty be "properly performed." [44] The proper performance of discipline is found in the reasonable exercise of force. Society imposes the duty and society places the limits on the degree of that force.

[44] R.C.M. 916(c).

Conclusion

The military prosecutor faced with a "discipline defense" faces an imposing array of legal concepts bundled into what appears to be one defense. The military courts have avoided setting clear guideposts on the legal theories they are following. As a result, the government must be prepared to prove a lack of intent to discipline, general malice, unreasonable force, and, in some instances, specific intent to kill, injure, or inflict great bodily harm. Additionally, the government may need to show that any bodily harm was not the result of accident. That is a tall order.

The general trend of the cases, however, indicates that, where the prosecution has been able to demonstrate a brutal or excessive or unnecessary force, it is able to satisfy the appellate courts. Until the military courts refine their analysis of the "discipline defense," the best counter to the defense will be evidence of brutal or excessive force. Such evidence rebuts all aspects of the defense and can provide circumstantial evidence of any requisite specific intent.

Clerk of Court Notes

No Double Review for GCM Under Articles 69(a) and 69(b)

We are continuing to encounter soldiers who have been misadvised by trial defense counsel and members of staff judge advocate offices. An accused whose general court-martial conviction will be or has been reviewed ("examined") mandatorily pursuant to article 69(a) of the Uniform Code of Military Justice and Rule for Courts-Martial 1201(b)(1) is not also entitled to consideration of an Application for Relief pursuant to article 69(b) of the code. See Rule for Courts-Martial 1201(b)(3)(A), as amended, effective 12 March 1987 (MCM, 1984, C3, 1 Jun 87).

Of course, if the basis on which relief is sought is newly discovered evidence or fraud upon the court-martial—two of the grounds for relief under article 69(b)(3)(A)—a Petition for New Trial pursuant to article 73 of the code can be filed. Note, however, that the two-year limitation in article 73 is firm and cannot be extended upon a showing of "good cause for failure to file within that time" as can article 69(b) applications.

We suspect one cause of the bad advice has been the failure to amend subparagraph 14-3*b* of Army Regulation 27-10 when R.C.M. 1201(b)(3)(A) was amended in 1987. The regulation current as this note is written (edition dated 16 Jan. 89) implies that GCM cases can be reviewed under article 69(b), but that provision conflicts with the Manual and will be changed.

What to Do When an Accused Waives Appellate Review

We have been noticing a great deal of confusion about case processing when there has been waiver of appellate review. The key references are Rule for Courts-Martial 1110 and paragraph 13-5 of Army Regulation 27-10. If a waiver is timely (R.C.M. 1110(f)(1)) and is in substantial compliance with the rule (R.C.M. 1110(g)(4)), do not merely bundle up the record and send it off to the Clerk of Court as several commands have done.

First, the record must be reviewed by a judge advocate officer, just as records of trials by summary courts-martial and ordinary special courts-martial are reviewed. R.C.M. 1111(a)(2), 1112(a)(1). Be sure that the judge advocate's review covers the matters specified in R.C.M. 1112(d).

Next, when a dishonorable or bad-conduct discharge or confinement for more than six months is involved (as is almost always the case) the record goes to the GCM convening authority a second time for a further action. R.C.M. 1112(e), (f). You will find a sample promulgating order in figure 12-2 of AR 27-10. A case must also go to the GCM convening authority when the judge advocate's review finds that corrective action is needed (this applies to ordinary SPCM and SCM, too).

Only then, when those two tasks have been accomplished (review by a judge advocate and action by the GCM convening authority), is the original GCM or BCD/SPCM record sent to the Clerk of Court (ATTN: JALS-CC). Officer dismissal cases are sent because action by the Secretary of the Army is required. R.C.M. 1112(g)(2), 1113(c)(2). Cases in which the GCM convening authority did not grant the corrective action that the reviewing judge advocate found to be legally required must be forwarded for further review by TJAG. R.C.M. 1112(g)(1) (applies to SPCM and SCM cases, too). All

other GCM and BCD/SPCM cases in which appellate review was waived are likewise forwarded to the Clerk of Court, because they are filed as permanent records along with those that have undergone appellate review (see AR 27-10, paras. 5-35*b* (last sentence), 5-36*b*).

What if the attempted waiver is not timely or is not in substantial compliance with R.C.M. 1111? For example, suppose the attempted waiver is not received until more than ten days after the convening authority's initial action, is not on DD Form 2330 (MCM, 1984, app. 19) or DD Form 2331 (MCM, 1984, app. 2), and fails to include the essential elements set forth on those forms. When this occurs, the purported waiver should be forwarded to the Clerk of Court (with the original and two counsel copies of the record if not already sent).

The waiver itself will not be effective, but the same rules permit an accused to withdraw the case from appellate review. If that occurs, the Court of Military Review will direct the Clerk of Court to return the record to the original GCM convening authority for review by a judge advocate and a further action by the convening authority, exactly as in the case of a waiver. It is R.C.M. 1112(e) that requires that it be the original convening authority who takes any further action. If a punitive discharge is involved and more than six months have elapsed since the sentence was initially approved, R.C.M. 1113(c)(1) requires additional advice from the SJA before the convening authority may decide whether to order the discharge executed.

One final important point: When the GCM convening authority takes the supplemental action upon review of a case in which appellate review or examination has been waived, do not fail to send the supplementary order (AR 27-10, fig. 12-2) to the confinement facility, PCF, or other installation to which the accused is assigned. This much, and more, is commanded by subparagraph 12-7*e*, AR 27-10.

After the Trial: Do You Know Where Your Accused Is?

For persons at all levels concerned with the post-trial processing of court-martial cases in which an accused has been sentenced to confinement, the accused's location is critical. A copy of the record of trial must be sent to the accused, either as soon as it has been authenticated or after the trial defense counsel has finished using it for post-trial proceedings. The commander of the confinement facility must receive immediate notice of the convening authority's action and copies of the initial promulgating order, as must the accused. If—as still happens inexcusably often—the original record of a case destined for appellate review does not include the accused's election as to appellate representation, someone must find the accused to obtain the election. When the Court of Military Review issues a decision, a copy must be delivered to the accused in person when possible or served constructively by mailing to a proper address. Otherwise, the period within which an accused may petition for review by the Court of Military Appeals remains open and interminable.

This places two important burdens on the staff judge advocate office at the point of trial. First, you must be certain you know when an accused is transferred from the pretrial confinement facility and exactly where the accused was sent. As recent developments show, guesswork and assumptions will not do. Under the ongoing Army Corrections System 2000 Test (ACS 2000), some prisoners who otherwise might have gone to the U.S. Disciplinary Barracks (USDB) or U.S. Army Correctional Activity (USACA) are instead going to confinement facilities at Fort Meade or Fort Sill. In the future, other installations may also become involved in ACS 2000.

Moreover, for U.S. Army, Europe, and Seventh Army, DA Message DAMO-ODL 301234Z June 1989 changes the criteria for shipment of prisoners to the USDB and USACA. Instead of a two-year minimum sentence, only prisoners with sentences to confinement for over three years are being sent to the USDB. USAREUR prisoners with sentences to confinement of less than six months are transferred to installation detention facilities as determined by Corrections Branch in the Office of the Deputy Chief of Staff for Military Operations. This note is not intended to be an official statement of prisoner transfer criteria; our point is that SJA's must track post-trial confinees with the zeal of bloodhounds. Otherwise, the messages, documents, and the accused's copy of the record will go astray. Many have.

A second essential task for SJA's, relating to convicted accused who are not confined, is imposed by paragraph 13-11 of Army Regulation 27-10: The Clerk of Court must receive a copy of each transfer order or excess leave order pertaining to an accused convicted by a general court-martial or sentenced to a bad-conduct discharge by a special court-martial. This applies not only to the GCM trial jurisdiction SJA, but also to SJA's whose jurisdictions include Personnel Control Facilities or Installation Detention Facilities where soldiers are received from other commands, then placed on excess leave or returned to duty.

Delay between the date of a decision of the Court of Military Review and the expiration of the period within which an accused may petition the Court of Military Appeals can unreasonably postpone the finality of a court-martial. Reducing this period requires that the Clerk of Court know the whereabouts and status of the accused. The accused's copy of the decision, whether served in person or constructively, must be served promptly. Reducing this delay cannot be accomplished without your help.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and legal assistance program policies. They can be adapted for use as locally-published preventive law articles to advise soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

McCarty and Preemption Revived: Mansell v. Mansell

At the time of his retirement from the Air Force, Major Gerald E. Mansell suffered from a service-connected physical disability. While the degree of disability was not severe enough to qualify for military disability retirement, it was significant enough to entitle him to monthly payments from the Veterans Administration (VA). He chose to accept this benefit in lieu of a portion of his longevity-based retired pay, triggering a chain of events that resulted in a recent Supreme Court decision [1] that may affect *every* division of military retired pay in the foreseeable future.

In order to qualify for the VA benefits, Major Mansell had to waive an equivalent amount of his monthly military retired pay. [2] Nearly all retirees who are eligible to make such an election do so, even though they do not enjoy an increase in gross income. Choosing to receive VA benefits is financially advantageous because the money from the VA is tax-free, [3] unlike regular military retired pay. Thus, instead of receiving retired pay of $2000 per month, a retiree with a disability evaluated at $800 can waive $800 of taxable retired pay and receive a like sum, tax free, from the VA. The total monthly income is unchanged, but only $1200 would be taxable.

Major Mansell sought to gain another significant financial advantage through electing to receive VA benefits in lieu of a portion of retired pay. He was divorced, and the California court had awarded his former wife a percentage of his military retired pay. If he waived a portion of that retired pay, then it would seem that his former wife's share of his post-retirement income would be reduced. [4] Of course, there was no true surrender of income because he would receive the "waived" amount of money from the VA, and, as an added benefit, it would not be subject to the spousal share. [5] Thus, by accepting VA disability payments he could reduce the monthly payments to his wife, keep the difference himself, and reduce his income taxes as well. [6] For Major Mansell, it sounds too good to be true, doesn't it?

The California courts thought so. They already had confronted this situation (which is not uncommon among military retirees) and in *In re Daniels* [7] held that courts can award a spouse a share of military retired pay that has been waived in order to receive VA benefits. Enforcement of such an award can be difficult. VA benefits generally are not attachable, [8] and the former spouse probably could not receive a share of the waived portion directly from the military finance center. Still, the court held that retirees could be ordered to pay the money directly to their former spouses. Major Mansell received such an order and he appealed, eventually reaching the United States Supreme Court.

The merits of this issue can spark endless debate. Retirees argue that VA disability pay is compensation for personal suffering and reduced earning capacity in the future (after the marriage has ended). Thus, it carries the hallmarks of separate property and should not be divisible. Former spouses reply by focusing on the fact that the court awarded them a portion of community or marital property—military retired pay. It cannot be fair to allow the retiree to convert this asset to a form of property that the spouse has no interest in.

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[1] Mansell v. Mansell, 109 S. Ct. 2023 (1989). The case also is reported in 15 Fam. L. Rep. 2035 (1989).

[2] 38 U.S.C. § 3105 (Supp. V 1987).

[3] 38 U.S.C. § 3101(a) (Supp. V 1987).

[4] Suppose a court awards a former spouse 30% of the member's retired pay, and further suppose that the gross retired pay is $2000 per month. Ignoring, for the sake of simplicity, the other adjustments used to calculate disposable retired pay, the spouse would receive 30% of $2000, or $600. Now assume that the member elects to receive $800 per month in VA disability payments. This reduces the retired pay to $1200, and the spousal share is reduced to 30% of $1200, or $360.

[5] To continue the example in the previous footnote, the retiree who elected to receive VA payments would receive retired pay of only $1200, minus the former spouse's $360. The monthly retired pay thus would be $840. The retiree would recoup all of the waived $800, however, in the form of an $800 disability payment from the VA, yielding a total monthly compensation amount of $1640.

[6] From the example in the previous two footnotes, we see that a retiree who does not elect to receive VA payments would receive $2000 of retired pay minus the spousal share of $600, or $1400, all of which is taxable. If the election is made, the spouse receives only $360 (instead of $600) while the retiree receives $1640, $800 of which is tax-free.

[7] 186 Cal. App. 3d 1084, 231 Ca. Rptr. 169 (1986).

[8] 38 U.S.C. § 3101 (Supp. V 1987). *But see* 42 U.S.C. §§ 659, 662(f)(2) (1982 & Supp. V 1987) (allowing garnishment of VA disability payments to enforce a family support obligation if the payments are in lieu of a waived portion of military retired pay).

There is no clearly correct answer at this level of policy debate. [9] A more distilled legal analysis is possible, however. A key provision of the Uniformed Services Former Spouses' Protection Act (USFSPA) allows state courts to treat "disposable retired pay" as marital or community property and divide it in accordance with state law. [10] The term "disposable retired pay" is defined in the statute, [11] and it means gross retired pay minus certain deductions, including a deduction of any amount a retiree waives in order to receive VA disability benefits. [12] Thus, "disposable retired pay" clearly does not include the money that retirees have waived to qualify for VA payments.

