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Acquisition Reform: All Sail and No Rudder[1]

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At a recent seminar on acquisition reform, the acquisition process was described as being in a state of "chaos." That overstates the situation, but not by much. As the people in the acquisition business are painfully aware, in recent years acquisition efforts and the acquisition process have been buffeted by profound, nearly constant disruption.

The principal cause of the disruption is that there is no overarching commitment to *constancy* in acquisition. In fact, the reverse is true. The commitment is to *constant change*. In the words of the reformers' rhyming soundbite, the commitment is to "make reform the norm." [2]

As a consequence, acquisition professionals are now trying to get their work done in the middle of a storm of change—"storm of reform," if you will. In rapid succession we have had the National Performance Review in 1993,[3] the Federal Acquisition Streamlining Act of 1994,[4] the Federal Acquisition Reform Act of 1996,[5] the Information Technology Management Reform Act of 1996,[6] the Defense Management Initiative in 1997,[7] and myriad regulations, circulars, "Thrusts," "Cardinal Points," and "Lightning Bolts." These have generated successive, powerful waves of change that wash up against every person, every project, and every product on the acquisition firmament.

Are these constant waves of change bad? Well, it is difficult to maintain a firm footing in an environment in which the rules are changing faster than people can learn them. It is even more difficult to maintain a steady course. The underlying problem is that acquisition reform is "all sail and no rudder." It scuds along at an impressive pace, but only in whatever direction the wind is blowing at the time. It travels significant distances relative to where it was a week, a month, or a year ago, but it makes no headway against the wind and it does not seem to draw appreciably nearer to any destination.

Measuring Results as an Acquisition Reform

Is it a fair criticism to say that acquisition reform is all sail and no rudder? We should not have to ask. We should already know. We should already have measured where the acquisition process *was* and where it now *is*. We should *know* if we are making progress, if we are coming nearer to acquisition reform's announced goals.

Paraphrasing Professor Bill Kovacic,[8] the 1990's reforms are premised on the recognition that unique and burdensome defense regulations have substantial costs. They discourage entry of leading civilian sector suppliers into the defense sector. They impose substantial costs on suppliers already in the defense sector.[9] These Department of Defense (DOD) mandates impede use of the best civilian practices and, thereby, adversely affect the quality of procurements.

When the recent spate of reforms was initiated, their stated goal was reversal of those effects. Accordingly, we should be able to, and it would be fair to, evaluate the effectiveness of the recent reforms by measuring our progress in reversing those effects or at least drawing nearer to that goal.

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1. Based on remarks presented during the Contract Law Symposium at The Judge Advocate General's School, Charlottesville, Virginia in December 1997 by Ross W. Branstetter, Senior Counsel, Miller & Chevalier, Chtd., Washington, D.C. (rbranstetter@milchev.com).

2. *See* DOD Roundtable on Acquisition Reform, Wash., D.C. (Mar. 31, 1997) [hereinafter Roundtable]. A transcript of the roundtable discussions is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

3. Al Gore, Report of National Performance Review (7 Sept. 1993).

4. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

5. Pub. L. No. 104-106, 110 Stat. 679 (1996). The Federal Acquisition Reform Act of 1996 and the Information Technology Management Reform Act of 1996 were renamed the Clinger-Cohen Act of 1996.

6. *Id.*

7. William S. Cohen, Defense Reform Initiative Report (Nov. 1997). The report is available on the internet at <http://www.defenselink.mil/pubs/dodreform/>.

8. *See* William E. Kovacic, *Evaluating the Effects of Procurement Reform on Defense Acquisition,* 33 PROCUREMENT LAW. 2 (1998).

9. The DOD's regulations add an average increase in cost of about 18 percent, according to a study commissioned by then Deputy Secretary of Defense Perry. *See The DOD Regulatory Cost Premium: A Quantitative Analysis,* Coopers & Lybrand/TASC (Dec. 1994).

Again borrowing heavily from Professor Kovacic,[10] the following questions should already have been asked and answered: (a) What has been the effect of the 1990's reforms on migration of firms from the commercial sector into the defense sector? (b) Have these reforms induced contractors to unify their commercial and defense operations? (c) Have these reforms reduced contractors' costs of complying with defense regulations across the "portfolio" of government contracts? If the answer to those questions is, "We don't know," okay, but someone should at least stand up and say so.

Have these reforms improved procurement outcomes? We think we know the answer to that question, at least with regard to the "acquisition reform success stories" that have been collected and touted. However, the foregoing questions should be asked not only about the procurements which have been selected as success stories, but across the spectrum of procurements, so that we can determine objectively the impact of acquisition reform on the entire portfolio of federal contracts. Success stories are appropriate to encourage and to reinforce innovation by lauding achievements in specific contracts, but success stories are, by themselves at least, an inadequate basis for measuring the impact of reform efforts on the contracting process as a whole.

Somebody said, "what gets measured, gets done." Perhaps so, but there appears to be little enthusiasm for measuring acquisition reform. One DOD leader was candid in saying he "stiff-arms" requests for such measurements.[11] In his view, the people who want such measurements "are busy as hell coming up with just a fairly mediocre or maybe, in some cases, meaningless metric."[12]

This stiff-arming of objective assessment is directly contrary to the best practice in other government reforms, where measurements are not only embraced, they are the drivers of reform. In restructuring public education, for example, schools are given greater autonomy, but they are held accountable for producing proven results—a policy referred to as "assessment-driven reform."[13] In that vein, reform that avoids measurement could be called "accountability-free" or "results-immaterial" reform.

Whatever the reasoning in resisting metrics, to date, the measurements that have been undertaken do not appear to have reached a consensus that the 1990's reforms have achieved cost savings. The DOD reports that its special pilot programs have achieved significant savings. However, a General Accounting Office (GAO) review of a portfolio of more than thirty of the top touted programs disclosed a net increase, not a decrease, in program costs overall.[14] The bottom line is: we cannot agree that we have saved, or will save, money as a result of acquisition reform.[15] Which means it may be the case that acquisition reform has not saved, and may not save, *any* money.

If we do not know how much the recent acquisition reforms have saved, do we at least know what they have cost? Apparently not. It is clear that there has been a cost and that it has been substantial, but how much the current reform efforts have cost remains unknown.

A virtual industry has been created, the entire purpose of which is "acquisition reform." There are now thousands, if not tens of thousands, of people for whom a prime component of their jobs is reengineering the acquisition process.[16] For example, "the level of participation in [the 1997] Acquisition Reform Week was very extensive. About 100,000 people were actively involved."[17] Senior leaders in the White House and the Pentagon participated. Electronic chat rooms and virtual town halls were set up on the internet and by telephone. What was the *product* of all of that effort? What did it cost? Was it worth it?

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10. *See* Kovacic, *supra* note 8.

11. Roundtable, *supra* note 2 (remarks attributed to Mr. Arthur L. Money, Assistant Secretary of the Air Force for Research, Development, & Acquisition).

12. *Id.*

13. David Bechtel, Using Alternative Assessments to Hold Schools Accountable 1 (1996) (unpublished manuscript, on file at the Univ. of Pittsburgh library).

14. The GAO analyzed 33 of 63 programs (eliminating procurements that were classified, etc.) for which the DOD reported that cost decreased as a result of acquisition reform. The GAO concluded that "the cost of the programs increased, on average, by about 2 percent, after adjusting for quantity changes and inflation." *Acquisition Reform: Effect On Weapon System Funding*, GAO/NSIAD-98-31, Oct. 1997, at 5.

15. *Acquisition Reform: DOD Faces Challenges in Reducing Oversight Costs*, GAO/NSIAD-97-48, Jan. 1997, at 13 (reporting that "the amount of cost reduction that can actually be achieved from oversight reforms remains in question"); *Acquisition Reform: Effect on Weapon System Funding*, GAO/NSIAD-98-31, Oct. 1997, at 2 ("[O]ur review raises concerns about the extent to which cost reductions from acquisition reform that the services have reported will be available . . . ."); Vice Admiral John J. Shanahan, Center for Defense Information, presentation to the DOD's National Defense Panel (29 Apr. 1997) ("Acquisition reform has been underway for some years, but the returns to date have been disappointing and do not look as if they will come anywhere near the Defense Science Board projections.").

16. For example, the GAO reported that, as of 1996, the federal government had created 185 "reinvention laboratories." *Management Reform: Status of Agency Reinvention Lab Efforts*, GAO/GGD-96-69, Mar. 1996. Reinvention entities continue to be created. *See, e.g.*, Memorandum, Secretary of Defense, subject: Achieving National Performance Review Defense Acquisition Reinvention Impact Center Goals by Year 2000 (Nov. 22, 1997) [hereinafter National Performance Review Memo] ("The Department of Defense Acquisition [sic] has been designated a National Performance Review Reinvention Impact Center.").

17. Roundtable, *supra* note 2 (remarks attributed to Dr. Paul G. Kaminski, then Under Secretary of Defense for Acquisition & Technology).

If you measure the benefits of acquisition reform by the number of people caught up in it, acquisition reform is a success. On the other hand, if you measure the recent acquisition reforms by comparing the tangible benefits they have produced with the costs we collectively have had to pay, the jury is still out.

There has been a lot of discussion about the tremendous financial pressures caused by reductions in federal procurement budgets[18] and about how important it is to eliminate expenditures that do not provide a net contribution to our procurement effort. If the 100,000 people "actively involved"[19] in Acquisition Reform Week devoted just *one-tenth* of their time to that activity, that translated into *10,000* "manweeks." That would mean *200 years* of effort, time, and money were devoted to that single activity. Before we invest *more* effort, time, and money in acquisition reform, we should find out what has been the cost of, and the return on, our investment thus far.[20]

Pressuring Managers as an Acquisition Reform

Given the absence of measurement to confirm that recent acquisition reforms have produced a real benefit,[21] it is not surprising that there are some people who are skeptical about the reforms. However, it *is* surprising that experienced acquisition middle managers have been singled out for criticism by their leaders, because they are skeptical. In explaining resistance to acquisition reform, one DOD leader attributed it to an "hourglass effect," described as follows: the people at the top want acquisition reform and the people at the bottom want acquisition reform. "*The problem is in the middle*. It's people who have been around for ten or fifteen years. They've seen other kinds of acquisition reform come and go."[22] The people referred to as the problem are middle managers who are skeptical about the current deluge of reforms.

Individual managers may or may not be a problem, but an organizational culture that stifles expression of divergent professional opinions is definitely a problem. A 1996 GAO report regarding acquisitions by the Federal Aviation Administration (FAA) found cost increases up to 500 percent and schedule overruns that averaged almost four years,[23] and the report concluded that the FAA's "culture" was a primary cause of the overruns.[24] Specifically, according to the GAO's report, the culture at the FAA pressured its acquisition professionals to suppress bad news.[25] We should not go down that same road.

Why is the fact that a middle manager has "seen other kinds of acquisition reform come and go" a ground for criticism anyway? Why is "skepticism" regarding the current spate of reforms a ground for criticism? We all saw acquisition reforms come and go. We lived through them, and, in looking back, we know that not all of the ideas were good ideas (fixed-price R&D contracting, for example).

There is ample reason for caution among those in the middle of the hourglass. They are charged with the responsibility for prudent use of scarce resources, and their experience shows that effort invested in reforms is not always a wise investment. They would be derelict in the discharge of their duties if they did not consider these facts when allocating resources and directing their subordinates.

One theme of acquisition reform is that "if people do something new and it does not work out, they will not be criticized."[26] But the fact that middle managers are being criticized by their leaders is evidence that such forbearance is not extended to them—at least not to the skeptics. Indeed, in the DOD it has been suggested that the way to deal with resistance to acquisition reform is to build pressure on the middle managers in order to "widen the neck" of the hourglass.

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18. *Defense Contract Management*, GAO/HR-97-4, Feb. 1997 ("[b]etween fiscal year[s] 1991 and 1995, the defense procurement budget was reduced by almost 40 percent"); William S. Cohen, Report of the Quadrennial Defense Review 1 (May 1997) [hereinafter QDR] ("[s]ince 1985, America has . . . reduc[ed] its defense budget by some 38 percent, its force structure by 33 percent, and its procurement programs by 63 percent"). The QDR is available on the internet at <http://www.defenselink.mil/pubs/qdr>.

19. Roundtable, *supra* note 2.

20. The next Acquisition Reform Week is scheduled for 4-8 May 1998. Minutes from the Acquisition Reform Senior Steering Group Meeting, Sept. 9, 1997.

21. *See* Lightning Bolt #8 Update, U.S. Air Force (Aug. 1995) ("[I]t was not possible, in most cases, to identify direct, timely measures of acquisition reform progress in terms of cost and schedule.").

22. Roundtable, *supra* note 2 (remarks attributed to Mr. John W. Douglass, Assistant Secretary of the Navy for Research, Development, & Acquisition) (emphasis added). *See id.* (remarks attributed to Dr. Kaminski).

23. *Aviation Acquisition: A Comprehensive Strategy Is Needed for Culture Change at FAA*, GAO/RCED-96-159, Aug. 1996, at 15-16.

24. *Id.* at 22.

25. *Id.* at 5, 22-25 ("personnel [were] expected to do what they [were] told without challenge;" a majority of employees "were concerned about the consequences of reporting bad news;" and "program officials . . . suppressed bad news").

26. *See* Roundtable, *supra* note 2 (remarks by Mr. Douglass).

The suggestion that middle managers should be pressured to overcome their resistance is a very bad idea. Experienced middle managers are the backbone of any organization, and they are collectively, and in some cases individually, the most complete repository of an organization's accumulated experience and wisdom. Their opinions should be solicited and given due deference, not stifled. The FAA's experience—the huge cost and schedule overruns it endured—demonstrates the folly of pressuring people to stifle full and frank discussion of acquisition issues. If experienced middle managers have reservations about acquisition reform efforts, that should give us pause, that should be a cause for disquiet—not out of concern about their loyalty or about whether they are team players, but out of concern about the wisdom of these reforms when viewed from the perspective of their experience. We owe the professional managers, and the acquisition process would benefit from, respectful consideration of their views, even those views which are unpopular, inconvenient, or at odds with the course their leaders may wish to take.

Entrepreneurialism as an Acquisition Reform

The statistics for calendar year 1997 have not all been digested, but informal data indicates that the total number of GAO protests is down (probably proportionally to the total number of procurements) and that the overall percentage of cases in which protests are sustained appears to be unaffected. However, available information suggests that outcomes which are favorable to protesters and adverse to the government are on the rise in at least one area—protests of information technology (IT) procurements.

Preliminary 1997 data[27] shows the following about IT protests:

> Relief favorable to the protester was obtained in about thirty percent of the cases. [28]
>
> For all cases *filed*, about sixty-four percent were dismissed (voluntarily or involuntarily), and thirty-six percent were decided.
>
> In cases which were *dismissed*, the protester obtained relief in about thirty-four percent.
>
> In cases which were *decided*, about twenty percent were sustained.

Those percentages all appear to reflect substantial increases in outcomes that were favorable to protesters. For example, the twenty percent rate at which IT protests were sustained in 1997 stands in stark contrast to the twelve or thirteen percent rate at which the GAO has sustained protests overall in recent years. [29]

If the rate at which these protests are sustained is rising, why is that happening? The likely cause is that the elimination of rules and guidelines and the accompanying exhortation to be "entrepreneurial" are inducing agencies to make contracting mistakes. If that hypothesis is correct, if the present emphasis on aggressively entrepreneurial contracting contributes to contracting errors, acquisition reform is increasing disruption of procurements because it is increasing the number of instances in which corrective action is required.

Protest decisions, particularly those that reflect attempts to avoid contracting constraints, over time will provide an objective metric regarding the merits of reform. Early indications are that this metric will show that entrepreneurialism may have gone too far.[30]

Electronic Contracting as an Acquisition Reform

One endeavor regarding which plenty of measurement data exists but has been disregarded is government-forced electronic contracting. The DOD recently committed itself, and all of us, to contracting for major systems on a paper-free basis within three years.[31] This despite the fact that the DOD's experience with forced automation has been unsatisfactory, to say the least.[32]

The Federal Acquisition Streamlining Act of 1994 created a federal acquisition computer network (FACNET) to do business electronically for contracts between $2500 and $100,000.[33] The purpose of FACNET, like the current elec-

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27. *See infra* Appendix (compiling informal data available through September 1997).

28. This includes cases in which the protests were dismissed but corrective action was taken by the agency, as well as protests that were decided favorably to the protester (31 + 10 = 41; 41/141 = .29078). The GAO calls this percentage the "effectiveness rate."

29. Specifically, the 20% "sustain" rate is *fifty percent* higher than the historical overall percentage of cases in which the GAO sustained protests. *See infra* Appendix. Moreover, if IT protests are removed from the overall 1997 statistics, IT protests were sustained at nearly twice the rate that other protests were (20% versus 11%). *See id.*

30. *See, e.g.*, CCL, Inc. v. United States, No. 97-721C, 1997 WL 790570, at *17 (Fed. Cl. Dec. 23, 1997) (holding that the government's proposed use of an indefinite delivery indefinite quantity contract far exceeded its legitimate bounds). The government had carried innovative contracting too far.

31. Charles Aldinger, *U.S. Plans to Cut Military Bureaucracy*, REUTERS, Nov. 11, 1997; *Study Seeks More Base Closings*, FLA. TIMES-UNION, Nov. 11, 1997, at A1.

32. *Information Management and Technology*, GAO/HR-97-9, Feb. 1997, at 6. "During the past 6 years, agencies have obligated over $145 *billion* building up and maintaining their information technology infrastructure. The benefits of this vast expenditure, however, have frequently been disappointing." *Id*. (emphasis added).

tronic contracting initiative, was to move the government's contracting process away from paper, but it has been "a failure."[34] Despite a massive investment in the effort, the GAO reported that less than two percent of the procurements in the FACNET dollar range were accomplished through the network.[35] Those actions which were conducted using FACNET were slower, more expensive, and less reliable than processing them using the old, pre-reform methods. "Government and industry FACNET users reported hundreds of malfunctions in sending and receiving FACNET transactions."[36] They also reported "[l]ost, late, and duplicate transactions, and network interruptions frustrated agencies . . . and vendors and delayed procurements."[37] According to the GAO, using FACNET takes longer and costs more than traditional, pre-reform procurement methods.[38] One commentator put it this way: "As for the paperless office, everybody can see this brass ring, but it's never there when you grab for it. As urban myths go, it ranks down there with New York City's sewer alligators."[39]

Even if the cynics are wrong and this newest campaign for paperless contracting will eventually bear some fruit, there is a more important problem we should consider.[40] A fundamental tenet of acquisition reform is that unique and burdensome mandates by the federal government should be avoided because they are expensive, time-consuming, and adversely affect procurement outcomes. Paperless contracting, especially if forced on the proposed schedule, is precisely the kind of burdensome mandate that should be avoided for exactly those reasons.

Contracting on a paperless basis can be achieved, if at all, only if contractors make dramatic changes to the way they do business, to accommodate the DOD's demands.[41] Moreover, if a contractor changes its practices to suit the DOD, all of the contractor's trading partners (prime contractors, subcontractors, suppliers, vendors, and the like) also have to switch to electronic contracting, or the contractor will have to have *two* billing systems—one to meet the DOD-imposed requirement and one for its other business.[42] The government is not simply switching horses, but rather is demanding that everyone else add horses.[43]

Paperless contracting will be neither inexpensive nor easily done. What will it cost? Who will pay for it? What will be the net benefit?[44] These questions, and a host of others, should have been answered before paperless contracting was touted as an acquisition reform. If we neglect to answer these questions, we risk investing years of effort, money, and opportunity cost

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33. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

34. *Acquisition Reform: Classes of Contracts Not Suitable for the Federal Acquisition Computer Network*, GAO/NSIAD-97-232, Sept. 1997; Matthew Phair et al., *Buying and Selling Go On Line*, ENGINEERING NEWS-REC., Oct. 27, 1997, at 26.

35. *Acquisition Reform: Obstacles to Implementing the Federal Acquisition Network*, GAO/NSIAD-97-26, Jan. 1997, at 2-3; *Acquisition Reform: Classes of Contracts Not Suitable for the Federal Acquisition Computer Network*, GAO/NSIAD-97-232, Sept. 1997.

36. *Acquisition Reform: Obstacles to Implementing the Federal Acquisition Network*, GAO/NSIAD-97-26, Jan. 1997, at 7-8.

37. *Id.*

38. *Id.* at 13. Notwithstanding abysmal performance, the "DOD stated [that] FACNET use will continue, even if a current congressional amendment repeals its mandated use." *Acquisition Reform: Classes of Contracts Not Suitable for the Federal Acquisition Computer Network*, GAO/NSIAD-97-232, Sept. 1997.

39. *Being Taken for a Ride*, PRESS-ENTERPRISE [Riverside, California], Nov. 17, 1997.

40. Other issues are also apparent. For example, paper documents will not be available as a "backup" if automated systems fail, and the potential for malicious interference with electronic records is substantial. In May 1996, the GAO reported that "defense systems may have experienced as many as 250,000 attacks during 1995, that about 64 percent of attacks were successful at gaining access, and that only a small percentage of these attacks were detected." *Information Management and Technology*, GAO/HR-97-9, Feb. 1997, at 34.

41. *Defense Watch*, DEF. DAILY, Dec. 8, 1997 (reporting that, for the Pentagon to meet its ambitious goal of introducing paper-free contracting, the defense industry must be willing to make changes to their own operations so that the Pentagon can make contract payments electronically); William Jackson, *HHS Tries Buying on the Web*, GOV'T COMPUTER NEWS, Sept. 8, 1997 (stating that a principal reason for FACNET's failure was "the vendors wouldn't buy in. The vendors said, 'I'm not going to pay to be EDI-capable when I only get one or two solicitations a month.").

42. *See DOD News Briefing*, M2 PRESSWIRE, Dec. 11, 1997 (paraphrasing remarks by Dr. Hamre).

43. *See* Phair et al., *supra* note 34.

44. Experience suggests that electronic contracting may produce a net detriment, not a benefit. A U.S. Army Missile Command study revealed that:

> [T]he use of FACNET prolonged procurement processes . . . from an average of 3 days to more than 7 days and required extra resources and effort . . . . [T]he cost in time and effort far overshadows any small savings FACNET produces. The Department of the Interior performed a similar test at five buying locations and got comparable results.

Id. at 13.

in "vaporware," like FACNET, that will take longer, cost more, and be less efficient than current, unreformed procedures.

Scoring Contractors' Performance as an Acquisition Reform

Another area in which we are investing in reforms of questionable value is the collection of "past performance information." Moreover, with regard to past performance information, the reforms appear to be complicating, rather than streamlining the acquisition process—making matters worse, rather than better.

A November 1997 policy requires the DOD to collect past performance information regarding contractors in accordance with a specified procedure.[45] The DOD procedure for doing so divides contract work into various "business sectors" and establishes differing contract dollar thresholds above which information is to be collected according to a number of "assessment elements."[46] Neither the content nor the boundaries of the "business sectors" are obvious or readily discernible. Neither the dollar thresholds nor the "assessment elements" are uniform across all the business sectors. For example, a $1,000,000 threshold applies to the information technology sector, a $5,000,000 threshold applies to the operations support sector, and a $100,000 threshold applies to the health care sector.[47] Similarly, an assessment element called "business relations" *is* to be used for information technology sector contracts, but it is *not* to be used for systems sector contracts.[48] All of this imposes a major, new learning task on government contracts professionals, and it will generate a substantial amount of additional work for everybody.

Effective 1 February 1998, every DOD contract will have to be categorized by "business sector," measured against the applicable dollar threshold, and, if a contract is over the threshold, data collected and reported for every one of the attendant "assessment elements." This process will be confusing, at least in the near term, and will be a major pain in the neck. Good luck trying to explain to your clients how this streamlines acquisition.

The major flaw in this guidance is not that it is complicated or causes more work, but rather that it misses, or at least does not address, what ought to be the most important point. We are, or should be, interested in *past* performance primarily because we believe we can use it to predict *future* performance[49] (for example, we believe that suppliers who produced higher quality products in the past will produce higher quality products in the future). Accordingly, data regarding performance in a previous task is useful to us only if it is a reliable predictor of future performance.[50]

Reliability of data regarding performance in a past task as a predictor of performance in a future task depends fundamentally upon the similarity of the past task to the future task. Yet, the new guidance concerning collection of past performance information groups work in categories that are too broad to be helpful and compares past performance not against the desired future performance, but solely against the requirements of a (not necessarily comparable) past contract. It does not focus the inquiry on the similarity of the past and future tasks, and so it will be of questionable reliability as a predictor of future performance. As a consequence, this new policy will require the DOD to collect past performance information that may be useful only accidentally.

Similarly, this guidance does not distinguish between difficult tasks and relatively easy ones. This procedure gives no points for difficulty. In fact, the reverse may be true; the scoring may *subtract* points for difficulty. For example, because in this scoring regime contractors' performance is measured against their contracts' terms, not against the difficulty of their respective tasks, a contractor that struggled with, learned from, and ultimately succeeded at difficult tasks in contract A likely will receive lower scores than a contractor that easily performed much less difficult tasks in contract B. To use a sports analogy, this scoring will tell us how easily a contractor got over the bar, without telling us how high or low the bar was.

In addition, this policy may institutionalize the kind of favoritism that critics have cautioned against. For example, the "business relations assessment element" mentioned earlier will permit government personnel to evaluate, and potentially to award, contracts based on a "contractor's history of . . . cooper-

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45. Memorandum, Under Secretary of Defense for Acquisition & Technology, subject: Collection of Past Performance Information in the Department of Defense (Nov. 20, 1997) [hereinafter Past Performance Memo] (located on the internet at <http://www.acq.osd.mil/ar/doc/collect.pdf>). *See Gansler Calls for Tailoring Collection of Contractor Performance Information*, DAILY REP. FOR EXECUTIVES, Dec. 4, 1997, at A11-12.

46. Past Performance Memo, *supra* note 45.

47. *Id.*

48. *Id.*

49. *See* Office of Federal Procurement Policy, Policy Letter No. 92-5, Dec. 30, 1992 (stating that "[a] contractor's past performance is a key indicator for predicting future performance"); *see also* Naval Command, Control, & Ocean Surveillance Center, Contracts Standard Operating Center Procedure No. 108, Oct. 16, 1996.

50. *See* Benjamin D. Wright, *A History of Social Science Measurement* (MESA Psychometric Laboratory, University of Chicago 1997) ("Our interests are not limited to the data in hand, but go to what these data imply about other unknown data."). This source is located only on the internet at <http://mesa.spc.uchicago.edu/memo62.htm>.

ative behavior."[51] Given this assessment factor, award of a contract may be based not on the quality of a company's goods and services, but based on its relationship with the contracting officer. This could lead to exclusion of valid and worthy proposals and facilitate the funneling of contracts to a favored few.[52]

In a 1997 study by Coopers & Lybrand, use of past performance information in selecting contractors—a reform that was undertaken to produce higher quality products and services—was rated as having *zero* impact on quality.[53] This is despite the fact that the use of past performance is already one of the most fully implemented of the recent acquisition reforms. The use of past performance data has zero effect on quality because the data collected is not a reliable basis for inferences regarding future performance, for the reasons discussed above.

That is not to say that collecting data regarding contractors' past performance is an idea without merit; it is, however, an idea that, thus far, has been poorly executed. This criticism, being in essence that the measurement mechanism is ineffective, should be recognized by the DOD because (as discussed above) the DOD resists attempts to measure its *own* performance on the ground that the people who want such measurements "are busy as hell coming up with just a . . . meaningless metric."[54]

Globalization of Our Industrial Base as an Acquisition Reform

Simultaneous with its other initiatives, the DOD has apparently decided that the U.S. industrial base should be "globalized" as an acquisition reform measure.[55] In recent speeches, writings, and testimony, the DOD's leaders have taken the position that "international teams" should bid for U.S. contracts to build new systems or to provide major upgrades of current systems.[56]

This calls to mind what someone said about second marriages, that they are a triumph of optimism over experience. Globalization of U.S. acquisition is another area in which optimism has drawn the United States in directions at odds with its experience. An economic or operational case for multinational development of weapon systems is difficult, if not impossible, to support with facts.

The principal argument for "globalization" of U.S. defense procurements is that our allies' equipment should be interoperable with ours.[57] Indisputably, interoperability is highly desirable for coalition operations. However, the theory that armaments cooperation will create interoperability is contradicted by real-world experience.

The history of U.S.-allied armaments cooperation shows that it has been significantly more expensive to collaborate internationally in developing new weapon systems than to go it alone.[58] Furthermore, collaboration, despite its increased cost, has produced negligible improvements in interoperability, if any.[59] After fifty years of repeatedly trying, we are optimistic that we have figured out how to make meaningful strides in achieving interoperability by shouldering the extra costs of developing armaments multinationally, but such optimism does not appear to be warranted.

The fact is, while interoperability is a valuable goal, the United States usually achieves it *without* joint development. We become interoperable by exchanging necessary interface data (for example, wave forms and encryption data). We become interoperable when we and friendly nations buy the same equipment; Saudi Arabia bought our M1 tank, for example.[60] We become interoperable when we license production of the same equipment, such as U.S. 120mm tank gun ammuni-

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51. Past Performance Memo, *supra* note 45.

52. *See* Allan V. Burman, *Will Rule Changes Go Too FAR?*, GOV'T EXECUTIVE, Sept. 1997 (paraphrasing concerns of the U.S. Chamber of Commerce regarding Federal Acquisition Regulation Part 15).

53. *Acquisition Reform Implementation: An Industry Survey*, Coopers & Lybrand/Syracuse Research Corp. (Oct. 1997).

54. Roundtable, *supra* note 2 (remarks attributed to Mr. Money).

55. The DOD-driven internationalization of the U.S. industrial base is an old, unsuccessful idea. The proposal that it now should be called "globalization" and be championed as an acquisition reform lends itself to the criticism that everyone in the government who has an idea that they could not sell before now calls it acquisition reform in an effort to find a receptive audience.

56. *See, e.g.*, Jacques S. Gansler, Under Secretary of Defense for Acquisition & Technology, Address to the Aerospace Industry Association (Nov. 21, 1997). This address is available on the internet at <http://www.acq.osd.mil/ousda/speech/modernization.html>.

57. *Id.*

58. Thomas A. Callaghan, Jr., *Pooling Allied and American Resources to Produce a Credible, Collective, Conventional Deterrent*, DOD CONT. REP. NO. MDA-84-C-0274, at 4 (Aug. 1988) ("With very few exceptions, cooperative projects have cost more than national projects, thus consuming more Alliance [NATO] resources than they have conserved.").

59. *Id.* ("The ability of Alliance forces to operate together has been only marginally improved, if at all.").

tion, which we produced under a license from a German company.[61] All of these methods achieve interoperability and do so without joint development and without an "international team" bidding for the contract and the work.

In addition to interoperability as a reason for globalization of the U.S. industrial base, a DOD leader recently said:

> The United States will get more defense capability for its acquisition dollars *without any reduction in domestic labor content*. Each country will receive roughly the dollar value of its development and production program in proportion to the dollars that it invests in the effort. The U.S. gains the direct benefits of an international cooperative program while suffering no labor content loss.[62]

Those assertions and that theory are at odds with U.S. experience and U.S. interests.

First, the claim that it is cheaper to produce a military system through multinational collaboration, rather than by doing it entirely ourselves, is ill founded. As discussed above, it has virtually always cost us more to collaborate than it would have to develop and to produce a system on our own.[63] Moreover, if we do it ourselves, *we* control the schedule, the cost, the performance trade-offs, and the exports to countries whose interests may, or may not, be aligned with our own.

Second, the proposition that work share will be proportional to cost share, which here is held out as a *good* idea, is a proposition that the United States previously had resisted as a *bad* idea, because it means a nation that puts up one-third of the money will do one-third of the work, regardless of the capability of its industry and heedless of the impact on the system being developed. That might impair U.S. interests. Specifically, linking work share to cost share might require the United States to impair its military capability by lowering system performance requirements or manufacturing quality standards in order to find work that a contributing nation's industry can perform.

Third, heretofore the U.S. position has been that work should be allocated based solely on *merit*, based solely on the value offered by the competing contractors. The fact that the United States historically has taken the position that contracts for joint development should be awarded based on merit, together with the fact that U.S. contractors frequently have won the lion's share of the work, sometimes has meant that the United States received *more* of the work than its share of the cost alone would justify.[64]

Finally, if the United States builds a system by itself, it can do *all* of the work and keep *all* of the jobs. But, if the DOD develops and produces a system cooperatively, rather than independently, on the terms that the DOD now proposes, it will export work and jobs that otherwise would remain in the United States.

There are numerous other issues regarding globalization that should be addressed,[65] but we cannot discuss all of them here. Hopefully, it will suffice to say that any policy of globalization of the U.S. industrial base, including globalization "encouraged" in U.S. government RFPs, should be the subject of a public report by disinterested experts after an objective all-sources review and before the policy is implemented.[66] So far, the public discussion (to the extent that there has been any) regarding globalization of the U.S. industrial base appears to have been one-sided and less than complete.[67]

Stabilizing Program Funding as an Acquisition Reform

60. As another example, the Foreign Comparative Testing program has allowed the DOD to avoid development costs and simultaneously to achieve interoperability by buying $3 billion worth of foreign-developed equipment. *See Fiscal Year 1997 DOD Acquisition and Technology Program: Hearings Before the Subcomm. on Acquisition and Technology of the Senate Comm. on Armed Services*, 104th Cong. (1996) (prepared statement of Dr. Kaminski). Dr. Kaminski's statement is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

61. The company was Rheinmetall GmbH.

62. Gansler, *supra* note 56 (emphasis in original).

63. Callaghan, *supra* note 58, at 4.

64. For example, U.S. contractors might have 90% of the work even though the United States contributed only 50% of the funding.

65. For example, what are the consequences of transferring technology to other nations? Why train our industry's global competitors? Why turn potential customer nations into competitors? What obligations continue to hamstring the United States even after withdrawing from a multinational development program?

66. Process action teams, auditors, and others have studied internationalization/globalization of acquisition. However, reports—the results of which were less than laudatory—appear to have been suppressed.

67. Participants in international acquisition programs, like those in other acquisition programs, have powerful incentives for undue optimism, chauvinism, and compromises of good judgment. *See Weapons Acquisition: A Rare Opportunity for Lasting Change*, GAO/NSIAD-93-15, Dec. 1992, at 35. Because of those incentives, problems attendant to international system development generally are not publicly disclosed, even if they are privately acknowledged.

Whatever the benefits of recent acquisition reform proposals have been, those "benefits . . . pale in comparison to cost growth from program instability."[68] A principal recommendation of the Packard Commission in 1986 was radical reform of the planning, programming, and budgeting process. This recommendation has largely been ignored; at the least, it has not been implemented.[69]

It is routine for a multi-year program to be approved with all of the decisionmakers concurring that it has been streamlined and reformed and that the amount budgeted for the program is the minimum necessary to properly execute the program. Yet, within a year, the program may be ordered to be "stretched" to accommodate competing priorities.[70] Operation and maintenance funds (O&M) are "underfunded" every year, resulting in money being taken from acquisition accounts to pay for O&M. During the budget process, "horizontal cuts" of a certain percentage are made across the board annually, without regard to program impact. Huge amounts of money are taken from acquisition accounts to pay for contingency operations, like Somalia.

All of this causes tremendous instability in program funding and execution. Usually it causes shifts of programs "down and to the right" in an attempt to achieve near-term cost reductions.[71] But those near-term reductions significantly increase long-term cost and delay the deployment of the affected systems.[72]

The numbers used to describe the cost of these profound program changes vary, but, broadly speaking, the impact is about three to one.[73] That is to say, there is an ultimate cost of about three dollars for every one dollar "saved" in the near term by reducing and delaying a program. Of course, that dollar is not really saved, it is borrowed—borrowed at an interest rate of 200%.

What that means is that if $2 billion are taken from acquisition programs in order to pay for one year's unfunded contingency operations in places like Bosnia, the ultimate cost to the taxpayers of America will not be $2 billion, but likely will be on the order of $6 billion.[74] The reforms that have been implemented to improve the acquisition process are inadequate to recover such costs. As the 1997 report of the Defense Acquisition Pilot Program Consulting Group put it: "Funding stability is key to achieving effective program management . . . . Instability obviates performance gains and rapidly *erases* any process efficiency gains associated with acquisition reform."[75]

There is a lot of discussion about having the federal government act more like a civilian business. What would happen to a civilian board of directors that borrowed billions of dollars at 200% interest—and knowingly did that year after year?[76]

Funding instability is a "big ticket" item.[77] We know what its costs are. We know what its causes are.[78] We know it happens every year.[79] Why do we let it continue?

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68. Briefing Slides, Under Secretary of Defense for Acquisition & Technology, subject: Acquisition Program Stability, slide 3 (undated) [hereinafter Briefing Slides]. The slides are available on the internet at <http://www.osd.mil/api/speech/peosyscom>.

69. *See* Roundtable, *supra* note 2 (remarks attributed to Mr. Douglass).

70. *See id.* (remarks attributed to Mr. Gilbert F. Decker, Assistant Secretary of the Army for Research, Development, & Acquisition).

71. *See Pentagon Reforms Spark Concerns*, AVIATION WK., Nov. 17, 1997, at 31 (stating that other costs force acquisition spending to slide to the right every year).

72. Briefing Slides, *supra* note 68, slide 5. "In addition to the higher unit costs caused by program stretchouts, another downside to the affordability issue is [the] DOD's potential inability to address valid requirements when available resources are consumed on questionable priorities." *Defense Weapon Systems Acquisition*, GAO/HR-97-6, Feb. 1997, at 37. Moreover, actions that delay system deployments put lives at risk. *See Fiscal Year 1996 DOD RDT&E Program: Hearings Before the Subcomm. on Research and Development of the House Comm. on National Security*, 104th Cong. (1995) (prepared statement of Dr. Kaminski) ("lives of our soldiers, sailors, marines, and airmen may depend upon shortened acquisition cycle times"). Dr. Kaminski's statement is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

73. Roundtable, *supra* note 2 (remarks attributed to Dr. Kaminski) ("When we took out one dollar because of financial pressures, we ended up putting $3 back in.").

74. *Id. See Future Years Defense Program: DOD's 1998 Plan Has Substantial Risk in Execution*, GAO/NSIAD-98-26, Oct. 23, 1997, at 5-6 (reporting that the DOD expects that "migration" of funds from planned procurements to unplanned expenditures will be as much as $10-$12 billion).

75. DOD PILOT PROGRAM CONSULTING GROUP, CELEBRATING SUCCESS: FORGING THE FUTURE 2 (1997) [hereinafter DOD PILOT PROGRAM] (emphasis added).

76. In this context, financial audit reports have found:

> significant deficiencies across the spectrum of [the] DOD's financial management and reporting operations. None of the financial statements prepared by the military services or major DOD components have yet been able to withstand the scrutiny of a financial audit statement . . . . [T]he DOD Inspector General has stated that auditable financial statements for the Department would not be likely until the next century.

Defense Financial Management, GAO/HR-97-3, Feb. 1997, at 16.

77. If the DOD conducted a survey of every program management team in all four services, most respondents to the survey would identify program instability as the biggest problem. Roundtable, *supra* note 2 (remarks attributed to Mr. Douglass).

The DOD recently announced that it will fire 28,000 more civilian employees as part of its re-engineering of acquisition.[80] This zeal to fire people is reminiscent of a comment by Tom Peters, the author of *In Search of Excellence* and, most recently, *Circle of Innovation: You Can't Shrink Your Way to Greatness*: "[J]ust look at what happened to 're-engineering'—a great concept that became a euphemism and an excuse for bumping people off."[81] Why not attack funding instability instead of firing thousands of government employees?[82]

The DOD is considering initiatives to stabilize the funding for programs. These include proposals aimed at: (a) establishing a management reserve at the Office of the Secretary of Defense level (to cover "technical/uncertainty risk"); (b) fully funding O&M for required mission-capable rates; and (c) linking program decision milestones and the budgeting process to ensure that program "milestone" approval is funding approval.[83] These initiatives should include "fenced" funding dedicated to operational contingencies[84] so that acquisition accounts will not continue to be robbed[85] to pay for operations that Congress declines to fund.[86]

Reuters has reported that the savings from all of the presently planned "business reforms" plus the savings from firing 28,000 people are expected (if all of the hoped-for cost reductions are realized)[87] to reach about $3 billion.[88] If program funding can be stabilized, more than twice that much can be saved[89]—more than $6 billion a year—without firing anyone and without taking into account whatever modest savings we may eventually realize from the myriad "business reforms" that are presently being pushed.

If we are serious about acquisition reform, we should focus on the big ticket items. Moreover, we should postpone firing people and should postpone radical changes of the acquisition system that produced the most capable military in the world,

78. QDR, *supra* note 18. The primary source of instability in the DOD's acquisition plans is diversion to other activities of funding planned for procurement. The chronic erosion of procurement funding has three general sources: unprogrammed operating expenses (including contingency operations), unrealized savings from acquisition reform, and new program demands. *Id.*

79. William S. Cohen, Remarks at the Center for Strategic and International Studies (May 22, 1997) ("[Y]ear after year, procurement funds have been taken to pay for unexpected operations and support costs.").

80. *DOD News Briefing*, M2 PRESSWIRE, Nov. 21, 1997 ("those are absolute eliminations"); Bradley Graham, *Cohen Sets Major Pentagon Overhaul*, WASH. POST, Nov. 10, 1997, at A1. Note that the GAO reported that the DOD has already cut 20,334 more acquisition positions than legislative mandates require. *Defense Acquisition Organizations: Reductions in Civilian and Military Workforce*, GAO/NSIAD-98-36R, Oct. 23, 1997, at 2.

81. Anne Fisher and Tom Peters, *Smart Managing*, FORTUNE, Dec. 29, 1997, at 274.

82. The DOD has promulgated the 12 acquisition goals that "will constitute the hallmark of what [the DOD] will achieve during the second term of this administration." National Performance Review Memo, *supra* note 16. One of those explicit goals is "reducing the DOD acquisition[-]related workforce by 15%." *Id.* Firing people is a dubious hallmark.