Logic and a simple analysis of Congress's words can suggest that the USFSPA allows state courts to divide *only* "disposable retired pay." [13] The *McCarty* decision [14] is the starting point; it held that states are preempted from dividing any part of military retired pay. In response, Congress enacted the USFSPA, which allows state courts to "treat disposable retired . . . pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the laws of the jurisdiction of such court." [15] A review of the case and the statute could lead to the conclusion that states are preempted from dividing anything beyond "disposable retired pay." Logical as this analysis may be, however, it still begs the question of whether *McCarty's* preemption of state law survived enactment of the USFSPA.

In other contexts not involving VA disability benefits, several states have confronted precisely this question. They almost unanimously have concluded that there is no life left in the *McCarty* decision. [16] The rationale for this result, where rationales have been given, [17] is most fully developed in *Casas v. Thompson*, [18] wherein the Supreme Court of California held that Congress had intended that the USFSPA totally overrule all vestiges of *McCarty*. The court further reasoned that any limitation implied by the term "disposable retired pay" merely affects how much money a former spouse can obtain through the direct payment mechanism. [19]

Resurrecting the argument that had lost everywhere except in Louisiana, [20] Major Mansell challenged California's division of his waived retired pay on the grounds that it was not "disposable retired pay." Relying on the state supreme court's *Casas* decision, the trial court rejected this position, and the California appellate court not surprisingly affirmed the division. Major Mansell then took the matter to the United States Supreme Court.

After reciting the history of *McCarty* and its USFSPA aftermath, the Court framed the issue as one of statutory interpretation. Congress's formulation of section 1408(c)(1) [21] "affirmatively grants state courts the power

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[9] This is at least in part because the underlying provisions for VA benefits victimize military retirees as much as former spouses. To see how this is so, consider two soldiers who suffer a disability in their tenth year of service, one of whom immediately leaves the military and the other stays on active duty. The one who leaves begins receiving monthly VA disability payments, but the one on active duty does not. Twenty years later, after both have retired from their respective professions (and after the civilian already has received 240 monthly VA payments), the one who departed military service early is receiving a full civilian pension plus the continuing VA payments, which are tax-free. The military retiree, now a veteran, finally can begin receiving VA disability payments, but only if he or she decides to waive an equivalent sum of the retired pay that has been earned. In reality, the military retiree never gets VA disability payments at all; the only real benefit is a sheltering of a portion of retired pay from taxation.

The fairest solution for all concerned would be to eliminate the requirement that military retirees waive retired pay in order to qualify for VA disability benefits. Then, retirees would be elevated to the same status as their civilian counterparts, and VA benefits could be treated as separate property without adversely affecting the former spouse's rights. Not only would this change be just, but the issue that the *Mansell* case raised would disappear.

[10] 10 U.S.C. § 1408(c)(1) (1982).

[11] 10 U.S.C. § 1408(a)(4) (1982 & Supp. V 1987).

[12] 10 U.S.C. § 1408(a)(4)(B) (1982 & Supp. V 1987).

[13] *See* 10 U.S.C. § 1408(c)(1) (1982).

[14] McCarty v. McCarty, 453 U.S. 210 (1981).

[15] 10 U.S.C. § 1408(c)(1) (1982).

[16] Casas v. Thompson, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33, *cert. denied*, 479 U.S. 1012 (1986); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. App. 1984); White v. White, 734 P.2d 1283 (N. Mex. Ct. App. 1987); Lewis v. Lewis, 350 S.E.2d 587 (N.C. Ct. App. 1986); Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984); Martin v. Martin, 373 S.E.2d 706 (S.C. 1988); Grier v. Grier, 731 S.W.2d 936 (Tex. 1987); Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987). *But see* Campbell v. Campbell, 474 So.2d 1339 (Ct. App. La. 1985) (holding that courts could divide only disposable retired pay). Note also that the *Casas* and *Grier* cases involved state supreme court rulings that overturned lower court determinations that only disposable retired pay could be divided.

[17] *See, e.g.*, Casas v. Thompson, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33, *cert. denied*, 479 U.S. 1012 (1986); Grier v. Grier, 731 S.W.2d 936 (Tex. 1987). The other decisions either state that gross pay is divisible without acknowledging that there is an issue, or summarily decide that gross pay is divisible without explaining why.

[18] 42 Cal. App. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33, *cert. denied*, 479 U.S. 1012 (1986).

[19] The direct payment provisions of the USFSPA are found at 10 U.S.C. § 1408(d) (1982 & Supp. III 1985). They allow a qualifying former spouse to receive directly from a military finance center the share of military retired pay that a court has awarded. Such direct payments, however, cannot exceed 50% of the retiree's disposable retired pay.

[20] *See supra* note 15.

[21] 10 U.S.C. § 1408(c)(1) (1982) reads as follows:
Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of such jurisdiction.

to divide military retirement pay, yet its language is both precise and limited." [22] After noting that "disposable retired pay" is defined with some precision, [23] the Court went on to conclude that "under the [USFSPA's] plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted authority to treat total retired pay as community property." [24]

These observations dictate a decision in Major Mansell's favor unless Mrs. Mansell can show that a literal reading of the statute would thwart the obvious purposes of the USFSPA. [25] She tried to do so but failed to establish that Congress intended any specific or general result that would be subverted by applying the ordinary meaning of the statutory language. The Court found that the legislative history does not explain why Congress chose language that subjects a portion of retired pay to division while sheltering other portions from the authority of state courts. [26] The Court also found that this absence of congressional intent precludes identifying any specific "obvious purposes" that would be thwarted by a literal reading. From a broader perspective, the USFSPA creates and restricts various rights for both parties. Thus, there is no way to discern a general purpose that clearly would be thwarted by literally construing language that creates and at the same time limits a former spouse's rights. [27]

Based on this analysis, the Court ruled that "the Former Spouses' Protection Act does not grant state courts the power to treat, as property divisible upon divorce, military retirement pay that has been waived to receive veterans disability benefits." [28] Although the holding expressly addresses only retired pay that has been waived for VA benefits, the decision has broader significance. In this first interpretative effort, the Court hewed to the USFSPA's precise language, and in doing so it unequivocally found congressional intent to grant states authority that had been denied by *McCarty*, but to circumscribe the extent of that authority.

While not every military retirement case involves a retiree with disabilities, all divisions of military retired pay do confront the issue of whether the spouse receives a share of gross retired pay or disposable retired pay. The question is significant because part of the calculation for disposable retired pay includes a deduction for income tax withholdings that are applicable in each case. [29] As noted above, [30] state courts have tried to avoid dividing only disposable retired pay because this approach may mean that the former spouse pays a portion of the retiree's taxes (out of his or her share of retired pay) or that the retiree receives a windfall through a tax refund (at the former spouse's expense). In view of the Supreme Court's language in *Mansell*, [31] however, it now appears that courts can make awards only out of disposable retired pay, at least in contested cases. This in turn makes it unlikely that attorneys for members and retirees will agree to separation agreement provisions that give the spouse a percentage of gross retired pay.

There is yet another possible ramification of *Mansell*. Disabled military members may be voluntarily or involuntarily retired from the military under the provisions of Chapter 61, United States Code. [32] Because members do not receive both longevity retired pay and disability retired pay, it is arguable that disability retired pay includes compensation for longevity of service. [33] Some

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[22] *Mansell*, 109 S. Ct. at 2028.

[23] The definition is found at 10 U.S.C. § 1408(a)(4) (Supp. V 1987). As amended, it provides as follows.
"Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which—
(A) are owed by that member to the United States;
(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;
(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;
(D) are withheld under section 3402(i) of the Internal Revenue Code of 1986 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;
(E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

[24] *Id.*

[25] *Id.* at 2030.

[26] *Id.*

[27] *Id.* at 2031.

[28] *Id.*

[29] 10 U.S.C. § 1408(a)(4)(d) (1982 & Supp. V 1987).

[30] *See supra* notes 16-19 and accompanying text.

[31] *See supra* text accompanying note 23.

[32] 10 U.S.C. §§ 1201-21 (1982 & Supp. V 1987).

[33] For example, a soldier who is 50% disabled and receives a disability retirement after exactly 20 years of service would receive disability retired pay that is the same as the longevity retired pay he would receive if he retired due to length of service.

courts, therefore, have ruled that they can divide the portion of military disability retired pay that represents longevity retired pay "earned" during the marriage. [34]

This approach is valid to some extent, because even the USFSPA includes a portion of disability retired pay within the definition of "disposable retired pay." [35] Unfortunately for former spouses, the "disposable retired pay" portion almost always will be very small, and it never will equal the amount of disability retired pay that theoretically is attributable to longevity of service. In cases involving severely disabled retirees, the "disposable retired pay" portion of disability retired pay will be zero. [36]

These facts have not hindered most state courts in the past; they believed that their authority is not limited by the USFSPA. Thus, they divided disability retired pay in a manner that seemed equitable under the facts of particular cases. *Mansell* seems to say, however, that courts cannot divide any amount in excess of disposable retired pay. This may shield the entire amount of disability retired pay from division, leaving some long-term military spouses with no financial security, while allowing some disabled retirees to keep their full retirement paychecks.

All this is speculative, of course; it is too early to say with certainty what the fallout from *Mansell* will be. State courts sought to avoid some of the restrictions that the USFSPA seemed to create, and there is no reason to expect *Mansell* to be more warmly embraced. In the meantime, however, counsel for members and retirees should be cautious before recommending that clients agree to a division of gross retired pay. While it is not improper for the parties to adopt such a provision, the member now may demand a quid pro quo for surrendering benefits that do not fall within the ambit of disposable retired pay. Similarly, separation agreements proposed by spouses should be reviewed carefully to ensure there are no surprise definitions of what constitutes military retired pay for purposes of division that are implied or expressed in the agreement.

On the other hand, if the parties do agree to divide something in excess of disposable retired pay, counsel for the spouse should ensure that any ensuing court order clarifies the basis for the division. Military finance centers may become reluctant to accept orders that divide gross retired pay (and certainly those that divide waived retired pay) unless it is clear that the member voluntarily agreed to such provisions.

There is one final point. It is almost certain that *Mansell* will not be the last word in this area. Indeed, just as it did in *McCarty*, the Supreme Court closed this latest case by inviting the legislature to enact a statutory change if it does not like the result. Congress has shown little hesitancy to amend the USFSPA in the past, and there is no reason to expect that the seeming unfairness highlighted by the *Mansell* case will escape without corrective action.

The exact form of any amendment is unclear, however. The fairest solution for all would be the elimination of the waiver provision altogether, so retirees would not be required to waive retired pay in order to qualify for VA disability benefits. A less ambitious (and less expensive) answer would simply make waived retired pay divisible, thus overturning the *Mansell* result but not addressing the gross versus disposable and military disability retired pay issues. Alternatively, Congress

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[34] *See, e.g., In re* Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985).

[35] 10 U.S.C. § 1408(a)(4)(E) (Supp. V 1987).

[36] Under chapter 61, the amount of retired pay a disability retiree receives is the higher result from two separate formulas. For purposes of illustration, consider a member on active duty for 16 years, with an active duty base pay of $2,000 per month, who is medically retired due to a 30% disability.

The first formula requires obtaining a percentage by multiplying the number of years of service creditable for retirement purposes by 2.5. Here, 16 x 2.5 equals 40, which in this context means 40% . The monthly base pay (here, $2,000) is then multiplied by this 40% figure to yield a retirement benefit of $800 per month. The second formula merely involves multiplying the base pay by the percentage of disability. Here, 30% times $2,000 equals $600.

The retiree receives the higher of these two amounts; in the example, the monthly disability retired pay would be $800. The calculation used to arrive at this result seems to include some consideration of the soldier's longevity of service (rather than being based strictly on the degree of disability), but all money paid under chapter 61 is deemed to be disability retired pay.

Disability retirees never fare worse than they would if they retired based on longevity of service. In some cases they receive more than they would if their retirement was based solely on longevity. Nevertheless, the cap on longevity retired pay of 75% of base pay, regardless of the length of service, also applies to disability retired pay. Thus, a soldier who is more than 75% disabled or who is medically retired after more than 30 years of service would receive 75% of base pay even though the formulas yield a higher amount. There is also a floor for those placed on the *Temporary* Disability Retired List; they receive not less than 50% of their base pay.

To see what consequences these provisions have for divisions of military retired pay, start with the definition of "disposable retired pay" found in 10 U.S.C. § 1408(a)(4)(E). It defines the term to include total monthly retired pay "less amounts which . . . are equal to the amount of [disability retired pay] computed using the percentage of the member's disability." (Pub. L. 99-661, § 641, amended 10 U.S.C. § 1408(a)(4) in this regard; as first enacted, § 1408(a)(4) excluded *all* disability retired pay from the term "disposable retired pay").

Returning to the first set of facts discussed above, the total disability retired pay is $800, but the disposable retired pay portion is calculated by subtracting the amount that is "computed using the percentage of the member's disability," or $600 (i.e., 30% disability times $2000 base pay). Thus, the retiree's disposable retired pay is $800 minus $600, or only $200.