83. DOD PILOT PROGRAM, *supra* note 75, § 8.1. The GAO has made similar recommendations; for example, "link program decisions in a more durable way to [the] DOD's long-term budget." *Defense Weapon Systems Acquisition*, GAO/HR-97-6, Feb. 1997, at 37.

84. A proposal for a reserve to cover unfunded contingencies has been rejected by the DOD. *See* Minutes, Acquisition Reform Senior Steering Group Meeting (Aug. 12, 1997) ("The SECDEF [Secretary of Defense] vetoed the contingency reserve.").

85. QDR, *supra* note 18 (noting that "the key . . . is to halt the chronic disruption to [procurement] plans").

86. Last year, the DOD began asking Congress to fund "planned" operations in Bosnia and Southwest Asia. *See Fiscal Year 1996 DOD RDT&E Program: Hearings Before the Subcomm. on Research and Development of the House Comm. on National Security*, 104th Cong. (1995) (prepared statement of Dr. Kaminski). Dr. Kaminski's statement is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

87. In 1996, the GAO reported that the DOD's "Reducing Oversight Costs Reinvention Laboratory," which was established in September 1994 to reduce the *18%* regulatory premium disclosed in the 1994 Coopers & Lybrand/TASC study, could yield estimated savings of $119 million (about a *one percent* savings). *See Acquisition Reform: Efforts to Reduce the Cost to Manage and Oversee DOD Contracts*, GAO/NSIAD-96-106, Apr. 18, 1996, at 5. The DOD responded by saying that the projected one percent savings were a "work in progress" and that to conclude, as the GAO had, that "savings [might] be less than estimated" was "pure speculation." *Id.* at 5-6, 11. A follow-up study reported that "[o]nly a small portion of the projected potential cost reductions . . . ha[d] been realized" as of July 1996. *Acquisition Reform: DOD Faces Challenges in Reducing Oversight Costs*, GAO/NSIAD-97-48, Jan. 29, 1997, at 12. Specifically, only $11 million in cost reductions had been achieved—about one tenth of the GAO's estimated potential one percent savings. *See id.*

88. Aldinger, *supra* note 31 (reporting that "Defense Secretary William Cohen announced a drastic plan to cut 28,000 jobs from the U.S. military's civilian bureaucracy and [to] make business reforms to save $3.2 billion for arms modernization"); *but see Acquisition Reform: Effect On Weapon System Funding*, GAO/NSIAD-98-31, Oct. 1997, at 2 ("[O]ur review raises concerns about the extent to which cost reductions from acquisition reform that the services have reported will be available to fund [the] DOD's modernization program . . . .").

89. Over the five years from 1992 through 1996, an average of $2.5 billion was required every year to pay for contingency operations. *See Defense Acquisition Reform: Hearings Before the House Comm. on National Security*, 105th Cong. (1997) (statement of Dr. Kaminski). Procurement accounts were reduced by an annual average of $7.6 billion during that period. Briefing Slides, *supra* note 68, slide 18. *See* Roundtable, *supra* note 2 (remarks attributed to Dr. Kaminski regarding the three-for-one impact of taking money out of the F-22 procurement program).

until we have exhausted other methods for getting the savings we think we need. Stabilizing funding is an achievable, high-payoff reform that should be the primary goal of acquisition reform efforts.

Conclusion

Let me conclude by retelling a story originally told by Assistant Secretary of the Navy John Douglass. While taking a turn staffing the phones during an Acquisition Reform Week activity, he answered a call by saying "Navy Town Hall."[90] The caller said, "My suggestion is that you all ought to knock off this acquisition reform baloney and get back to your desks and get back to work."[91] The caller insisted that his suggestion be taken personally to Secretary Douglass. When Secretary Douglass told the caller that he was Secretary Douglass, there was a long pause followed by a "click" when the caller hung up.

The caller's description of acquisition reform as "baloney" is inapt, but the story does illustrate two valid points. First, the business of acquisition reform should be *acquisition*, not reform, and acquisition has been served by a dedication to reliably *delivering the product* perhaps better than it now is served by endlessly *changing the process.* Second, people in the business of acquisition are afraid to confront their leaders about the wisdom of the present storm of reform.

We should heed that caller's advice and refocus our acquisition efforts. Rather than promiscuously chasing change, we should value constancy and predictability. We should permit reform-generated disruption of acquisition systems and programs only when disinterested evaluation discloses that the benefits of disruption will outweigh its costs. We should objectively identify and quantify the benefits and the costs of changes in the acquisition system before we undertake them. We should pick targets for change not based on the fact that an idea is "outside the box," but based on a pragmatic confirmation that a particular change will provide a worthwhile return on our investment.[92] We should eliminate the major sources of cost growth—first and foremost, funding instability—before we let anyone eliminate thousands more people. And we should *encourage* the critics of acquisition reform; they have contributions to make too, not the least of which are a counterbalance to the reformers' zeal and a reminder that acquisition reform is not an end in itself, that its purpose is to be a help, not a hindrance, in getting this nation's work done.

90. Roundtable, *supra* note 2 (paraphrasing remarks attributed to Mr. Douglass).

91. *Id.*

92. As Nobel Prize nominee the late Professor Loh Seng Tsai said in lecturing on creative thinking, "It would be innovative to drink soup through your nose, but that wouldn't make it a good idea."

Appendix

General Accounting Office Bid Protests

Action On Information Technology Protests	1997 Data	1997 Rates
Closed (total cases)	141	
Dismissed	90	
With corrective action	31	34.3%
Without corrective action	59	65.6%
Decided	51	
Sustained	10	19.6%
Denied	41	80.4%
Relief provided to Protester	41	29.1%

Action On All Protests	1997 Data	1997 Rates	1996 Data	1996 Rates
Closed (total cases)	2000		2335	
Dismissed	1502		1773	
With corrective action	?		512	28.9%
Without corrective action	?		1261	71.1%
Decided	498		562	
Sustained	61	12.2%	72	12.8%
Denied	437	87.8%	490	87.2%
Relief provided to Protester	?		584	25.0%

Has DOD "Repaired" a Component of the Construction Funding Analysis?

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On 2 July 1997, the Department of Defense (DOD) developed a new standard definition of repair to be applied in a consistent manner throughout the DOD.[1] The new definition of repair implements the statutory guidance concerning the proper use of funds for construction projects.[2] This article introduces the new definition, its application to construction projects, and its place in the process of determining which pot of money to use when funding a construction project.

Funding

The first question to ask is why all the hoopla over a new definition of repair? To put the new definition of repair into perspective, it is important to give a brief overview of the construction funding process. In this era of decreasing budgets and decreasing funds, using the correct pot of money is vital to avoiding an Antideficiency Act[3] (ADA) violation.

In most construction contracts, there are three pots of money from which to choose. Which appropriation the construction funding planner uses is based on the final total of the funded construction costs. For projects greater than $1.5 million, the construction funding planner uses military construction funds specifically appropriated by Congress in the annual Military Construction Appropriation Act. For projects greater than $500,000 but less than $1.5 million, minor military construction funds are available. These funds are also appropriated each year by Congress in the annual Military Construction Appropriation Act.[4] For projects $500,000 or less, the DOD construction planner must use Operation and Maintenance funds (O&M).[5] Most installations fund routine operations with O&M. Additionally, the military services use O&M funds for military construction activities performed in furtherance of specific operational requirements.

Which Pot of Money Should Be Used?

How the construction funding planner determines which pot of money to use is a multi-step process. First, the planner must determine the scope of the project. Simply put, the scope of the project is the project size. Is the planned work one project or two? One building or two? Does it include all aspects of the project, or can the project be legitimately divided? These questions must be answered before continuing the construction funding analysis.

A military construction project includes all military construction work necessary to produce "a complete and usable facility or a complete and usable improvement to an existing facility."[6] An agency may not treat "clearly interrelated" construction activities as separate projects.[7] If an agency does treat "clearly interrelated" construction projects as separate projects, the agency risks engaging in illegal project splitting. Normally, project splitting is done to avoid exceeding monetary thresholds, thereby allowing the agency to use a different type of funding than would otherwise be appropriate. In most cases, an agency will engage in project splitting when appropriate to avoid exceeding the $500,000 threshold for the use of O&M

1. Memorandum, Office of the Secretary of Defense, Comptroller, subject: Definition of Repair and Maintenance (2 July 1997) [hereinafter Repair Memo].

2. *See* 10 U.S.C. § 2811 (1994).

> Using funds available to the secretary concerned for operation and maintenance, the secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility . . . . A repair project costing more than $5 million may not be carried out . . . unless approved in advance by the secretary concerned. In determining the total cost of a repair project, the secretary shall include all phases of a multi-year repair project to a single facility. In considering a repair project for approval, the secretary shall ensure that the project is consistent with force structure plans, that repair of the facility is more cost effective than replacement, and that the project is an appropriate use of operation and maintenance funds.

3. 31 U.S.C.A. § 1341 (West 1996). Exceeding a monetary threshold essentially means that the construction funding planner obligated appropriated monies for the wrong purpose, thereby violating the Purpose Statute. *Id*. § 1301.

4. A minor military construction project is a military construction project that has an approved funded cost equal to or less than $1.5 million. However, if the military construction project is intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening, a minor military construction project may have an approved cost equal to or less than $3 million. 10 U.S.C. § 2805(a)(1).

5. *Id.* § 2805.

6. *Id.* § 2801(b). *See* The Honorable Michael B. Donley, B-234326, 1991 WL 315260 (Comp. Gen. Dec. 24, 1991).

7. The Honorable Bill Alexander, House of Representatives, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

funds. Typically, this is because the installation commander has the delegated authority to approve such construction projects and does not need approval from a higher level.[8]

After determining the scope of the project, the construction funding planner must next define the work. This is done by asking whether the work is maintenance, repair, construction, or a combination of the three. Identifying the nature of the work is vital, because only the construction costs are taken into account when determining whether a project meets a funding threshold.

Last, the construction funding planner must determine the "funded" and "unfunded" project costs. Although this is arguably the easiest step in the process, it is fraught with controversy. Unfunded costs are costs which are charged against appropriations other than those which are directly paying for the construction project. For example, unfunded costs include costs funded by military personnel appropriations,[9] planning and design costs,[10] government equipment used in the project,[11] and excess distributions from other agencies.[12] Although unfunded costs do not apply toward the military construction thresholds, these costs must be reported to higher headquarters and must be listed in the contract file for approval. As a general rule, a cost is a funded cost if it is not specifically listed as an unfunded cost. Funded costs *do* factor into the equation of which funds the construction funding planner uses. Typical examples of funded costs include materials and supplies, non-active duty military labor, military personnel TDY costs, value of real property, and transportation and relocation costs. These items are specifically listed in the regulations and instructions of each agency.[13]

When this analysis is complete, the construction funding planner will have a final total of the funded construction project costs. The next step is to simply compare that amount with the monetary thresholds. If the funded construction costs are $500,000 or less, the planner uses O&M funds. If the project is greater than $500,000 but not more than $1.5 million, the planner uses unspecified minor military construction funds. If the funded construction costs are more than $1.5 million, the installation must go through the chain of command to request that Congress specifically approve and fund the project.

The final step is to determine the approval authority, which is also based on the construction thresholds. Generally, for projects $500,000 or less, the major command has delegated approval authority to the installation commander. For projects between $500,000 and $1.5 million, the service secretary has approval authority.[14]

Defining "Repair"

The focus of the new DOD guidance is the determination of whether work can be classified as repair, maintenance, or construction.[15] The classification is crucial, because only the funded construction costs apply toward the funding thresholds. As more costs are attributed to repair or maintenance, fewer are classified as construction, and the chances that a project will remain within a funding threshold are increased. Of course, when constructing an entirely new facility, all costs are classified as construction.[16] The issue of how to classify costs, however, is vital when performing construction work on an existing facility. But, how does one distinguish construction costs from maintenance and repair costs?

Assuming that the construction funding planner is preparing a project for an existing facility, the determination of what is construction, repair, or maintenance is essential for identifying which funds must be used. Military construction is any construction, development, conversion, or extension of any kind

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8. U.S. DEP'T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION, app. B, para. B-1 (30 Aug. 1994) [hereinafter AR 415-15]; U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 65-601, BUDGET GUIDANCE PROCEDURES, vol. 1, tbl. 9-1 (21 Oct. 1994) [hereinafter AFI 65-601]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 11010.20F, FACILITIES PROJECT MANUAL, app. B, tbl. 1 (7 June 1996) [hereinafter SECNAV INSTR. 11010.20F].

9. For example, the salaries of military personnel would be included in these costs.

10. These costs include architect and engineer efforts, as well as environmental studies.

11. Equipment and maintenance and operation costs are funded costs.

12. These distributions are received on a non-reimbursable basis, but transportation costs are funded.

13. SECNAV INSTR. 11010.20F, *supra* note 8; AFI 65-601, *supra* note 8, para. 9.14; U.S. DEP'T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF ENGINEERING AND HOUSING, glossary (2 July 1987) [hereinafter AR 420-10]. *Army Regulation (AR) 420-10* only specifically defines unfunded costs. Use the previous Army guidance (*AR 435-10*) for examples of funded costs.

14. AR 415-15, *supra* note 8, para. 3-1; AFI 65-601, *supra* note 8, para. 9.9; SECNAV INSTR. 11010.20F, *supra* note 8.

15. If the construction funding planner cannot legitimately segregate the costs, all of the project costs must be treated as construction. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 32-1032, PLANNING AND PROGRAMMING REAL PROPERTY MAINTENANCE PROJECTS USING APPROPRIATED FUNDS (APF), para. 3.3 (11 May 1994) [hereinafter AFI 32-1032].

16. The term facility means a building, structure, or other improvement to real property. 10 U.S.C. § 2801 (1994). This definition includes buildings, bridges, roads, dams, etc. *Id*.

carried out with respect to a military installation.[17] This includes the acquisition, installation, and assembly of a new facility,[18] as well as work on an existing facility. An expansion or extension to real property is one which changes the facility to add to its overall external dimensions.[19] An alteration is work to the interior or exterior of a facility that changes its current purpose, and it includes the installation of equipment which is made a part of the existing facility.[20] When the interior or exterior arrangements of a facility are changed for a new purpose (for example, changing from an administrative facility to a barracks building or vice-versa), this is a conversion.[21] Replacement of a real property facility (complete rebuilding of the facility) that has been destroyed or damaged beyond economical repair is also construction.[22] All of these projects are considered to be construction when calculating which pot of money to use.

Maintenance and repair are not construction; therefore, they are not factored into the funding analysis. Maintenance is defined somewhat differently by each service, but it is essentially recurrent work required to preserve or to maintain a facility in such a condition that it may be used for its designated purpose.[23] It is day-to-day work required to preserve real property facilities and to prevent system components from prematurely wearing out and failing.[24] Generally, maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done on such parts to minimize or to correct wear and tear and to ensure the maximum reliability and useful life of the facility or component.[25] Examples of maintenance include elimination of hairline cracks, cyclic painting, waterproofing, cleaning of wood floors, grass cutting, fertilization, road surface treatment, dredging to a previously established depth, and filling joints.

Former Use of "Repair"

The crux of these definitions is the determination of what is repair. Prior to the new DOD standard definition, each military service treated repair work differently. The Navy's guidance stated that repairs may include modifications or additions of building or facility components or materials which are required for compliance with "current life safety standards, recognized national or regional building codes, or environmental rules or regulations."[26] The Air Force defined repair as work that is required for any facility or facility component to restore its safe, effective, and economical support of assigned missions and organizations.[27] The Air Force definition included the following example of repair: "restoration or replacement of components and systems that have worn out, failed, or exceeded their economic life, by installing modern, reliable, maintainable, functional, economical, and energy-efficient materials and equipment."[28] The definition also included: (1) work necessary to rectify fire or other occupational safety and health code deficiencies; (2) modifications to utility systems to reduce O&M costs or to provide more reliable services by increasing capacity or efficiency necessary to support current requirements;[29] (3) the addition, removal, or rearrangement of non-loadbearing walls either to restore a building to functional standards[30] or to facilitate the consolidation of similar functions or organizations; and (4) the inactivation or removal of excess facilities.[31]

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17. *Id*. §§ 2801(a)-(b). Military installation means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the secretary of a military department or the secretary of defense. *Id*. § 2801(c)(2).

18. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

19. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

20. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

21. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

22. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8. *But see* 10 U.S.C. § 2854 (1994) (providing that a service secretary may repair, restore, or replace a facility that is damaged or destroyed). O&M funds will be used if the cost of replacement is less than $500,000. The secretary of defense has restricted use of this authority to complete replacement or major restoration of a facility that is urgently required.

23. AR 420-10, *supra* note 13, glossary.

24. AFI 32-1032, *supra* note 15, para. 3.3.

25. SECNAV INSTR. 11010.20F, *supra* note 8.

26. *Id.* para 4.1.1.

27. For example, building, utility system, or other real property infrastructure. SECAF INSTR. 32-1032, *supra* note 15, para. 3.3.2.

28. *Id.*

29. *Id.*

Generally, all of the services agreed that repair was the restoration of a facility for use as its designated purpose by overhauling, reprocessing, or replacing parts or materials which have deteriorated from the elements or from wear and tear in use and which have not been corrected through maintenance.[32] Repair was also defined as work required to restore safe, effective, and economical support of an assigned mission.[33] Although neither the Army nor the Air Force definitions included building codes or environmental laws, can these definitions of repair be read to include these requirements? Do these definitions encompass Occupational Safety and Health Administration requirements, handicapped requirements, or other safety needs?

In past practice, the answers to these questions depended on whom you were asking. It was not uncommon for installation level offices and major commands to interpret these provisions differently. Nonetheless, work was regularly classified as repair when the work was necessary to meet building codes, environmental requirements, or other safety requirements. Were all of these actions ADA violations? The answer hinges on the individual facts of each project. Generally, the services commonly classified such work as repair, and the GAO did not question the practice. Of course, the old axiom that "everyone else is doing it" does not make the practice correct. It was in this context that the DOD announced the new standardized definition of repair. It is the DOD's effort to settle the issue, and it is certainly a step in the right direction. Unfortunately, the new definition is not without its problems.

The New DOD Definition

The DOD memorandum which defines repair states that 10 U.S.C. § 2811 "provides authority for the Department to carry out repair projects costing more than $5 million using O&M funds, provided that they are approved in advance by the Secretary concerned."[34] Although the DOD guidance discusses repair authority for projects greater than $5 million, the military services are logically assuming that the new definition of repair applies to all repair projects, regardless of cost. The memorandum further states that "in order to ensure that this authority is being applied in a consistent manner throughout the [DOD], we have developed the attached standard criteria for determining what constitutes a repair project. These criteria should be applied to all future projects."[35]

The new "criteria" or definition of repair has three parts. To appreciate the impact of this new definition of repair, it is necessary to analyze each part. The first part states that "repair means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated purpose."[36] With the exception of taking out the verbiage "by overhaul, reconstruction, or replacement" and defining how the facility came to be in need of repair through "the elements or wear and tear in use," the definition for repair remains essentially the same as past practice by the services. These differences, however, have major ramifications.

The lack of specific guidance greatly expands the contracting officer's discretion. The former repair definitions gave the construction funding planner guidance on how to restore (for example, "by overhaul, reconstruction or replacement"), but the term "restore" is now undefined. Does the new definition mean that an installation can now tear down an entire facility and then "restore" the facility through a complete rebuild? Obviously not, but the lack of guidance begs the question of how far the construction funding planner can go in restoring a facility. Also, up to what level can a facility be repaired so that it can "effectively be used for its designated purpose?" This leads to issues such as whether "replacement" can be state-of-the-art or in-kind and to what extent cost is a factor in the determination of how to bring a facility back to its effective use. This issue existed under the previous definitions of repair, and it continues under the new definition.

Another issue in this part of the definition is what is meant by the facility's "designated purpose." This was a problem with the previous definition. All work necessary to change a building from one designated purpose to another is considered to be "conversion" and is classified as construction. One variant on this theme was that, if the repair work would have been necessary (for example, the repair of a leaky roof) even without the conversion, the work could be classified as repair. Deciding what repair work was due to the conversion, however, was a difficult task and allowed for abuse by planners who were attempting to keep the funded construction costs down.

30. Defined as that necessary to make an existing building fully functional and capable of supporting assigned mission or organizations effectively and efficiently. *Id*. para. 3.3.2.1.

31. *Id.*

32. AR 420-10, *supra* note 13, glossary.

33. AFI 32-1032, *supra* note 15, para. 3.3.2.2. If the cost to repair an entire building is greater than $3 million, the repair must be financed with military construction money. This only applies to an entire building renovation; it does not apply if the decision is made to repair parts of the building only.

34. Repair Memo, *supra* note 1. Although titled "Definition of Repair and Maintenance," the memorandum did not offer a definition or guidance on maintenance.