For a more striking result, consider the situation that arises if a soldier with 16 years' service is 50% disabled. On these facts, the disability retired pay would be $1,000 (i.e., 50% times $2,000). *None* of this sum would constitute disposable retired pay. The calculations yield the same result for a member with a 70% disability who is retired after 25 years of service, and so forth.

Thirty percent is the minimum level of disability necessary to qualify for disability retirement. Thus, at least 30% of a member's active duty base pay always will be deducted from retired pay (which itself will be only a fraction of active base ranging from 30% to 75%) in calculating "disposable retired pay." Of course, more than 30% will be deducted in cases involving more severe disabilities, and, as the examples show, in some cases there will be no "disposable retired pay."

After examining the formulas, it becomes clear that the only time a disability retiree will receive a significant amount of "disposable retired pay" is when: 1) the retiree is senior in rank; and 2) the retiree has served on active duty for a long time; and 3) the degree of disability is relatively small.

could modify the definition of disposable retired pay in varying degrees to fine-tune the answer to some or all of these issues. Finally, Congress could simply uncouple the term "disposable retired pay" (which, after all, probably was crafted with an intent to define spousal remedies rather than spousal rights) from section 1408(c)(1)'s grant of authority to treat retired pay as marital or community property. Whichever approach the courts and Congress adopt, it will be necessary to stay abreast of what are sure to be changing rules. MAJ Guilford.

State-by-State Update

In the June 1989 issue of *The Army Lawyer* we published a state-by-state listing of current decisions on the division of military retired pay. We will update the information in that list as new cases are decided. This month there is one correction to be made and a notation of a new case.

The correction relates to Puerto Rico, where military retired pay is *not* divisible as marital property. The authority for this statement is an opinion by the Supreme Court of Puerto Rico that has not yet been published, *Delucca v. Colon*. [37] Military retired pay may be considered as income in setting alimony and child support obligations. We thank Colonel Otto Riefkohl and Lieutenant Colonel Fabio A. Roman-Garcia, two reserve component judge advocates in Puerto Rico, for bringing this case to our attention.

The new case comes from Indiana, and it adds that state to the list of jurisdictions that award a spousal share of military retired pay only if it is vested at the time of division. State statutory law declares "the right to receive disposable retired . . . pay . . . that is or may be payable after the dissolution" to be marital property, [38] but when does the "right to receive" military retired pay arise?

In *In re Bickel* [39] Mrs. Bickel filed a petition for dissolution in May 1987. Her husband completed twenty years of military service two months later, and he retired before October. The dissolution was granted in October 1987, and the trial court refused to award Mrs. Bickel a portion of the retired pay. In Indiana the valuation date for marital property is the date of filing the petition, and property acquired by either spouse after that date is separate property. Given this rule, the husband argued that his pension is not marital property because his "right to receive" military retired pay did not accrue until sometime after May. Based on this reasoning, the appellate court affirmed the trial court's refusal to award the spouse a share.

The case establishes the fact that military retired pay is not divisible unless the member at least is entitled to receive the pension as of the valuation date. The decision also raises another possible restriction. The court seems to focus on the date that the husband began receiving retired pay, not only on the date he was eligible to receive it. This could mean that the "right to receive" occurs only when the member actually retires. On the other hand, this aspect of the *Bickel* case is *dicta*, as the husband had not yet served a full twenty years as of the valuation date, and the statute would not seem to require actual retirement as a prerequisite for division. [40] We will have to await future cases to clarify the issue. MAJ Guilford.

Consumer Law Notes

State Automobile Insurance Premiums

After several years of effort, judge advocates at Fort Bragg have recently realized their goal of obtaining lower automobile premiums for military personnel assigned to North Carolina. In 1987 the Office of the Staff Judge Advocate, XVIII Airborne Corps, discovered a disparity between insurance rates paid by soldiers living on post and rates paid by soldiers and others living off post. Subsequent research by judge advocates at Fort Bragg and Camp Lejeune Marine Corps Base revealed that the North Carolina Rate Bureau, which designates insurance areas within the state, had grouped all military installations in the state into one entity, known as Territory 19. The Rate Bureau partitioned all other insurance areas within the state so that each was a separate geographic entity with territorial integrity. As a general rule, the insurance rates for the military installations within Territory 19 were significantly higher than the rates in the surrounding communities.

In January 1989 commanders and judge advocates from military installations in North Carolina met with the Rate Bureau and the Insurance Commissioner for North Carolina. Invoking North Carolina's recently enacted law barring discrimination against those in military service, [41] the military representatives urged the Rate Bureau to abolish Territory 19. Subsequently, in February 1989 the Rate Bureau voted to abolish Territory 19 and merge each military installation with its surrounding insurance rate territory. The insurance rate commissioner approved the Rate Bureau's action and directed that the Rate Bureau abolish Territory 19 in fall 1989.

Through aggressive advocacy and negotiations, the judge advocates at Fort Bragg and other military installations instigated changes that should lead to lower insurance premiums for the military communities in North Carolina. Legal assistance attorneys in other states should examine existing state-wide insurance schemes for

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[37] 118 D.P.R. _____ (1987).

[38] Indiana Code § 31-1-11.5-2(d)(3) (1987).

[39] 533 N.E.2d 593 (Ind. Ct. App. 1989)

[40] Marital property includes military retired pay that "is *or may be* payable after the dissolution" (emphasis added). This formulation certainly could encompass retired pay that is "vested" in the sense that the member has served 20 years or more, even if he or she has not retired as of the dissolution.

[41] N.C. Gen. Stat. § 127B-11 (1988) bars private discrimination against military service members and section 127B-12 prohibits governmental discrimination. Violation of these provisions may be punished by fines of up to $500.00 or confinement for up to six months, or both.

similar cost-inflating arrangements. If these arrangements do exist, the success of the military legal community in North Carolina serves as a superb example of how to remedy the problem. MAJ Pottorff.

Fair Credit Reporting Act

The Fair Credit Reporting Act [42] (FCRA) requires credit reporting agencies to report consumer credit information in a manner that ensures the confidentiality, accuracy, relevancy, and proper use of the reported information. If a credit file contains inaccurate information, a consumer may, by written notice to the credit reporting agency, challenge the information. The credit agency is obligated to investigate each such challenge. Consumers may sue to recover actual damages, costs, and attorneys fees for either negligent or willful failure of an agency to comply with any provision of the FCRA. Consumers must bring actions for negligent failure to comply with the FCRA within two years from "the date on which liability arises" under the act. [43] Consumers may bring actions for willful misrepresentation of credit information anytime within two years after they discover the misrepresentation. [44] A recent case has applied this two-year statute of limitations, clarifying when consumers may bring an action under the FCRA.

In *Hyde v. Hibernia National Bank* [45] a credit reporting agency prepared a report erroneously indicating that the plaintiff had defaulted on a loan from the Hibernia National Bank. The plaintiff, Hyde, received this report in 1983 and telephonically notified the credit reporting agency that it was incorrect. He failed to follow-up his call with written notification, as required by FCRA. The agency did not correct the report; instead, it informed Hyde that his complaint would have to be in writing. Hyde, however, took no further action. Three years later the credit reporting agency provided the erroneous information to the Diner's Club, which rejected Hyde's application for a credit card.

In 1987 Hyde sued the credit reporting agency and the bank for both intentional and negligent violation of the FCRA. The district court held that the statute of limitations for negligent release had run because the erroneous report was first issued in 1983, more than two years before Hyde brought suit. The court also held that the statute of limitations had run on the willful release action because Hyde knew of the misrepresentation as early as 1983.

On appeal, the Fifth Circuit concluded that the statute of limitations had not run for either the negligence theory or the willful release theory. It held that the statute of limitations begins to run when a consumer suffers injury from a negligent release of an erroneous report. The statute of limitations for willful release also begins running at that time, unless the consumer is not aware of the issuance of the report. In that case, the statute begins to run when the consumer discovers the credit report. The court also held that each subsequent issuance of an erroneous credit report begins a separate cause of action to which a separate statute of limitations applies.

This result provides a powerful tool to consumers who may have struggled for years to correct erroneous credit reports. The fact that a consumer knows that a credit report agency has compiled a report with inaccurate information is not dispositive. The significant factor is when the report is issued to third parties and when the consumer knows of that issuance. Even if the statute of limitations has run for actions based on earlier releases by an agency, if the agency has continued to issue the same report again and again, a consumer may have multiple causes of action against the credit reporting agency. MAJ Pottorff.

Tax Notes

Proposed Regulations Implement Problem Resolution Procedures

The Treasury Department has issued proposed temporary regulations to implement new problem resolution procedures set up under the taxpayer's Bill of Rights. [46] Under legislation passed last year, [47] the Ombudsman's Office within the Internal Revenue Service (IRS) was given the authority to issue taxpayers assistance orders (TAO) to settle administrative problems that have not been expeditiously resolved through normal channels. The new proposed temporary regulations specify the time and manner for filing an application for a TAO and took effect on February 8, 1989.

An application for a TAO must be made on IRS Form 911, but the form may be supplemented by a signed written statement that identifies the taxpayer and describes the significant hardship he or she faces. The request for a TAO must be filed at the IRS Problem Resolution Office in the district where the taxpayer resides, and it must be filed within a reasonable time after the taxpayer has become aware of the significant hardship. [48] Soldiers serving overseas should file applications with the IRS Problem Resolution Office where their return is filed.

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[42] 15 U.S.C. § 1681 (1982).

[43] *Id.* § 1681p.

[44] *Id.*

[45] 861 F.2d 446 (1988), *cert. denied*, 57 U.S.L.W. 3827 (U.S. June 19, 1989) (No. 88-1467).

[46] The Taxpayers Bill of Rights was Part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988) [hereinafter TAMRA].

[47] TAMRA § 6230.

[48] Treas. Temp. Reg § 301.7811-1T(b)(2).

The Ombudsman's Office may issue a TAO if it determines that the taxpayer is suffering or is about to suffer a "significant hardship" as a result of the manner in which the IRS is administering revenue laws. According to the regulations, "significant hardship" is present if the disruption to be caused by the IRS action would offend the sense of fairness of taxpayers in general if they were aware of all the facts and circumstances. [49] More than mere inconvenience or financial hardship will be required before a finding of significant hardship will be issued.

The regulations clarify the types of action that may be the subject of a TAO. [50] Upon a determination of significant hardship, the Ombudsman may issue a TAO requiring the IRS to refrain from taking further action against the taxpayer that causes or will cause a significant hardship. A TAO may not generally require the IRS to take affirmative action other than to release levied property. The TAO may not be issued to enjoin the IRS from investigating a criminal tax case or to contest the merits of any tax liability. Moreover, the regulations specify that the TAO is not to be used as a substitute for established administrative or judicial review procedures. [51]

A TAO may be modified only by the Ombudsman, a district director, a service center director, a regional director of appeals, or their supervisors. A TAO is binding on the IRS unless it has been modified or rescinded. The statute of limitations on any action that is subject to a TAO is suspended from the date of the taxpayer's application until the date of the Ombudsman's decision. If a TAO is issued in the absence of a written application by the taxpayer, the statute of limitations is not suspended. MAJ Ingold.

New Tax Form for 1989 Issued

Beginning in 1989, parents can avoid the need for filing a tax return for a minor child under age 14 by electing to include the child's unearned income on their return. [52] New IRS Form 8814, Parent's Election to Report Child's Interest and Dividends, will be used by parents for this optional method of reporting investment income of dependent children.

To use the new form, the child's income must consist entirely of interest and dividends and must total more than $500 and less than $5,000. [53] The election is not available if estimated tax payments have been made during the year in the child's name.

When the parent elects to report the child's income on the new form, no return is required to be filed for the child. While the use of the new form may simplify reporting requirements for families, it could be disadvantageous under some circumstances. The child's unearned income will add to the parent's adjusted gross income and, because certain itemized deductions such as medical and miscellaneous are measured against a percentage of adjusted gross income, this type of reporting will reduce or eliminate deductions for those parents who are above the required levels.

The advance proofs of Form 1040 and several schedules also reflect several minor changes. The name and address area on Form 1040 has been redesigned to allow a husband and wife filing a joint return to enter their names on separate lines. Taxpayers will also be required to report social security numbers for their dependents age two and over on Forms 1040 and 1040A.

Form 2441, Child and Dependent Care Expenses, has been modified to require identification of child care providers. The name, address, and social security number of child care providers must now be reported to the IRS.

A new form entitled Schedule D-1 has been released to provide additional space for reporting short-term and long-term securities sales. The form is to be used as a continuation sheet to Schedule D if additional lines are needed. MAJ Ingold.

IRS Announces 1990 Electronic Filing Program

The IRS recently announced that it will expand the electronic filing program nationwide for the 1989 tax reporting season. [54] The expansion of the program includes Hawaii and Alaska. United States citizens living abroad with either APO or FPO addresses will also be able to transmit their returns electronically.

Forms 1040, 1040A, and 1040EZ and most of the commonly used schedules will now be accepted under the electronic filing program. Forms W-2, W-2G, W-2P, 2106, 2119, 2441, 3903, 4136, 4137, 4255, 4562, 4684, 4797, 4835, 5329, 6198, 6251, 6252, 8283, 8582, 8606, and 8808 can also be transmitted electronically.