35. *Id.*

36. *Id.*

The new DOD definition has criteria which must be read in conjunction with the new definition and which might answer some of these questions. The first criterion provides:

> [W]hen repairing a facility, the components of the facility may be repaired by replacement, and the replacement can be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and provide for more capacity than the original unit due to increased demands/standards. Interior rearrangements (except for load bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental) may be included as repair.[37]

This answers the question of the extent to which a facility can be repaired. Under the new definition, repairs may include replacement, can be state-of-the-art, and can provide more capacity than the original unit. But once again, the question of how far a military service can go in repairing to state-of-the-art levels or in providing for more capacity is uncertain. For example, if a facility has window air-conditioning units and one needs to be repaired, can the repair be in the form of replacement by central air-conditioning? It is certainly state-of-the-art and provides for more capacity than the original unit due to increased demands and standards. It meets the new test, but the "old test" still remains—does it make sense? If a regulation or code requires central air-conditioning, the planner has a stronger argument. The extent to which an installation can "provide for more capacity" is fact-specific, and the planner should proceed with caution. One window air-conditioning unit in a 100-room barracks/dormitory does not justify replacement with state-of-the-art central air-conditioning for the entire facility. The unit can certainly be replaced with a new, stronger BTU unit. On the other hand, if many of the units are in failing condition and the construction funding planner plans to replace all 100 units, the installation of central air may well be justified. In fact, it may be cheaper than replacing all of the window units. Note, however, that the cost of the replacement is not a factor in this new criterion. Therefore, cost will not necessarily dictate whether the replacement of a facility component is repair or construction, but it may be a factor to consider when determining the level of repair.

Another issue that frequently arises with repair work is whether replacement in-kind is required. For example, under the old definition, for a project to be considered repair, worn carpet had to be replaced with new carpet and old tiles with new tiles, but old tiles could not be replaced with new carpet.[38] Does the new criterion change this general rule? Although the safest answer may be "no," the agency may well have greater latitude with this issue than ever before. Indeed, the new criterion provides that work which is associated with meeting current standards, codes, or environmental regulations constitutes repair. It specifically states that "the replacement can be up to current standards or codes" and later clarifies by referring to "accessibility, health, safety, and environmental laws and regulations."[39] The best argument in support of replacement of one item with a different type of item is to argue that the new product is state-of-the-art, meets current code requirements, meets increased demands, or allows for more effective use of the facility. In the area of fiscal law, "silence is not golden."[40]

Do the new criteria clear up the issues involved when a conversion incorporates repair work that would have been necessary even without the conversion? At this point, no. The first criterion provides for "interior rearrangements . . . and restoration of an existing facility to allow for effective use of existing space."[41] However, this fails to answer the conversion question and creates a different issue. The definition of an "alteration" is a change in the interior or exterior arrangements of a facility to improve its current purpose, and alterations are classified as construction. The new criterion for repair concerning rearrangements is similar to the construction definition of alteration. Does this mean that the DOD guidance redefines certain construction work as repair? The most likely answer is no. In order to take advantage of the ability to rearrange interiors to allow for effective use of existing space and to classify the work as repair, the facility must still be in need of repair; if not, the work is still classified as construction.

"Conversion" is defined as work necessary to change the interior or exterior arrangement of a facility so that it may be used for a new purpose.[42] Although this work is classified as construction, all of the services have interpreted the provision as still allowing some of the work to be classified as repair.[43] The general rule has been that any repair work that would have been necessary whether the facility was being converted or not

37. Repair Memo, *supra* note 1.

38. AFI 32-1032, *supra* note 15, subch. 3.3.

39. Repair Memo, *supra* note 1.

40. Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) (holding that one may obligate appropriated funds only when authorized by Congress).

41. Repair Memo, *supra* note 1.

42. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

would still be considered repair. Conversely, any work which is only mandated because of the conversion is construction. The problem has been where to draw the line.

Imagine a warehouse that has been sitting vacant on an installation for twenty years and which is in obvious need of repair. The decision is made to convert it to a teaching facility. Is all of the work dictated by the conversion and considered to be construction? Or, since the building is falling apart and needs to be repaired anyway, should all of the work be considered repair? The criteria for the new definition do not shed any light on this issue. The last part of the first criterion states that "additions, new facilities, and functional conversions must be done as construction."[44] This simply reiterates the guidance in the definition of construction; therefore, it is still necessary to follow the guidance provided by individual service regulations or instructions. Planners should be wary of efforts to classify any work in a conversion project as repair. Even if the work may be legitimately classified as repair, the planner should be sure that such a classification makes sense. If defining the conversion work as "repair" keeps the project below a funding threshold, the project deserves a second, and perhaps a third, look.

The final criterion in the DOD memorandum states that "construction projects may be done concurrent with repair projects as long as the projects are complete and usable."[45] This brings the analysis full circle back to the issue of project scope. Remember, a project includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Although the work can be segregated into construction, repair, or maintenance, the construction planner must still fund a complete and usable facility.

The new standardized definition of repair and its criteria for implementation provide the DOD and the services with additional guidance in determining what is repair. The definition has its problems, but, overall, the guidance is helpful. Of particular benefit are the criteria for repair which allow for state-of-the-art replacement; increase in capacity and efficiency; and compliance with building, health, and environmental codes and regulations.

The issue now becomes how the services plan on implementing the new DOD standard definition of repair.[46] An example is the Army's implementing memorandum, which was issued on 4 August 1997.[47] It characterizes the new DOD definition as "more liberal,"[48] and it states that the new definition "expand[s] [the Army's] ability to provide adequate facilities for our soldiers and civilians."[49] The memorandum provides additional basic guidance and examples for using the new definition.

The Army's Implementation

Called "the basic guidance for the new definition of repair,"[50] the Army's memorandum provides some valuable tests which the construction funding planner must meet before characterizing the work as repair. First, "a facility must exist and be in a failed or failing condition in order to be considered for a repair project."[51] Although this seems elementary, the categorization of work as "repair" is subject to great abuse. This rule prevents abuses such as repainting the commander's office simply because he does not like the color then replacing the relatively new carpet because it no longer matches the paint. These projects can still be accomplished, but they can no longer be characterized as repair. Therefore, the first step in the process must be a legitimate determination that the facility or component thereof is in a failed or failing condition.

The second part of the Army guidance, however, is extremely troublesome. It states:

> [W]hen repairing a facility, you may now bring the facility (or a component of the facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair

43. AR 420-10, *supra* note 13; AFI 32-1032, *supra* note 15, subch. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8, para 4.1.1.

44. Repair Memo, *supra* note 1.

45. *Id.*

46. The author does not anticipate any additional Air Force guidance on implementing the DOD standard definition, because the new definition is virtually the same as the previous Air Force definition.

47. Memorandum, Department of the Army, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997) [hereinafter Army Memo].

48. *Id.* The Army's characterization of the new definition as being more liberal should give the reader an idea of how the Army plans to implement the new DOD guidance.

49. *Id.*

50. *Id.*

51. *Id.*

> project. Another example would be adding air-conditioning to meet a current standard when repairing a facility.[52]

The Army guidance appears to indicate that once the construction funding planner determines that a facility needs to be repaired, the planner can undertake all work necessary to meet applicable codes or standards and can classify it all as repair. This would effectively open the floodgates to allow construction costs to flow in as repair. Imagine, for example, the following scenario. Upon inspection of a barracks building, the inspector discovers a crack on one interior wall. The building needs repair, because it has failed or failing components. The building has no air-conditioning, and service regulations require central air-conditioning in barracks buildings. According to the Army guidance, the installation may now repair the wall, install the air-conditioning, and classify all of the work as repair. Since such repair and maintenance costs do not count toward the construction funding threshold, the Army could use O&M funds, regardless of cost. Incredible as it may seem, this is exactly what the Army guidance recommends.

If interpreted in this manner, the guidance will create many problems. First, it is inconsistent with the definition of construction, which includes alteration of the interior or exterior arrangements of a facility to improve its current purpose, including the installation of equipment which is made part of the existing facility. Installed equipment includes built-in furniture, cabinets, shelving, venetian blinds, sprinkler systems, fire alarms, and heating and air-conditioning systems.[53] Second, it violates the new DOD definition of repair, which states that "the components of a facility may be repaired by replacement."[54] Replacement is the key word; the component that is being replaced has to exist first.

Not every action taken pursuant to this guidance is illegal, but caution and common sense must be exercised. Interpretations that are clearly inconsistent with long-standing guidance will invite scrutiny from Congress and the GAO—scrutiny that the commander and the Army may not want. If a building needs a new roof and, at the same time, exhaust fans that did not exist are added to bring the building up to code, it is legitimate to classify all of this work as repair. However, common sense dictates that work that has no connection to the need for the facility repair should be classified as construction. Each case must be judged on its own facts.

The Army guidance also attempts to remind the construction funding planner that "pursuant to the new definition, moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction."[55] The word "additions" could be construed as a limitation on the ability to add compliance work to any repair project. However, this word alone neither legitimizes nor contradicts the general guidance. "Addition" traditionally means adding rooms, space, or size to a facility.[56] Thus, the Army's guidance does not prevent the addition of the air-conditioning system in the scenario described above.

Finally, the Army guidance reminds the construction funding planner to ensure that the facility is in need of repair. "Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when the component or facility is not in need of repair, is *construction*."[57] This is important, because work required to bring a facility up to building, safety, health, or environmental standards cannot be classified as repair unless the facility is already in a failed or failing condition.

Conclusion

The DOD's new definition of repair is a valiant effort to help ensure the proper funding of military construction projects and to standardize an area which was previously marked by disparity among the military services. The new definition and implementation criteria are very useful to the construction funding planner, provided they are properly implemented. The construction funding planner cannot substitute the new definition and its criteria for the common sense and caution that construction funding planners must continue to bring to the decision-making process. Worse, if the enhanced flexibility given by the new guidance is abused, the military services face the potential loss of the significant benefits the new definition provides.

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52. *Id.*

53. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

54. Repair Memo, *supra* note 1.

55. Army Memo, *supra* note 47.

56. Repair Memo, *supra* note 1.

57. Army Memo, *supra* note 47 (emphasis added).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School, U.S. Army

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

Family Law Note

Marine Corps Changes Family Support Rules

The Marine Corps recently rewrote the family support guidelines which apply to Marines. Previously, all support guideline provisions for the Marine Corps were contained in 32 C.F.R. Parts 733 and 734. Now, in addition to the Code of Federal Regulations, the *Legal Administration Manual* has a separate chapter which specifies the Marine Corps policy on support, paternity, and garnishment actions involving Marines' pay.[1]

Chapter 8 of the *Legal Administration Manual* is a significant expansion of the policy and guidelines for the Marine Corps. Perhaps the most significant change is that the Marine Corps now joins the Army in making its support obligation punitive.[2] A violation of Chapter 8 is now punishable under Article 92 of the Uniform Code of Military Justice. In addition to making the obligation punitive, the Marine Corps changed the basic support formula used to determine a Marine's support obligation.[3]

Although the new Marine regulation is modeled after *Army Regulation 608-99*,[4] it is not identical. The Marine Corps regulation, like the Army regulation, sets up a priority for establishing and enforcing support obligations. All Marines must comply with a court order of support or a written support agreement signed by the parties.[5] In the absence of either a court order or a written agreement, Chapter 8 sets out interim support requirements.[6]

The general rule for the interim support requirement is that the Marine owes the greater of $200 per month per supported family member or the entire Basic Allowance for Housing (BAH),[7] up to a maximum of one-third of the Marine's gross pay.[8] For a single family living in government quarters, the interim support will be $200 per supported family member, up to a maximum of one-third of the Marine's *base pay.*[9]

When a Marine is married to another service member, there are special rules for the support obligation.[10] The Marine has no support obligation for the other service member.[11] If there

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1. LEGAL ADMINISTRATION MANUAL, ch. 8 [hereinafter LEG. ADMIN. MAN.].

2. *Id.* para. 8001.8.

3. Previous Marine Corps guidelines were based on a specified percentage of base pay, depending on the number of family members a Marine supported. Support included a percentage of base pay, basic allowance for quarters (BAQ), and variable housing allowance (VHA). Under the old guidelines, a Marine with only a spouse owed BAQ, VHA, and 20% of base pay; if there were a spouse and one child, the Marine owed BAQ, VHA, and 25% of base pay; for a spouse and two or more children, the Marine owed BAQ, VHA, and 30% of base pay. If there were only children and no spouse, the figures were: one child, one-sixth of base pay; two children, one-quarter of base pay; and three or more children, one-third of base pay. These were expressly guidelines only. There was a tremendous disparity in the enforcement of the guidelines throughout the various Marine commands.

4. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994) [hereinafter AR 608-99].

5. LEG. ADMIN. MAN., *supra* note 1, para. 8001.7.

6. *Id.* para. 8002.1.

7. Basic allowance for housing (BAH) is the new designation for housing allowances paid to all service members. As of 1 January 1998, leave and earning statements will not designate BAQ and VHA. The BAH is a combined figure, taking into account the BAQ and VHA authorized for the service member for that locale.

8. LEG. ADMIN. MAN., *supra* note 1, para. 8001.7. Gross pay is defined as basic pay and BAH, but it does not include hazardous duty pay, incentive pay, or basic allowance for subsistence. *Id*.

9. *Id.* para. 8002.2.

10. *Id.* para. 8002.4.

11. *Id.* para. 8002.4(a).

are children of the marriage who are entitled to support, however, the regulation sets up some rules. If the children are in the custody of one service member, the noncustodial Marine owes the greater of $200 per supported family member or BAH, up to a maximum of one-third of the Marine's gross pay.[12] If the children are split between the service couple, there is no support obligation.[13]

Under the new interim support requirement, support payments will be paid for up to twelve months or until a court order or written agreement is obtained, whichever occurs first.[14] Unlike the Army regulation, in-kind payment of financial support is authorized, at the discretion of the Marine commander, for expenses other than nongovernmental housing expenses, such as automobile loans or charge accounts.[15]

Chapter 8 sets out specific reasons for releasing a Marine from his obligation to pay support. A Marine's commander[16] *may* release a Marine under one of the following circumstances: if the Marine cannot determine the whereabouts and welfare of the child(ren) concerned;[17] if it is apparent that the person requesting support for the child(ren) does not have physical custody of the child(ren);[18] if the Marine is the victim of a substantiated instance of physical abuse by a spouse who is requesting support;[19] or if the family member is in jail.[20] In addition to these specified reasons, the regulation allows release from *spousal* support under the interim standards if the spouse who is requesting support has engaged in marital misconduct.[21] The General Court-Martial Convening Authority is the approval authority for such a request.[22]

The enforcement mechanism for this regulation is the Marine commander. A commander has five working days to respond to a complaint of nonsupport against a Marine in his command.[23] When a commander receives a nonsupport complaint, the commander must interview the Marine about whom the complaint is made and must inform the Marine of his Article 31 rights.[24]

Marine commanders must address paternity claims against Marines under this regulation as well. While the regulation states a preference for civil court resolution of the paternity issue, if a Marine admits paternity of a child, the regulatory requirements of support apply to that child, regardless of whether a court order of support exists.[25]

Army legal assistance attorneys must be familiar with the support requirements of the other services. The Army legal assistance program does not restrict access to just soldiers or their family members. It is, therefore, not uncommon for an Army attorney to have a client from a sister service. It is particularly noteworthy that the regulation now establishes a mandatory support obligation. There will undoubtedly be a period of adjustment while the Marines and commanders learn the new rules. Hopefully, this new regulation will increase

12. *Id.* para. 8002.4(b).

13. *Id.* para. 8002.4(c).

14. *Id.* para. 8002.5. The 12 month limitation means 12 consecutive months. If a Marine pays the required support for a few months, then stops paying and a complaint is received, the 12 month period starts again.

15. *Id.* para. 8002.6(2). *Army Regulation 608-99* limits in-kind payments of interim support to nongovernmental housing costs when there is a written agreement by the supported spouse to accept such in-kind payments in lieu of the interim support payment. AR 608-99, *supra* note 4. The new Marine regulation gives commanders more leeway in determining whether a Marine satisfies the regulatory support requirement by means other than cash payments.

16. The regulation refers to "commander" throughout without limiting the level of command. The proponent of the new regulation, the Legal Assistance Policy Branch, Headquarters, Marine Corps, indicates that battalion level command is the appropriate level. Drafters, however, did not want to restrict interpretation of the term; thus, the regulation allows for flexibility in the diverse missions of the Corps.

17. LEG. ADMIN. MAN., *supra* note 1, para. 8003.5(a).

18. *Id.* para. 8003.5(b).

19. *Id.* para. 8003.5(c).

20. *Id.* para. 8003.5(d).

21. *Id.* para. 8004.4.

22. *Id.* para. 8004.6.

23. *Id.* para. 8004.1.

24. *Id.* para. 8004.2.

25. *Id.* para. 8005.3. This is significantly different from the Army approach. Under *AR 608-99*, a male soldier cannot be ordered to provide support to a child based on a paternity claim unless there is a court order of paternity and support. AR 608-99, *supra* note 4. A soldier who admits paternity can be encouraged to provide monetary support for the child, but he cannot be found in violation of the punitive paragraphs of *AR 608-99* for failure to do so. *Id.*

response to complaints of nonsupport when the service member is a Marine. Major Fenton.

Consumer Law Note

The Seventh Circuit Continues to Give FDCPA Guidance

The United States Court of Appeals for the Seventh Circuit continues to be at the forefront of resolving Federal Fair Debt Collection Practices Act (FDCPA)[26] issues. A practice note in a recent edition of *The Army Lawyer* concerned a Seventh Circuit decision which helped to resolve the debate about what constitutes a debt under the FDCPA.[27] Two recent decisions help with other FDCPA issues.

In *Jang v. A.M. Miller & Associates*,[28] the court considered the issue of verification of debts[29] under the FDCPA in the context of dunning letters from a collection agency. *Jang* was a class action law suit in which the consumers claimed that dunning letters sent by two firms collecting for Discover Card "were misleading because the collection agencies never intended to fully comply with the statutory notices set forth in the letters."[30] The letters said, in relevant part:

> Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.[31]

The consumers questioned the validity of the debt, but never received any response from the collection agencies. Instead, the agencies ceased all debt collection activities, and the accounts were returned to Discover Card, allegedly pursuant to either a policy of the collection agencies or an agreement between Discover Card and the agencies.[32] The consumers filed suit, and the district court found no FDCPA violation.[33] On appeal, the consumers argued that:

> [T]he promise to provide validation when the [a]gencies knew that they would instead return the accounts to Discover Card constitutes a false, misleading, and deceptive practice under the FDCPA. They also contend[ed] that the 'false promise' [to provide verification of the debt] violates the FDCPA provisions against unfair collection practices because it undermines the protections and purpose of the validation requirement.[34]

The consumers did not convince the court. With regard to verification of debts, the court stated that the FDCPA "gives debt collectors two options when they receive requests for validation. They may provide the requested validations and continue their debt collecting activities, or they may cease all collection activities."[35] In the case at hand, the collection agencies ceased all debt collection activities and, therefore,

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26. 15 U.S.C.A. §§ 1692-92o (West 1997).

27. *See* Consumer L. Note, *Seventh and Ninth Circuits Hold That Bad Checks Are Debts Under the FDCPA*, ARMY LAW., Feb. 1998, at 29.

28. 122 F.3d 480 (1997).

29. *See* 15 U.S.C.A. § 1692g. The statute provides:

> [I]f the consumer notifies the debt collector in writing within the thirty-day period . . . that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt . . . and a copy of such verification . . . is mailed to the consumer by the debt collector.

Id. This requirement is often referred to as "validation" of the debt since that word is used in the title of the statutory section.

30. *Jang*, 122 F.3d at 481.

31. *Id.* at 482.

32. *Id.* The court made no finding of fact as to whether these policies actually existed. They stated that "[a]t this stage of the proceedings, we accept as true all well-pleaded facts contained in the complaints, and we construe all reasonable inferences in favor of the plaintiffs." *Id*. at 483. Thus, the court accepted as true the plaintiffs' allegations regarding the policies of returning debts once verification was requested.

33. *Id.* at 482.

34. *Id.*

were in compliance with the FDCPA. With regard to the dunning letters, the court found that those sent were not misleading or deceptive. Key to this decision was the fact that the letters mirrored the required statutory notices under the FDCPA almost verbatim.[36] The court held that:

> When a debt collector provides the language required by the statute, and only the language required by the statute, we hold that a collection letter cannot be false, misleading, or deceptive merely because the collection agency always chooses one statutorily allowed path (ceasing all collection activity) over the other (providing debt verification).[37]

The decision is important in several respects. First, it highlights a loophole in the FDCPA that is potentially damaging to consumers. The consumers in *Jang* argued that the court's approval of the practice of returning accounts to the creditor upon request for verification would defeat the purpose of notification.

> [This practice] would allow creditors to thwart the purpose of the verification notice. [The plaintiffs] contend that when a creditor receives a file back from a collection agency because the debtor has requested verification, the creditor can simply assign the file to another collection agency which can again initiate collection activities. After the file has been reassigned a few times, the debtor may become frustrated, they contend, and may pay the debt without ever obtaining verification of the debt.[38]

The court was not persuaded by this argument because this scenario had not occurred in the case at hand.[39] The court did comment, however, that "it is for Congress, and not the courts, to close this alleged loophole in the FDCPA."[40] While we can hope that Congress will recognize this problem and act upon it, legal assistance practitioners should be alert to this technique as a possible course of action for creditors who seek to "wear down" a consumer.

This opinion is also important because it highlights the value of requesting verification.[41] Verification ensures that the debt is legitimate and also gains the consumer valuable time to deal with the debt. In addition, if the request actually causes the return of the file to the creditor, it may be easier for a legal assistance attorney to negotiate a favorable disposition of the dispute for the client.

Jang also demonstrates that not all inconsistencies in dunning letters will be actionable. Thus, while consumer legislation seeks to protect the least sophisticated consumer,[42] the interpretation of those letters must be reasonable. Not every individual interpretation will cause courts to view the letter as misleading. Legal assistance attorneys should, therefore,

35. *Id.* at 483.

36. *See* 15 U.S.C.A. § 1692g(a) (West 1997). The FDCPA mandates the notice that debt collectors must provide. It requires:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Id.

37. *Jang*, 122 F.3d at 484.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See supra* note 29.

42. The least sophisticated consumer is used as a standard for many aspects of consumer law. It is especially prevalent, however, in considering the effect of dunning letters in debt collection. *See generally Jang*, 122 F.3d at 483-84; Bartlett v. Heibl, 128 F.3d 497, 500 (7th Cir. 1997). An excellent explanation of the least sophisticated consumer standard and its history can be found in *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

emphasize in their preventive law efforts that consumers should read collection letters carefully and consult with their legal assistance office when they have questions.

In another dunning letter case, the Seventh Circuit issued some good news for consumers—even if they do not heed the advice to read the letters. *Bartlett v. Heibl*[43] involved an attorney who sent dunning letters to a consumer on behalf of a credit card company. Attorney Heibl's letter stated that if Mr. Bartlett wished to resolve the dispute prior to the commencement of a law suit, he had to "do one of two things within one week of the date of [the] letter . . . ." [44] Bartlett's two choices were to pay $316 toward the debt or contact the credit card company to make arrangements for repayment.[45] Under the attorney's signature block, however, was a nearly literal paraphrase of the statutorily required notice,[46] which allows Mr. Bartlett "thirty days within which to dispute the debt. At the end of the paraphrase, Heibl add[ed]: 'suit may be commenced at any time before the expiration of this thirty (30) days.'"[47] The main issue in the case was whether these contradictory notices as to the timing of a law suit were misleading, in violation of the case law interpreting the FDCPA.[48] The court found that they were.[49] The court went on to provide a "safe harbor" letter that, if complied with, would protect debt collectors from claims that they misled consumers, at least in the Seventh Circuit.[50]

What makes the case interesting from the consumer's perspective, however, was the fact that, while Mr. Bartlett received the dunning letter involved in the case, he never read it.[51] Attorney Heibl argued on appeal that this fact defeated Bartlett's claim for damages under the FDCPA. The court disagreed, saying that the fact that Bartlett had not read the letter:

> would be a telling point if Bartlett were seeking actual damages, for example as a consequence of being misled by the letter into surrendering a legal defense against the credit card company. He can't have suffered such damages as a result of the statutory violation, because he didn't read the letter. But he is not seeking actual damages. He is seeking only statutory damages, a penalty that does not depend on proof that the recipient of the letter was misled . . . . All that is required is proof that the statute was violated . . . .[52]

Thus, if a dunning letter is confusing or misleading, it does not matter whether the consumer is actually misled or whether he read the letter at all. This may be important in a legal assistance case. A client may not read all of the mail he gets from a collection agency before he comes to the legal assistance office. In fact, his visit to the legal assistance office may be prompted by a phone call after receipt of several letters that remain unopened. In negotiations with the debt collector, violations of the law (particularly those that have statutory damages) may be important in convincing the debt collector to be reasonable in dealing with the client. *Bartlett* emphasizes that dunning letter violations are always useful, even if the client was not actually misled by the letters or if he did not even read the letters.

Debt collection is a common consumer problem for which service members seek legal assistance. These two decisions provide important guidance to practitioners in using federal law to protect their clients' interests when faced with dunning letters. Attorneys are reminded that it is also important to check state laws, which may provide even greater protections than the federal statute in debt collection cases. Major Lescault.

International and Operational Law Note

Appeals Court Denies Michael New's Petition for Habeas Corpus

43. 128 F.3d at 497.

44. *Id.* at 499.

45. *Id.*

46. *See supra* note 36 (noting the statutory provision which mandates the notice requirement).

47. *Bartlett*, 128 F.3d at 499.

48. *Id.* at 500. The court noted that "the implied duty to avoid confusing the unsophisticated consumer can be violated by contradicting or 'overshadowing' the required notice." *Id.*

49. *Id.* at 501.

50. *Id.*

51. *Id.* at 499.

52. *Id.* (citations omitted).

On 25 November 1997, the United States Court of Appeals for the D.C. Circuit denied Michael New's petition for a writ of habeas corpus.[53] Specialist Michael New refused to wear a United Nations badge, patch, and headgear prior to his deployment to participate in the United Nations preventive deployment to Macedonia (UNPREDEP). On 17 October 1995, the commander preferred charges against Specialist New for disobeying a lawful order, in violation of Article 92 of the Uniform Code of Military Justice.[54] Prior to his court-martial, Specialist New unsuccessfully petitioned the federal court for an emergency stay of the court-martial and a ruling to remove him from military jurisdiction.[55] On review, the circuit court held that the district court was "fully justified in dismissing New's habeas petition on grounds of comity for lack of exhaustion."[56] The opinion enhances military discipline because soldiers who emulate New's disobedience cannot anticipate "premature federal intervention in the affairs of the military."[57]

Background

Specialist Michael New was a medic assigned to Headquarters and Headquarters Company, 1st Battalion, 15th Infantry, 3rd Infantry Division. On 21 August 1995, his chain of command informed him that his unit would deploy to Macedonia to participate in the ongoing UNPREDEP.[58] As part of the deployment, his unit would wear a United Nations badge, patch, and the blue UN Beret. In addition, the United States contingent to UNPREDEP (termed Task Force Able Sentry) was under the operational control of a Finnish Brigadier General.[59] Specialist New believed that an order to deploy and to wear UN insignia was unlawful. He informed his chain of command that he would refuse to wear the UN uniform items until the chain of command provided him with constitutional authority for the order.[60]

On 23 August 1995, Specialist New received oral orders to do research into the history and objectives of the United Nations. His squad leader suggested that he write a statement concerning his convictions and personal position regarding service in an operation while wearing the UN uniform items. On 6 September 1995, three of his non-commissioned officers (NCOs) discussed the matter with New and informed him that the UN items were necessary to distinguish United States soldiers from warring factions in the Republic of Macedonia. The NCOs also informed him that he would be subject to military discipline if he disobeyed the order to wear the uniform items.[61]

On 19 September 1995, Specialist New submitted a two page, single-spaced statement of his personal views regarding the pending deployment.[62] Specialist New wrote that he could not "understand the legal basis of the Army order to change [his] uniform and thus shift or alter [his] status and allegiance against [his] oath of enlistment, [his] conscience, and against [his] will."[63] Specialist New opined that the principles of the United Nations are "diametrically opposed" to his "God-given" inalienable rights enshrined in the U.S. Constitution.[64] Specialist New concluded his comments with the following challenge:

> Without a response from the Army about the justification, it is difficult if not impossible to judge the legality of any orders to become a UN solider, and in the face of any doubt, I do not intend to surrender my status as an American soldier to wear the uniform of a

53. New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997).

54. Robert S. Winner, *SPC Michael New v. William Perry, Secretary of Defense: The Constitutionality of U.S. Forces Serving Under U.N. Command*, 3 DePaul Dig. Int'l L. 30 (1997).

55. United States *ex rel.* New v. Perry, 919 F. Supp. 491 (D.D.C. 1996). The district court refused to stay the court-martial. United States *ex rel.* New v. Perry, No. CIV.A.96-0033(PLF), 1996 WL 420175, at *1 (D.D.C. Jan. 16, 1996) (rejecting the argument that "the quality of justice in the military tribunals is inferior to that which might be provided by this [c]ourt. The [c]ourt is confident that the military courts will provide due process of law and consider all relevant arguments.").

56. *New*, 129 F.3d at 644.

57. *Id.* at 645.

58. Winner, *supra* note 54, at 30.

59. *Id.*

60. *New*, 919 F. Supp. at 493.

61. *Id.* at 493.

62. Memorandum, SPC Michael G. New, HHC 1/15 Inf, Medical Platoon, to Chain of Command, subject: Statement of SPC New Concerning Wearing of the UN Uniform (19 Sept. 1995) (copy on file with author).

63. *Id.* para. 4.

64. *Id.* para. 6.

> foreign power. If you wish to convene a court martial and send me to jail for standing on my oath as an American soldier and for firmly defending my wearing [of] the American Army uniform, and upholding its historic significance, than [sic] I cannot prevent that action, and I will gladly accept it as a price I am willing to pay rather than submit to an order to obey or [to] render allegiance to a foreign power, the United Nations. [65]

On 2 October 1995, the entire unit attended a briefing on the legal basis for deploying United States troops to the former Yugoslav republic of Macedonia.[66] The commander ordered all deploying soldiers to appear in formation on 10 October 1995 in the UN accoutrements. The company commander repeated the order at a company formation on 4 October 1995. Specialist New attended the 10 October formation, but he disobeyed the order to wear the prescribed uniform.[67]

The Court-Martial

As noted above, the command charged New with violating a lawful order, in violation of Article 92, on 17 October 1995.[68] Specialist New was arraigned on 17 November 1995.[69] The case spawned a firestorm of media coverage and national debate.[70] One Republican presidential candidate proclaimed, "Michael New is a hero of conscience," and promised to pardon New as his first presidential act.[71] Specialist New's father spoke on over 400 talk shows in defense of his son.[72]

As with many courts-martial, the motions in limine were a critical factor in Specialist New's ultimate conviction. The government asked the military judge to exclude evidence concerning the legality of the deployment orders to the former Yugoslav republic of Macedonia as well as other United States deployments in multilateral operations.[73] The government also filed a motion to exclude evidence of New's opinions, motives, personal philosophy, and religious beliefs, on the grounds that such evidence was irrelevant to the duty to obey the lawful order and thus would not constitute a defense to the charged offense.[74]

The defense filed a number of motions to dismiss the charge based upon its interpretation of the illegality of the order to wear the UN items.[75] The defense motions alleged that the deployment order was unconstitutional and that the order to wear the uniforms was, therefore, illegal. The defense also alleged that the order was illegal because it required Specialist New to engage in an unauthorized alteration of the battle dress uniform. The defense further alleged that the order was unlawful because it forced Specialist New to serve involuntarily as a United Nations soldier, in violation of the Thirteenth Amendment to the U.S. Constitution. Finally, the defense charged that the order was unlawful because it constituted a breach of Specialist New's enlistment contract.

Specialist New forgot his stated intent, as noted above, to "gladly accept his court-martial." His attorney filed an emergency petition to the United States District Court for the District of Columbia, asking for a stay of the court-martial until the federal district court could hear argument on his petition for a writ of habeas corpus. Citing *Shlesinger v Councilman*,[76] the court refused to halt the pending court-martial because the defense was unable to demonstrate any risk of irreparable harm.[77] The ruling is important because it reestablished the principle that Article III courts generally cannot preempt resolution of issues properly presented to military courts

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65. *Id.* para. 8.

66. *New*, 919 F. Supp. at 493.

67. *Id.* at 494.

68. UCMJ art. 92 (West 1995).

69. *Id.*

70. *See, e.g.*, Rowan Scarborough, *American Poised to Snub U.N. Uniform*, WASH. TIMES, Sept. 1, 1995, at A1; Carla Anne Robbins, *To Some, Soldier is a Hero for Refusing to Obey an Order*, WALL ST. J., Jan. 24, 1996, at A1. The publicity and discussion on talk shows and the internet prompted the lead defense attorney to set up the Michael New Legal Defense Fund, complete with envelopes for mailing in contributions; the envelopes proclaimed, "We're standing with you for the Constitution." The author has one of the envelopes on file.

71. Marc Fisher, *War and Peacekeeping: Battle Rages Over the GI Who Said No to U.N. Insignia*, WASH. POST., Mar. 4, 1996, at D1.

72. *Id.*

73. Government Motion in Limine, filed Dec. 6, 1995, United States v. New, No. 96-00263 (3rd Inf. Div. Jan. 24, 1996) (copy on file with author).

74. *Id.*

75. Unless otherwise noted, all information in this paragraph derives from defense motions in *United States v. New.* Defense Motions, filed Dec. 6, 1995, United States v. New, No. 96-00263 (3rd Inf. Div. Jan. 24, 1996) (copies on file with author).

concerning persons within the jurisdiction of Article 2, Uniform Code of Military Justice. As the district court stated in its ruling on 16 January 1996, "[m]any other members of the U.S. military have been or are likely to be deployed to Macedonia or other venues under UN command."[78]

Despite the potential implications of the trial, the district court allowed the court-martial to proceed. On 19 January 1996, the military judge denied the defense motions to dismiss the charge and its specification.[79] The military judge found that issues regarding the service member's perception of the legality of the military and political decision to deploy forces are irrelevant to a subsequent Article 92 prosecution.[80] Announcing his findings, the judge stated that:

> [While] every citizen has the right to have an opinion regarding the manner in which the President chooses to conduct foreign policy on behalf of the people of this nation, and, in an appropriate time, place, and manner, to make that opinion known or manifest, in regards to a soldier, that freedom does not extend to taking that politic [sic] expression to the point of disobeying a lawful order of his appointed military commanders.[81]

On 24 January 1996, the court-martial panel found Specialist New guilty as charged and deliberated less than twenty minutes before sentencing him to a bad conduct discharge.[82]

Post Conviction Efforts in the Federal Courts

Following his conviction, Specialist New renewed his petition for a writ of habeas corpus on the grounds that the illegal order changed his status into that of a civilian. According to Specialist New's logic, the court-martial did not have jurisdiction to prosecute him because the "illegal" order voided his enlistment contract. For the first time, Specialist New stated that instead of ordering him to be reassigned to another unit, the court should order him discharged with an honorable discharge.[83] Specialist New told the district court that the trial proceedings were a "badge of infamy" likely to cause him to be scorned.[84] The court refused to grant New's petition on the grounds of comity because the military courts have jurisdiction over the case and are competent to consider the constitutional and statutory issues raised.[85]

As noted above, the court of appeals upheld the lower court's decision. The circuit court opinion restates the precedent that service members who are subject to military discipline must exhaust their military remedies before seeking collateral review in the federal courts.[86] The exhaustion principle prevents needless friction between federal and military courts. The circuit court opinion obliges Specialist New and his attorneys to use the military appellate process to argue that the order was unlawful and that the illegality absolved him of any remaining service obligations. Any contrary rule would allow "service members to circumvent the exhaustion requirement merely by contending . . . that an action

76. 420 U.S. 738, 740 (1974) (holding that "when a service member charged with crimes by military authorities can show no harm other than that attendant to resolution of the case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise"). *See also* Orloff v. Willoughby, 345 U.S. 83, 93 (1953) (holding that the judiciary must be scrupulous not to intervene in legitimate military matters); McDonough v. Widnall, 891 F. Supp. 1439 (D. Colo. 1995) (declining to intervene in military cases without clear statutory authority from Congress).

77. United States *ex rel.* New v. Perry, 919 F. Supp. 491, 494 (D.D.C. 1996).

78. United States *ex rel.* New v. Perry, No. CIV.A.96-0033(PLF), 1996 WL 420175, at *3 (D.D.C. Jan. 16, 1996).

79. United States v. New, No. 96-00263 (3rd Inf. Div. Jan. 24, 1996).

80. *Id.*

81. *Id.*

82. Winner, *supra* note 54, at 30. *See also* Carla Anne Robbins, *Army Specialist Michael New Won't Wear U.N. Blue; Father Runs for Congress*, WALL ST. J., Jan. 24, 1996, at A1.

83. United States *ex rel.* New v. Perry, 919 F. Supp. 491, 499 (D.D.C. 1996).

84. *Id.*

85. *Id.* (citing Darr v. Burford, 339 U.S. 200 (1950)).

86. New v. Cohen, 129 F.3d 639, 640 (D.C. Cir. 1997). Judge advocates who are preparing to deploy should be aware of the narrow exception to the general rule (requiring exhaustion of military processes) arising from *Parisi v. Davidson*, 405 U.S. 34 (1972). The service member in *Parisi* had initiated an application for conscientious objector status prior to refusing to board an airplane for deployment to Vietnam. After his conviction, the Army made a final decision to deny the conscientious objector claim. The Supreme Court determined that the habeas corpus petition filed in federal court was based on the conscientious objector petition, which "antedated and was independent of the military proceedings." *Parisi*, 405 U.S. at 42. Because the court-martial appeal could not award the service member the desired honorable discharge, the doctrine of comity did not preclude the petition in federal court. *Id.*

by the military 'released' them from further service."[87] Major Newton.

87. *New*, 129 F.3d at 645.

The Art of Trial Advocacy

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The Art of Clemency

Introduction

You might be surprised to see the term "post-trial" associated with *The Art of Trial Advocacy*, but those of you who are fortunate enough to have practiced in the post-trial arena appreciate the value of advocacy during this critical stage of the court-martial process, which is described as the accused's "best opportunity for relief."[1] Post-trial practitioners understand that when advocacy fails at the trial level and your client is convicted and severely sentenced, all is not necessarily lost.

Clemency is defined as "an act or instance of leniency."[2] It is synonymous with notions of mercy.[3] Pursuant to Rule for Courts-Martial 1107(b)(1),[4] the decision to grant clemency is within the sole discretion of the convening authority. United States Army Trial Defense Service (TDS) policy requires Army TDS counsel to submit clemency matters in every case, absent a specific waiver from the accused.[5] If we start with the assumption that not all cases are equally deserving of clemency, the current TDS policy poses a serious problem for defense counsel: how to prevent cases which are truly deserving of clemency from becoming lost among the more numerous, routine cases that are unworthy of clemency.

The challenge for the conscientious defense counsel is to prepare unique, yet credible, requests for clemency on behalf of each client and to communicate to the government that perhaps one particular case is more deserving than another. This note advises counsel of some[6] of the tools and techniques available to help them effectively advocate clemency on behalf of their convicted, but as yet, not finally sentenced clients.[7]

Counsel should not be surprised to discover that most convening authorities are inclined to approve the sentence adjudged by the military judge or court members. The same applies in cases involving a pretrial agreement, where the convening authority's natural inclination will be to approve the sentence as limited by the terms of the negotiated agreement. There are three major explanations for these initial perspectives of the convening authority: (1) court members are viewed as the *conscience of the community*; (2) military judges are usually more experienced in these matters and have a better understanding or *feel* for the appropriate sentence in a particular case; and (3) soldiers who are accused of crimes and agree to the terms of a pretrial agreement do so *voluntarily.* Consequently, convening authorities are understandably reluctant to second-guess the decisions made by judges and court members who observed the witnesses and know the facts. The convening authority prefers to let the system run its course. Of course, this same "system" also includes the right of an accused to submit clemency matters and the obligation of the convening authority to "consider" these matters.[8] It is the duty of defense counsel (and, for that matter, the staff judge advocate) to remind the convening authority of this very important obligation.

To overcome the convening authority's inclination to approve the findings and sentence adjudged, the defense must convince the convening authority that the decision of the judge, the court members, or the accused (who agreed to the sentence limitation in the pretrial agreement) is not the best result for the accused, the command, or the Army. One approach is a frontal attack on the wisdom and appropriateness of the adjudged sentence. This is a difficult approach because counsel must overcome the additional predilection of the convening authority to approve the decisions of his hand-picked panel members (who

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1. United States v. Boatner, 43 C.M.R. 216 (C.M.A. 1971).

2. WEBSTER'S NEW COLLEGIATE DICTIONARY 206 (1973).

3. *Id.*

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(b)(1) (1995) [hereinafter MCM]. "The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command discretion." *Id*.

5. Counsel are reminded of the recent decision of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Hood*, 47 M.J. (1997). In *Hood*, the CAAF established the requirement that counsel coordinate with clients regarding matters to be submitted for clemency. *Id*. The court also clarified that the final decision regarding specific matters to be submitted ultimately rests with the accused. *Id.*

6. Rule for Courts-Martial 1105(b) permits the defense to submit "any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." MCM, *supra* note 4, R.C.M. 1105(b). Consequently, matters which the defense may submit in pursuit of clemency are limited by a simple rule of reason.

7. *Id*. R.C.M. 1107(a) ("The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable.").

8. *Id.* R.C.M. 1107(b)(3)(A)(iii) ("Before taking action, the convening authority shall consider . . . [a]ny matters submitted by the accused.")

were selected, in part, on the basis of their perceived judicial temperament).[9] Attacking the decision of the military judge poses a different, yet no less daunting, task. The convening authority is more likely to defer to sentences handed down by military judges because military judges have experience and expertise in the area of sentencing.

Convincing the Convening Authority that Circumstances Have Changed

A better approach is to demonstrate to the convening authority that either the circumstances have changed since the sentence was adjudged or those who adjudged the sentence were unaware of all of the facts relevant to determining an appropriate sentence. Counsel need not attack the wisdom of the decision maker, or even the wisdom of the sentence adjudged at trial. The focus is on the fact that, when the decision was made, the decision maker was not aware of all of the information relevant to determining the truly appropriate sentence.