Installations and offices interested in participating in the electronic filing program should apply to the IRS before 1 October 1989. A special IRS Form 8633, Electronic Filer Application to File Individual Income Tax Returns Electronically, should be used to make the application. The form should be mailed to the service center to which electronic returns will be filed. The service centers are Andover, Massachusetts; Cincinnati, Ohio; and Ogden, Utah. [55]

Offices that were accepted into the electronic filing program last year do not need to reapply this year.

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[49] Treas. Temp. Reg. § 301.781-1T(a)(4)(ii).

[50] Treas. Temp. Reg. § 301.7811-1T(c)(1).

[51] Treas. Temp. Reg. § 301.7811-1T(c)(3).

[52] I.R.C. § 1(i)(7) (West Supp. 1989).

[53] I.R.C. § 1(i)(7)(A)(ii) (West Supp. 1989).

[54] 54 Fed. Reg. 28,148 (1989).

[55] The IRS announcement in 54 Fed. Reg. 28,148 (July 5, 1989) contains mailing addresses for these service centers and indicates what states they service.

These offices are required to notify the IRS, however, if information provided on previous applications has changed. Information concerning changes in electronic filing functions performed, the names of the organization's contact person, or the address or telephone of the office should be reported to the appropriate IRS service center.

For more information on the 1990 electronic filing program, interested persons should contact the nearest District Office Electronic Filing Coordinator. Further information can also be obtained by calling a nationwide telephone number, 1-800-424-1040, which has been set up for answering inquiries on the program. MAJ Ingold.

Professional Responsibility Note

Can a Lawyer Disclose That Client Has AIDS?

The Delaware Bar Association Committee on Professional Ethics recently issued an opinion stating that an attorney may not disclose the fact that a client has acquired immune deficiency syndrome (AIDS) to a woman the client is living with. [56] A different conclusion, however, would probably be reached if the same fact setting arose in a military context.

The client in the case revealed to his attorney during the course of the representation that he had AIDS. The client asked the attorney not to release the information to anyone. The client was living with a woman at the time the disclosure was made. The attorney, uncertain about his ethical responsibilities, asked the state bar ethics committee whether he could release the information to the woman.

Delaware Rule of Professional Conduct 1.6 provides that an attorney may not reveal information relating to the representation of a client unless the client consents or unless it is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. [57] The committee believed that the information could not be released under this exception because there is no Delaware law that makes the transmission of AIDS to an unknown victim criminal. The committee also expressed concern that the imminent danger requirement for permitting disclosure would not be satisfied because it is not altogether certain that a person will transmit the AIDS virus while having sexual relations.

The Delaware Bar Association Ethics Committee was not entirely comfortable with the consequences of its decision. It strongly encouraged the lawyer to confront the client and urge him to disclose the fact that he has the AIDS virus to the woman he was living with or to let the attorney make the disclosure. The committee suggested that the attorney advise the client that nondisclosure could result in possible civil liability and potential criminal sanctions under a possible test case.

According to the ethics committee, if the client refuses to disclose the information or to consent to release, the attorney's duty is to withhold the information. If the attorney nevertheless feels morally compelled to release the information, he should inform the client that he will release the information and be prepared to accept discipline. The committee suggested that an attorney facing discipline for making disclosure under these circumstances could argue a "moral compulsion" exception to Rule 1.6. The committee did not indicate, however, whether this argument would be likely to succeed.

A military lawyer facing the same dilemma as the Delaware attorney should not follow the conclusion reached by the Delaware ethics committee. Unlike Delaware, engaging in unprotected sexual intercourse after being diagnosed as having the AIDS virus is a criminal offense in the military. [58] Thus, a lawyer who has a reasonable belief that a client with the AIDS virus intends to have unprotected sex with another must release the information under Army Rule 1.6 which mandates disclosure of information to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm. [59]

Army attorneys must carefully analyze the facts of each particular case before making disclosure. An Army attorney must possess a reasonable belief that the client actually intends to commit a future offense before making disclosure under Army Rule 1.6. Accordingly, disclosure would not be authorized, for example, if the client is not married and sincerely informs his or her attorney that he does not intend to have unprotected sexual relations.

When making mandatory disclosure under Army Rule 1.6, an attorney has the duty to disclose information only to the extent necessary to prevent the harm. [60] Under most situations, it would be appropriate to limit disclosure to a client's spouse or any person with whom the client is living. MAJ Ingold.

Estate Planning Note

Making Anatomical Gifts

One area of estate planning that is frequently overlooked by legal assistance attorneys is helping clients

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[56] Delaware Bar Association Professional Ethics Committee, Formal Opinion 1988-2.

[57] Delaware Rules of Professional Conduct, Rule 1.6.

[58] *See, e.g.*, United States v. Stewart, ACMR 8702932 (A.C.M.R. 9 Sept. 1988) (unpub.) (guilty plea to assault with a means likely to produce death or grievous bodily harm upheld); United States v. Johnson, 27 M.J. 798 (A.F.C.M.R. 1988) (conviction for aggravated assault affirmed upon proof that accused attempted to engage in unprotected anal intercourse after being diagnosed as having the AIDS virus); United States v. Woods, 27 M.J. 749 (A.F.C.M.R. 1988) (specification alleging that the accused committed the article 134 offense of reckless endangerment by engaging in unprotected anal intercourse after having been diagnosed to have the AIDS virus). For more information concerning these cases, see TJAGSA Practice Notes, *AIDS Update*, The Army Lawyer, March 1989, at 31.

[59] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 1.6 (31 Dec. 1987) [hereinafter Army Rules].

[60] Army Rule 1.6 comment.

make anatomical gifts. An attorney can render a great service not only to the client but also to medical patients needing body tissue or organ transplants by discussing this topic during estate planning interviews and preparing appropriate forms to execute the gift.

The transplantation of body parts including skin grafts, bones, blood, corneas, kidneys, livers, arteries, and hearts is a rapidly expanding branch of medical technology. While advances in medical science have made even complex transplants possible, there are never enough organs available to meet the demand.

In light of this ever present need, the Department of Defense (DOD) policy is to encourage organ and tissue donation and coordinate donors with needy recipients. [61] Under present DOD directive, donors interested in making an organ or tissue gift should comply with the law of the state where the gift is being made. [62] Clients residing overseas should make the gift in accordance with the Uniform Anatomical Gift Act unless host nation law requires otherwise. [63]

The task of making anatomical gifts has been simplified by the fact that all 50 states, the District of Columbia, and the Virgin Islands have enacted the Uniform Anatomical Gift Act (UAGA). [64] The UAGA provides that any person over age eighteen may donate his or her body or any part to any hospital, physician, medical school, organ transplant bank, or particular individual. [65]

The Act specifies several alternative forms for executing an anatomical gift. One method is by a statement in a will, and such a gift is valid even before the will is submitted for probate and even if the dispositive portions of the will are ruled invalid. [66] Because wills are often not located until well after a person's death, however, it is advisable to make anatomical gifts in a separate document or card. No special form is required to make a valid gift, but the donor should sign the document in the presence of at least two witnesses. [67] Delivery of the document to the intended recipient is not necessary. [68]

The most effective method for making an anatomical gift is to execute a small card that is carried on the person. Many states now issue anatomical gift card forms as part of drivers' licenses. A sample card for making a valid anatomical gift is reproduced above.

SAMPLE ORGAN DONOR CARD

UNIFORM DONOR CARD

OF _____
(Print or type name of donor)
In the hope that I may help others, I hereby make this anatomical gift, if medically acceptable, to take effect upon my death. The words and marks below indicate my desires.
I give (a)_____any needed organs or tissues
(b)_____only the following organs or tissues

_____
Specify the organs or tissues for the purposes of transplantation, therapy, medical research or education
(c)_____ my body for anatomical study if needed.
Limitations or special wishes, if any _____

Signed by the donor and the following two witnesses in the presence of each other:

_____ _____
Signature of Donor Date of Birth of Donor

_____ _____
Date Signed City and State

_____ _____
Witness Witness
(preferably next of kin)

This is a legal document under the Uniform Anatomical gift Act or similar laws.

A donor may designate in the will, card, or other document what body parts or organs are donated. [69] The donor may also specify a recipient and include special procedures or requests.

An anatomical gift document may be amended or revoked at any time by simply destroying or mutilating

[61] Dep't of Defense Directive 6465.3, Organ and Tissue Donation (Aug. 14, 1987) [hereinafter DOD Dir. 6465.3]. The Army Organ Transplant Program has been established to implement DOD policy. *See* Army Reg. 40-3, Medical Services: Medical, Dental, and Veterinary Care, para. 18-1 (15 Feb. 1985).

[62] DOD Dir. 6465.3, para. F1.

[63] DOD Dir. 6465.3, para. F1.

[64] Unif. Anatomical Gift Act § 1, 8A U.L.A. 30 (1987). The Uniform Anatomical Gift Act was enacted in 1968 and amended in 1987. Thus far three states, California (West's Ann. Cal. Health & Safety Code, §§ 7150 to 7158), Connecticut (C.G.S.A. §§ 19a-271 to 19a-280), and Hawaii (HRS §§ 327-1 to 327-9), have repealed the 1968 version of the Act in lieu of the 1987 amended version. The focus of this note will be on the 1968 version.

[65] Unif. Anatomical Gift Act § 2, 8A U.L.A. 34 (1968).

[66] Unif. Anatomical Gift Act § 4(a), 8A U.L.A. 43 (1968).

[67] Unif. Anatomical Gift Act § 4(b), 8A U.L.A. 43 (1968). If the donor is unable to sign, the document may be signed for him or her in the presence of two witnesses.

[68] Unif. Anatomical Gift Act § 5, 8A U.L.A. 55 (1968).

[69] Unif. Anatomical Gift Act § 4(c), 8A U.L.A. 44 (1968).

the document. [70] Gifts made by will may be revoked by codicil or any other method recognized for amending a will. [71] If the document has been delivered to a specified donee, the donor may execute and deliver a revocation to the donee, make an oral statement revoking the gift to the donee in the presence of two persons, or carry a card revoking the gift on his or her person. [72]

If a person fails to make a gift or communicate his or her intention not to make a gift prior to death, certain relatives or the next of kin of the decedent may make an anatomical gift. [73] Accordingly, it is extremely important for clients who do not wish to make an anatomical gift to nevertheless clearly and strongly place that decision in an appropriate document so that the next of kin will follow through on that desire.

The discussion of anatomical gifts, like many other areas in estate planning, is often uncomfortable and unpleasant. It is, however, a highly important topic that should be addressed by legal assistance attorneys interested in doing a thorough job for their clients. MAJ Ingold.

Contract Law Note

Concorde Battery Corporation [74]

It is Friday afternoon and there is hope that the weekend will finally arrive. To this point you have had a perfect week; none of your advice has come back to haunt you. Suddenly, out of the corner of your eye, you notice that a contracting officer is standing at your office door. The next thing you know, he says he has "one *quick* question." You put your game face on (small closed-mouth smile) and reply, "Sure, please come in." The contracting officer has received a bid on a small business set-aside and the apparent low bidder has failed to certify [75] that all end items to be furnished will be manufactured or produced by a small business. Is the bid responsive?

"Bid responsiveness concerns whether a bidder has unequivocally offered to provide supplies in conformity with all material terms and conditions of a solicitation. Only where a bidder provides information with its bid that reduces, limits, or modifies a solicitation requirement may the bid be rejected as nonresponsive." [76]

With regard to a bidder's failure to complete the small business size status portion of the representation, a bidder's failure to certify under a small business set-aside that it is a small business does not affect the bid's responsiveness. Information as to the bidder's size is not required to determine whether a bid meets the solicitation's material requirements. [77] In contrast, the General Accounting Office (GAO) has held that a bidder's failure to complete the end item certification does require rejection of its bid as nonresponsive, because to be responsive, a bid on a total small business set-aside must establish a bidder's obligation to furnish only end items manufactured or produced by a small business. [78]

Recently the GAO has *changed* its position regarding its holding in *J-MAR Metal Fabricating Co.* In *Concorde Battery Corporation* [79] the GAO held that a bidder's failure to certify that it will furnish only end items manufactured or produced by small business concerns does not require rejection of its bid as nonresponsive where the bidder would still be obligated to furnish only small business end items. In *Concorde* and in *J-MAR Metal* the solicitation incorporated FAR clause 52.219-6, [80] which provides that the bidder "agrees to furnish" only small business end items in its performance of the contract. The GAO held in *Concorde* that, although the bidder failed to complete the certifications contained in the solicitation provision 52.219-1 (May 1986), because the bidder did not take exception to any of the solicitation terms, including those contained in FAR 52.219-6 (Apr. 1984), it would be obligated to provide supplies produced by small businesses. Accordingly, its bid was responsive. The GAO did not address the agreement contained in FAR 52.219-6 (Apr. 1984) in the *J-MAR Metal* case, although the facts clearly indicate that the clause was in the solicitation. It is clear that the GAO has changed its position concerning its holding in *J-MAR Metal Fabricating Company*.

After reading this note you are now prepared to look your contracting officer straight in the eye and answer his "quick" question with an unequivocal, "Maybe;

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[70] Unif. Anatomical Gift Act §6(b), 8A U.L.A. 57 (1968).

[71] Unif. Anatomical Gift Act § 6(c), 8A U.L.A. 57 (1968).

[72] Unif. Anatomical Gift Act § 6(a), 8A U.L.A. 57 (1968).

[73] Unif. Anatomical Gift Act § 2(b), 8A U.L.A. 34 (1968). The Act specifies the following order of priority among the relatives who are authorized to make a binding gift: 1) spouse; 2) adult son or daughter; 3) either parent; 4) adult brother or sister; 5) guardian of a person of the decedent at the time of death; and 6) any other person authorized by law. The DOD Directive concerning anatomical gifts is consistent with this approach, but states that the wishes of the next of kin will be honored even if a valid donor document exists. Dep't of Defense Directive 6465.3, Organ and Tissue Donation, para. F2e (Aug. 14, 1987).

[74] B-235119 (30 Jun. 1989).

[75] FAR clause 52.219-1, Small Business Concern Representation, Apr. 1984.

[76] *Ibex Ltd.*, B-230218 (11 Mar. 1988), 88-1 CPD ¶ 257.

[77] *Insinger Machine Co.*, B-234622 (15 Mar. 1989), 89-1 CPD ¶ 277.

[78] *J-MAR Metal Fabricating Co.*, B-217224 (21 Mar. 1985), 85-1 CPD ¶ 329.

[79] B-235119 (30 Jun. 1989).

[80] Notice of Total Small Business Set-Aside (Apr. 1984).

maybe not. It depends on some other facts!" If the solicitation contained the required solicitation provision, 52.219-6 (Apr. 1984), and the bidder did not take exception to any of the solicitation terms, including those contained in 52.219-6 (Apr. 1984), the bid would be responsive. MAJ Mellies.

Claims Report

United States Army Claims Service

Westfall v. Erwin

Colonel Charles R. Fulbruge III
Chief, Tort Claims Division, USARCS

In early 1988 the United States Supreme Court decided the case of *Westfall v. Erwin*. [1] This case potentially limits immunity for federal employees who commit state-law torts within the scope of their government employment.

To briefly review the *Westfall* case—Mr. William Erwin and his wife, Emily, sued his federal supervisors, Mr. Rodney Westfall, and others for chemical burn injuries to his eyes and throat sustained when Mr. Erwin was exposed to "negligently" stored bags of toxic soda ash at Anniston Army Depot in February 1984. The suit was initiated in the Circuit Court for Jefferson County, Alabama, in February 1985. After removal of the case to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1442, the supervisors' motion for summary judgment was granted on June 5, 1985, on the grounds that the supervisors were absolutely immune from suit because their activities were within the scope of their official duties. The Eleventh Circuit reversed, [2] holding there was a material question of fact whether the supervisors' acts were discretionary. Certiorari was granted, and in January 1988 the Supreme Court held that federal officials are not absolutely immune from state-law tort liability unless the challenged conduct is within the scope of an official's duties *and* is discretionary in nature.

This decision was seen by many as greatly limiting the immunity from common law torts enjoyed by federal officials. The fact that the official was acting in the scope of his or her official duties would no longer be sufficient by itself to protect the official from state-law tort suits. Accordingly, the Federal Employees Liability Reform and Tort Compensation Act of 1988 [3] was passed to provide an exclusive remedy against the United States for suits based upon negligent or wrongful acts of United States officials acting within the scope of their employment. The Act amended 28 U.S.C. §§ 1346(b) and 2679 to substitute the United States as defendant for common law tort actions. Constitutional torts and suits for violations of federal statutes authorizing actions against an individual were specifically excluded.

In accordance with the legislative provisions, the United States substituted itself for Mr. Westfall and the other supervisors on December 22, 1988. A government motion for summary judgment was filed on February 1, 1989, alleging the action should be dismissed for Mr. Erwin's failure to present an administrative claim under the Federal Tort Claims Act (FTCA) prior to filing suit. [4] The court agreed, and on March 15, 1989, Erwin's suit was dismissed.

Under the amended provisions of 28 U.S.C. § 2679(d)(5)(B), whenever an action in which the United States is substituted as the party defendant is dismissed for failure to present an administrative claim pursuant to the FTCA, any subsequently filed administrative claim is deemed timely if presented within sixty days after dismissal of the civil action. Mr. Erwin promptly filed a $500,000 administrative claim on April 10, 1989, alleging that, as a result of his exposure to the soda ash, he suffered chemical burns to his eyes and throat, permanent injury to his eyes and vocal cords, and severe emotional and mental distress.

After review of an excellently prepared claims report from Anniston Army Depot, USARCS established that Mr. Erwin had been receiving monetary payments under the Federal Employees Compensation Act. [5] This constitutes Mr. Erwin's exclusive remedy against the United States for his job-related injuries. [6] Accordingly, Mr. Erwin's administrative claim under the FTCA was denied on June 1, 1989.

Mr. Erwin has until December 1, 1989, in which to file suit challenging the USARCS denial, or his judicial

[1] 484 U.S. 292 (1989).

[2] 785 F.2d 1551 (11th Cir. 1986).

[3] Pub. L. No. 100-694 (1989).

[4] *See* 28 U.S.C. § 2675(a) (1982).

[5] 5 U.S.C. §§ 8101-8193 (1982 & Supp. V 1987).

[6] 5 U.S.C. § 8116(c) (1982); Avhasti v. United States, 608 F.2d 1059 (5th Cir. 1979).

remedy will be forever barred. [7] What Mr. Erwin will do now is unclear. It is equally unclear what a district court in Alabama will do with any suit in view of the Eleventh Circuit's recent decision in *Newman v. Soballe*. [8] In that case, which specifically involved an interpretation of the "Gonzalez Act" (10 U.S.C. § 1089), the court concluded that active duty doctors could be sued in state courts for alleged medical malpractice occurring overseas. More particularly, the circuit court decided that the district court had no jurisdiction to remove Newman's complaint from a Florida state court and to dismiss the complaint under the FTCA's "foreign country" exception. [9] Accordingly, the case was remanded to state court. Additionally, the Eleventh Circuit independently raised the issue of the *Westfall*-generated legislation and concluded that, under these circumstances, it does not bar suit against the doctor in state court in his individual capacity. Another court likewise appears concerned that, by substituting the United States as the party defendant and allowing all the defenses available under 28 U.S.C. § 2680, a plaintiff may be deprived of the opportunity to obtain a judicial remedy for a common law tort.

In *Mitchell v. United States* [10] the court concluded it would be improper to allow an Army member who allegedly assaulted a civilian employee to hide behind the FTCA's "assault and battery" exception, [11] deciding it had no jurisdiction because the action was barred by sovereign immunity. Thus, here too the action was remanded to state court; to do otherwise would "leave persons injured by the assaults and batteries of federal employees completely without a remedy." [12] Such a result "may be inconsistent with the stated purpose" of the *Westfall*-generated legislation. Thus, the statutory immunity for individual defendants intended in 28 U.S.C. § 2679 may not be as broad as envisioned by the drafters of the legislation.

Regardless of the subsequent judicial sorting out of the *Westfall* legislation, claims attorneys should be alert to possible statutory bars to payment of claims if presented as allegations of state-tort causes of action. As examples, claims for assault and battery are excluded from payment by the FTCA, and personal injuries suffered as a result of "negligence" by supervisors may be barred by the Federal Employees Compensation Act, for appropriated fund employees, or the Longshoremen's and Harbor Worker's Compensation Act, for nonappropriated fund employees. [13] Claims attorneys should immediately advise the Tort Claims Division, USARCS, of any claims that appear to be affected by the *Westfall*-generated legislation.

[7] 28 U.S.C. § 2401(b) (1982).

[8] 871 F.2d 969 (11th Cir. 1989).

[9] 28 U.S.C. § 2680(k) (1982). *But see* Powers v. Schultz, 821 F.2d 295 (5th Cir. 1987), which reached the exact opposite statutory construction of 10 U.S.C. § 1089 (Supp. V 1987) from that of the *Newman* court. Because the *Powers* case was decided some two years before the new legislation, the *Westfall* issue was not considered.

[10] 709 F. Supp. 767 (W.D. Tex. 1989).

[11] 28 U.S.C. § 2680(h) (1982).

[12] *Mitchell*, 709 F. Supp. at 769.

[13] 5 U.S.C. § 8171 (1982); 33 U.S.C. §§ 901-948a (1982 & Supp. V 1987).

Claims Notes

Personnel Claims Recovery Note

Dispatching DD Form 1843 to the Correct Carrier

Field claims offices must ensure that DD Form 1843, Demand on Carrier/Contractor, is addressed to the carrier named on the Government Bill of Lading (GBL) when carrier liability is involved. The carrier named on the GBL is the government contractor and the party who will bear ultimate liability.

Some field offices are mistakenly addressing demands to the carrier listed in the "Name and Address of Carrier" block on DD Form 1840, Joint Statement of Loss or Damage at Delivery. While the DD Form 1840R, Notice of Loss or Damage, is sent to the carrier address listed on DD Form 1840, this addressee may not be the carrier named on the GBL and thus is not the proper recipient of the DD Form 1843.

Sometimes a correction is made to the GBL that changes the carrier named after the GBL is issued. If the carrier to whom the DD Form 1843 was sent denies performing the move and the issue cannot be resolved by examination of the claim file, complete DD Form 870 (Request for Fiscal Information Concerning Transportation Requests, Bills of Lading and Meal Tickets) to request the GBL documents from USAFAC. The documents furnished by USAFAC should include a corrected GBL or a SF 1200 (GBL Correction Notice) if the shipment was actually handled by a different carrier. DD Form 870 must be addressed to:

U.S. Army Finance and Accounting Center
Transportation Operations
ATTN: FINCH-GFG (Data Research Branch)
Indianapolis, IN 46249-0611

If the information received from USAFAC reflects that a correction was made, the DD Form 1843 packet should be resent to the correct carrier. Ms. Schultz.

Management Note

Office Closure

The claims office at Arlington Hall Station, VA, has been closed due to the relocation of Army activities from that installation. Office Code 342 is rescinded. Claims previously processed at Arlington Hall have been assumed by Fort Belvoir (office code 331). LTC Gibb.

Labor and Employment Law Notes

Labor and Employment Law Office, OTJAG, and Administrative and Civil Law Division, TJAGSA

OTJAG Changes

The Labor and Civilian Personnel Law Office has changed its name to the Labor and Employment Law Office to reflect the full scope of its mission. As part of a larger OTJAG reorganization, the labor advisor function, which deals with labor standards and private-sector labor issues, has been moved to the Contract Law Division.

Personnel Law Developments

Whistleblower Protection Act of 1989 Takes Effect

The Whistleblower Protection Act became effective on 8 July and applies to administrative proceedings not pending at the time the statute was enacted in April.

Section 6 of the Act, amending 5 U.S.C. § 7701, will have immediate and significant impact on day-to-day MSPB practice. Under the new law, any appellant becomes entitled to relief adjudged by an administrative judge at the time of the initial decision, notwithstanding an agency petition for review to the board. The sole exceptions are: 1) when the administrative judge concludes it would not be appropriate; or 2) when the agency decides that returning the employee to the work site will be disruptive. In the latter case the employee will receive pay, compensation, and all other benefits pending the outcome of any petition for review.

The two other significant provisions of the Act, which will carry out Congress's desire to better protect whistleblowers, impose a heavier burden on agencies to justify actions against whistleblowers and give employees an individual right of action against the agency when the Office of Special Counsel either does not act on a complaint or rejects one. The Labor and Employment Office will defend an individual right of action, except when delegation appears appropriate.

The MSPB's interim rules implementing the new act were published in 54 Fed. Reg. 28654-64 (July 6, 1989).

Random Drug Testing Upheld

The Army's drug testing program was sustained in *Thomson v. Marsh*, Civil No. 88-2838 (4th Cir. July 6, 1989), at least with respect to fourth amendment claims by employees in the Chemical Personnel Reliability Program. The court relied upon the decisions in *Skinner v. Railway Labor Executive Assoc.*, 109 S. Ct. 1402, and *NTEU v. Von Raab*, 109 S. Ct. 1402, decided earlier this year. The compelling governmental interest in safety for employees whose work involved chemical weapons clearly outweighed the employees' expectation of privacy. The special and obvious demands of their positions diminished the employees' expectation of privacy.

Final Rules on Ch. 43 Adverse Action

By regulations published on June 21, 1989 (57 Fed. Reg. 26172), OPM clarified the procedures for removing or reducing in grade an employee for unacceptable performance. An agency must notify the employee of what must be done to bring performance back up to an acceptable level. Agencies determine what is "acceptable performance" based upon their own rating systems, and the length of the performance improvement period is left to managerial discretion. If an employee does not improve or fails to sustain improved performance, an agency may take adverse action. If the employee performs fully successfully for one year or more and then declines in performance, the employee must be given another opportunity to improve.