Despite the relaxed application of the rules of evidence to the sentencing phase of a court-martial, the defense is sometimes prevented from presenting certain evidence to the members or the military judge. This is particularly true with respect to collateral consequences of certain punishments under the Uniform Code of Military Justice (UCMJ). As a general rule, members are instructed not to concern themselves with collateral consequences of a court-martial sentence.[10] Consequently, the panel members (and, in theory, military judges) should not consider such matters as: (1) how the length of confinement will determine the confinement facility to which the accused will be assigned; (2) the potential loss of retirement benefits due to a punitive discharge;[11] or (3) the obligation an officer may have to repay education costs if sentenced to a dismissal.

There are no such limitations placed on the information an accused may include in his clemency submission. Rule for Courts-Martial 1105(b) permits an accused to submit any written matters which *may reasonably tend to affect* the convening authority's decision to grant clemency.[12] The enormous number of potentially adverse collateral consequences arising from the various military punishments under the UCMJ provide fertile ground for aggressive counsel to make the argument that the court members might have adjudged a different sentence if they had known of the adverse collateral consequences.[13]

Evidence suppressed during the merits phase of the trial may also be relevant to an appropriate sentence. If evidence of the victim's prior sexual history was suppressed under the rape shield rule of Military Rule of Evidence 412,[14] counsel might consider presenting the suppressed evidence to the convening authority, perhaps to show how the impact on the victim *was not as severe as was originally presented to the court members*. Similar evidence might be presented to support an argument for clemency in the form of approving only a lesser included offense (for example, simple assault rather than assault with the intent to inflict grievous bodily harm).[15] Evidence of diminished victim impact may be discovered after the fact. In some cases, defense counsel are well served by contacting victims after trial to determine their reaction to the adjudged sentence. A change of heart or forgiveness from the victim often weighs heavily in a convening authority's decision whether to grant clemency.

Information regarding the sentences received by co-accuseds is another example of information which counsel can present to the convening authority which was not considered by the court members during sentencing deliberations. The success of defense efforts to convince the convening authority to cross-level sentences among co-accuseds depends greatly upon

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9. *See* UCMJ art. 25 (West Supp. 1996) (setting forth the criteria upon which a convening authority may select court-members).

10. There is a "longstanding rule that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the *collateral* administrative effects of the penalty under consideration." United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989) (emphasis in original).

11. The issue of retirement benefits is one area where the appellate courts have begun to acknowledge the need to inform members of potential collateral consequences. *See* United States v. Greaves, 46 M.J. 133 (1997) (holding that it was error for the military judge not to answer questions of members regarding the impact of a bad-conduct discharge on retirement benefits when the accused was nine weeks from retirement eligibility).

12. MCM, *supra* note 4, R.C.M. 1105(b) ("The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence.").

13. *Id.* R.C.M. 1105(b)(4) (authorizing counsel to submit clemency recommendations "by any member, military judge, or any other person" and noting that "the defense may ask any person for such a recommendation"). Counsel may want to consider asking court members if they are willing to submit a clemency recommendation based on the fact they would have adjudged a lesser sentence if certain evidence had not been precluded from their deliberations by the military judge. When approaching members, counsel must be wary of the rules prohibiting disclosure of matters effecting deliberations or votes of the members. *See* MCM, *supra* note 4, MIL. R. EVID. 606. One other source counsel may look to for clemency is the command sergeant major (CSM). The CSM typically has direct access to the convening authority and is the person whom the convening authority relies on for advice on matters affecting the enlisted soldiers in his command.

14. *See* MCM, *supra* note 4, MIL. R. EVID. 412.

15. Although the focus of this note is clemency in the form of sentence reduction, counsel should also consider creative methods to request clemency in the form of modifying the findings of the court-martial.

the relative culpability of the client and the severity of his sentence in comparison to the others.

Evidence of restitution or a public apology from an accused, if presented to the convening authority as information not considered by the court-members or the military judge, may lend further support to a clemency request. Finally, convincing one's client to cooperate with the government to solve other crimes or to assist in the prosecution of other cases is yet another example of an *after the fact* circumstance warranting clemency.[16]

Clemency and the Pretrial Agreement

The most difficult cases for defense counsel to win clemency are those which involve pretrial agreements. In these situations, counsel must overcome the natural belief that the defendant, by agreeing to the terms of the pretrial agreement, has acknowledged in some respects that the agreement represented an appropriate and just sentence. This may not necessarily be the case, and counsel must ensure that the government understands the difference between sentence reduction pursuant to a pretrial agreement and clemency. In *United States v. Griffaw*,[17] the Air Force Court of Criminal Appeals recently compared the sentence cap in a military pretrial agreement to a "flood insurance policy on a house."[18] You buy insurance not because you want a flood to occur, but to put a ceiling on the loss in the event that "disaster strike[s]."[19]

Counsel should echo this same argument in their clemency submissions. Counsel should emphasize that the accused's willingness to enter into a pretrial agreement was not an admission that the terms of the agreement constitute a fair sentence; the agreement was simply the high end of a much broader spectrum of potentially appropriate sentences. More importantly, counsel should also remind the convening authority that sentence reduction pursuant to the terms of the pretrial agreement *is not an act of clemency.* This principle was reinforced by *Griffaw,* where the staff judge advocate erroneously advised the convening authority that "the accused has already received clemency in the form of six months off the sentence adjudged by the court" as required by the terms of the pretrial agreement.[20]

Regrettably, in those cases where defense advocacy efforts succeed at trial and the accused "beats the deal," counsel are hard-pressed to convince the convening authority that clemency is warranted. Nevertheless, counsel should remind the convening authority that the sentence adjudged at trial, like the terms of a pretrial agreement, is not a matter of clemency. The sentence adjudged at trial is simply a determination of an appropriate sentence, *based on the evidence presented at trial*. In this respect, the sentence adjudged at a guilty plea is no different from that of a contested case in which there is no pretrial agreement. Counsel should bolster their pleas for clemency with the same arguments and evidence of changed circumstances discussed above.

Good Habits for Clemency

The scope and content of clemency petitions depend on the facts and circumstances of each case and each client. There are, however, certain steps that competent counsel should take in every case, the first of which is to get to know your opponent, the convening authority, as well as possible. Find out his personality by talking with the staff judge advocate, the chief of justice, or other nonlegal members of his staff. There is no telling when you might discover something that might later assist your efforts to convince this person to grant clemency.

Another good habit is to humanize each and every client. Counsel should never assume that the convening authority will read the unsworn (or sworn) statement of the accused in the record of trial.[21] Consequently, the convening authority may know very little about the accused, other than his service record and military awards, since little else is required of the staff judge advocate's post-trial review and recommendation.[22] This void can be filled by providing a short (or, if warranted, lengthy) personal history of the accused.[23] The ability of the defense to portray the individual personality, background, and character of the client is frequently the key to winning clemency from the convening authority.

16. Counsel must balance these latter options against the potential risk that if the client's case is reversed on appeal, the admissions of guilt or incriminating testimony given against a co-accused may be used against him in a retrial.

17. 46 M.J. 791 (A.F. Ct. Crim. App. 1997).

18. *Id.* at 793.

19. *Id.*

20. *Id.* at 792. The court emphasized that sentence reduction pursuant to a pretrial agreement is done as required by law, as compared to clemency, which is granted solely as a matter of command prerogative. *Id.*

21. In fact, counsel should do just the opposite, as the convening authority is no longer required to consider the record of trial. MCM, *supra* note 4, R.C.M. 1107(b)(3)(A). Actual review of the record is now a matter of discretion for the convening authority. *Id*. R.C.M. 1107(b)(3)(B). In practice, it is the rare convening authority who reads a record of trial other than in the most extraordinary cases.

22. *See id*. R.C.M. 1106(d).

One final comment regarding efforts to personalize your client concerns the decision to request a personal appearance before the convening authority. While the convening authority is not required to grant such requests, counsel are not prohibited from asking.[24] This may be an effective means for counsel to convince the government that this is the truly meritorious case for clemency. Counsel should use caution in exercising this option too often, lest it lose its impact on the government.

Counsel should not assume that the convening authority will read, or otherwise be informed of, defense evidence presented in extenuation and mitigation at trial. Rather than simply photocopying favorable testimony from the trial and attaching it as an enclosure to the clemency submission, counsel should summarize the testimony in the light most favorable to the accused and present it in a form that is easy for the convening authority to digest. While counsel must not lose sight of the fact that convening authorities are busy people with precious little time for details, they should also remind the convening authority of the obligation to "consider"[25] all written matters submitted by the accused prior to acting on the adjudged sentence.

Put your bottom line up front. Even though the convening authority must consider all written clemency matters, counsel should not expect convening authorities to spend several hours reviewing clemency submissions. Brevity and packaging are critical to gaining the attention and interest of the convening authority. Consider short, easy-to-read, bullet-type comments. Avoid legalese from the party of the first part (your client) to the party of the second part (the convening authority). Highlight your best arguments in **bold type,** *italics*, or underlined text. If your submission includes pictures (TAB A), letters from family (TAB B) and friends (TAB C), or other enclosures (TAB D), tab and index them for easy reference. Do not rely on the government to package your final submission. Never forget that busy commanders do not like to read documents which are as long as this note. They prefer to read one- to two-page documents.

Although recent changes to the *Manual for Courts-Martial* excuse the convening authority from considering *unwritten* clemency matters,[26] these changes do not prohibit the convening authority from doing so. If you believe that circumstances justify the submission of a videotape, submit one, but also submit a written explanation of why it is important for the convening authority to review the tape in addition to the written matters. This might be appropriate if you have a forgiving victim who is willing to be videotaped. As another example, a videotape of the alleged victim having a good time at a party can be used to rebut the victim's trial testimony that the victim was afraid to socialize with others as a result of the attack.

Counsel are also wise to monitor the results of cases in the local jurisdiction and beyond. Sentence disparity is probably the leading cause of clemency. In cases involving multiple offenders, sentence disparity is an issue which counsel must explore. By tracking cases on a broader scale, counsel are better prepared to highlight to the convening authority additional examples of the often inverse relationship between culpability and approved punishments.

Counsel should also monitor the convening authority's track record for granting clemency. If you have exhausted the well of all other approaches to clemency, you may have to resort to a simple plea for mercy. Such pleas for mercy can be bolstered by reminding the convening authority that it has been quite some time since he last demonstrated such compassion and benevolence.

Finally, when preparing clemency matters, counsel must strive to avoid two common pitfalls. First, counsel must be careful not to exaggerate or to minimize the significance or impact of certain facts. This provides easy openings for the government—which has the eyes and ears of the convening authority (not to mention the final say)—to refute or to contradict your arguments. Even if the dispute is over a minor point, it may be sufficient to kill any hopes of clemency for your client. The second pitfall to avoid is being overly apologetic for your client's behavior. There is no need to repeat how bad a person your client is. The government will take care of that. If you must acknowledge the shady side of your client's conduct (and sometimes you will have to), do it quickly and move on to your more persuasive arguments which are worthy of **bold**, *italicized*, or underlined type.

Conclusion

There is an art to practically everything you do as a defense counsel. Admittedly, most of the artwork noticed by the public occurs within the four walls of the courtroom. By virtue of the UCMJ's unique post-trial clemency stage, however, military defense counsel are obligated (or, from a more positive perspective, given the additional opportunity) to continue their advocacy until the convening authority takes final action on a case. Hopefully, the tools and techniques described in this note will help sharpen your post-trial advocacy skills so that you can

23. Counsel may want to supplement this history with enclosures from family, friends, former teachers and coaches, and others who knew the accused. If counsel choose to do this, they should take the extra time to summarize the information for the convening authority.

24. Counsel should not limit their options to requests for the accused to appear before the convening authority. Other options to consider are family members, other soldiers, or simply the defense counsel.

25. MCM, *supra* note 4, R.C.M 1107(b)(3).

26. UCMJ art. 60(b) (West Supp. 1996).

consistently and confidently provide your clients a realistic "best opportunity for relief." Lieutenant Colonel Lovejoy.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 4, is reproduced in part below.

Storage and Disposal of Non-Department of Defense Toxic and Hazardous Materials

Section 343 of the National Defense Authorization Act for Fiscal Year 1998[1] provided welcome news for installations which face the problem of non-Department of Defense (DOD) entities wishing to store or to dispose of toxic or hazardous materials on DOD installations. This provision amended 10 U.S.C. § 2692, which generally forbade the storage or disposal of such materials.[2]

Initially, section 343 amended 10 U.S.C. § 2692(a) to permit storage or disposal of materials which are owned by the DOD or by a member of the armed forces or dependent family members assigned to installation housing.[3] In effect, this amendment now allows soldiers and their families to legally possess toxic and hazardous materials, such as pesticides and household cleaning supplies, while residing on a military installation.

Section 343 also greatly expanded the number of exceptions to the general prohibition against storage or disposal of non-DOD toxic or hazardous materials. Under the previous authority of 10 U.S.C § 2692, non-DOD entities could store or dispose of toxic or hazardous materials only under extremely limited circumstances.[4] In particular, the statute provided hardships for Base Realignment and Closure (BRAC) installations because local reuse authorities who were seeking to redevelop the property could not obtain the needed exemptions to store the materials of potential lessees pending conveyance.

One of the more important changes to the exemptions in the statute is that which permits storage when the Secretary of the Army determines that the "material is required or generated in connection with the authorized and compatible use of a facility of the DOD . . . ."[5] This encompasses the BRAC situation, allowing reuse authorities more flexibility in marketing property to potential lessees. A second exception will allow installations to assist federal, state, or local law enforcement agencies in temporarily storing explosives.[6] Another significant exception will permit storage, treatment, or disposal of materials used in connection with a service or activity performed on an installation for the benefit of the DOD.[7]

It is important to note that many of these exceptions require Secretary of the Army approval, but efforts are underway to delegate this approval authority to lower levels of command. The ELD is assisting in the development of guidance on this issue and will provide information as it becomes available. Major Polchek.

The Sikes Act Improvement Act of 1997

Introduction

Since 1960, hunters and fishers held dear the principles of the Sikes Act,[8] which facilitated access to twenty-five million acres of land managed by the Department of Defense (DOD).[9] On 18 November 1997, President Clinton signed into law the Sikes Act Improvement Act (SAIA) as Title XXIX of the National Defense Authorization Act for Fiscal Year 1998.[10] In many ways, the SAIA simply codifies present DOD and Army practices. In other ways, however, the SAIA fundamentally

1. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 343, 111 Stat. 1629 (1997).

2. 10 U.S.C.A. § 2692 (West 1997).

3. National Defense Authorization Act for Fiscal Year 1998 § 343(a).

4. *See* 10 U.S.C.A. § 2692(b)(1-9).

5. National Defense Authorization Act for Fiscal Year 1998 § 343(d). The amendment also authorizes the secretary to permit treatment and disposal of non-DOD materials in more limited circumstances. *Id*. § 343(e).

6. *Id.* § 343(c). The statute previously permitted such assistance only to federal law enforcement agencies. 10 U.S.C.A § 2692(b)(3).

7. National Defense Authorization Act for Fiscal Year 1998 § 343(b)(2).

changes the way in which the DOD manages its land and natural resources. Most notably, what was once done according to guidance must now be accomplished according to statute. The Sikes Act is not just for hunters and fishers anymore: the DOD's installation trainers, range managers, natural resource managers, and attorneys should take note.

That Was Then

As it existed prior to the SAIA, [11] the Sikes Act authorized much but mandated little. The Act primarily focused on empowering the DOD and its component services to enter into partnerships with the Department of the Interior (DOI), state fish and wildlife agencies, and even private entities to provide for the sound management of natural resources on military installations. The intended management framework revolved around the authority for installations to enter into "cooperative plans" that were "mutually agreed upon" by the military installation, the DOI, and the state wildlife agency.[12] Cooperative planning allowed installations to develop sustainable fish and game programs by generating revenue for conservation projects,[13] establishing management partnerships, and facilitating enforcement. Formal natural resource planning under the Act, however, remained entirely discretionary.

Prior to 1986, the Sikes Act did not mandate planning. A 1986 amendment,[14] however, directed each military department to manage the natural resources at its installations to provide for "sustained multiple purpose uses" and public access "necessary or appropriate for those uses."[15] Congress made it clear that the military mission must prevail in situations where natural resource management goals conflict with the military mission.[16] Rather than legislate how this mandate should be carried out, Congress committed this judgment to the discretion of each military department, effectively precluding judicial review of DOD natural resource planning and management.

To more uniformly manage its natural resources, and despite the lack of a statutory mandate, the DOD adopted a policy in 1996 which required formal integrated natural resource management plans (INRMPs).[17] In early 1997, the Army established guidance and a timeframe for completing installation INRMPs.[18]

This Is Now

The SAIA continues the baseline requirement for the DOD to manage installation natural resources on a sustained multiple-use basis, and it makes the DOD's self-imposed INRMP requirement a Congressional directive.[19] Most DOD installations are required to prepare and to begin implementing INRMPs by 18 November 2001.[20] Each INRMP must: (1) reflect the "mutual agreement" of the U.S. Fish and Wildlife Service (FWS) and state fish and wildlife agencies in regard to certain aspects of the plan,[21] (2) address specified areas,[22] and (3) solicit public comments.[23] In short, natural resource plan-

8. 16 U.S.C.A. § 670a-f (West 1997). The Sikes Act was first enacted in 1960. It authorized the DOD to manage fish and wildlife resources in cooperation with state fish and game agencies and to retain hunting and fishing fees on installations to help finance conservation programs. Pub. L. No. 86-797, 74 Stat. 1052 (1960). Subsequent amendments substantially expanded the Act to provide authority for cooperative plans with both government and non-governmental entities and encouraged planning for sustained multiple-use management of a broad range of natural resources.

9. RAND NATIONAL DEFENSE RESEARCH INSTITUTE, MORE THAN 25 MILLION ACRES? DOD AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER 4 (1996). The Army manages approximately 12.5 million acres, while the Air Force and Navy (including the Marine Corps) manage 9.0 million acres and 3.5 million acres, respectively.

10. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

11. The last time the Sikes Act was significantly amended was in 1986. *See* Pub. L. No. 99-561, 100 Stat. 3149 (1986).

12. If an installation chose to develop a "cooperative plan," the Act established minimum content requirements that must be met (for example, range rehabilitation and habitat improvement projects). *See* 16 U.S.C.A. § 670a.

13. The Sikes Act's most important financial provisions allow the DOD to retain funds collected from the operation of any cooperative plans and agreements and restrict their spending to the purposes of those plans and agreements. *Id.* § 670d.

14. The Act contained other minor mandates, such as the requirement to use, "to the extent feasible," professionally trained DOD personnel for fish and wildlife management and enforcement. *See id.* § 670a-1(b).

15. *Id.* § 670a-1(a).

16. *Id.* Management for multipurpose uses and public access was required, but only "to the extent that those uses and that access are not inconsistent with the military mission of the reservation." *Id.*

17. U.S. DEPARTMENT OF DEFENSE, INSTR. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996).

18. *See* Memorandum, Major General Randolph W. House, Army Assistant Chief of Staff for Installation Management, to Army Major Commands, subject: Army Goals and Implementing Guidance for Natural Resources Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP), para. 13 (21 Mar. 1997) (copy on file with authors). *See also Integrated Natural Resources Management Plan (INRMP) Guidance Released,* ARMY LAW., June 1997, at 57.

ning and management must now follow a statutorily mandated process which establishes timelines, prescribes necessary elements, and requires open and coordinated preparation.

Equally important to military commanders, the SAIA expresses the intent of Congress to ensure that military installations remain focused on conducting military training and operations. In particular, three statements in the SAIA signal the Congressional intent to protect the primary purpose of military installations. First, Congress recognized and unequivocally declared that military departments have the use of "installations to ensure the preparedness of the Armed Forces."[24] Second, Congress mandated that every INRMP must be "consistent with" the primary use for installation lands.[25] Third, Congress required that each INRMP ensure that there is "no net loss in the capability of military installation lands to support the military mission of the installation."[26] The conference report for the SAIA further establishes that the Congressional intent of the Sikes Act reauthorization effort was to give military installation commanders a better tool to conduct military operations and training activities while conserving natural resources.[27]

Practice Notes

Several important implementation issues warrant careful attention by installation environmental law specialists (ELS).

The Scope of FWS and State Involvement. For two years, the Sikes Act reauthorization effort floundered because the DOD would not accede to FWS and state control over portions of the INRMPs which did not address fish and wildlife.[28] Under the SAIA, only those portions of the INRMP which concern "conservation, protection, and management of fish and wildlife resources" are subject to the "mutual agreement" of the FWS and state fish and game agencies.[29] While the FWS and states are significant stakeholders and are entitled to close coordination in INRMP development, the Act clearly states that nothing in the Act "enlarges or diminishes the responsibility and authority of any [s]tate for the protection and management of fish and resident wildlife."[30] If the INRMP is to be used as a valuable tool by military installations, it must address military training and land use planning areas beyond fish and wildlife. The language of the SAIA reflects the DOD's position and excludes the need for the DOD to reach mutual agreement with the FWS and the state on issues beyond their expertise.

Existing INRMPs. The conference committee report indicates an intent to "grandfather" existing "cooperative plans" that could be modified to meet the new legislation.[31] Nevertheless, the SAIA directs installations with existing cooperative

19. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997). The SAIA also imposes substantial reporting requirements. The DOD must report to Congress by 18 November 1998, describing all installations for which INRMPs will be prepared, and must explain its reasons for excluding installations from the INRMP requirement. *Id.* Thereafter, the DOD must report annually the status of INRMP preparation and implementation for those installations for which the INRMP requirement applies. *Id.*

20. *Id.* § 2905(c). Reporting requirements apply to installations with sufficient resources to warrant INRMPs.