Hatch Act

After two Army employees circulated copies of magazine literature that appeared to be critical of Presidential candidate Michael Dukakis's gun control stand, a Hatch Act complaint was made to the Special Counsel. Citing *Blaylock v. U.S. Merit Systems Protection Board*, 851 F.2d 1348 (11th Cir. 1988), the Special Counsel returned the case to OTJAG without further action: "In order for a violation to occur, employees must be acting in concert with a national political party, or they must be part of an organized group whose purpose is to actively campaign for a national political party or such party's candidate."

Equal Employment Opportunity

Recent Supreme Court Decisions

Marking the 25th anniversary of Title VII, the Supreme Court decided several important civil rights cases at the end of the term. For Army labor counselors, the most significant cases are *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), and *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

Making clear that the burden of proof remains at all times with plaintiff employees, *Wards Cove* requires disparate impact plaintiffs to show that a statistical

disparity between minorities in the workforce and the relevant *qualified* labor force is the result of *specifically identified employment* practices having a significantly disparate impact. It also requires plaintiffs to disprove any business necessity advanced by the employer. *Wards Cove* makes the plaintiff's prima facie case the focus of litigation. Labor counselors should ensure that EEO officers receiving disparate impact complaints analyze them according to the standard imposed by the Court.

Providing a rule for "mixed motive" discrimination cases that is somewhat at odds with its other Title VII standards, the Court held in *Price Waterhouse* that once a complainant shows that an unlawful factor (like sexual stereotyping) was a substantial or motivating factor in an unfavorable employment decision, the burden of proof shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the prohibited factor.

Another case decided earlier this term with significant impact on the Army was *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). This January case, which we mentioned briefly in the March edition of *The Army Lawyer*, holds that the fourteenth amendment requires that affirmative action programs be based on proof of past discrimination in the government unit concerned. The *Croson* case suggests that race or sex can be a factor in employment decisions in only very limited circumstances.

Other end-of-term cases that will be less significant to labor counselors, but which have also been widely publicized are *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); and *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

Lorance, holding that the time to challenge a sexually discriminatory seniority system was when the system was first adopted rather than when the aggrieved employees were adversely affected, abandons the "continuing violation" theory in a narrow range of cases involving seniority systems. *Martin* allows white employees to challenge affirmative action consent decrees to which they were not parties. Civil rights advocates fear that this case will allow reverse discrimination claimants to reopen long-closed consent decrees. Because the Army is not currently a party to such a decree (nor does it face the likelihood of one in the foreseeable future), *Martin* will not significantly affect our operations. The last case, *Patterson*, holds that racial harassment is not actionable under 42 U.S.C. § 1981, which prohibits discrimination in the making and enforcement of contracts. Although *Patterson* has far reaching impact in the private sector and portions of the public sector, it will have no effect on the Army because section 1981 does not apply to federal employees.

Proposed Federal Sector EEOC Regulations

EEOC forwarded to OMB 1989 revisions to regulations that OMB had rejected the previous year. The changes to 29 C.F.R. Part 1614 would streamline the complaint process. Under the 1988 proposal, which has now been revived in part, agencies will have 180 days (or up to 270 days with complainant's consent) to process complaints and render a final decision. EEOC would normally not be involved in the agency process, but rather would serve as an appellate agency. If the agency does not issue a final decision within 180 days, complainant could submit an appeal to EEOC. Under the 1989 proposals, complainants would have a right to an EEOC hearing unless the Army can demonstrate that there are no genuine issues of fact or credibility. Another suggested change allows the EEOC to draw an adverse inference from an agency failure to supplement the record on request. Other major changes include the award of attorneys' fees or costs in age complaints and the requirement of interest payments on back pay awards.

Race and Color Not Synonymous

A light-skinned black employee may pursue a Title VII "color" discrimination action against a darker-skinned black supervisor. In *Walker v. Secretary of Treasury*, 713 F. Supp. 403 (D. Ga. 1989), the court rejected IRS arguments that there was no cause of action because the complainant was the same race as the supervisor and color was synonymous with race. The court recognized that blacks may be members of subgroups with distinctive contrasts in color and physical characteristics. Title VII protects blacks of one subgroup from discrimination by blacks of another subgroup.

Attorney Fees

Title VII attorney fee awards may be enhanced to compensate attorneys for the contingent nature of the fee arrangement and the quality of representation. In *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), the court enhanced fees fifty percent for a contingency fee arrangement and twenty-five percent for the quality of representation. The court relied upon the test in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711 (1987), which allowed recovery of an enhanced fee based on a contingent fee arrangement when a party would have faced substantial difficulties in obtaining counsel without such an adjustment. The *McKenzie* court held that the local geographic market, on which the adjustment is based under the Supreme Court's rule, is composed of all contingency fee cases at the time the action was initiated, not when the fees are awarded. The court also decided that a party need not show actual difficulty in obtaining counsel.

Alcohol Accommodation

In *McElrath v. Kemp*, 1989 WL 59822, 89 FEOR 5030 (D.D.C. Mar. 22, 1989), the court again presented a federal agency with the dilemma of how to accommodate an alcoholic employee. The court preliminarily enjoined removal although the employee had three prior opportunities to undergo treatment and each time relapsed. Between proposal and removal, the employee entered the agency's counseling program. Four months after removal, she entered another residential treatment program. While the employee showed evidence of rehabilitative potential, there was insufficient evidence of undue agency hardship were it to grant leave without pay for the employee to pursue more treatment.

Collateral Involvement of Security Issue Does Not Bar EEO Complaint

In *Hahn v. Marsh*, 89 FEOR 1109 (1989), the EEOC remanded to the Army a case in which an engineer claimed he was turned down for a job because he was Korean. The agency's reason for nonselection was that he had been born in North Korea and, therefore, processing of a top secret clearance would have taken too long. The agency argued that *Department of the Navy v. Egan*, 108 S. Ct. 818 (1988), precluded review. The EEOC disagreed, finding that the fact that the agency's articulated reasons may indirectly involve security concerns does not divest EEOC of authority.

Labor Law Developments

Unilateral Change in Job Requirements Is Negotiable

Reversing the FLRA, the court in *Overseas Education Assoc. v. FLRA*, 876 F.2d 960, 89 FLRR 1-8020 (D.C. Cir. 1989), held that management must negotiate with the union concerning employees adversely affected by new job requirements. The court held that FLRA too narrowly construed the term "adversely affected" [5 U.S.C. § 7106(b)(3)] to apply only to unfavorable job actions such as removals, demotions, or reductions in pay. FLRA held that the change in job requirements did not by itself adversely affect employees. The court held that the intent of the statute and its legislative history indicated that the term "adversely affected" means that the management decision will have some substantial impact on employees. Whether the impact triggers the right to negotiate requires FLRA to evaluate each case on its own unique facts. This case concerned union proposals that followed the issuance of new rules requiring teachers to cover the classes of absent teachers and to monitor lunchrooms. While the decision does not directly allow unions to negotiate the assignment of work, it gives them a significant opportunity to affect the exercise of this reserved management right.

Unions Pay Their Own Travel Expenses for FLRA Hearings

The D.C. Circuit Court of Appeals invalidated 5 C.F.R. § 2429.13 insofar as it requires agencies to pay transportation and per diem costs for union witnesses and representatives in FLRA proceedings. 5 U.S.C. § 7131(c) allows the FLRA to determine that witnesses must be granted official time, but does not provide for payment of travel and per diem expenses. The court extended the holding in *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89 (1983) (union negotiators entitled to official time but not travel and per diem), to FLRA proceedings. *Sacramento Air Logistics Center v. FLRA*, 1989 WL 67044, 27 GERR No. 1321 at 875 (D.C. Cir. June 23, 1989). Labor counselors should examine local practices and bring them in line with this holding.

Racial Stereotyping Not a Protected Union Activity

In *AFGE v. FLRA*, 1989 WL 68606 (D.C. Cir. June 27, 1989), the court upheld the FLRA's decision that an article in a union newsletter that used racially stereotyped comments to criticize an EEO management official was not protected conduct. Although the article contained legitimate criticism of the management official, the FLRA reasonably concluded that the racial statements went beyond robust debate. The FLRA held that the stereotypes, even though authored by someone of the same race as the management official, tended to generate or exacerbate racial conflict in the workplace and were therefore not protected by 5 U.S.C. § 7102 or § 7116(a).

Excepted Service Employees' Grievance Rights

Nonpreference eligible excepted service employees, having no statutory right to appeal adverse actions, cannot demand a negotiated grievance procedure to challenge adverse actions through arbitration. Department of Treasury v. FLRA, 1989 WL 42639 (D.C. Cir. May 2, 1989). The court's decision agrees with a similar holding in *Department of Health and Human Services v. FLRA*, 858 F.2d 1278 (7th Cir. 1988). The D.C. Circuit recognizes that a different rule might apply to employees covered under "other personnel systems," according to 5 U.S.C. § 7121(e).

Enlisted Update

Sergeant Major Carlo Roquemore

Enlisted Assignments

In the Enlisted Update in the May issue of *The Army Lawyer*, I discussed training as one of four components of career progression. The other three key components mentioned were: 1) assignments; 2) experience; and 3) evaluations. This article will focus on the assignment process.

The primary goal of the personnel assignment system is to meet the personnel requirements of the Army. Whenever possible, the system also attempts to meet individual desires. We must always remember, however, that "the personnel requirements of the Army prevail." The Army has a system called "The Army Authorization Documentation System (TAADS)," which accounts for all duty positions in the Army by MOS and grade. The Army's automated assignment, nomination, distribution, and requisition systems use the TAADS list of duty positions to satisfy the goal of "right soldier, right time, right place." Army Regulation 614-200, Selection of Enlisted Soldiers for Training and Assignment, provides a list discussing the secondary goals of the enlisted personnel assignment system. In essence, they are:

—To equalize desirable and undesirable assignments by reassigning the most eligible soldiers from among those of like MOS's and grades.

—To meet personal desires of soldiers.

—To assign soldiers so they will have the greatest opportunities for professional development and promotion.

Considering the size of the Army and the complexity of the problems associated with the assignment process, the system does an excellent job of satisfying both the Army and the individual soldier. Computers are used to nominate soldiers for assignments, but they do not make any of the decisions. The system uses people in all parts of the process to make judgments, to react to unforseen circumstances, and to provide experience and flexibility. While computers record the requirements and nominate soldiers to meet them, people actually make the final decisions.

Everyone is under the impression that making assignments should be a rather simple process because the Army has X number of positions and X number of people to put in them. Wrong. Many things affect the assignment process. Although the total number of authorized positions remains fairly constant, their locations are always changing. Most important, however, are the many human factors that affect the assignment process. Reclassification, compassionate reassignment, early outs, UCMJ actions, sickness and death, tour curtailments and extensions, medical profiles, deferments, and deletions can all impact on the assignment system.

The following is an example of the assignment system in use where a command has a valid vacancy to be filled by an NCO in the grade of E5; MOS—71D; position title—Legal NCO. The command sends a requisition to Total Army Personnel Command detailing the date the replacement is needed, the grade and MOS of the replacement, and any other special requirements. The information is then fed into the computer. The computer verifies the validity of the vacancy and searches its files for all eligible replacements. The computer is programmed to consider many factors in putting together a list of eligible soldiers, including grade, MOS and skill level, months since last PCS, ETS, SQI, ASI, and others. Each nominee will receive points based on the number of "matches" the nominee has with the items for which the computer is checking. The more items that are matched, the higher the eligibility number. After the computer does the work, assignment managers make the decisions. They consider variables that the computer can't work with, such as impact on the soldier's professional development.

Once the soldier has been notified at the local station of his or her selection for a new assignment, information used to nominate the soldier has to be verified by the local military personnel office. When the information is verified, the new assignment for the soldier is "good to go." The Judge Advocate General has two assignment managers working out of Total Army Personnel Command. They are: MSG Michael A. Anschutz and SFC Howard Metcalf. Both NCO's are 71D's, and their primary function is to make sure 71D's and 71E's are assigned to the many authorized positions within the Army based on valid requisitions or authorized needs. Every 71D and 71E can make the assignment process easier and more beneficial to the Army and the soldier by ensuring that their personnel qualification record (PQR), DA Form 2A, contains accurate information. All the information reflected on the PQR is taken from the enlisted master file maintained by Total Army Personnel Command. The information contained in the enlisted master file on a soldier is used by personnel managers to choose the best possible assignment for the soldier. That is the reason each soldier must carefully review and verify the information on his or her PQR. If it is not accurate, the Personnel Administration Center (PAC) should be contacted to assist the soldier in updating the PQR.

Whenever possible, soldiers should seek those assignments that are challenging and supervisory in nature. Try to find new areas of duties and responsibilities within the total job description of a 71D or 71E that one has not been exposed to in the past. If you have spent a great deal of time as a 71D at inferior court jurisdictions (battalions, groups or brigades), tell your Chief Legal NCO or installation personnel manager that you want an assignment at a staff judge advocate or command judge advocate office. Conversely, if all or most of your time as a 71D has been spent at a staff judge advocate or command judge advocate office, seek assignments with inferior court jurisdictions. Soldiers should try to become as knowledgeable and versatile as possible across the spectrum as a 71D. Court reporters should seek additional duties at their assignment location. Such duties should revolve around as much 71D work as possible, to include the added responsibilities associated with training. Conduct instruction relating to common task and skill qualification training. The rating chain should ensure that all these various duties and responsibilities are mentioned on the soldier's NCOER.

In many cases, NCOER's are considered when NCO's are about to receive new assignment instructions. Soldiers not eligible to receive an NCOER should be given letters of commendation or appreciation attesting to their performance.

Training

As a result of the Base Closure and Realignment Act, the 71D AIT course is scheduled for relocation to Fort Jackson, SC, in October 1991. The last 71D AIT course to be conducted at Fort Benjamin Harrison will begin in late September 1991 and will graduate in early December 1991.

The Combined Arms Training Center located in Vilseck, Germany, offers two resident legal courses for enlisted legal personnel. They are: Legal Specialist's Course (LC 100) and Lawyer's Assistant Course (LC 102). To standardize training for enlisted legal personnel Army-wide, both courses will be revised. LC 100 will become TJAGSA's Law for Legal Specialists Course, and LC 102 will become the Law for legal Noncommissioned Officers Course. Both courses will be supplemented with USAREUR specific instruction and practical exercises.

Two resident courses and one workshop will be conducted at The Judge Advocate General's School during the calendar year 1990. They are: 1st Law for Legal NCO's Course (512-71D/E/20/30), 26-30 Mar 90; 1st Senior Legal NCO Management Course (512-71D/E/40/50), 20-24 Aug 90; and, Chief Legal NCO Workshop, 17-19 Sep 90. The Chief Legal NCO Workshop will be by invitation only. Remember—office managers should plan ahead to budget for the courses you want your people to attend. Chief and senior legal NCO's should ensure training, funding, and quota requirements are communicated to office managers.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

1990 JATT Training Dates

The Judge Advocate General's School (TJAGSA) will conduct Judge Advocate Triennial Training (JATT) for military law centers and legal service teams from 18-29 June 1990. Inprocessing will take place on Sunday, 17 June 1990. Attendance is limited to commissioned officers only; alternate AT should be scheduled for warrant officers and enlisted members. The 2093d U.S. Army Reserve Forces School (USARFS), Charleston, WV, will host the training; orders will reflect assignment to the 2093d USARFS, with duty station at TJAGSA.

JATT is mandatory for all military law center and legal service team officers. Only their CONUSA staff judge advocate, with the concurrence of the Director, Guard and Reserve Affairs Department, TJAGSA, may excuse individuals belonging to these units.

Units should forward a tentative list of members attending AT at TJAGSA to: The Judge Advocate General's School, ATTN: JAGS-GRA (MAJ Chiaparas), Charlottesville, VA 22903-1781. Lists should be forwarded no later than 27 October 1989. Final lists of attendees must be furnished no later than 16 March 1990. Units are responsible for ensuring attendance of unit personnel. "No-shows" will be reported to respective ARCOM commanders for appropriate action. Team members who do not appear on the final list of attendees submitted by the unit should not be issued orders. Personnel reporting to Charlottesville who have not been previously enrolled in JATT will be sent home. Commanders are encouraged to visit their units during the training; these visits, however, must be coordinated in advance with Major Chiaparas of the Guard and Reserve Affairs Department at the telephone numbers listed below.

ARNG judge advocates are invited to attend this training and may obtain course quotas through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground. Point of contact at TJAGSA is Major Chiaparas, Guard and Reserve Affairs Department, telephone (804) 972-6380 or Autovon 274-7110, ext. 972-6380.

1990 JAOAC Training Dates

The Judge Advocate Officer Advanced Course (JAOAC), Phase IV, is scheduled at TJAGSA from 18-29 June 1990. Inprocessing will take place on Sunday, 17 June 1990. Attendance is limited to those officers who are eligible to enroll in the advanced course. Course quotas are available through channels from the Military Education Branch, Army National Guard Operating Activity Center (ARNG OAC), Aberdeen Proving Ground, for ARNG personnel and through channels from the JAGC Personnel Management Officer, Army Reserve Personnel Center (ARPERCEN) (800-325-4916), for USAR personnel. Requests for quotas must be received at ARNG OAC or ARPERCEN by 20 April 1990. Military law center or legal service team officers who wish to attend JAOAC instead of JATT must obtain a JAOAC quota. No transfers between courses will be permitted after arrival at TJAGSA. Personnel who report to Charlottesville without a quota from ARNG OAC or ARPERCEN will be sent home.

All personnel are reminded that students must comply with Army height/weight and Army Physical Readiness Test standards while at TJAGSA. Point of contact at TJAGSA for this course is Major Chiaparas, Guard and Reserve Affairs Department, telephone (804) 972-6380 or AUTOVON 274-7110, ext. 972-6380.

1990 JAG Reserve Component Workshop

The 1990 JAG Reserve Component Workshop will be held at The Judge Advocate General's School in Charlottesville, Virginia, during the period 24-27 April 1990. As in the past, attendance will be by invitation only. Attendees should expect to receive their invitation packets by the end of December 1989. It is important that invitees notify TJAGSA of their intention to attend by the suspense date set in the invitation. Any suggestions as to theme, topics, or speakers for the 1990 workshop are welcome. Additionally, any materials or handouts that might be appropriate for distribution at the workshop would also be welcome. Because the planning process for the 1990 agenda is currently in progress, early input from the field is necessary. Send all comments and materials to The Judge Advocate General's School, ATTN: Guard and Reserve Affairs Department, Charlottesville, VA 22903-1781.

Notes From the Field

Editor's Note—This new section contains brief notes that are timely and useful to members of the military legal community. Notes on any subject are welcome, provided they are interesting and relevant to Army lawyers in the field. The notes must be less than ten pages, double-spaced and should have few, if any, footnotes. The TJAGSA faculty and the editorial board of The Army Lawyer will review all notes to ensure they are legally and factually accurate. Authors should submit a hard copy manuscript and a 5 1/4" IBM-compatible computer disk prepared in Enable 2.15, WordPerfect 4.2 or 5.0, Multimate, DisplayWrite 3, or ASCII. The manuscript should be labeled with the author's name, office address, and phone number. The disk should be labeled with the author's name, word processing software used, and the file name. Notes should be sent to: Editor, The Army Lawyer, The Judge Advocate General's School, Charlottesville, Virginia 22903-1781.

Electronic Filing of Income Tax Returns: A Recommended Approach

Electronic filing is a method by which income tax returns are electronically processed and transmitted via telephone lines directly to an Internal Revenue Service (IRS) computer. The IRS instituted electronic filing services in 1986. During the first year a handful of metropolitan areas were serviced and only 20,000 returns were filed electronically. Since then the program has rapidly expanded. In 1989 nearly 1,200,000 returns were filed, and forty-eight of sixty-three IRS districts were serviced. During 1990 the IRS expects that all districts, including Hawaii, will be served by the program.

The Army's participation in the electronic filing program has also increased dramatically since it began in 1987. Most major CONUS installations now offer or plan to offer the service. The system results in direct savings to soldiers and their families. It also saves the IRS considerable time and money by eliminating much of the manual handling of returns that is required under the traditional system.

Electronic filing is normally a part of an installation's tax assistance program and is offered in addition to the traditional tax preparation services. The electronic filing effort requires additional equipment and personnel. In addition, electronic filing can create an overwhelming amount of administrative and clerical work in order to meet all the legal requirements imposed by the IRS. Electronic filing stations must: 1) ensure the accuracy of all the returns filed; 2) give the taxpayer copies of all information transmitted to the IRS; 3) maintain internal file copies; 4) resolve all material discrepancies between the paper return and the electronic return; and 5) assign a document control number to each return. The impact of these administrative requirements can be minimized, however, by developing a systematic approach to electronic processing and filing.

Two basic approaches to processing returns for electronic filing have been used by military tax assistance programs. Under the first approach, tax returns are prepared manually by the taxpayers, unit tax advisors, or by volunteers. The returns are then collected at a centralized location for later electronic processing and transmission by an electronic filing center. Under this system, the taxpayers are not present when the returns are processed and transmitted. The second approach is to have the taxpayers hand-carry the paper tax returns to the computer room, where operators input and process the electronic returns while the taxpayers wait.

The first approach allows for the rapid processing of large numbers of returns with a minimum number of distractions for the computer operators. It also spares taxpayers from long waiting lines at the electronic filing center. There are, however, several disadvantages inherent in this approach.

Because of the large number of returns that are received at the same time, it may be impossible to check each return for accuracy and completeness while the taxpayers are present. Consequently, many errors are discovered by the computer operators after the returns are calculated by the computer. This fact prevents many returns from being timely transmitted and requires subsequent contacts with the taxpayers in order to resolve discrepancies. In addition, returns not ready to be transmitted must be manually deleted from the electronic files so that a clean batch may be sent to the IRS. In order to comply with IRS requirements, a copy of all documents electronically transmitted must be compiled and mailed to the taxpayer. This process can create an overwhelming amount of administrative and clerical work. It also creates numerous opportunities for the misplacing or mishandling of returns.

The first approach does not provide a mechanism to prevent an overload to available equipment and personnel. By accepting and processing paperwork instead of taxpayers, all returns are accepted for transmission, regardless of the capability of the program to process them within the filing center's operating hours. Under this system, the electronic filing center absorbs the entire burden of transmitting the returns accurately and expeditiously. The taxpayers are under the impression that their role in the process has ended, that their tax returns were correctly prepared, and that their tax refund checks will soon be in the mail.

The second approach avoids many of the problems experienced with the first system. Having the taxpayer present while the return is being processed allows the computer operator to ask questions and resolve discrepancies on-the-spot. Once the return is calculated by the computer, the taxpayer can review the final product, authorize the transmission, and depart the center with a copy of the return. Most of the labor-intensive clerical tasks generated by the first approach are eliminated. Furthermore, only the volume of work that can be processed within a given day is accepted, therefore avoiding a backlog of unprocessed electronic returns.

The total time required to fully process each return is significantly reduced by adopting the second approach.

The time required by the computer operators to transmit each electronic file, however, is increased. The computer operators must perform additional tasks such as instructing taxpayers to review and approve the electronic version of the returns, asking additional questions where appropriate, and troubleshooting the returns. In addition, operators are subjected to the inevitable distractions caused by their interaction with taxpayers. Finally, taxpayers must often wait in long lines at the filing center. The shortcomings of this approach can be overcome by dedicating enough personnel and equipment to handle the workload.

A careful evaluation of the advantages and disadvantages of the approaches to electronic filing services must be made by each installation based on the local circumstances and the overall goals of the local tax assistance program. Under either approach, electronic filing is a labor-intensive process requiring the commitment of additional personnel to the tax assistance program. Under the first approach, most of the effort is dedicated to administrative and clerical tasks and to correcting discrepancies discovered after the returns are calculated by the computer. Too much time is wasted in troubleshooting discrepancies, contacting taxpayers, and handling paperwork. Under the second approach, virtually all the effort is dedicated to processing returns electronically.

Based on the factors discussed above, the following approach is recommended:

a. Where a centralized tax assistance office is used, the electronic filing center should be collocated with it.

b. The paper tax return is initially prepared by unit tax advisors or by volunteer preparers. Taxpayers who elect to file electronically are sent to the filing center for processing.

c. Upon arriving at the filing center, the taxpayer is directed to a quality assurance station where the return is summarily reviewed for completeness.

d. If the tax return packet contains all the necessary information and documentation, the taxpayer is sent to a waiting line to be called by the next available computer operator.

e. The computer operator enters the data in the computer, creates a file, calculates the return, and prints the electronic filing authorization forms in three copies. The operator compares the amounts from the paper return and the electronic version. If no discrepancies are found, the taxpayer reviews the return and signs the authorization forms. The taxpayer is given copies of the documents, and the taxpayer can depart.

f. If discrepancies are found that cannot be readily resolved by the operator, the taxpayer returns to the quality assurance station for an in-depth review of the return and resolution of the discrepancies. When this is completed satisfactorily, the taxpayer returns to the same computer operator who initially processed the return, and the return is corrected and recalculated.

In summary, processing a large number of returns places increased demands on the limited resources available to perform the tax assistance mission. Furthermore, handling the tax returns of soldiers and their families is a sensitive task that must be performed expeditiously and accurately. For those reasons, it is extremely important that electronic filing services be well planned and that the most efficient approach be selected. Captain Jose F. Monge, HQ III Corps, Fort Hood.

Automation in the Tactical Environment

Introduction

The Judge Advocate General's Corps has come a long way in its efforts to use high technology on the battlefield. During Exercise Team Spirit 1989 in Korea, the Office of the Staff Judge Advocate, 25th Infantry Division (Light), successfully conducted "business as usual" in the field by combining the capabilities of a telefax machine, a laptop computer, and a direct dial Autovon line to the personal computers (with modems) of the permanent SJA office at Schofield Barracks, Hawaii. With proper care and maintenance, this equipment not only automated daily field reports and other administration, but it allowed informal networking, photocopying, enhanced communications, and rapid reaction to legal emergencies in Korea and in Hawaii.