21. *Id.* § 2904(a). These provisions tend to favor fish and wildlife interests over other natural resource interests, such as outdoor recreation, livestock grazing, and timber harvesting.

22. *Id.* § 2904(c).

23. *Id.* § 2905(d).

24. *Id.* § 2904(a). It should also be noted that Congress did not use the words "necessary for reasons of national security" when dictating the level of consideration for military activities, as it has done with many other environmental statutes. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C.A. § 1536(j) (West 1997). While the term "national security" denotes a high standard that can only be invoked when overall military readiness is threatened, the use of the term "military preparedness" denotes a much lower standard, which ensures that INRMPs do not interfere with military operations and training activities that contribute to military or unit readiness. The SAIA emphasis on "preparedness" strengthens the "purpose" statement that had previously been in the Sikes Act. *See supra* note 16 (prior statutory text).

25. National Defense Authorization Act for Fiscal Year 1998 § 2904(c).

26. *Id.*

27. H.R. CONF. REP. NO. 105-340, at H9435 (1997).

> The conferees note that the reauthorization of the Sikes Act would directly affect the nearly 25 million acres managed by the Department of Defense. The conferees agree that reauthorization of the Sikes Act is not intended to expand the management authority of the U.S. Fish and Wildlife Service or the state fish and wildlife agencies in relation to military lands. Moreover, it is expected that integrated natural resources management plans shall be prepared to facilitate installation commanders' conservation and rehabilitation efforts that support the use of military lands for readiness and training of the armed forces.

28. *Sikes Act Agreement in Jeopardy After Military Services' Objections*, DEF. ENVTL. ALERT, June 12, 1996, at 3.

29. National Defense Authorization Act for Fiscal Year 1998 § 2904(a).

30. *Id.*

plans to "complete negotiations with the [FWS] and [the state] regarding changes in the plan" which are necessary for the plan to meet the requirements for an INRMP. [32] While the term "negotiation" is not defined, installations with existing INRMPs may want to point out during those negotiations the Congressional intent to grandfather existing INRMPs.

Prepare Record for Possible Litigation. The SAIA's elevation of the INRMP to mandatory agency action has significant administrative law consequences. Preparation of an INRMP may be subject to the judicial review provisions of the Administrative Procedure Act (APA). [33] The APA empowers the federal judiciary, at the request of an aggrieved party, to set aside agency action that is taken without adherence to all of the procedures required by law. Thus it is possible for a state fish and wildlife agency to seek judicial review of an INRMP in which the state did not concur. It is also possible that potential litigants could challenge natural resource management activities designed to enhance military training (e.g., prescribed burning) but which are not part of an INRMP.

Ensure INRMPs Integrate Other Planning Statutes. The legal procedures associated with development of an INRMP are not limited to those set forth in the SAIA. Installations should consider the necessary levels of supporting National Environmental Policy Act (NEPA)[34] documentation, Section 7 of the Endangered Species Act (ESA)[35] consultation, and Section 106 of the National Historic Preservation Act (NHPA)[36] consultation. The INRMP development process must be tailored to integrate these processes.[37] Most importantly, installations must document the decision-making process in a detailed, thorough administrative record.[38] This process would also prove helpful for Army secretariat review and override of a nonconcurrence to an INRMP by the FWS or state fish and game agencies.

Develop Compliance Strategy. The Army must amend its existing natural resource management policy and guidance to implement many of the provisions of the SAIA. In the meantime, the ELS can review the state of the existing natural resource program on post,[39] establish communications with the FWS and relevant state agencies, and work closely with the installation natural resource professionals to establish a compliance strategy. The compliance strategy should project timelines, funding, and the procurement mechanisms necessary to ensure completion of the planning level surveys, integration of all legal processes (SAIA, NEPA, ESA, and NHPA), and coordination with all major stakeholders prior to the 18 November 2001 deadline.

Develop a Baseline for Non-Mission Lands. Each installation's natural resource managers, range officers, and training

31. *See* H.R. CONF. REP. NO. 105-340 (1997).

> The conferees note that the military departments will have completed approximately 60 percent of the required integrated natural resources management plans by October 1, 1997. The conferees understand that most of these plans have been prepared consistent with the criteria established under this provision. In addition, the conferees note the significant investment made by the military departments in the completion of current integrated natural resources management plans. The conferees intend that the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment.

32. National Defense Authorization Act for Fiscal Year 1998 § 2905(c).

33. 5 U.S.C.A. §§ 701-06 (West 1997). The APA provides that "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* § 702.

34. National Environmental Policy Act, 42 U.S.C.A. §§ 4321-70d (West 1997).

35. Endangered Species Act, 16 U.S.C.A. § 1536(a)(2) (West 1997). *See* Implementing Regulations: Interagency Cooperation—Endangered Species Act of 1973, as amended, 50 C.F.R. pt. 402 (1997).

36. National Historic Preservation Act, 16 U.S.C.A. § 470f (West 1997).

37. Environental law specialists should also give close consideration to how an INRMP addresses impacts from testing, training, and other mission-related activities. Challenge to an INRMP could provide a forum for indirectly attacking such activities.

38. Under the Army INRMP implementing guidance, all installation INRMPs must undergo NEPA analysis in accordance with *Army Regulation 200-2 (AR 200-2)*, Environmental Effects of Army Actions (1988). In most cases, because INRMPs are derived to maintain and to sustain natural resources, an environmental assessment and a Finding of No Significant Impact (FONSI) should satisfy the requirements of *AR 200-2* and the NEPA. If, however, implementation of the INRMP will significantly impact the environment, the installation must produce an Environmental Impact Statement (EIS). To comply with *AR 200-2*, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a range of reasonable alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain a detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP (for example, perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency).

39. In the review, the environmental law specialist should initially focus on existing cooperative plans, endangered species management plans, ESA biological assessments and opinions, and NEPA documents addressing impacts to natural resources. Many installations have also prepared draft INRMPs in anticipation of SAIA enactment. These should be reviewed for consistency with the new mandates.

officers should coordinate and document existing non-mission uses of installation land and natural resources. This is an essential task that should be completed either as part of the INRMP process or as a separate activity. This effort may ultimately give effect to the SAIA's intent that lands be used to ensure the preparedness of military units and that there must be no net loss in the use of those lands for intended purposes (namely, military operations and training). At the same time, the installation should develop a baseline of documented military use and the need for training flexibility on the installation's range and training lands. This will entail doing more than just cataloging numbers of training days on which ranges were used. It should include such details as the necessity and use of weapons safety buffer zones, requirements for flexibility (to accommodate preparations for deployments, visiting units, reserve units, or expanding missions), and the requirement "to rest and to rotate" training areas for natural resource renewal and to keep soldiers from knowing terrain too well. Mr. Scott M. Farley and Lieutenant Colonel Richard A. Jaynes.

EPA's New Guidance on the Use of RCRA's Imminent Endangerment Authority

On 20 October 1997, the Environmental Protection Agency (EPA) sent to its regional offices new enforcement guidance on using the Resource Conservation and Recovery Act's[40] (RCRA) Section 7003, the imminent and substantial endangerment authority.[41] The guidance emphasizes the power of Section 7003 as a broad enforcement tool that can be used to address circumstances that may present an imminent and substantial endangerment to health or the environment. This document takes the place of previous guidance issued in 1984 that dealt exclusively with how to issue administrative orders pursuant to Section 7003.[42] The new guidance also discusses procedures for taking judicial action and updates policy to conform with new case law and revised enforcement priorities. [43] The EPA provides an explanation of imminent substantial endangerment, case-screening factors, the relationship of Section 7003 to other authorities, and the legal requirements for initiating action under Section 7003.[44]

The EPA cites the many benefits of Section 7003, chiefly its effectiveness in furthering risk-based enforcement and in addressing the worst RCRA sites first.[45] The guidance also points out the availability of Section 7003 as an enforcement tool for sites and facilities that are not subject to the RCRA or other environmental regulation.[46] In addition, Section 7003 can be used to address endangerment at facilities that are in compliance with a RCRA permit.[47] In this instance, however, the guidance directs the regions to consider requiring necessary actions under the permit authorities rather than Section 7003.[48] Another benefit noted by the document is that administrative remedies do not have to be exhausted before using the imminent and substantial endangerment authority.[49]

In deciding whether to take action under Section 7003, the EPA urged the regions to give the highest priority to sites that pose serious risks to health or the environment.[50] In addition, the guidance cautions that special consideration should be given to sites that pose environmental justice concerns.[51] Other screening factors which regions are directed to consider are the technical difficulty of performing the necessary activities and the likelihood that the responsible party will be capable of the required performance.[52]

The EPA cited case law in which courts have interpreted Section 7003 authority broadly in describing what constitutes an "imminent and substantial endangerment."[53] The EPA

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40. 42 U.S.C.A. § 6973 (West 1997).

41. Memorandum, Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, subject: Transmittal of Guidance on the Use of Section 7003 of RCRA (Oct. 20, 1997) [hereinafter Guidance]. The EPA guidance is available on the internet at <http://es.epa.gov/oeca/osre/971020.html>.

42. *Id.* § I.

43. *Id.* § VI.

44. *Id.*

45. *Id.* § II.

46. *Id.* § III A.

47. *Id.*

48. *Id.*

49. *Id.* § III B2.

50. *Id.* § II.

51. *Id.*

52. *Id.*

emphasized that the endangerment "may" occur in the future and that there need not be proof of harm, only a risk of potential harm.[54] The guidance states that for the "substantial" component to be satisfied, the risk does not have to be quantified, as long as there is a reasonable cause for concern about potential harm.[55]

The guidance gives the circumstances under which the use of RCRA Section 7003 is preferred over the Comprehensive Environmental Response, Compensation, and Liability Act[56] (CERCLA) authority. Regions are advised to consider using the RCRA if the materials which pose the risk of harm meet the RCRA's statutory definition of hazardous waste but do not qualify as hazardous substances under the CERCLA.[57] Section 7003 may also be advantageous in addressing potential endangerment caused by petroleum, because petroleum is not a hazardous substance under the CERCLA.[58] In addition, RCRA Section 7003 authority is preferred in circumstances where a region is seeking an administrative order requiring long-term cleanup.[59] Under the CERCLA, remedial action must be in the form of a judicial consent decree.[60]

Using the language of the statute and recent case law, the EPA has proposed the most expansive reading of the Section 7003 enforcement authority. Only time will tell whether the new guidance will result in an increase in Section 7003 enforcement actions or just a heightened awareness of the breadth of the authority. Major Anderson-Lloyd.

Fines and Penalties

At the close of the first quarter of fiscal year 1998, four new fines had been assessed against Army installations. Of the 160 fines assessed against Army installations since fiscal year 1993, the majority are Resource Conservation and Recovery Act[61] fines (89), followed by fines under the Clean Air Act[62] (40), the Clean Water Act[63] (22), the Safe Drinking Water Act[64] (6), and, finally, the Comprehensive Environmental Response, Compensation, and Liability Act[65] (3).

The latest reporting quarter marked the first fine assessed against an Army installation under the amended Safe Drinking Water Act.[66] The fine was based on allegations by the Environmental Protection Agency (EPA), Region IV, that an Army installation failed to collect samples of coliform bacteria, exceeded maximum contaminant levels (MCL) for coliform bacteria, failed to maintain properly a disinfectant residual throughout the drinking water distribution system, failed to implement an adequate main flushing system, failed to operate and to maintain properly storage tanks and reservoirs, and failed to provide timely public notice of MCL violations. The EPA, Region IV, has proposed a $600,000 fine due to the allegations, and negotiations have begun.

The Safe Drinking Water Amendments of 1996, which became effective on 6 August 1996, significantly expanded federal liability to include injunctive relief, civil and administrative fines and penalties, administrative orders, and reasonable service charges assessed in connection with permits, plans, inspections, or monitoring of drinking water facilities, as well as any other nondiscriminatory charges respecting the protection of wellhead areas or public water systems or underground injection.[67] Under the amendments, the EPA may issue penal-

53. *Id.* § IV (citations omitted).

54. *Id.* § IV A1.

55. *Id.*

56. 42 U.S.C.A. §§ 9601-75 (West 1997).1

57. Guidance, *supra* note 41, § III B1a.

58. *Id.*

59. *Id.*

60. *See* 42 U.S.C.A. § 9622(d)(1)(A).

61. *Id.* §§ 6901-92k.

62. *Id.* §§ 7401-7671q.

63. 33 U.S.C.A. §§ 1251-1387 (West 1997).

64. 42 U.S.C.A. §§ 300f through 300j-26.

65. *Id.* §§ 9601-75.

66. *Id.* §§ 300f through 300j-26.

67. *See generally* Safe Drinking Water Amendments of 1996, Pub. L. No. 104-182 (1996).

ties against federal agencies, and the penalties can be as high as $25,000 per day per violation.[68]

Installation environmental law specialists should keep in mind that the payment of fines and penalties by Army installations is governed by, inter alia, the Supreme Court decision in *Department of Energy v. Ohio*.[69] Additionally, by regulation, the Environmental Law Division must "review all draft environmental orders, consent agreements, and settlements with federal, state, or local regulatory officials before signature."[70] Major DeRoma.

Litigation Division Note

Congress Rescues MEPS Medical Exams

Congress recently amended two sections of Title 10[71] to extend malpractice protection to military entrance processing station (MEPS) part-time physicians. The amendments grant health care providers hired through personal services contracts the same malpractice protection enjoyed by other military and Department of Defense (DOD) civil service health care providers.

During the late 1970s and early 1980s, the need for more DOD health care providers (HCPs) became acute. In response, Congress authorized the DOD to hire HCPs through personal services contracts (PSCs) to staff military treatment facilities.[72] The DOD agencies considered these PSC HCPs to be federal employees, thus entitling them to certain privileges and immunities which are provided to military and DOD civil service HCPs. In fact, many of the PSCs contained language to the effect that the hirer recognized the HCP as a federal employee. The contract HCPs, therefore, were not required to carry personal malpractice insurance, and the Army did not purchase an overall malpractice insurance policy for PSC HCPs.

The Department of Justice (DOJ), however, strictly construed the Federal Tort Claims Act (FTCA) and contended that PSCs did not create a federal employer-employee relationship.[73] The DOJ considered such HCPs to be independent contractors. Several courts agreed with the DOJ's interpretation, finding that personal service contractors were excluded from coverage under the FTCA's contractor exception.[74] In spite of the DOJ's position and that of the courts, the DOD continued to use PSCs to hire HCPs and continued to maintain that these HCPs were federal employees.

Although the court decisions and the DOJ's position were not conducive to HCP recruiting and hiring, it was not until a suit was brought against a MEPS fee-based physician that Congress resolved the issue. The suit involved an Army officer-to-be who alleged physician misconduct during her pre-commissioning physical examination and filed a suit against the part-time, fee-basis physician working at the MEPS. The physician requested, pursuant to the requirements of 10 U.S.C. § 1089 and the FTCA, that the United States substitute itself for him, the named defendant. The DOJ refused his request on the grounds that he was a contractor, not a federal employee. Upon learning of the decision not to represent the physician, fee-basis contract physicians at fourteen of the sixty-three MEP stations refused to perform health care duties.

Congress thereafter amended 10 U.S.C. § 1091 specifically to authorize the Secretary of Defense to enter PSCs "to carry out other health care responsibilities of the secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations) at locations outside medical treatment facilities."[75] Congress also amended 10 U.S.C. § 1089, adding that the remedy against the United States for personal injury caused by the negligence of health care providers of the armed forces acting within the scope of their employment includes those health care providers serving under personal services contracts entered into pursuant to 10 U.S.C. § 1091.[76]

An additional provision of the amendments removes the authority for the Secretary of Defense and designees to enter into PSCs for health care responsibilities outside medical treatment facilities one year after the enactment of the amend-

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68. 42 U.S.C.A. § 300j-6(b)(2).

69. 503 U.S. 607 (1992).

70. U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 17d (21 Feb. 1997).

71. The National Defense Authorization Act for Fiscal Year 1998 amends Title 10 United States Code, Section 1089 (Defense of Medical Malpractice Suits) and Section 1091 (Personal Services Contracts).

72. 10 U.S.C. § 1091(a) (1994).

73. *See* DeShaw v. United States, 704 F. Supp. 186 (D. Mont. 1988).

74. *See, e.g.*, United States v. Orleans, 425 U.S. 807 (1976); Loque v. United States, 412 U.S. 52 (1973); Maryland v. United States, 381 U.S. 41 (1965); *DeShaw*, 704 F. Supp. at 186.

75. 10 U.S.C. § 1091, *as amended by* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629.

76. National Defense Authorization Act for Fiscal Year 1998 § 736.

ments.[77] The Secretary of Defense must submit to Congress a report on "feasible alternative means" for MEPS medical screening.[78] This provision, however, does not affect PSC HCPs who were hired to work in medical treatment facilities.

Personal services contract HCPs who are acting within the scope of their employment are now protected from personal liability for malpractice claims—at least until next November. Such HCPs who are sued in their individual capacity for work-related acts should contact the Litigation Division's Tort Branch to request representation or substitution from the DOJ. Lieutenant Colonel Belser.

77. *Id.*

78. *Id.*

Claims Report

United States Army Claims Service

Personnel Claims Notes

The Effect of Disciplinary Action on Article 139 Claims

Several field claims offices have asked whether disciplinary action against a soldier can affect a claim against the soldier under Article 139 of the Uniform Code of Military Justice (UCMJ)[1] when the claim and the disciplinary action arise out of the same incident. Sometimes, the Article 139 investigating officer[2] waits for the findings of a criminal investigation or court-martial before recommending pecuniary liability against a soldier for wrongfully taking or willfully destroying the claimant's property. This practice, however, is not permitted.

There is no authority for delaying the processing of Article 139 claims to await the outcome of disciplinary action under the UCMJ. Administrative action taken under Article 139 is "entirely separate and distinct" from disciplinary action taken under the UCMJ.[3] Article 139 investigations require independent findings of fact,[4] involve a different standard of proof and rules of evidence,[5] and afford the respondent significantly less due process than is present in disciplinary actions.[6] Investigating officers must facilitate a crime victim's "right to restitution"[7] and cannot delay action on an Article 139 claim simply because criminal charges are pending.[8]

A respondent's refusal to provide a statement to an Article 139 investigating officer (because of the effect it may have in a pending criminal proceeding) is an insufficient basis for delaying an Article 139 investigation.[9] A delay in these circumstances may prevent an Article 139 claimant from obtaining restitution, particularly if the respondent is convicted and sentenced to total forfeiture of all pay and allowances.

In taking final action on an Article 139 claim, the investigating officer must also be careful not to rely on a verdict in a UCMJ action; the result of the UCMJ action is not dispositive of the Article 139 claim.[10] However, the requirement for an independent inquiry under Article 139 does not preclude an investigating officer from reviewing relevant information contained in a law enforcement report or from observing relevant testimony of witnesses at a court-martial or administrative separation hearing. It is essential, however, that the investigating officer not delay an investigation to await such information or testimony. In addition, the investigating officer must consider all relevant evidence permitted under *Army Regulation 15-6*[11] and must submit independent findings of fact and an independent recommendation to the approval authority. The investigating officer will most effectively protect the rights of the claimant and the respondent by thoroughly obtaining and carefully analyzing all admissible evidence pertaining to the alleged property crime. Captain Metrey.

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1. UCMJ art. 139 (1994).

2. *See* U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 9-7(c) (1 Aug. 1995) [hereinafter AR 27-20] (governing the appointment of Article 139 investigating officers).

3. *Id.* para. 9-3.

4. *Id.*

5. U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS, para. 10-4(a) (15 Dec. 1989) [hereinafter DA PAM 27-162].

6. Due process for Article 139 claims is not the same as due process for criminal proceedings under the *Manual for Courts-Martial*. *See generally* UCMJ art. 139 (1994); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995). *See also* AR 27-20, *supra* note 2, ch. 9; DA PAM 27-162, *supra* note 5, ch. 10; U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, ch. 4 (11 May 1988) [hereinafter AR 15-6].

7. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 18-10(a)(6) (24 June 1996) [hereinafter AR 27-10].

8. DA PAM 27-162, *supra* note 5, para. 10-5(d). It is essential, however, that "Article 139 investigations are conducted in a manner that does not interfere with any ongoing criminal investigations or courts-martial proceedings." AR 27-10, *supra* note 7, para. 18-16(b).

9. A respondent is not precluded, however, from requesting reconsideration of a finding of pecuniary liability after completion of disciplinary action against him. AR 27-20, *supra* note 2, para. 9-8. Because final action under Article 139 may be modified under certain circumstances, including the presentation of "substantial new evidence," a respondent may be able to present evidence which he previously withheld while disciplinary action was pending. Even if the original action is modified, however, the approval authority can neither compel the claimant to repay money which has been assessed from the respondent's pay nor order repayment to the respondent from appropriated funds. *Id.*

10. *Id.* para. 9-3.

11. AR 15-6, *supra* note 6.

Recovery for Damage Not Listed on DD Form 1840/1840R

A recent Defense Office of Hearings and Appeals (DOHA) decision has shed some light on the Military-Industry Memorandum of Understanding (MOU) on Loss and Damage Rules.[12] The DOHA reaffirmed that the military can recover for loss and damage that is not listed on the Department of Defense (DD) Form 1840 or 1840R,[13] as long as *some* damage to the item involved is noted on the form.[14]

The case involved a German schrank. On a DD Form 1840, the claimant indicated that hardware was missing from the schrank. When she submitted her claim on the DD Form 1844,[15] she claimed other damage to the schrank which was not listed on the DD Form 1840. The carrier denied liability for everything except the missing hardware.

The Army argued that the MOU provides for such situations. Section IV(B), *Carrier Settlement of Claims by the Government*, states that "[t]he claims for loss and/or damage shall not be limited to the general description of loss or damage to those items noted on the DD Form 1840 and 1840R."[16] The Army contended that it is not limited by the "general description" noted on the DD Form 1840.

The DOHA concurred with this approach and noted:

> [W]here the claimed damage is not even limited by a "general description" of the damage, there is a fair inference that any loss or damage involving the subject item(s) may be claimed. This is consistent with the decisions of this Board and the Comptroller General which hold that a notice of loss or damage is adequate in content when it alerts the carrier that there may be a claim on the item and that it should investigate the facts surrounding the loss or damage.[17]

The Army contended that the carrier should inspect the damage when it receives notice of loss or damage. The Army referred to a DOHA case which noted that "the purpose of the DD Form 1840R is to provide notice to the carrier that damage occurred to an item so that the carrier may inspect."[18] In *American Van Services*,[19] the Comptroller General held that, where the carrier had enough information to conduct an investigation of the damage, the notice was adequate.[20] In another case, the Comptroller General held that "[n]otice of a claim is sufficient if it alerts the carrier that damage or loss occurred for which reparation is expected so that the carrier may promptly investigate the facts."[21]

Claims practitioners should keep the recent DOHA decision in mind when damage is claimed that is not specifically listed on DD Form 1840 or DD Form 1840R. Section IV(B) of the MOU, along with the case law discussed in this note, can be used to establish that the damage, though not specifically listed, may be claimed. Ms. Schultz.

VTC Schedule

The next two claims video teleconferences (VTCs) are scheduled for 8 April and 10 June 1998. The VTCs will begin at 1300 on each of the scheduled dates. Starting in September 1998, VTCs will be scheduled quarterly. Ms. Johnson.

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12. Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* ARMY LAW., Mar. 1992, at 45 [hereinafter MOU].

13. The DD Form 1840 is a Joint Statement of Loss or Damage at Delivery, and DD Form 1840R is a Notice of Loss or Damage.

14. DOHA Claims Case No. 97112401 (Dec. 11, 1997).

15. The DD Form 1844 is the List of Property and Claims Analysis Chart.

16. MOU, *supra* note 12.

17. DOHA Claims Case No. 97112401.

18. DOHA Claims Case No. 96070212 (Nov. 27, 1996).

19. American Van Serv., Inc., B-249834, 1993 WL 50530 (Comp. Gen. Feb. 11, 1993), *aff'd*, B-249834.2, 1993 WL 342244 (Comp. Gen. Sept. 3, 1993).

20. *Id.*

21. Resource Protection, B-270319 (Comp. Gen. May 21, 1996).

CLAMO Report

Center for Law and Military Operations (CLAMO), The Judge Advocate General's School

The Shifting Sands at NTC

This is the latest in a series of articles from judge advocates who are serving at the Army's combat training centers. The series offers judge advocate observer/controller insights into all five of the training centers and provides updates on the operations and issues arising there. The series will be supplemented by after action reports which highlight lessons learned. The series should not, however, be mistaken for instructional pieces or primers—for such information, contact CLAMO to receive practical guides and comprehensive after action reports.

It's 0430 on a Sunday morning and the Rolling Stones' *Satisfaction* is blasting from the observer/controller radio system on my HMMWV.[1] I awaken to the glow of a green chemlite hanging from my antenna and a spectacular view of the stars shining brightly in the darkness of the Mojave desert. As the Stones fade out, reveille blares and is followed by the two trivia questions for the day. I reach out of my coffin for my hand-held radio and answer, "five marines and one sailor" and "*Our American Cousin*." It is a battle day at the National Training Center (NTC), and the traditional Bronco Team wake-up call to the senior brigade trainer is followed by an FM radio brief which prepares my counterparts and me for the day ahead. Although I have traded in my desk for a HMMWV, I remain a judge advocate and have become part of an expanding group of judge advocates who have added observer/controller[2] to their resumes. I am a judge advocate observer/controller (O/C) at the NTC at Fort Irwin, California.

The NTC provides realistic joint and combined arms training to brigade-sized elements, with an emphasis on developing soldiers and commanders from mechanized and armored units. Formed in October 1981, the NTC was the Army's first combat training center (CTC) and was borne of the fear that the Vietnam conflict and its aftermath had left mechanized and armored forces unprepared to face a large Soviet conventional threat. Although the NTC started paying dividends soon after it was formed, the Army truly realized its value when commanders at all levels cited the time spent at the NTC as a contributing factor for the success of U.S. heavy forces in the Gulf War.

Training at the NTC features sophisticated live fires, use of "multiple integrated laser engagement system" (MILES),[3] a dedicated opposing force (OPFOR),[4] and full-time O/Cs, all of which are confined to the maneuver "box." The "box" is an area of the Mojave which is about the size of the State of Rhode Island where training units are isolated within geographical boundaries carefully set so that unit performance can be assessed and compared to doctrinal standards. It is barren, desolate, and unforgiving—perfect for the force-on-force, armored maneuver training that takes place here.

Considering the NTC's location and mission, it is not surprising that legal issues were not integrated into training at the NTC. Operation Desert Storm, however, proved that military operations, even in the mid- to high-intensity conflict spectrum and conducted in remote locations, give rise to legal issues. As a result of the "lessons learned" in the Gulf War and in response to real world events, recent command initiatives have rendered the "sterile" battlefield[5] a thing of the past.

From 1981 through 1997, units which trained at the NTC fought an OPFOR from the fictitious People's Democratic Republic of Krasnovia, a Warsaw Pact nation schooled in traditional Soviet tactics. Elements of the 11th Armored Cavalry Regiment (11th ACR) comprise the 32nd Guards Motorized Rifle Regiment (MRR). Configured in Warsaw Pact-fashion and employing Soviet doctrine, the MRR employ actual threat and visually modified equipment to simulate the Soviet-based conventional force.

The geo-political situation in the Tierra Del Diablo region now provides the background for the NTC "Road to War." While the Krasnovians remain the Soviet-style enemy, increasing tensions between the United States, Krasnovia, and the two other principal nations in the region, Pahrumphia and Mojavia, provide an environment complete with civilians on the battlefield and the potential for a wide range of legal issues.

In September 1997, I joined the operations group (OPSGRP) as the first judge advocate O/C. Although I am assigned to the Bronco Team, I work extensively with the Lizard Team, which develops the scenarios for each rotation. In addition to these

1. High Mobility Multi-purpose Wheeled Vehicle (HMMWV or "hummer").

2. An observer/controller (O/C) is a subject matter expert and training analyst of the operations group. The O/Cs observe and assess individual and collective performance, teach and coach their training unit counterparts, and provide feedback through formal and informal after action reviews.

3. MILES gear allows troops and tanks to "shoot" and be "shot" using eye-safe lasers and alarms.

4. The OPFOR are the permanently positioned opposing force of superior numbers for training units at the NTC. The OPFOR are schooled in enemy doctrine, tactics, and strategy.

5. A "sterile battlefield" is a training scenario which is devoid of non-combat events.

two teams, the OPSGRP is comprised of the Cobra, Wolf, Dragon, Eagle, Goldminer, Raven, Scorpion, Sidewinder, Tarantula, and Vulture teams. These teams make up the armor, field artillery, live-fire, aviation, logistics, Air Force, mechanized infantry, engineer, light infantry, and audio/visual trainers, respectively. Together, these twelve teams consist of over 600 O/Cs, support personnel, and civilian contractors, and they have the primary training responsibility for all exercises/rotations conducted at the NTC.

The NTC hosts up to twelve training rotations per year for divisions, separate brigades, and armored cavalry regiments. Each rotation actually begins with the Leader Training Program (LTP), which has offered rotational unit commanders and their staffs an additional training opportunity since 1994. Conducted at 120 days prior to the start of the exercise, the LTP is designed around core training objectives and a menu of elective subject areas selected by the commander, based upon his own training assessment. It provides a full-up brigade and battalion staff—about seventy-five soldiers—a six-day active component training opportunity (three days for reserve component). The training unit is billeted at the LTP site at the NTC.

While most of the core training includes topics such as the tactical decision-making process and battle command, attendance at the LTP is one of the single most important events for a judge advocate who is supporting a training unit. Judge advocates will not only see first-hand how commanders and their staffs plan for missions, they also have an excellent opportunity to become integrated and synchronized with their commanders.

The process continues with the issuance of the alert order (about three months prior to the start of the exercise) and the home station trainup. Finally, the training unit arrives in the area of operations (AO) about seven days before the exercise. While the focus of the twenty-eight-day NTC rotation remains force-on-force maneuver training and live fires, the OPSGRP has incorporated contingency-based scenarios, especially during the Reception, Staging, Onward Movement, and Integration (RSOI) phase. The RSOI occurs during the first five days of the rotation, during which the training unit prepares to move from the assembly area (the "dust bowl") into the "box."

The contingency-based scenarios may give rise to a myriad of legal issues. A typical scenario is a Humanitarian Assistance operation in which a small, armored task force is dispatched to deliver humanitarian aid. Regular or irregular forces may ambush friendly forces, creating questions on the rules of engagement (ROE), the employment of weapons systems, or the laws applicable to providing assistance to the host nation.

The RSOI is followed by force-on-force and live-fire, which comprise the bulk of tactical operations. These two phases in the rotation provide the maximum opportunity for judge advocates, commanders, and soldiers to contend with tough legal issues. Everything that can happen on a modern battlefield occurs during these phases. Although some events are driven by scenario writers (civilians on the battlefield), much of a judge advocate's work will be based on a brigade's performance during a battle. The number of fratricides to be investigated, civilians or protected places hit by indirect fires, and incidents involving enemy prisoners of war vary greatly between battles.

Like the O/Cs at the other training centers, I observe training unit commanders, staffs, and judge advocates as they wrestle with the legal issues arising during operations. At certain periods during and after rotations, all of the other O/Cs and I conduct after actions reviews (AARs)—we conduct more than 600 AARs during each twenty-eight-day rotation. I conduct some AARs informally: HMMWV-top discussions with training unit judge advocates. Others are much more formal in nature—comprehensive summaries which are developed for each battalion and company using multi-media presentations and which are intended to provide a base for home station training.

Though most legal AARs are done on a smaller scale, some legal issues are significant enough to make it into the formal AAR which is briefed to the entire brigade staff. This can be a very important development, as many participants may still be unaccustomed to the causes and effects which legal issues may have on operations and training. Whatever their form, AARs are the most important events at the NTC and, if done properly using introspection, they are tremendous learning experiences for all parties concerned.

As interesting as the legal training at the NTC is, the military training is what makes all the difference. To see an entire battalion of M1A1 tanks or Bradley fighting vehicles maneuvering around the desert at top speed—raising clouds of dust while moving, shooting, and communicating on the run—is an awesome sight. Judge advocates and 71Ds obtain realistic live-fire training, but on a smaller scale. At the end of each rotation, a rotational judge advocate and each 71D will form a fire-team and participate in a raid upon a local village. It is here that legal personnel have the opportunity to fire an M16, M4, or squad automatic weapon (SAW) under live-fire conditions.

Though the desert is a great place to train, it would not be my first choice of places to live. It is hot during the daytime and cold at night—the average summer high temperature is over 100 degrees and the winter lows average 37 degrees. High winds seem to create a continuous cloud of blowing sand, from the low-lying valleys to the tops of the mountains. The elements demand preparation and underscore the importance of a well-equipped vehicle. As O/Cs, we drive completely open "hummers" that serve as our transportation and sleeping quarters. Like many O/Cs, I have built a "coffin" on the back of my "hummer." By raising the top and pulling out the side panels, I have a dry and relatively dust-free sleeping area by simply placing a tarp over the open end. Moreover, I have plenty of storage areas below the sleeping compartment.

The NTC mission is to provide realistic, practical training for commanders, their staffs, and judge advocates. One of our current initiatives, therefore, is to determine how best to incor-

porate operational law issues and command and control issues into training scenarios. We are working closely with the scenario developers at plans and operations with a view toward formulating methods by which these issues may develop properly during training unit rotations, yet remain relevant to the NTC.

In addition to the training conducted in the "box," we are establishing training programs for other judge advocates. We have established a ride-along program for installation judge advocates. The program allows judge advocates to go into the box overnight during a rotation, and it provides an orientation to the NTC by teaching map reading, radio procedures, and the use of the global positioning system (GPS).[6]

The legal issues which have arisen in recent rotations have varied. Training units have dealt with host nation officials, civilians on the battlefield (including displaced civilians), enemy prisoners of war, ROE issues, status of forces agreement issues, fratricides, soldier misconduct, and other basic soldier support issues. The training environment at the NTC is as fluid and evolving as the unpredictable operations for which we are preparing—new and different issues are arising all the time.[7] Major Kantwill and Captain Swansiger.

6. The GPS is often referred to as the PLGR or "plugger"—Precision Lightweight Global Position System Receiver.

7. For more information on legal issues at the NTC, see the NTC Homepage at <http://www.Irwin.army.mil> or <http://www.Irwin.army.mil/opsgrpte.htm>.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services,* paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riveraju@otjag.army.mil. Major Rivera.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at http://www.army.mil/usar/vacancies.htm. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....tromeyto@otjag.army.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera,.....riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1997-1998 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ Stephen Parke MAJ Charles Pede COL Keith Hamack	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
28 Feb- 1 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Joseph R. Barnes BG John F. DePue LTC Mark Henderson MAJ John Einwechter COL Thomas Tromey	COL Robert P. Johnston Office of the SJA, 12th LSO Bldg. 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Michael Marchand BG John F. DePue LTC Karl Ellcessor MAJ Scott Morris COL Thomas Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO Clarion San Francisco Air-port 401 East Millbrae Avenue Millbrae, CA94030 (650) 692-6363	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Thoms W. Eres MAJ Christopher Garcia MAJ Norman Allen Dr. Mark Foley	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol. com

21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John Cooke BG Richard M. O'Meara MAJ Thomas Hong MAJ Geoffrey Corn COL Keith Hamack	MAJ Ronald C. Riley 20825 Brookside Blvd. Olympia Fields, IL 60461 (312) 603-6064
28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran COL Thomas Tromey	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Joseph R. Barnes BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows Dr. Mark Foley	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364
25-26 Apr	Newport, RI 94th RSC Naval War College 686 Cusing Road Newport, RI 02841	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Maurice Lescault LTC Stephen Henley Dr. Mark Foley	MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140/2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton Dr. Mark Foley	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17May	Kansas City, MO 89th RSC Embassy Suites Hotel KCI Airport 7640 NW Tiffany Springs Pkwy Kansas City, MO 64153-2304 (800) 362-2779	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N. Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1998

February 1998

9-13 February	68th Law of War Workshop (5F-F42).
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).
23-27 February	42nd Legal Assistance Course (5F-F23).

March 1998

2-13 March	29th Operational Law Seminar (5F-F47).
2-13 March	140th Contract Attorneys Course (5F-F10).
16-20 March	22d Admin Law for Military Installations Course (5F-F24).
23-27 March	2d Contract Litigation Course (5F-F102).
23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).
30 March-3 April	147th Senior Officer Legal Orientation Course (5F-F1).

April 1998

20-23 April	1998 Reserve Component Judge Advocate Workshop (5F-F56).
27 April-1 May	9th Law for Legal NCOs Course (512-71D/20/30).
27 April-1 May	50th Fiscal Law Course (5F-F12).

May 1998

4-22 May	41st Military Judges Course (5F-F33).
11-15 May	51st Fiscal Law Course (5F-F12).

June 1998

1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).

1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
8-12 June	2nd Chief Legal NCO Course (512-71D-CLNCO).
8-12 June	28th Staff Judge Advocate Course (5F-F52).
15-19 June	9th Senior Legal NCO Course (512-71D/40/50).
15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
29 June-1 July	Professional Recruiting Training Seminar.

July 1998

6-10 July	9th Legal Administrators Course (7A-550A1).
6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).
7-9 July	29th Methods of Instruction Course (5F-F70).
13-17 July	69th Law of War Workshop (5F-F42).
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
22-24 July	Career Services Directors Conference.

August 1998

3-14 August	10th Criminal Law Advocacy Course (5F-F34).
3-14 August	141st Contract Attorneys Course (5F-F10).
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
14-18 September	USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1998

February

19-20 Feb ICLE	Advocacy & Evidence Courtroom Evidence Atlanta, GA

March

12-13 Mar ICLE	Trial Evidence Atlanta, GA
26 Mar ICLE	Cutting Edge in Courtroom Persuasion Atlanta, GA
27 Mar ICLE	Jury Selection and Persuasion Atlanta, GA

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

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

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

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

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

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

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

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

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

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

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

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

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

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

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

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

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

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

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

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

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

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

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

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

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

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

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

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

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually

Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two-year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Law Guru Mailing List Manager (http://www.lawguru.com/subscribe/listtool.html).

The Mailing List Manager makes the process of subscribing, unsubscribing and sending commands to over 500+ mailing lists (in categories such as law, art, music, computers, news, business, humor and more) easy. Once you are subscribed to a mailing list, you can send an email message to the mailing list's email address and this message will be automatically distributed to everyone else on that particular mailing list. Discussions can be held, somewhat similar to what happens on newsgroups.

b. Library of Congress Guide to Law Online (http://lcweb2.loc.gov/glin/worldlaw.html).

The Library of Congress has created an online guide to laws from around the world. This annotated guide explains the legal resources available on the Internet and provides hypertext links to those resources. Researchers can select from the United States guide, guides from other nations, and multinational and international law guides. Those guides are further subdivided into types of materials, as well as legal subject areas. The guides focus on quality rather than quantity. They are highly selective, claiming to emphasize sites offering the full texts of laws, regulations, and court decisions, along with commentary from lawyers writing primarily for other lawyers.

c. House of Representatives Law Library (http://law.house.gov/).

The House of Representatives Law Library also links to online sources of full text law. This site is one of the most complete directories of online law on the web, with links to almost five thousand federal, state, foreign and international law sites. The searchable versions of the Code of Federal Regulations and the U.S. Code found on this site provide for both simple and sophisticated search statements. Any legal researcher looking for a law passed by some branch of some government would be wise to consult this site.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-

800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A333321 Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).

AD A326002 Wills Guide, JA-262-97 (150 pgs).

AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (60 pgs).

*AD A332897 Tax Information Series, JA 269-97 (116 pgs).

*AD A329216 Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

*AD A328397 Defensive Federal Litigation, JA-200-97 (658 pgs).

AD A327379 Military Personnel Law, JA 215-97 (174 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

*AD A325989 Federal Tort Claims Act, JA 241-97 (136 pgs).

*AD A332865 AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692 The Law of Federal Employment, JA-210-97 (290 pgs).

AD A336235 The Law of Federal Labor-Management Relations, JA-211-98 (320 pgs).

Developments, Doctrine, and Literature

AD A332958 Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A302312 Senior Officer Legal Orientation, JA-320-95 (297 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967	Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2)The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.
ALAW.ZIP	June 1990	*The Army Lawyer/ Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
21ALMI.EXE	January 1998	Administrative Law for Military Installations Deskbook, March 1997.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.

97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.
JA210.EXE	January 1998	Law of Federal Employment, May 1997.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	January 1998	Federal Tort Claims Act, May 1997.
JA250.EXE	January 1998	Readings in Hospital Law, January 1997.
JA260.EXE	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.EXE	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.EXE	January 1998	Tax Information Series, December 1997.
JA269W6.DOC	December 1997	Tax Information Series, December 1997.
JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	January 1998	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280HH.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 4, Legal Assistance, Chapter HH, October 1997.

JA280P1.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 1, LOMI, October 1997.
JA280P2.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 2, Claims, October 1997.
JA280P3.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 3, Personnel, October 1997.
JA280P4.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 4, Legal Assistance (minus Chapter HH), October 1997.
JA280P5.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 5, Reference, October 1997.
JA285V1.EXE	January 1998	Senior Officers Legal Orientation Deskbook, December 1997.
JA285V2.EXE	January 1998	Senior Officers Legal Orientation Deskbook, December 1997.
JA280P1.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.
JA280P2.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	December 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/ Reference), February 1997.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.

JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.

YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK"_files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP JANUARY.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. Articles

The following information may be useful to judge advocates:

Diane Marie Amann & Edward J. Imwinkelried, *The Supreme court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond*, 116 S. Ct. 1923 (1996): The Meaning of "Experience" and the Role of "Reason" under Federal Rule of Evidence 501, 65 U. CIN. L. REV. 1019 (1997).

Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569 (1998).

8. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

9. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.