Task Organization of OSJA (Fwd & Rear) for Team Spirit

The SJA (Forward) element consisted of the staff judge advocate, a combination trial counsel/claims officer/administrative law attorney, a noncommissioned officer in charge, and a driver.

The SJA (Rear) element consisted of the deputy staff judge advocate, the chief of criminal law, the chief legal NCO, the family law center/administrative law, and numerous support staff.

Equipment

During Exercise Team Spirit 1989, the SJA (Forward) elements deployed with a Zenith ZWL-184-87 laptop computer, an ALPS ASP1000 printer, and an OMNIFAX G35. The SJA (Rear) elements used Zenith 248 computers, ALPS P2000G printers, and an OMNIFAX G35.

I know every staff judge advocate office doesn't have a fax machine, but, given OTJAG's recent purchase of computer equipment, a laptop computer should be available at all offices. The Zenith laptop computer has an internal modem and Enable has telecommunications capabilities. Using the laptop to interface with our PC's at the main office in Hawaii was no problem. (Within the laptop memory, we stored our one-stop wills program, operational law opinions, every known power of attorney format, and criminal law formats.) A direct dial Autovon line is a must. When you're not using the computer or fax machine with the telephone line, you'll be able to use the telephone (without disconnecting it from the computer or facsimile).

Setting Up

Several tasks must be accomplished before establishing a PC-to-PC connection. The most important task is convincing the division communication-electronics officer to let you have one of the direct dial AUTOVON lines in the field. We managed to get one only by agreeing to share it with the G-5 and the division surgeon. To solve the time difference between Korea and Hawaii, prearranged times were established for making daily phone connections. The NCOIC's of each section established an AUTOVON sharing plan to ensure that no section would suffer for lack of access to the phone. This worked so well that, by the middle of the exercise, each section was sending and receiving data for the others. Teamwork was great.

To begin operating the system, the internal modem in the Zenith laptop must be activated. To do this, go to the C: > prompt and enter the following command: "mode modem on." Telephonic contact must then be made with the target system's operator to determine which telecommunications setup will be used between systems. To enter Enable's main menu at the C: > prompt, type "CD Enable." The prompt will read C:ENABLE>. Type "Enable" again. At Enable's main menu, select "Use System," "Telecom," "Communicate," and "Quick Connect." Look at the Word Processing/Enable/Check/Telecommunication manual, Section Three C, for the Quick Connect. We've had success using the "Quick Connect" option of the Enable telecommunications section using the following defaults listed under the "Quick Connect" menu:

Baud Rate: 4 = 1200

Select one of the options described below: 3

Select type of duplex: Half

Which of your computer's COMM-PORTs are you using? (This does not have to be the same. This is dependent on what comm-port your computer is using.) We used comm-port 2. Once you complete this portion press "Enter" twice. This will take you to a blank screen. Press "F10;" you will receive a screen with the menu across the top reading "BREAK CAPTURE DISCONNECT FILES MCM PRINT TELE WP." At this point, one computer will have to set to call and the other to answer. To do this, select "TELE" and press "Enter." You will receive another menu just below the last menu reading "ANSWER-MODE CALL HANG UP." If you are going to call, select "CALL" and press "Enter." At this time you will be asked for the phone number, enter the phone number (including any necessary prefixes) and press "Enter." If you do not hear the sound of a push button telephone, your call will not go through. Make sure the telephone is connected in the right phone jacks. If they are not, connect them properly. The outside phone line must be connected to the "line in" jack on the side of the laptop. Connect the telephone to the other jack. Press "F10" again and follow the menu. If the connection does not work despite proper phone connection, press "F10" and select "DISCONNECT"—you might be using the wrong comm-port. Answer the prompts and return to the Enable main menu. Start over again and select another comm-port. Do not connect the computer to the fax machine; neither will work using the phone line. You can connect both to the same phone line if you use a splitter. Normally only one should be connected at a time.

Communicating

Once a good connection has been made, the computer will print on the screen that a connection is made and the Baud Rate. Communicate to the computer operator of the other PC using the keyboard. Ensure that you both can read each other's communications. If you can't read it, disconnect and call the other operator by phone. Make another selection at the "Quick Connect" menu. Most of the time, if you change to another number at "Select one of the options described below," you will be able to read the communications. If you can't read their communications on the screen, do not attempt to transmit documents; they will not be legible.

When you have a good connection, press "F10" again and receive the menu across the top. This time select "FILES." You will then get another menu, select "RECEIVE" if you are going to receive a document or "TRANSMIT" if you are transmitting a document and press "Enter." Select "ENABLE" at the next menu and press "Enter." If you are receiving, enter the name you wish the file to be titled in your computer's memory, including the ".WPF" if it is a word processing file. When transmitting, enter the name of the file to be transmitted including the ".WPF" if it is a word processing file. Press "Enter." The computers will do the rest. After the document has been transmitted and received you will automatically go back to the blank screen. You can then communicate again with the other operator.

Capabilities

The commanding general and his staff were impressed with our ability to provide quick and complete legal opinions, criminal law documents, and powers-of-attorney. He was especially impressed with our ability to send copies of the powers-of-attorney to Hawaii for the family members.

By being portable, we were able to reach the soldiers wherever they were located. As we all know far too well, not everyone will prepare for deployment. Numerous powers-of-attorney were prepared using the formats on the laptop. After completion, the powers were telefaxed to the SJA (Rear) and delivered to the family members.

Administrative and operational law opinions were readily available on the laptop or were just a phone call away. Previous opinions from Team Spirit were carried with us when we deployed. When questions arose and the reference material to research the problem was not available, a phone call to the SJA (Rear) provided the solution. The SJA (Rear) would do the research, write the opinion, and send the opinion by modem to the laptop computer. The opinion would then be printed out in original form. If a previous related opinion was stored in the laptop memory, we provided an original almost immediately.

Criminal law matters were started at the SJA (Rear), transmitted through the laptop to the SJA (Forward), printed out, and then submitted to the Commanding General in original. After signature, the documents were faxed back to the SJA (Rear).

With a little determination and the cooperation of an AUTOVON operator, you may also research using LEXIS or WESTLAW. Contact the operator (in our case Hawaii) and ask for off-net access. We had no problem getting a local connection to LEXIS, as most calls were made after normal duty hours in Hawaii.

If you have access to DDMS or another computer bulletin board, you can leave messages as if you were still in your office.

Shipping Equipment

You must remember that the Zenith laptop and fax machines were not built for a field environment. In fact, we were a little hesitant about taking such delicate pieces of equipment on deployment. With a little effort, however, they can be packed and deployed with no damage at all. We used two *serviceable* footlockers and styrofoam packing (saved from the original boxes used to ship the machines to our office). The footlockers were secured inside the SJA's vehicle (a CUCV) by wrapping metal banding around the footlocker and the rear seat. What about the dust, dirt, and foul weather? Well, a TACCS computer won't work from the bottom of the Han River either. You must always be mindful of the weather. If the wind is blowing, don't raise the flaps; don't set up next to a stove; and most importantly, don't put MRE jelly on the printer platen! Take along a small (1/2 wide) regular paint brush, a soft lint-free rag, and spray cleaner to get that foreign matter off.

Conclusion

The many benefits received from this operation far outweigh the risks. By being portable, we were able to reach our clients where they worked. We were able to truly take care of our soldiers and their families in time of need.

The wheels of justice continued to turn. Criminal law matters did not have to wait for the United States Postal Service. Court-martial processing time continued to improve.

The "war" did not stop for a JAG opinion. We rendered most opinions quickly. We did not need a lot of heavy pre-printed forms, reference papers, and regulations. Using plain bond paper and division stationery, we printed all that we needed.

By using our imagination, we improved upon what had already been done. For a line soldier, this automation stuff is all right. Sergeant First Class Frederick Dowdell, 25th Infantry Division, Schofield Barracks.

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

October 2-6: 1989 Judge Advocate General's Annual CLE Training Program.

October 16-20: 25th Legal Assistance Course (5F-F23).

October 16-December 20: 120th Basic Course (5-27-C20).

October 23-27: 43d Law of War Workshop (5F-F42).

October 23-27: 3d Installation Contracting Course (5F-F18).

October 30-November 3: 100th Senior Officer Legal Orientation Course (5F-F1).

November 6-9: 3d Procurement Fraud Course (5F-F36). **Changed from basic to advanced/update course.**

November 13-17: 23d Criminal Trial Advocacy Course (5F-F32).

November 27-December 1: 29th Fiscal Law Course (5F-F12).

December 4-8: 6th Judge Advocate & Military Operations Seminar (5F-F47).

December 11-15: 36th Federal Labor Relations Course (5F-F22).

1990

January 8-12: 1990 Government Contract Law Symposium (5F-F11).

January 16-March 23: 121st Basic Course (5-27-C20).

January 29-February 2: 101st Senior Officer Legal Orientation Course (5F-F1).

February 5-9: 24th Criminal Trial Advocacy Course (5F-F32).

February 12-16: 3d Program Managers Attorneys Course (5F-F19).

February 26-March 9: 120th Contract Attorneys Course (5F-F10).

March 12-16: 14th Administrative Law for Military Installations Course (5F-F24).

March 19-23: 44th Law of War Workshop (5F-F42).

March 26-30: 1st Law for Legal NCO's Course (512-71D/E/20/30).

March 26-30: 26th Legal Assistance Course (5F-F23).

April 2-6: 5th Government Materiel Acquisition Course (5F-F17).

April 9-13: 102d Senior Officer Legal Orientation Course (5F-F1).

April 9-13: 7th Judge Advocate and Military Operations Seminar (5F-F47).

April 16-20: 8th Federal Litigation Course (5F-F29).

April 18-20: 1st Center for Law & Military Operations Symposium (5F-F48).

April 24-27: JA Reserve Component Workshop.

April 30-May 11: 121st Contract Attorneys Course (5F-F10).

May 14-18: 37th Federal Labor Relations Course (5F-F22).

May 21-25: 30th Fiscal Law Course (5F-F12).

May 21-June 8: 33d Military Judge Course (5F-F33).

June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).

June 11-15: 20th Staff Judge Advocate Course (5F-F52).

June 11-13: 6th SJA Spouses' Course.

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

June 26-29: U.S. Army Claims Service Training Seminar.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

December 1989

1-2: PLI, Deposing the Expert Witness, San Francisco, CA.

2-8: NJC, Tax and Valuation Issues for Domestic Relations Judges, Williamsburg, VA.

3-7: NCDA, Forensic Evidence, Fort Lauderdale, FL.

3-8: AAJE, Evidence, New Orleans, LA.

4-5: PLI, The Basics of Bankruptcy and Reorganization, Chicago, IL.

4-5: PLI, Securities Filings Review and Update, New York, NY.

5: PLI, Workshop on Legal Writing, San Francisco, CA.

5-8: ESI, Operating Practices in Contract Administration, Palo Alto, CA.

7-8: NELI, Employment Law Conference, Washington, DC.

7-8: ALIABA, Tax Exempt Charitable Organizations, Washington, DC.

7-8: PLI, Litigating Copyright and Trademark Cases, Los Angeles, CA.

7-8: ALIABA, Prosecution and Defense of a Lender Liability Lawsuit, Atlanta, GA.

7-9: PLI, Computer Law Institute, New York, NY.

8: PLI, Workshop on Legal Writing, Los Angeles, CA.

8-9: NCLE, Best of CLE, Omaha, NE.

11-12: PLI, Environmental Regulation and Business Transactions, New York, NY.

11-13: GWU, Patents, Technical Data and Computer Software, San Francisco, CA.

12-15: SLF, Short Course on Securities Regulation, Dallas, TX.

14-15: PLI, The Basics of Bankruptcy and Reorganization, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1989 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
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
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	Reporting requirement temporarily suspended for 1989. Compliance fees fees and penalties for 1988 shall be paid.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals

Ohio	24 hours every two years
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
Utah	27 hours during 2 year-period
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 July 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 pgs).
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	ClaimsProgrammedText/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 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. Constitution Bicentennial Packet

The Judge Advocate General's School has prepared an updated resource packet to assist staff judge advocates in planning local celebrations of the bicentennial of the U.S. Constitution. The packet includes draft speeches suitable for presentation to lay and civilian audiences, samples of articles and pamphlets, and order forms for bicentennial materials. TJAGSA will forward copies of the packet to SJA's upon request. To obtain a packet, SJA's should write to TJAGSA, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 1-201	Army Inspection Policy	28 Jun 89
AR 15-110	Board of Directors, Army and Air Force Exchange Service (AAFES)	5 May 89
AR 145-1	Reserve Officers' Training Corps Program: Organization, Administration, and Training, Interim change 101	19 May 89
AR 570-2	Manpower Requirements Criteria (MARC)-Tables of Organization and Equipment	30 June 89
UPDATE 15	Enlisted Ranks Personnel	15 Jun 89

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